NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 18

SPRING SESSION 1973

RALEIGH
1973

CITE THIS VOLUME

18 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

WALTER E. BROCK[1]

Associate Judges

HUGH B. CAMPBELL
DAVID M. BRITT
NAOMI E. MORRIS
FRANK M. PARKER
R. A. HEDRICK
EARL W. VAUGHN
JAMES M. BALEY, JR.

Emergency Judge

RAYMOND B. MALLARD[2]

Clerk

THEODORE C. BROWN, JR.

ADMINISTRATIVE OFFICE OF THE COURTS

Director

BERT M. MONTAGUE

Assistant Director

FRANKLIN FREEMAN, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

SHERRY L. MCMANUS

[1] Appointed Chief Judge effective 1 August 1973.
[2] Appointed Emergency Judge effective 1 August 1973.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

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

Second Division

9	HAMILTON H. HOBGOOD	Louisburg
10	**DONALD L. SMITH**	Raleigh
	JAMES H. POU BAILEY	**Raleigh**
11	HARRY E. CANADAY	Smithfield
12	E. MAURICE BRASWELL	Fayetteville
	COY E. BREWER	Fayetteville
13	EDWARD B. CLARK	Elizabethtown
14	**CLARENCE W. HALL**	**Durham**
15	**D. MARSH MCLELLAND**	Burlington
16	HENRY A. MCKINNON, JR.	**Lumberton**

Third Division

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

Fourth Division

DISTRICT	JUDGES	ADDRESS
24	W. E. ANGLIN	Burnsville
25	SAM J. ERVIN III	Morganton
26	FRED H. HASTY	Charlotte
	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, JR.	Charlotte
27	B. T. FALLS, JR.	Shelby
	JOHN R. FRIDAY	Lincolnton
28	W. K. MCLEAN	Asheville
	HARRY C. MARTIN	Asheville
29	J. W. JACKSON	Hendersonville
30	LACY H. THORNBURG	Webster

SPECIAL JUDGES

J. WILLIAM COPELAND	Murfreesboro
ROBERT M. MARTIN	High Point
A. PILSTON GODWIN	Raleigh
MARVIN K. BLOUNT, JR.	Greenville
JOHN WEBB	Wilson
SAMMIE CHESS	High Point
DENNIS J. WINNER	Asheville

EMERGENCY JUDGES

W. H. S. BURGWYN	Woodland
ZEB NETTLES	Asheville
WALTER J. BONE	Nashville
F. DONALD PHILLIPS	Rockingham
GEORGE B. PATTON	Franklin
CHESTER R. MORRIS	Coinjock
FRANCIS O. CLARKSON	Charlotte
P. C. FRONEBERGER	Gastonia
JOSEPH W. PARKER	Windsor
ROBERT M. GAMBILL	North Wilkesboro
WILLIAM Y. BICKETT	Raleigh

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	FENTRESS HORNER (Chief)	Elizabeth City
	WILTON F. WALKER	Currituck
2	HALLETT S. WARD (Chief)	Washington
	CHARLES H. MANNING	Williamston
3	J. W. H. ROBERTS (Chief)	Greenville
	CHARLES H. WHEDBEE	Greenville
	HERBERT O. PHILLIPS III	Morehead City
	ROBERT D. WHEELER	Grifton
4	HARVEY BONEY (Chief)	Jacksonville
	PAUL M. CRUMPLER	Clinton
	WALTER P. HENDERSON	Trenton
	KENNETH W. TURNER	Rose Hill
5	GILBERT H. BURNETT (Chief)	Wilmington
	N. B. BAREFOOT	Wilmington
	JOHN M. WALKER	Wilmington
6	J. T. MADDREY (Chief)	Weldon
	JOSEPH D. BLYTHE	Harrellsville
	BALLARD S. GAY	Jackson
7	J. PHIL CARLTON (Chief)	Pinetops
	ALLEN W. HARRELL	Wilson
	TOM H. MATTHEWS	Rocky Mount
	BEN H. NEVILLE	Whitakers
8	W. MILTON NOWELL (Chief)	Goldsboro
	HERBERT W. HARDY	Maury
	EMMETT R. WOOTEN	Kinston
	LESTER W. PATE	Kinston
9	JULIUS BANZET (Chief)	Warrenton
	CLAUDE W. ALLEN, JR.	Oxford
	LINWOOD T. PEOPLES	Henderson
10	GEORGE F. BASON (Chief)	Raleigh
	EDWIN S. PRESTON, JR.	Raleigh
	S. PRETLOW WINBORNE	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	N. F. RANSDELL	Fuquay-Varina
11	ROBERT B. MORGAN, SR. (Chief)	Lillington
	W. POPE LYON	Smithfield
	WILLIAM I. GODWIN	Selma
	WOODROW HILL	Dunn
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	DARIUS B. HERRING, JR.	Fayetteville
	SEAVY A. CARROLL	Fayetteville
13	RAY H. WALTON (Chief)	Southport
	GILES R. CLARK	Elizabethtown
14	E. LAWSON MOORE (Chief)	Durham
	THOMAS H. LEE	Durham
	J. MILTON READ, JR.	Durham
15	HARRY HORTON (Chief)	Pittsboro
	STANLEY PEELE	Chapel Hill
	COLEMAN CATES	Burlington
	JASPER D. ALLEN, JR.	Burlington
16	SAMUEL E. BRITT (Chief)	Lumberton
	JOHN S. GARDNER	Lumberton
	CHARLES G. McLEAN	Lumberton
17	LEONARD H. VAN NOPPEN (Chief)	Danbury

DISTRICT	JUDGES	ADDRESS
	FOY CLARK	Mount Airy
	GEORGE M. HARRIS	Yanceyville
	FRANK FREEMAN	Dobson
18	E. D. KUYKENDALL, JR. (Chief)	Greensboro
	BYRON HAWORTH	High Point
	ELRETA M. ALEXANDER	Greensboro
	B. GORDON GENTRY	Greensboro
	KENNETH M. CARRINGTON[1]	Greensboro
	EDWARD K. WASHINGTON	Jamestown
	WALTER E. CLARK, JR.	Greensboro
19	HAL HAMMER WALKER (Chief)	Asheboro
	L. T. HAMMOND, JR.	Asheboro
	ROBERT L. WARREN	Concord
	FRANK M. MONTGOMERY	Salisbury
	ODELL SAPP	Salisbury
20	F. FETZER MILLS (Chief)	Wadesboro
	EDWARD E. CRUTCHFIELD	Albemarle
	WALTER M. LAMPLEY	Rockingham
	A. A. WEBB	Rockingham
21	ABNER ALEXANDER (Chief)	Winston-Salem
	BUFORD T. HENDERSON	Winston-Salem
	JOHN CLIFFORD	Winston-Salem
	A. LINCOLN SHERK	Winston-Salem
	ROBERT K. LEONARD	Winston-Salem
22	HUBERT E. OLIVE, JR. (Chief)	Lexington
	L. ROY HUGHES	Thomasville
	PRESTON CORNELIUS	Troutman
	C. H. DEARMAN	Statesville
23	RALPH DAVIS (Chief)	North Wilkesboro
	SAMUEL L. OSBORNE	Wilkesboro
24	J. RAY BRASWELL (Chief)	Newland
	BRUCE B. BRIGGS	Mars Hill
25	MARSHALL E. CLINE (Chief)	Lenoir
	RANDY DEAN DUNCAN	Hickory
	WHEELER DALE	Morganton
	JOE K. MATHESON[2]	Hickory
26	WILLIAM H. ABERNATHY (Chief)	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	J. EDWARD STUKES	Charlotte
	P. B. BEACHUM, JR.	Charlotte
	CLIFTON JOHNSON	Charlotte
	WILLIAM G. ROBINSON	Charlotte
	LARRY THOMAS BLACK	Charlotte
27	LEWIS BULWINKLE (Chief)	Gastonia
	OSCAR F. MASON, JR.	Gastonia
	J. RALPH PHILLIPS	Gastonia
	ROBERT W. KIRBY	Gastonia
	ARNOLD MAX HARRIS	Ellenboro
28	CARY WALTER ALLEN (Chief)	Asheville
	ZEBULON WEAVER, JR.	Asheville
	JAMES O. ISRAEL, JR.	Candler
	WILLIAM MARION STYLES	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	WADE B. MATHENY	Forest City
	LADSON F. HART	Brevard
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	J. CHARLES MCDARRIS	Waynesville

[1] Resigned 31 July 1973. Succeeded by Darl L. Fowler 17 August 1973.
[2] Deceased 18 September 1973.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

ROBERT MORGAN

Deputy Attorneys General

HARRY W. MCGALLIARD
JAMES F. BULLOCK
JEAN A. BENOY
ROBERT BRUCE WHITE, JR.
ANDREW A. VANORE, JR.

Special Counsel

RALPH MOODY

Assistant Attorneys General

PARKS H. ICENHOUR
WILLIAM W. MELVIN
MILLARD R. RICH, JR.
MYRON C. BANKS
I. BEVERLY LAKE, JR.
SIDNEY S. EAGLES, JR.
T. BUIE COSTEN
CLAUDE W. HARRIS
WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
JACOB L. SAFRON
EUGENE HAFER
EUGENE A. SMITH
LESTER V. CHALMERS, JR.
JAMES B. RICHMOND
JAMES L. BLACKBURN
EDWARD L. EATMAN, JR.
RICHARD N. LEAGUE
RUSSELL G. WALKER, JR.
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
H. AL COLE, JR.
GUY A. HAMLIN
RAFFORD E. JONES
WILLIAM F. O'CONNELL
RAYMOND W. DEW, JR.
CHARLES A. LLOYD
WALTER E. RICKS III
ALFRED N. SALLEY
DONALD A. DAVIS
JOHN R. MATTHIS
GEORGE W. BOYLAN
JONES BYRD
RALF F. HASKELL
HENRY E. POOLE
ANN REED
EDWIN M. SPEAS, JR.

SOLICITORS OF SUPERIOR COURT

DISTRICT	SOLICITOR	ADDRESS
1	JOHN HERBERT SMALL	Elizabeth City
2	WILLIAM C. GRIFFIN, JR.	Williamston
3	ELI BLOOM	Greenville
4	WALTER T. BRITT	Clinton
5	WILLIAM ALLEN COBB	Wilmington
6	W. H. S. BURGWYN, JR.	Woodland
7	ROY R. HOLDFORD, JR.	Wilson
8	F. OGDEN PARKER	Goldsboro
9	CHARLES M. WHITE III	Warrenton
10	BURLEY B. MITCHELL, JR.	Raleigh
11	JOHN W. TWISDALE	Smithfield
12	JACK A. THOMPSON	Fayetteville
13	LEE J. GREER	Whiteville
14	ANTHONY BRANNON	Durham
15	HERBERT F. PIERCE	Graham
16	JOHN B. REGAN	Saint Pauls
17	ALLEN D. IVIE, JR.	Eden
18	W. DOUGLAS ALBRIGHT	Greensboro
19	JAMES E. ROBERTS	Kannapolis
20	CARROLL R. LOWDER	Monroe
21	FRANK J. YEAGER	Walkertown
22	H. W. ZIMMERMAN, JR.	Lexington
23	J. ALLIE HAYES	North Wilkesboro
24	CLYDE M. ROBERTS	Marshall
25	DONALD E. GREENE	Hickory
26	THOMAS F. MOORE, JR.	Charlotte
27	W. HAMPTON CHILDS, JR.	Lincolnton
28	ROBERT D. LEWIS	Asheville
29	M. LEONARD LOWE	Caroleen
30	MARCELLUS BUCHANAN III	Sylva

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE

RULES OF PRACTICE CONSTRUED

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

Case	*Reported*	*Disposition in Supreme Court*
Allen v. Foreman	18 N.C. App. 383	Denied, 283 N.C. 752
Blackley v. Blackley	18 N.C. App. 535	Allowed, 283 N.C. 752
Comr. of Insurance v. Attorney General	18 N.C. App. 23	Denied, 283 N.C. 585
Doggett v. Welborn	18 N.C. App. 105	Denied, 283 N.C. 665
Faggart v. Biggers	18 N.C. App. 366	Denied, 283 N.C. 752
Floyd v. Jarrell	18 N.C. App. 418	Denied, 283 N.C. 752
Forsyth County v. Barneycastle	18 N.C. App. 513	Denied, 283 N.C. 752
Hollowell v. Hollowell and Tappan v. Hollowell	18 N.C. App. 279	Denied, 283 N.C. 665
In re Confinement of Hayes	18 N.C. App. 560	Denied, 283 N.C. 753 Appeal Dismissed
In re York	18 N.C. App. 425	Denied, 283 N.C. 753
Kaczala v. Richardson	18 N.C. App. 446	Denied, 283 N.C. 753
Livengood v. Railway Co.	18 N.C. App. 352	Denied, 283 N.C. 753
McKinney v. Morrow	18 N.C. App. 282	Denied, 283 N.C. 665
Miller v. Belk	18 N.C. App. 70	Denied, 283 N.C. 665
Park v. Carroll	18 N.C. App. 53	Denied, 283 N.C. 665
Philpott v. Kerns	18 N.C. App. 663	Allowed, 283 N.C. 754
Records v. Tape Corp. and Broadcasting System v. Tape Corp.	18 N.C. App. 183	Denied, 283 N.C. 666
Schafran v. Harris	17 N.C. App. 500	Denied, 283 N.C. 666
Simms v. Stores, Inc.	18 N.C. App. 188	Allowed, 283 N.C. 666
Sims v. Trailer Sales Corp.	18 N.C. App. 726	Denied, 283 N.C. 754
Smith v. Kilburn	18 N.C. App. 204	Denied, 283 N.C. 754
State v. Alexander	18 N.C. App. 460	Denied, 283 N.C. 666
State v. Avery	18 N.C. App. 321	Denied, 283 N.C. 666
State v. Bailey	18 N.C. App. 313	Denied, 283 N.C. 754 Appeal dismissed
State v. Brady	18 N.C. App. 325	Denied, 283 N.C. 667
State v. Brandon	18 N.C. App. 483	Denied, 283 N.C. 754 Appeal dismissed
State v. Briggs	18 N.C. App. 351	Denied, 283 N.C. 667
State v. Brooks	18 N.C. App. 349	Denied, 283 N.C. 667
State v. Brown	18 N.C. App. 35	Denied, 283 N.C. 586
State v. Campbell	18 N.C. App. 586	Denied, 283 N.C. 755
State v. Cauthen	18 N.C. App. 591	Denied, 283 N.C. 755
State v. Cobb	18 N.C. App. 221	Allowed, 283 N.C. 755
State v. Doby	18 N.C. App. 123	Denied, 283 N.C. 586
State v. Floyd	18 N.C. App. 677	Denied, 283 N.C. 755

Case	*Reported*	*Disposition in Supreme Court*
State v. Foust	18 N.C. App. 133	Denied, 283 N.C. 667
		Appeal dismissed
State v. Fox	18 N.C. App. 523	Denied, 283 N.C. 755
State v. Fullerton	18 N.C. App. 303	Denied, 283 N.C. 667
		Appeal dismissed
State v. Griffin	18 N.C. App. 146	Denied, 283 N.C. 668
State v. Grissom	18 N.C. App. 332	Denied, 283 N.C. 668
State v. Johnson	18 N.C. App. 338	Denied, 283 N.C. 668
State v. Jones	18 N.C. App. 531	Denied, 283 N.C. 756
State v. Lee	18 N.C. App. 580	Denied, 283 N.C. 756
State v. Lewis	18 N.C. App. 681	Denied, 283 N.C. 756
		Appeal dismissed
State v. McDougald	18 N.C. App. 407	Denied, 283 N.C. 756
State v. McIlwain	18 N.C. App. 230	Denied, 283 N.C. 668
State v. McIlwain	18 N.C. App. 335	Denied, 283 N.C. 668
State v. Martin and Padgett	18 N.C. App. 398	Denied, 283 N.C. 757
State v. Mason	18 N.C. App. 433	Denied, 283 N.C. 669
State v. Miller	18 N.C. App. 489	Denied, 283 N.C. 757
State v. Phelps	18 N.C. App. 603	Denied, 283 N.C. 757
State v. Powell	18 N.C. App. 732	Denied, 283 N.C. 757
State v. Rice	18 N.C. App. 575	Denied, 283 N.C. 757
State v. Roberts	18 N.C. App. 388	Denied, 283 N.C. 758
		Appeal dismissed
State v. Shelton	18 N.C. App. 616	Denied, 283 N.C. 758
State v. Stokes	18 N.C. App. 148	Denied, 283 N.C. 669
State v. Tilley	18 N.C. App. 291	Denied, 283 N.C. 669
		Appeal dismissed
State v. Tilley	18 N.C. App. 341	Denied, 283 N.C. 669
		Appeal dismissed
State v. West	18 N.C. App. 150	Denied, 283 N.C. 669
State v. White	18 N.C. App. 31	Denied, 283 N.C. 587
		Appeal dismissed
State v. Wise	18 N.C. App. 151	Denied, 283 N.C. 670
State v. Wooten	18 N.C. App. 269	Denied, 283 N.C. 670
		Appeal dismissed
State v. Wooten	18 N.C. App. 652	Denied, 283 N.C. 758
State v. Wright	18 N.C. App. 76	Denied, 283 N.C. 758
State v. Yelverton	18 N.C. App. 337	Denied, 283 N.C. 670
State v. Young	18 N.C. App. 576	Denied, 283 N.C. 758
Wright v. Holt	18 N.C. App. 661	Denied, 283 N.C. 759

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

Case	*Reported*	*Disposition on Appeal*
Bartlett v. Duke University	17 N.C. App. 598	Pending
Mann v. Transportation Co. and Tillett v. Transportation Co.	17 N.C. App. 256	283 N.C. 734
Spence v. Durham	16 N.C. App. 372	283 N.C. 671
Winters v. Burch	17 N.C. App. 660	Pending

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1973

REMIS THOMAS AND WIFE, NAOMI FUQUAY THOMAS v. WILLIAM DAVID PICKARD

No. 7311DC137

(Filed 11 April 1973)

Infants § 9— right of surviving parent to full custody of minor — effect of changed circumstances on consent judgment

Trial court erred in granting custody of minor child to plaintiff maternal grandparents for one week-end each month where the evidence tended to show that defendant and the child's stepmother were the fit and proper persons to have absolute custody of the child, and a consent judgment signed by the father immediately after the death of the child's mother giving the maternal grandparents custody of the child for two week-ends per month would not affect the father's right to full custody since the father had remarried and established a new home fifty miles from that of plaintiffs subsequent to the signing of the judgment.

APPEAL by defendant from *Morgan, Chief District Judge;* judgment entered 20 July 1972 in LEE County.

Defendant, William David Pickard, was married to Jennie Margaret Thomas (daughter of plaintiffs) on 3 May 1968 and lived with her thereafter until he was drafted into the army on 16 August 1968. Because of his military duty defendant lived with his wife only intermittently until he left for Korea under military orders in December 1968.

The child, Sherry Renee Pickard, who is the subject of this controversy, was born on 28 May 1969. Thereafter, in the Spring of 1969, defendant's wife became ill with cancer. Through intervention by the Red Cross defendant was returned to Fort Bragg, North Carolina, on or about 11 July 1969. On 10 October

1969 defendant was discharged from the army because of his wife's illness.

Defendant's wife died on 7 January 1971. On 16 January 1971 defendant was served with notice of this action by plaintiffs to obtain custody of defendant's daughter. On 28 January 1971 defendant signed a Consent Order whereby plaintiffs were granted temporary custody of defendant's daughter on two weekends each month.

Since the entry of the Consent Order defendant (on 1 August 1971) remarried and moved to a home near Siler City. Defendant and his second wife, Sandra Johnson Pickard, are both regularly employed, and defendant's second wife's mother, Mrs. Hugh Johnson, cares for defendant's daughter during the daytime.

On several occasions the child has been ill and defendant did not take her for her weekend stay with plaintiffs. Because of defendant's refusal to allow his daughter, because of her illness, to visit with plaintiffs, they caused defendant to be cited for contempt of court. The judge found that defendant was not in contempt. Following this, defendant petitioned the Court to amend the 28 January 1971 Consent Order so as to award to defendant exclusive custody of his daughter.

Judge Morgan conducted hearings on 9 March 1972 and 12 May 1972 upon defendant's petition. Judge Morgan found facts substantially as summarized above, and in addition made the following pertinent findings:

> "5. That at the request of defendant and his wife, a psychiatric evaluation of the said Sherry Renee Pickard was accomplished during December 1971 and January 1972 by Dr. Robert Ilaria, a resident in child psychiatry at North Carolina Memorial Hospital in Chapel Hill, North Carolina; that Dr. Ilaria testified that the child was evaluated over a period of three weeks, that her behavior was consistent with what would not be unlikely responses in a child of her age caught in a situation where there were serious conflicts between parent and grandparents, as the Court found in this case; that the child did not, however, demonstrate clinically direct evidence of psychiatric disturbances during the evaluation, but there is likelihood that with time, psychic stress will become manifest from the then current

situation; that he recommended that visiting by the grandparents should be by voluntary extension of the parents and that visiting in the grandparents' home be with the parents present rather than having her left there, at least until the behavioral changes which he described had abated; and that such behavioral patterns would, in his opinion, abate within about three or four months; that the recommendations contained in said report were not only those of Dr. Ilaria but also those of a panel of psychiatrists, which included Dr. David F. Freeman, the Chief of the Division of Child Psychiatry at said hospital."

"10. That there have been material changes in conditions since the entry of the Consent Order or Judgment of Judge Godwin on January 28, 1971, among which changes are the following:

(1) The defendant has remarried and has reestablished a home within which to rear his minor daughter, (2) that said new home is about 50 miles from the plaintiffs' residence instead of being close to the plaintiffs as was his former home, (3) that since defendant's remarriage relations between defendant and plaintiffs have become tense and more strained because of the defendant's being deprived of full-time custody of his own child."

The judge then ordered as follows:

"ORDERED, ADJUDGED AND DECREED:

1. That plaintiffs, defendant and defendant's wife, Sandra Johnson Pickard, are fit and proper persons to have the care, custody and control of Sherry Renee Pickard and the primary custody of said child is placed with defendant and his wife, who shall be responsible for her care and maintenance; and plaintiffs are hereby granted partial custody of said minor child and are authorized to pick her up at the home of defendant at one o'clock p.m. on the fourth Saturday of each month, beginning with the fourth Saturday in July 1972, and return her to the home of defendant by five o'clock p.m. on the next day and during such periods plaintiffs shall be responsible for her care and maintenance; when the holidays of Christmas and Easter fall on a weekend when the child would, under this Order, go to visit in the home of plaintiffs, or when illness

of said child, duly certified by a licensed physician, shall prevent such child from visiting in the home of plaintiffs, she shall remain with defendant and the scheduled visitation shall be postponed until the next weekend and the following month shall be resumed on the fourth weekend as herein directed.

2. Plaintiffs and defendant shall see that said child is properly cared for subject to proper influences and regular in her church and church school attendance while she is in their respective custody.

3. In the event of serious illness of said child the party with whom she is residing shall promptly notify the other; during such illness the child shall either remain with or be returned to defendant's custody, and during such illness plaintiffs shall be permitted to visit said child in the home of defendant and his wife.

4. This cause is retained for the further order of the Court."

From the entry of the order, insofar as it grants partial custody to plaintiffs, defendant appealed.

Pittman, Staton & Betts, by William W. Staton and R. Michael Jones, for plaintiffs.

Harold W. Gavin for defendant.

BROCK, Judge.

As a general rule at common law and under our own decisions, parents have the legal right to the custody of their children. *Shackleford v. Casey,* 268 N.C. 349, 150 S.E. 2d 513. "This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it." *James v. Pretlow,* 242 N.C. 102, 104, 86 S.E. 2d 759, 761; *accord, In re Jones,* 14 N.C. App. 334, 188 S.E. 2d 580.

A court should not take a child from the custody of its parents and place it in the hands of a third person except upon convincing proof that the parent is an unfit person to have custody of the child or for some other extraordinary fact or circumstance. 3 Lee, N. C. Family Law, Custody of Children,

§ 224, p. 25. "(A) natural parent, father or mother, as the case may be, who is of good character and a proper person to have the custody of the child and is reasonably able to provide for it ordinarily is entitled to the custody as against all other persons, . . . such as other relatives, including grandparents . . . . " (Citation omitted). *Shackleford v. Casey, supra; see Child Custody—Father or Grandparent,* 25 A.L.R. 3d 7.

In this case there is no evidence that it would be to the best interest of the child that the grandparents should be awarded custody or partial custody of the child; nor has there been such a determination by the court. All of the evidence and findings point to the father and the stepmother of the child as being the fit and proper persons to have the care and custody of the child. There is absolutely no suggestion by anyone that the child's interests would not be served best by absolute custody in the father.

The fact that the grandparents love the child is no cause to give them a *legally enforceable right* to have the child visit with them one weekend a month, or any other time. It is surely to be desired that the child will be able to enjoy the love and affection of her grandparents and that they in turn will be able to enjoy the love and affection of the child. But this desire does not justify interfering with the proper and normal parent-child relationship.

We do not consider the consent of the father in the 28 January 1971 Judgment to be an impediment to his now having full and complete custody of his daughter. At that time he had been served with notice of a custody hearing within ten days of his wife's death, and the hearing was only twenty-one days after her death. Under such circumstances there is small wonder that he was willing to consent to partial custody by the grandparents, although he may not have been well advised.

The order appealed from is reversed, and this cause is remanded to the District Court for a new hearing on the defendant's petition.

Reversed and remanded.

Judges VAUGHN and GRAHAM concur.

WILLIAM F. ANDREWS AND WIFE, CAROL B. ANDREWS, GLENN E. ANDERSON AND WIFE, GRACE C. ANDERSON, RAYMOND M. TAYLOR, CALVIN B. KOONCE AND WIFE, MARY G. KOONCE, DR. GEORGE W. PASCHAL, JR. AND WIFE, BETH C. PASCAL, CARL B. MIMS AND WIFE, JEAN W. MIMS, MRS. MARY PARKER THOMPSON, BRYON W. FRANKLIN AND WIFE, MARIETTA G. FRANKLIN, GEORGE E. VIALL AND WIFE, BETSY VIALL AND R. MAYNE ALBRIGHT AND WIFE, FRANCES S. ALBRIGHT v. COUNTRY CLUB HILLS, INCORPORATED AND CLYDE B. CLINE

No. 7310SC88

(Filed 11 April 1973)

1. **Dedication § 1— sale of lots by reference to map — offer to dedicate streets**

The sale of lots by reference to a map or plat representing a division of a tract of land into streets and lots constitutes an offer to dedicate such streets to public use, and the dedication is complete only when the offer is accepted by the responsible public authority.

2. **Dedication § 3—dedication of park as conveyance — withdrawal of dedication — street necessary for ingress to or egress from land conveyed**

A real estate developer's dedication of a park in a residential subdivision was a conveyance within the meaning of the provision of G.S. 136-96 prohibiting the withdrawal from dedication of land dedicated for a street which is necessary to afford convenient ingress or egress to any lot or parcel of land sold or conveyed by the dedicator.

3. **Dedication § 3— unopened street — withdrawal from dedication — necessity for ingress to and egress from park**

Action to enjoin the withdrawal from dedication of an unopened street bordering a dedicated park in a residential subdivision is remanded for determination of whether the continued right to use the street is necessary to afford convenient ingress or egress to and from the park within the purview of the exception to G.S. 136-96.

Judge VAUGHN dissents.

APPEAL by defendants from *Braswell, Judge,* at the 26 June 1972 Session of Superior Court held in WAKE County.

This is a civil action instituted by plaintiffs to have declarations of withdrawal from dedication made by defendant corporation declared null and void, and to permanently enjoin defendants from subdividing or otherwise withdrawing from public use certain land in the Country Club Hills Subdivision in Raleigh, North Carolina.

Country Club Hills is a residential area in the northwest section of Raleigh, which was developed by Country Club Hills,

Inc., a North Carolina corporation. The defendant Cline is now the president of the defendant corporation. In 1945 and 1946, the corporation subdivided the land now constituting Country Club Hills and recorded certain maps. The maps contained a layout of streets by name and lots by number. Lots were sold by reference to said maps.

On 17 April 1970 defendant corporation, proceeding under G.S. 136-96, filed declarations of withdrawal from public use of two areas designated on the maps: the "Hyde Park" area consisting of several acres of land; and a 100-foot-wide unnamed street at the western end of "Hyde Park." Following the filing of the declarations of withdrawal, the defendant corporation conveyed the unnamed street area to the individual defendant, Clyde B. Cline.

Plaintiffs, all owners of certain designated lots in Country Club Hills—none of which are contiguous to the park or unnamed street, instituted this action on 4 April 1972 and obtained a temporary restraining order on 5 April 1972. After a trial without a jury, the trial judge found: that there had been a dedication by Country Club Hills, Inc., of Hyde Park and the 100-foot-wide unnamed street; that Hyde Park had been used continuously as a park by purchasers of lots in Country Club Hills Subdivision since its dedication in 1945; that the unnamed street had never been opened; and that the declarations of withdrawal of the park and street from public and private use were ineffective in that they were not within the purview of G.S. 136-96. The judgment held the declarations of withdrawal from dedication null and void, the conveyance of the unnamed street area by the corporation to defendant Cline null and void, and permanently enjoined defendants from subdividing Hyde Park and the unnamed street. Defendants appealed.

Gulley & Green, by Charles P. Green, Jr., for plaintiffs.

Wolff, Harrell & Mann, by Bernard A. Harrell, for defendants.

BROCK, Judge.

All of defendants' assignments of error relate to that portion of the judgment which held null and void defendant corporation's declaration of withdrawal from dedication of the unnamed street area. Defendants make no exceptions or assign-

ments of error to the judgment as it relates to the Hyde Park area.

[1] In general, the sale of lots by reference to a map or plat which represents a division of a tract of land into streets and lots constitutes an offer to dedicate such streets to public use. This dedication to the public is complete only when the offer is accepted by the responsible public authority. *Owens v. Elliott*, 258 N.C. 314, 128 S.E. 2d 583. G.S. 136-96 provides for withdrawal of dedication to public use:

> "Every strip, piece, or parcel of land which shall have been at any time dedicated to public use as a road, highway, street, avenue, or for any other purpose whatsoever, by a deed, grant, *map*, plat, or other means, which shall not have been actually opened and used by the public within fifteen (15) years from and after the dedication thereof, shall be conclusively presumed to have been abandoned by the public for the purposes for which same shall have been dedicated; *and no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein* . . . provided, that no abandonment of any such public or private right or easement shall be presumed until the dedicator or some one or more of those claiming under him shall file and cause to be recorded in the register's office of the county where such land lies a dedication withdrawing such strip, piece or parcel of land from public or private use to which it shall have theretofore been dedicated . . . .
>
> *"The provisions of this section shall have no application in any case where the continued use of any strip of land dedicated for street or highway purposes shall be necessary to afford convenient ingress or egress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway . . . ."*

The provisions of this statute do not apply when the continued use of the street is "necessary to afford convenient ingress or egress" to any lot sold or conveyed by the dedicator. In the present case, the unnamed street has not been opened or used by the public as a street for more than 25 years from the time of its dedication. The dedicator, Country Club Hills, Inc., has complied with the provisions of G.S. 136-96 and filed a declaration withdrawing the unnamed street from public or

private use. Unless the continued use of the street is "necessary to afford convenient ingress or egress," G.S. 136-96 is applicable to this situation and its effect is to extinguish "any public or private easement" in the dedicated property. The question presented, then, is whether the unnamed street area falls within this statutory exception to the application of G.S. 136-96.

[2] The only land involved in this case to which plaintiffs have an interest in convenient ingress and egress is the Hyde Park area. Defendants have not challenged the trial court's holding that Hyde Park remains dedicated to public use. Plaintiffs purchased lots by reference to maps which contained the park designation. This park dedication was certainly an inducement to their purchasing lots. The park dedication by Country Club Hills, Inc., was a conveyance within the meaning of the statutory exception to G.S. 136-96.

The words "continued use of" in the statutory exception to the application of G.S. 136-96 have been construed to mean the continued *right* to use. *Janicki v. Lorek,* 255 N.C. 53, at 60, 120 S.E. 2d 413, at 419. This continued *right* to use is not contingent on some prior use, but is merely a continuance of a right that existed at the time of dedication. The operation of this statutory exception is predicated upon a determination of whether the continued *right* to use the dedicated street "shall" be necessary to afford convenient ingress or egress to any lot or parcel of land conveyed by the dedicator.

[3] The trial court found that the Hyde Park area was bordered by Pasquotank Drive, Granville Drive, Perquimans Drive, and the 100-foot-wide unnamed street. No determination was made, however, as to whether the continued *right* to use this unnamed street, in view of the access afforded by the three bordering public streets, "shall" be necessary to afford convenient ingress or egress to the park. The unnamed street may be necessary to afford convenient access to a portion of the park not conveniently reached by the three public streets; or the three public streets, due to their width, the amount of traffic, or some like consideration, may not provide convenient access to the park. This determination was not made by the trial court, and was necessary in order to determine whether the unnamed street came within the statutory exception to G.S. 136-96. If it is determined that the unnamed street is within the purview of this exception so that G.S. 136-96 is inapplicable,

the withdrawal from dedication of the unnamed street would be ineffective.

The judgment appealed from is reversed as it relates to the unnamed street and this cause is remanded for a determination of the issue heretofore discussed.

Reversed in part, and remanded.

Judge GRAHAM concurs.

Judge VAUGHN dissents and would affirm the judgment from which defendants appealed.

STATE OF NORTH CAROLINA v. NELSON GALE REYNOLDS

No. 7219SC826

(Filed 11 April 1973)

1. **Criminal Law § 60— fingerprint evidence — sufficiency of evidence to withstand nonsuit**

Evidence given by a qualified expert that fingerprints found at the scene of a crime correspond with those of an accused, when accompanied by substantial evidence of circumstances from which the jury can find that such fingerprints could have been impressed only at the time the offense was committed, is sufficient to withstand a motion for nonsuit.

2. **Criminal Law § 60; Burglary and Unlawful Breakings § 4; Larceny § 7— fingerprint evidence — sufficiency of evidence to withstand nonsuit**

Where the evidence tended to show that fingerprints on vending machines in the refreshment area of a manufacturing company matched those of defendant, that the fingerprints could have been impressed only at the time the offenses charged were committed, that the refreshment area was not open to the public in general or to defendant in particular and that defendant had never lawfully been in or around the place of business before, evidence was sufficient to withstand nonsuit in a felonious breaking and entering and felonious larceny case.

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

Indictment for: (1) felonious breaking and entering and (2) felonious larceny. Plea: not guilty. The State introduced

evidence to show: At some time between the close of work on Friday, 19 February 1971, and the following Monday morning, the place of business of United Brass Works, Inc., at Randleman, N. C., was broken into and vandalized. The company was primarily engaged in the manufacture of bronze valves. On 19 February 1971 the business was operated in normal shifts and had approximately 70 employees working each shift. The business was enclosed in a single building, in the basement of which there was a refreshment area containing vending machines for soft drinks, sandwiches, candy and cigarettes. At the close of the workday on Friday, 19 February 1971, the doors, windows, and places of ingress and egress were secured. On the following Monday morning it was discovered that several louvers had been pulled out from the frame of a louvered window on the north side of the building, leaving a hole measuring 17 by 22 inches. Desk drawers had been pried open, vending machines in the refreshment area severely damaged, the change machine opened and emptied, and approximately $600.00 taken from a cash box in a desk and from a locked desk drawer. The investigating S.B.I. agent noticed that the Coke and Pepsi machines in the basement refreshment area had been pulled slightly away from the wall and unplugged. On processing for latent fingerprints, the agent obtained from the Pepsi machine one whole palm print, with four of the five fingerprints legible. In the opinion of an expert witness the fingerprints and palm print taken from the Pepsi vending machine were the same as those of the defendant.

The Director of Administration of United Brass Works, Inc., who had been associated with the company for approximately ten years, testified that the recreation area was not open to the public other than employees, that defendant had never been employed by the company, that he did not know the defendant, and on 19 February 1971 defendant was not authorized to enter the building of the corporation. On cross-examination, this witness testified: "People other than employees may have used the recreation room but if so it was done without my knowledge."

The defendant offered no evidence. The jury found him guilty of felonious breaking and entering and felonious larceny. From judgment imposing prison sentence, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Parks H. Icenhour for the State.

Bell, Ogburn & Redding by Deane F. Bell and J. Howard Redding for defendant appellant.

PARKER, Judge.

The sole question argued in defendant's brief and presented by this appeal concerns the denial of his motions for nonsuit. He contends that the evidence in this case was entirely circumstantial and was insufficient to support the verdict, relying on *State v. Minton,* 228 N.C. 518, 46 S.E. 2d 296. It is elementary that upon motion for nonsuit in a criminal case the evidence must be viewed in the light most favorable to the State and that the motion should be denied if, when the evidence is so viewed, the court determines that there is substantial evidence to warrant a jury finding defendant guilty of all material elements of the offense charged. In this connection it is immaterial whether the evidence be direct or circumstantial or both; if there be substantial evidence from which a jury could find that the offense charge has been committed and that defendant committed it, regardless of whether that evidence be direct or circumstantial or some combination of both, the motion to nonsuit should be overruled. "Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury." *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

[1] In the present case defendant does not challenge the sufficiency of the evidence to show that the offenses charged had been committed by someone; he challenges only the sufficiency of the evidence to justify the court in submitting to the jury the question whether he was the person who committed them. The sufficiency of fingerprint evidence to establish the identity of an accused as the person who committed the offense charged has been before the appellate courts of this State in many cases. See, *e.g., State v. Tew,* 234 N.C. 612, 68 S.E. 2d 291; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104 (footprints); *State v. Reid,* 230 N.C. 561, 53 S.E. 2d 849, cert. denied, 338 U.S. 876; *State v. Minton, supra; State v. Helms,* 218 N.C. 592, 12 S.E. 2d 243; *State v. Huffman,* 209 N.C. 10,

182 S.E. 705; *State v. Combs,* 200 N.C. 671, 158 S.E. 252; *State v. Stewart,* 16 N.C. App. 419, 192 S.E. 2d 60; *State v. Phillips,* 15 N.C. App. 74, 189 S.E. 2d 602; *State v. Pittman,* 10 N.C. App. 508, 179 S.E. 2d 198; *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472; see also, Annot., 28 A.L.R. 2d 1115. The rule deducible from these cases is that evidence given by a qualified expert that fingerprints found at the scene of a crime correspond with those of an accused, when accompanied by substantial evidence of circumstances from which the jury can find that such fingerprints could have been impressed only at the time the offense was committed, is sufficient to withstand a motion for nonsuit. Such evidence logically tends to show that the accused was present when the crime was committed and that he participated in its commission. Whether such evidence in any case supports that conclusion beyond a reasonable doubt is a matter for the jury to decide.

[2] When the evidence in the present case is viewed in the light of the foregoing rule, we are of the opinion that the trial court properly overruled defendant's motions for nonsuit. There was substantial evidence from which the jury could find that fingerprints found at the place where the crimes charged were committed corresponded with those of defendant's; a qualified expert so testified. There was also substantial evidence of such circumstances as would support a jury finding that these fingerprints could have been impressed only at the time the offenses charged had been committed. The place where the fingerprints were found was not open to the public generally or to the defendant in particular. There was no evidence that defendant ever had been lawfully in or around the place of business before, as was the case in *Minton.* Nothing in the evidence in the present case even indicates any reason why defendant might ever have had lawful occasion to have been there. It would be pure speculation to assume that he had.

The motions for nonsuit were properly overruled.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROSE MAE GRIFFIN

No. 7315SC253

(Filed 11 April 1973)

1. **Criminal Law § 106— circumstantial evidence — sufficiency to overrule nonsuit**

Where evidence introduced by the State is circumstantial in nature, it is not necessary that the evidence establish facts so connected and related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis in order to withstand nonsuit; rather, there must be substantial evidence against the accused of every essential element that goes to make up the offense charged in order to submit the case to the jury.

2. ***Homicide* § 21— second degree murder — sufficiency of evidence to overrule nonsuit**

Evidence was sufficient in a murder case to withstand nonsuit where it tended to show that defendant and deceased who were married were driving along a rural road at the time of the homicide, five gunshots sounded in rapid succession as the car came to a halt, five bullet holes were observed on the right side of deceased's head, a .22 caliber six-shot revolver was on the seat beside deceased when an officer arrived, a search of defendant's purse revealed five spent .22 caliber cartridge casings, deceased had changed his life insurance beneficiary to his wife's name two months before his death, and defendant had previously threatened to kill her husband.

3. **Criminal Law § 99— questions by trial court — no expression of opinion**

The trial court in a murder case did not express an opinion in violation of G.S. 1-180 by asking defendant questions with respect to her testimony that deceased was driving fast prior to the shooting, that defendant told deceased to slow down, that deceased threatened to kill defendant, that deceased pulled a pistol, and defendant's reason for reloading the pistol, where the questions and answers tended to exculpate rather than inculpate defendant and where the court restricted its questioning to statements previously testified to by defendant.

4. **Criminal Law § 113— necessity for instruction on circumstantial evidence**

Jury instructions with respect to circumstantial evidence were adequate, particularly since the State relied primarily on direct evidence and no instructions on circumstantial evidence were required.

APPEAL by defendant from *Clark, Judge,* 13 November 1972 Criminal Session of CHATHAM Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the murder of her husband, Wesley Griffin.

Prior to offering any evidence, the solicitor announced that he would seek a verdict of either murder in the second degree or of voluntary manslaughter, whichever the facts would support. Defendant pleaded not guilty but a jury returned a verdict of guilty of voluntary manslaughter. From judgment imposing prison sentence of not less than eight nor more than twelve years, defendant appealed.

Attorney General Robert Morgan by C. Diederich Heidgerd, Associate Attorney, for the State.

Dark & Edwards by L. T. Dark, Jr.; Billy R. Craig for defendant.

BRITT, Judge.

[1] Defendant first assigns as error the failure of the trial court to sustain her motions for nonsuit. She contends that since "all of the evidence introduced by the State was circumstantial in nature" and that such evidence "must establish facts so connected and related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis," the trial court erred in denying her nonsuit motion.

A like contention was rejected in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956). We quote from the opinion by Justice Higgins, pp. 383-384:

> "Admittedly, this is a case of circumstantial evidence. The defendant argues, therefore, that it was the duty of the trial court to analyze and weigh the evidence and to sustain the motion for judgment as of nonsuit unless the evidence, when so weighed and analyzed, points unerringly to the guilt of the accused and excludes every other reasonable hypothesis. The argument does not distinguish between the function of the court and the function of the jury. When the evidence is closed and the defendant moves for a directed verdict of not guilty, or demurs to the evidence, or moves for judgment of nonsuit, (the three being for all practical purposes synonymous) the trial court must determine whether the evidence taken in the light most favorable to the State is sufficient to go to the jury. That is, whether there is substantial evidence against the accused of every essential element that goes to make up the offense charged. If the trial court so finds, then it is its duty to overrule the

motion and submit the case to the jury. Otherwise, the motion should be allowed. If the motion is overruled, it becomes the court's duty to charge the jury that in making up its verdict it must return a verdict of not guilty unless the evidence points unerringly to the defendant's guilt and excludes every other reasonable hypothesis. It is the duty of the jury to weigh and analyze the evidence and to determine whether that evidence shows guilt beyond a reasonable doubt.

* * * * * *

* * * It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. (Citations.)"

In the case at bar, the evidence taken in the light most favorable to the State tended to show:

Defendant and deceased were married to each other on 30 August 1969. On 22 May 1971 at approximately 7:00 p.m., defendant and her husband were riding in a 1965 blue Ford along rural paved road No. 2145 near the Southern Wood Piedmont Plant (Southern Wood) in the Gulf community of Chatham County. As the car slowly came to a stop, five gunshots sounded in rapid succession. Defendant got out of the car on the passenger side and walked around behind the car to the driver's side and leaned forward as though talking to the driver. Immediately thereafter, one Tommy Tillman, a neighbor in the Gulf community who had known the deceased 23 or 24 years, was on his way to work at Southern Wood when he saw the Ford with its brake lights on and the motor running stopped in the eastbound lane of traffic on the aforesaid road. Tillman walked up to the side of the car and observed deceased behind the steering wheel with his head slumped sideways. A gun pointing toward deceased was on the seat in deceased's hand and his right foot was on the brake pedal. Turning to go back to his car,

Tillman saw defendant approaching from a nearby building and she said: "Lord, Wes has been shot." "Wes and I got in an argument over a cow and we were fighting over the gun and the gun went off and it shot Wes." Defendant shook the deceased and he fell over in the seat. Defendant removed the gun from deceased's hand and dropped it on the ground. She later picked up the gun and placed it back on the seat.

Deputy Sheriff Whitt arrived at the scene approximately 7:40 p.m. Whitt saw a .22 caliber six-shot revolver on the right front bucket seat beside deceased. The pistol had five live bullets in it and one spent bullet casing. Whitt observed five bullet holes on the right side of deceased's head. One hole was "almost directly in the ear; two above in the front part of his ear in his head, and two behind— . . . . All five holes were near or above his right ear in the right side of his face." Powder burns were on the inside of deceased's right elbow and on the muscle of his right arm.

With defendant's permission two police officers searched her pocketbook and found five spent .22 caliber cartridge casings in a green change purse. Regarding the gunshots defendant testified: "When I grabbed his arm the gun just went and fired. I don't know whether I ever had the gun in my sole possession at that time; I don't know one way or the other. I was using both hands when I was struggling with it."

Further evidence tended to show that deceased had changed his life insurance beneficiary to his wife's name two months before his death; deceased's son-in-law testified that defendant had threatened to kill her husband. It was stipulated that deceased died as a result of a wound caused by a gunshot which penetrated his brain on 22 May 1971.

[2] We do not agree with defendant that "all of the evidence introduced by the State was circumstantial." Even so, there is plenary evidence to establish every material element of the crime charged. We find no merit in the assignment of error.

[3] Defendant next assigns as error the questioning of defendant while on the stand by the trial court contending that such questioning constituted an expression of the court's opinion in violation of G.S. 1-180. We do not agree.

It is well recognized that the court may ask questions designed to elicit a proper understanding and clarification of the

witness' testimony or to bring out a fact overlooked. 2 Strong, N. C. Index 2d, Criminal Law, § 99, p. 634. Judges preside over courts not as moderators but as essential, active factors or agencies in the due and orderly administration of justice, and it is proper, sometimes necessary, that they ask questions of a witness in order to get the truth before the jury. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). A defendant will not be granted a new trial for remarks of the court during the trial unless the remarks prejudice defendant in the light of the circumstances under which they were made. 2 Strong, N. C. Index 2d, *supra,* p. 635.

In the case at bar, the able trial judge prefaced his questioning by saying, "Let me ask you this for clarification . . . . " The questions asked by the court were with regard to defendant's testimony that deceased was driving fast prior to the shooting, that defendant told deceased to slow down, that deceased threatened to kill defendant, that deceased pulled a pistol, and defendant's reason for reloading the pistol. It would appear that the questions were beneficial rather than prejudicial to defendant's case since the questions and answers tended to exculpate rather than inculpate her. Further, the court restricted its questioning to statements previously testified to by defendant and sought only to ascertain if defendant had made a certain statement as the court had understood her to make it. The assignment of error is overruled.

[4] In her last assignment of error defendant contends the trial court erred in its charge to the jury by failing to declare and explain the law relating to circumstantial evidence. In *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), Lake, Justice, speaking for the court said:

> " * * * While circumstantial evidence is sufficient to justify a conviction when, and only when, the circumstances proved are consistent with the hypothesis of guilt and inconsistent with every other reasonable hypothesis, this Court has repeatedly held that no set form of words is required to be used in conveying to the jury this rule relating to the degree of proof required for conviction upon circumstantial evidence. (Citations.)"

In the case at bar, we think the jury instructions were adequate. If defendant desired additional instructions, she should have requested them. *State v. Westbrook, supra; State*

v. Warren, 228 N.C. 22, 44 S.E. 2d 207 (1947). Furthermore, where, as here, the State relies primarily on direct evidence, instructions on circumstantial evidence are not required. *State v. Sutton,* 225 N.C. 332, 34 S.E. 2d 195 (1945); *State v. Wall,* 218 N.C. 566, 11 S.E. 2d 880 (1940).

For the reasons stated, we find

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. DAHL THOMAS CARNES

No. 7326SC151

(Filed 11 April 1973)

1. **Criminal Law § 98— defendant taken into custody before trial — no error**

   There was no error in the trial court's incarceration of defendant pending the start of his trial on the following morning where there was no showing that defendant was placed in the custody of the sheriff in the jury's presence or that the jury was influenced by his being placed in custody.

2. **Criminal Law § 169— exclusion of testimony — failure to show what testimony would have been — no error**

   Defendant failed to show prejudicial error in the trial court's restriction of his cross-examination of State's witnesses where the record did not show what the witnesses' testimony would have been had they been permitted to answer.

3. **Criminal Law § 96— incompetent evidence withdrawn — error cured**

   In a prosecution for unlawfully discharging a firearm into an occupied dwelling where the trial court instructed the jury to disregard testimony tending to suggest defendant's involvement with persons in the drug traffic immediately after the testimony was given, and where there was ample competent evidence from which the jury could find defendant guilty, a mistrial was not warranted.

4. **Criminal Law §§ 6, 119— defense of intoxication — requested instructions — no error**

   The defendant's requested instructions on intoxication as a defense, though not given verbatim, were given in substance, and the court's charge fairly defined defendant's rights.

APPEAL by defendant from *Friday, Judge,* 28 August 1972 Schedule "C" Criminal Session, MECKLENBURG Superior Court.

Defendant was tried on a bill of indictment charging him with unlawfully discharging a firearm into an occupied building. Evidence most favorable to the State tended to show:

On 9 April 1972 at 7:00 p.m. one Henry Brake (Brake) picked up his date, Miss Brenda Kay Dunham (Miss Dunham), at her apartment in the Williamsburg Apartments Complex in Charlotte. Around 11:30 p.m. Brake and Miss Dunham went to the Ramada Inn Lounge (Lounge) on Independence Boulevard and there saw the defendant. Some two weeks previous to this date Miss Dunham and defendant, a married man with a family, had "broken up" after going together for approximately four years. Defendant remained at the Lounge the entire time that Miss Dunham and Brake were there from 11:30 p.m. until 1:15 or 1:30 a.m. Defendant exchanged no conversation with either Miss Dunham or Brake (whom he had known for about a year) at the Lounge. Brake and Miss Dunham left the Lounge and went to Miss Dunham's apartment.

Upon arriving at the apartment, Brake and Miss Dunham observed defendant riding through the parking lot of the apartment complex in a black and white Mercury. Shortly thereafter, the telephone rang; Miss Dunham answered and the caller was defendant who said that he wanted to talk to her. Miss Dunham replied that she had company and hung up. Defendant called again and Brake answered, telling defendant to "call back tomorrow." About two or three minutes after the second call, Brake and Miss Dunham heard loud, hard knocking on her apartment door which was chained and locked. Defendant hollered several times, "Let me in." The knocking damaged the door, splitting the left upper panel an inch or so. Brake told Miss Dunham to call the police and then told defendant that he was going to open the door.

As Brake attempted to unhook the top door chain, which was stuck in its track, Brake heard a gunshot and "felt something knick" the inside calf of his right leg. Thereafter, Brake observed a hole in the lower door panel and a trench in the floor an inch and a half long and three quarters of an inch deep. Charlotte Police Officer Lawson (Lawson) arrived at Miss Dunham's apartment at approximately 2:00 a.m. About five minutes later, the telephone rang; Brake answered upstairs and Lawson lifted a receiver in the kitchen at the same time. Brake asked the caller, "Dahl, did you know you shot me?"

Defendant answered, "I didn't mean to shoot you. You are just a victim of circumstances." Lawson found a .25 caliber bullet in the apartment.

Police officers obtained a warrant to search defendant's mobile home premises and found a .25 caliber automatic pistol in or near the steps leading to his mobile home. Defendant testified, "After I had that last conversation with Mr. Brake, I went home. In the process of going home, I was thinking that when he said that I had shot him, I didn't know what he was talking about, whether I had really hurt him or what, and it scared me and I hid the .25 caliber automatic under my steps."

Defendant pleaded not guilty. From a jury verdict of guilty as charged and judgment imposing a prison sentence of not less than eighteen nor more than twenty-four months, defendant appealed.

Attorney General Robert Morgan by James E. Magner, Jr., Assistant Attorney General, for the State.

Paul L. Whitfield for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the trial court's incarceration of defendant pending the start of his trial on the following morning.

In *State v. Smith,* 237 N.C. 1, 74 S.E. 2d 291 (1953), opinion by Justice (later Chief Justice) Parker, we find:

> "' * * * It is within the discretion of the trial court whether accused should be placed in custody; and the court's proper exercise of discretion is not error where the jury were unaware that accused had been placed in custody, or were not influenced by that fact.' 23 C.J.S., Criminal Law, Sec. 977."
>
> * * * *
>
> " 'In the absence of constitutional or statutory provisions to the contrary, the general rule is that the inherent power of the court to insure itself of the presence of the accused during the trial may, in its discretion, be exercised so as to order a person who has been at liberty on bail, into the custody of the sheriff during trial of the case . . . It is not necessary for the court, in exercising its discretionary

power to remand during trial, to file any reasons for such action; and if such order is made, it must be assumed, in the absence of a contrary showing, that the court acted in good faith and upon sufficient grounds.' 6 Am. Jur., Bail and Recognizance, Sec. 101."

In the instant case, defendant does not contend nor does the record show that he was placed in the custody of the sheriff in the jury's presence or that the jury was influenced by his being placed in custody. We perceive no error.

[2] Defendant assigns as error the trial court's restriction of defendant's cross-examination of State's witnesses. We are unable to ascertain whether the trial court's rulings were prejudicial since the record does not disclose what the witnesses' testimony would have been had they been permitted to answer and the burden is on appellant to show prejudicial error. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972); *State v. Royall,* 14 N.C. App. 214, 188 S.E. 2d 50 (1972). This assignment of error is without merit.

[3] Defendant next assigns as error the failure of the trial court to declare a mistrial "due to the prejudicial and inflammatory questions and remarks of the Solicitor." Defendant's main contention under this assignment relates to testimony tending to suggest defendant's involvement with persons in the drug traffic. The first time such testimony was given, defendant moved to strike. The motion was sustained and the trial judge instructed the jury that they were not to consider the testimony in their deliberations. Defense counsel moved for a mistrial and this motion was overruled. It is well established in our criminal law that if the court properly withdraws incompetent evidence from jury consideration and instructs the jury not to consider it, this cures error in its admission in all but exceptional circumstances. *State v. Aycoth,* 270 N.C. 270, 154 S.E. 2d 59 (1967); *State v. Bronson,* 10 N.C. App. 638, 179 S.E. 2d 823 (1971). Whether the incompetent evidence should be deemed cured of prejudicial effect depends upon the nature of the evidence and circumstances of the individual case. *State v. Aycoth, supra.* Where the trial court has instructed the jury not to consider improper testimony, and where as in the instant case there is ample competent evidence from which the jury could find defendant guilty, a mistrial is not warranted. *State v. Bronson, supra.*

Also under this assignment of error, defendant maintains that the solicitor's reference to defendant's .25 caliber pistol as a "Saturday Night Special" constituted error. In view of the fact that defendant had already admitted ownership of said gun and had denied familiarity with "Saturday Night Specials," we do not see how this reference prejudiced defendant. The assignment of error is overruled.

[4] By his fifth assignment of error, defendant contends the court erred (1) in failing to charge the jury on the defense of intoxication as requested by defendant and (2) in inadequately charging on intoxication as a defense. This assignment of error is without merit.

The record discloses that while the requested instruction was not given in the exact language of the request, it was given in substance. Where a defendant is entitled to requested instructions, the court does not have to give them verbatim; it is sufficient if the requested instructions are given in substance. *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968). We have carefully reviewed that portion of the court's charge on intoxication as a defense and believe that the charge fairly defined defendant's rights. A charge on intoxication as a defense in language substantially similar to the one given in the case at bar was found to be proper in *State v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885 (1943).

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

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE AND THE NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE v. STATE OF NORTH CAROLINA EX REL. ATTORNEY GENERAL

No. 7310INS304

(Filed 11 April 1973)

Insurance § 79.1— automobile liability rates — sufficiency of evidence and findings

There was substantial evidence to support the findings of fact made by the Commissioner of Insurance on remand of this automobile

liability insurance rate case which was begun on 1 July 1971, the findings support the Commissioner's order increasing private passenger automobile liablity rates by 8.9%, and substantial justice has been afforded to the companies and the consuming public notwithstanding more current information may have been available to the Commissioner than that which he used in making his findings.

APPEAL by Attorney General, intervenor, from decision and order of Commissioner of Insurance entered 4 December 1972.

This cause was before the Court of Appeals at the 1972 Fall Session. See opinion filed 25 October 1972 and reported in 16 N.C. App. 279, 192 S.E. 2d 138.

On 26 May 1972 the Commissioner of Insurance (Commissioner) entered an order directing that private passenger automobile liability insurance rates be increased by 8.9%, reduced by reason of federal price control regulations to 7.4%. This action by the Commissioner was pursuant to a 1 July 1971 filing made by the North Carolina Automobile Rate Administrative Office (Rate Office) as required by G.S. 58-248. Additional facts regarding the proceedings are set forth in the former opinion cited above.

The Attorney General appealed from the 26 May 1972 order of the Commissioner. This court vacated the order and remanded the cause to the Commissioner with the following directions:

> "On remand the Commissioner will make specific findings of fact, upon substantial evidence based on underwriting experience in North Carolina, as to (1) the earned premiums to be anticipated by the company (i.e., all companies operating in North Carolina considered as one) during the life of policies to be issued in the near future, (2) the reasonably anticipated loss experience during the life of said policies, (3) the reasonably anticipated operating expenses in said period, and (4) the percent of earned premiums which will constitute a fair and reasonable profit in that period."

On 28 November 1972, pursuant to proper notice, the Commissioner convened a "remand" hearing. Mr. Mize, general manager of the Rate Office, testified and presented certain exhibits prepared by him and other pertinent data. Mr. Holcombe, a member of the Commissioner's staff, also testified and presented pertinent information developed by him. Mr. Mize and Mr. Hol-

combe each gave his opinion with respect to the additional information required by the Court of Appeals opinion. Other documentary evidence was introduced.

The Attorney General filed two motions in which he asked that the Commissioner deny any rate increase and that the Rate Office be required to furnish more recent and more detailed information than it had furnished. The motions were overruled.

On 4 December 1972 the Commissioner entered a "Supplementary Decision and Order" which, among other things, contains the following findings of fact:

(1) That the earned premiums to be anticipated by all companies operating in North Carolina considered as one company in the near future, i.e., for the calendar year 1973, from writing private passenger automobile liability insurance using the proposed rates in the amount approved by the Commissioner in his May 26, 1972, decision is $171,659,442.

(2) That the reasonably anticipated loss experience during the life of said policies for calendar year 1973 will be $120,721,394.

(3) That the reasonably anticipated operating expenses in said period will be $45,968,155.

(4) That the percent of earned premiums which will constitute a fair and reasonable underwriting profit for all of the insurance companies engaging in writing private passenger automobile liability insurance in that period in this State is five percent (5%), reduced to three percent (3%) by consideration of earnings of all companies writing automobile liability insurance in this State from the investment of unearned premium reserves in the amount of one percent (1%) and by consideration of investment income from loss reserves on policies written in North Carolina in the amount of one percent (1%), and further reduced to 2.9% by Federal Price Commission limitations on insurance rate increases.

(5) That the underwriting profit which can be reasonably anticipated for all companies writing private passenger automobile liability insurance in North Carolina using the proposed increased rate level approved by the Commissioner in his May 26, 1972, Decision and Order and herein

reaffirmed is approximately $4,969,893 on an anticipated volume of earned premiums of approximately $171.7 million, which produces a 2.9% of earned premiums underwriting profit before federal income taxes. That said 2.9% of earned premiums provides for a fair and reasonable underwriting profit within the meaning of G.S. 58-248 and constitutes a fair and reasonable profit for all companies writing automobile liability insurance in this State in the 1973 calendar year period.

The "Supplementary Decision and Order" provided "that the private passenger automobile liability insurance rates for use in North Carolina in the future be increased by 8.9% to be effective on the earliest practicable date that the rate increase can be placed into effect by the Rate Office, subject, however, to any necessary modifications in order to comply with any existing or further applicable federal price control regulations, which regulations in effect at this time would result in an overall 7.4% rate level increase or an increase in basic limits private passenger automobile liability insurance rates for Class 1A of $5."

The Attorney General appealed.

Allen, Steed & Pullen by Arch T. Allen for plaintiff appellee.

Attorney General Robert Morgan by Benjamin H. Baxter, Jr., Associate Attorney, and Charles A. Lloyd, Assistant Attorney General, for appellant intervenor.

BRITT, Judge.

Inasmuch as fire and automobile liability insurance rate making procedures in this State have been fully discussed in the recent cases of *In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155 (1971), and *In re Filing by Fire Insurance Rating Bureau,* 275 N.C. 15, 165 S.E. 2d 207 (1969), and to a limited degree in our former opinion in this case, we deem it unnecessary to "plow that ground" again.

In the Rating Bureau case (at page 35), an appeal from this court, we find:

"As the Court of Appeals stated, the Commissioner of Insurance 'is a specialist in the field' and has been given

by the Legislature the authority and the duty to set rates which will, in the future, produce a fair and reasonable profit and no more. His projection of past experience and present conditions into the future is presumed to be correct and proper if supported by substantial evidence, G.S. 58-9.3, and if he has taken into account all of the relevant facts which he is directed by the statute to consider. G.S. 58-131.2."

It is clear that in the order appealed from the Commissioner made the specific findings of fact called for in our former decision. It is also clear that his findings are supported by substantial evidence. But the Attorney General contends that the Commissioner had available to him on 28 November 1972 data, statistics and information that were more recent than that which he used in making his findings and arriving at his decision.

Conceding, *arguendo,* that information which was more current might have been available to the Commissioner, we think the record supports a conclusion that substantial justice has been done to all parties concerned—affected insurance companies and the consuming public. Applicable statutes appear to provide for at least annual review of rates charged for automobile liability insurance in North Carolina and we are dealing here with a review which began on 1 July 1971. We can reasonably assume that a review of filing made on 1 July 1972 is now in progress and in a matter of a few weeks the 1 July 1973 filing will be due.

Furthermore, G.S. 58-248.1 provides in pertinent part as follows:

"Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonably, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications, or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest."

For the reasons stated, the order appealed from is

Affirmed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. HORACE LEE METCALF

No. 7330SC142

(Filed 11 April 1973)

Criminal Law § 53; Homicide § 15— medical testimony as to possibility of suicide — invasion of province of jury — error

The trial court in a murder case committed prejudicial error when it allowed the doctor who examined deceased immediately after her death to express an opinion that it was not possible for the deceased to have shot herself, since that opinion answered the exact issue which the jury was to determine.

APPEAL by defendant from *Falls, Judge,* 15 October 1972 Session of SWAIN County Superior Court.

Defendant was tried on a proper bill of indictment charging him with the first-degree murder of his wife, Josie Metcalf, on 29 April 1972. The defendant was placed on trial for murder in the second degree or a lesser offense. He pleaded not guilty, and the jury found him guilty of manslaughter. From a sentence of imprisonment, the defendant appealed.

The State's evidence tended to show that on the night of 29 April 1972 at about 11:30 p.m. a Swain County Deputy Sheriff went to the Metcalf home and found Mrs. Metcalf lying on a bed. She had two puncture wounds on the left side of her neck, and she was dead. A .22 caliber revolver, in its holster, was lying on the pillow beside her.

The pistol was designed to hold six bullets. In it were found five live cartridges but only one spent cartridge. Although Mrs. Metcalf had two wounds in her neck, a second empty cartridge was never found.

Dr. William E. Mitchell testfied that he examined Mrs. Metcalf at about 12:30 a.m. or 1:00 a.m. on 30 April 1972. He observed two "wounds of entry for a low velocity small gunshot"

on the left neck and jaw, and one wound on the right neck which, "I would characterize as an exit wound." Dr. Mitchell found one bullet in Mrs. Metcalf's body. Another bullet was found later by officers on the bed on which Mrs. Metcalf's body was found.

A witness, admitted without objection as a firearms expert, testified that the bullet found in the bed was fired from the pistol found on the bed; that the empty shell case found in the pistol was also fired from that pistol; and that the shells were Remington, .22 caliber shorts. The expert testified that the bullet taken from Mrs. Metcalf's body was mutilated and distorted so that it could not be determined whether it was fired from the pistol. However, he did testify that the mutilated slug was a .22 caliber short projectile, and that, "In my opinion that bullet is probably Remington ammunition due to the copper-nickel coating and because it compares favorably with known Remington bullets pulled from a live round. I cannot, however, state beyond a reasonable doubt that Remington made this bullet; it could be another brand."

In his testimony, Dr. Mitchell also stated:

> "I feel that the deceased died from hemorrhage and strangulation as a result of injuries from two gunshot wounds to the neck. Either of the wounds, I think, could have caused death as each wound cut major arteries."

The State had called Dr. Mitchell as its first witness, and propounded to him a hypothetical question. There was no evidence in the case at that time except the testimony of Dr. Mitchell himself; and defendant objected to the question, which objection was sustained. After other witnesses had testified, Dr. Mitchell was recalled, and asked the following question:

> "Dr. Mitchell, on yesterday, the State propounded a hypothetical question to you; at the conclusion of that hypothetical question, the State asked you the following question: Based upon the foregoing findings, if the jury should so find, and beyond a reasonable doubt, do you have an opinion satisfactory to yourself, sir, whether or not the deceased, Josephine Metcalf, could have shot herself twice? Do you have such an opinion, Doctor?"

In response to this question, Dr. Mitchell testified that, "I feel that she would have been unable to shoot herself twice."

Attorney General Robert Morgan by Attorney Ruth G. Bell for the State.

McKeever, Edwards, Davis & Hays by George P. Davis, Jr. for the defendant appellant.

CAMPBELL, Judge.

Defendant contends that Dr. Mitchell's opinion was improperly admitted because it was based on facts not in evidence (that the two bullets were fired from the pistol found next to the body), and that the question asked on recall was different from the question asked originally.

We agree that the opinion was improperly admitted, but for a different reason: whether the hypothetical question was or was not properly phrased, the witness may not testify that the deceased could not have shot herself. *State v. Carr,* 196 N.C. 129, 144 S.E. 698 (1928).

In *Carr* the defendant was convicted of manslaughter in the shooting death of her husband. The deceased had one bullet wound two inches above his right eye; the bullet traveled downward. There were no powder stains on the body. Defendant testified that the deceased had shot himself.

A medical expert who examined the body testified, and answered the following question:

> " 'Q. From the position the body was lying in, from your examination of it, have you an opinion as to whether that wound could have been made by a gun in the hands of this deceased or not? A. I don't think it is possible for the deceased to have fired the gun and made the wound that I saw.' "

The court held that the answer was objectionable because it did not follow a question outlining the facts observed and relied on by the witness in forming his opinion. Additionally, the court said the answer was ultimately inadmissible in any event because it answered the exact issue which the jury was to determine.

> " . . . But the exception to the general rule which excludes opinion evidence is subject to the limitation that the opinion or inference of the witness must not be an answer to the exact issue which the jury is to determine. When the

witness testified that he did not think it possible for the deceased to have fired the gun and to have made the wound he necessarily testified in effect that in his opinion the deceased did not kill himself. True, the 'exact issue' was whether the defendants are guilty, but if the deceased killed himself the conclusion that the defendants did not kill him would necessarily follow. . . . " *State v. Carr, supra,* at 132.

In a homicide prosecution, where it is contended that the deceased killed himself, it is proper for the State to present evidence from which *the jury* may infer that the deceased did not kill himself. *State v. Atwood,* 250 N.C. 141, 108 S.E. 2d 219 (1959).

We agree with the State that the evidence was sufficient to withstand defendant's motion for nonsuit. However, we cannot say that the error of the court in allowing into evidence the testimony of Dr. Mitchell to the effect that deceased could not have committed suicide was harmless error. We think it was sufficiently prejudicial to warrant a new trial.

New trial.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JOHN PHILLIP WHITE

No. 7326SC53

(Filed 11 April 1973)

1. **Arrest and Bail § 3— arrest without warrant for carrying concealed weapon — probable cause**

Police officers had probable cause to arrest defendant without a warrant for carrying a concealed weapon in violation of G.S. 14-269 when they stopped defendant's car to make a routine driver's license check and, upon inquiry by the officers as to the contents of a paper bag on the back seat, defendant removed a revolver therefrom.

2. **Searches and Seizures § 1— search of seized articles at police station — search incident to arrest**

Where police officers lawfully arrested defendant for carrying a concealed weapon in a paper bag in his automobile, seizure of the bag at the arrest scene and search of the bag at the police station without a warrant were incident to the arrest, and heroin found in

the bag during the search at the police station was properly admitted in evidence.

3. **Witnesses § 7— reference to notes made by another — refreshing recollection**

The trial court did not err in allowing a police officer in the course of his testimony to refer to notes made by another officer.

4. **Narcotics § 4— possession of heroin found in car — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of felonious possession of heroin found in a paper bag on the back seat of defendant's car.

APPEAL by defendant from *Seay, Judge,* at the 14 August 1972 Schedule "B" Criminal Session of MECKLENBURG Superior Court.

In an indictment proper in form defendant was charged with the felonious possession of heroin. Evidence favorable to the State tended to show:

On 28 March 1972 at approximately 2:00 a.m., Mecklenburg County police officers were stopping cars for the purpose of checking driver's licenses at the intersection of Sunset and Beatties Ford Road. Defendant's car approached said intersection and stopped. Upon request, defendant displayed a valid New York driver's license. Officer Frye noted that defendant's automobile license plate had expired and informed defendant of this fact. Officer Frye then saw a " ' . . . reflection from within a brown paper bag sitting on the backseat' " and asked defendant three times what the bag contained. Defendant reached to the back seat and withdrew a .44 Magnum revolver from the bag. On order of the officer, defendant dropped the gun on the floorboard of the back seat. Defendant was removed from the car, placed under arrest for carrying a concealed weapon and searched; $726 in small bills was found on defendant's person. A companion in defendant's car was arrested and searched; 46 bags of heroin were found on the companion's person.

The officer returned the revolver to the bag from which it was withdrawn and carried the bag and its contents to the Law Enforcement Center. The bag was first opened and checked by police at the Center, where the bag was found to contain 37 tinfoil packets of a substance determined to contain heroin.

Defendant entered a plea of not guilty and from a jury verdict of guilty of felonious possession of heroin and judgment

imposing a prison sentence of not less than three nor more than five years, defendant appealed.

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

Arthur Goodman, Jr., and Howard J. Greenwald for defendant appellant.

BRITT, Judge.

Defendant contends that the trial court erred in denying his motion to suppress evidence obtained from a search of his car and the search and seizure of the bag containing 37 packets of heroin found therein. Defendant argues that the officer who seized the bag did not have probable cause to believe that the bag contained either "the instrumentalities or the fruits of a crime" and that this warrantless search was unreasonable and therefore violated defendant's Fourth Amendment Constitutional rights. We do not agree.

[1] It is clear that the police officers were authorized to stop defendant's car to make a routine driver's license check. G.S. 20-183(a); G.S. 20-7; *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973). When defendant removed the revolver from the bag, the police properly arrested him without a warrant inasmuch as they had reasonable ground to believe defendant was committing a misdemeanor—carrying a concealed weapon in violation of G.S. 14-269—in their presence. G.S. 15-41. Defendant does not challenge the legality of the arrest.

[2] A warrantless search and seizure may be made when incident to a valid arrest. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969); *State v. Allen, supra.* An element of the crime for which defendant was arrested is concealment of the deadly weapon; therefore, the bag was proper evidence in proving the crime for which defendant was arrested. The record does not indicate that the bag was taken for any other purpose.

Defendant argues that the subsequent examination of the bag and discovery of the 37 packets of heroin was not incident to the arrest but occurred at a later time and was therefore unlawful. We reject this argument.

While our research discloses no precedent directly in point —and defendant cites none—we believe the analogy that fol-

lows is sound. It has been held that a car that may be searched without a warrant where it is stopped may be searched later at a police station without a warrant. *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970). Recognizing that the paper bag could have been opened at the time the car was stopped as a lawful search incident to the arrest, we feel that the bag could lawfully be opened without a warrant later at the Law Enforcement Center as a valid extension of the *Chambers v. Maroney* rule. Furthermore, it has been held that discovered evidence not related to the crime which created a basis for the original search is admissible. *Harris v. United States,* 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947); *State v. Higgins,* 16 N.C. App. 581, 192 S.E. 2d 699 (1972). We hold that under the facts in this case, the court did not err in admitting the challenged evidence.

[3] Defendant next contends that the trial judge erred in permitting Officer Gibson to testify using notes made by Officer Frye. To support this contention, defendant argues that the two officers gave inconsistent testimony at the preliminary hearing; that at the trial the court granted defendant's motion to have State's witnesses sequestered; but, when the court permitted Officer Gibson in the course of his testimony to refer to notes made by Officer Frye, defendant was prejudiced.

The record is silent with regard to proceedings at the preliminary hearing, defendant's motion to sequester witnesses, the court order granting sequestration and the text of the notes. Matters discussed in the brief outside the record will not be considered on appeal. *State v. Roberts,* 279 N.C. 500, 183 S.E. 2d 647 (1971).

Even so, the record does indicate that Officer Gibson in testifying referred to notes Officer Frye said he had made. In Stansbury, N. C. Evidence 2d, § 32, pp. 60-62, we find:

> " * * * In the ordinary case the device used for stimulating the memory is a memorandum or other writing made by the witness himself, but it is well settled that a writing made under the supervision of the witness or by another in his presence may also be employed, and no good reason is apparent why any object perceptible to the senses, or even a sound or an odor, should not be used with propriety, as well as any writing regardless of its source. In any event the evidence consists of the testimony of the witness,

and not of the device by which his memory is revived, and cross-examination is always available to bring to light any improper practice or suspicious circumstance."

The contention is without merit.

[4] Finally, defendant maintains that the court erred in denying his timely motion for nonsuit. We hold that when the evidence in this case is considered in the light most favorable to the State, as we are required to do, *State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235 (1972), it is plenary to take the case to the jury and to support a guilty verdict.

For the reasons stated, we find

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. GEORGE LEON BROWN

No. 7326SC129

(Filed 11 April 1973)

1. **Criminal Law § 66— observation of defendant at crime scene — in-court identification of defendant — independent origins**

Where there was competent, clear and convincing evidence to support the trial court's findings that in-court identifications of defendant by victims of a robbery and felonious assault were of independent origin, based solely on what they observed during and immediately after the robbery, and did not result from any out-of-court confrontation or from any pre-trial identification procedure suggestive of and conducive to mistaken identification, the findings are binding on the court on appeal.

2. **Criminal Law §§ 102, 128— improper jury argument by solicitor — new trial denied — no error**

Defendant was not entitled to a new trial where the court ordered the jury to disregard a remark of the solicitor, in arguing to the jury, that "If you don't march right out of the jury room and convict him, I am going to be sick with you."

APPEAL by defendant from *Friday, Judge,* 31 July 1972 Session of Superior Court held in MECKLENBURG County.

State v. Brown

Defendant, George Leon Brown, was charged in separate bills of indictment, proper in form, with (1) armed robbery and (2) felonious assault with a deadly weapon with intent to kill Carrie Lynn Schrecengost inflicting serious injury. Upon his pleas of not guilty, the State offered evidence tending to show that at about 9:00 p.m., 25 December 1971, defendant and two male companions entered the office of Horne's Motor Lodge in Charlotte, approached the counter and inquired of the desk clerks, Carrie Lynn Schrecengost and Tony Prince, about renting a room. The office was well lighted. Defendant Brown stood within two and one-half feet of Mrs. Schrecengost and asked "if I couldn't give him a special rate on a room with one bed with all of them sleeping in one room." As Mrs. Schrecengost turned to look at the "room board" a pistol discharged and the man holding the pistol stated, "Give me all your money." Mrs. Schrecengost removed the drawer from the cash register and placed it on the counter. Defendant Brown and another man began removing the money from the cash register while the man with the pistol held it about two inches from the head of Tony Prince. Mr. Prince and Mrs. Schrecengost were told that they would be shot if they moved. After defendant and his two companions left, Mrs. Schrecengost, who had been shot in the abdomen, "laid down on the floor . . . for about ten minutes," awaiting the arrival of an ambulance. She was taken to Memorial Hospital and underwent four hours of surgery, then remained in the hospital for over two weeks. In May, 1972, Mrs. Schrecengost returned to the hospital for a second operation and remained there for an additional three weeks. Defendant was in the presence of Mrs. Schrecengost and Tony Prince for approximately ten minutes during the perpetration of the robbery.

Defendant offered the testimony of his mother, Daisy Brown, describing his appearance on 24 December 1971.

Defendant was found guilty as charged and from a judgment imposing consecutive active prison sentences of 16 to 20 years for armed robbery, and 4 to 7 years for felonious assault, defendant appealed.

Attorney General Robert Morgan and Associate Attorney Howard A. Kramer for the State.

Peter H. Gerns for defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns as error the conclusion of the trial court that the in-court identifications of defendant by State's witnesses Carrie Lynn Schrecengost and Tony Prince were "of independent origin and not tainted by pre-trial identification procedures."

The record fails to disclose an objection by defendant to testimony of Mrs. Schrecengost that "this man (indicating Brown) to whom I am now taking a look . . . is the man that was standing in front of me in Horne's Motor Lodge on the night of December 25th when I was shot and robbed," or that defendant objected to testimony of Tony Prince identifying defendant as the perpetrator of the crime charged. Nevertheless, the trial judge, during the testimony of Mrs. Schrecengost and again during the testimony of Tony Prince, conducted *voir dire* hearings in the absence of the jury and, after hearing testimony of Mrs. Schrecengost and Mr. Prince, made detailed findings of fact as to any out of court confrontation between them and the defendant and as to what they observed during and immediately after the robbery. There was competent, clear and convincing evidence to support the court's positive findings that the in-court identifications of the defendant by Mrs. Schrecengost and Tony Prince were of independent origin, based solely on what they observed during and immediately after the robbery, and did not result from any out of court confrontation or from any pre-trial identification procedure suggestive 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). This assignment of error is overruled.

[2] Defendant assigns as error the denial of his motion for a new trial interposed when the solicitor, in arguing to the jury, stated: "If you don't march right out of the jury room and convict him, I am going to be sick with you."

A motion for a mistrial 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. Williams*, 7 N.C. App. 51, 171 S.E. 2d 39 (1969).

In the instant case, upon objection by defendant, the trial court instructed the jury "to strike these comments from their

mind." Defendant has failed to show an abuse of discretion by the trial judge in the denial of his motion for a new trial.

Defendant has additional assignments of error which we have carefully considered and find to be without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and VAUGHN concur.

DONALD GRAY JOYNER v. JOE W. GARRETT, COMMISSIONER, N. C. DEPARTMENT OF MOTOR VEHICLES

No. 7310SC40

(Filed 11 April 1973)

Automobiles § 2— refusal to take breathalyzer test — revocation of license — no error

In a proceeding to revoke petitioner's driver's license for refusal to take a breathalyzer test upon arrest for driving under the influence of intoxicating liquor, the trial court's findings of fact are supported by the evidence and the findings support the conclusions of law which in turn support the judgment affirming revocation of petitioner's license.

APPEAL by petitioner from *Bailey, Judge,* 31 July 1972 Session of Superior Court held in WAKE County.

Pursuant to the provisions of G.S. 20-25, petitioner, Donald Gray Joyner, filed a petition seeking judicial review of the order of a hearing officer of the Department of Motor Vehicles sustaining the revocation of his operator's license. The material facts of this case are summarized as follows:

On or about 27 September 1969, petitioner was arrested and charged with driving upon the public highways of this State while under the influence of intoxicating liquor. On 1 October 1969, petitioner was notified by the Department of Motor Vehicles that pursuant to the provisions of G.S. 20-16.2, his operator's license was being suspended for a period of 60 days because of his refusal to submit to a chemical analysis of the breath. Petitioner submitted a written request for a hearing as provided

by G.S. 20-16.2(d) and on 6 November 1969, a hearing, attended by petitioner, his attorney, and a hearing officer, was held. The order of revocation of petitioner's operator's license was sustained. Thereafter, petitioner received an official notice of revocation of his driving privileges for 60 days, commencing at 12:01 a.m., 28 November 1969. On 1 December 1969, a petition was filed in the Superior Court held in Wake County, pursuant to G.S. 20-25, seeking a review of the order of the Department of Motor Vehicles sustaining the revocation of petitioner's driving privileges.

Following a *de novo* hearing in the Superior Court held in Wake County, Judge Clark, on 26 October 1970, affirmed the order of revocation. Petitioner appealed, and the case was transferred for hearing by the Supreme Court which, in an opinion filed in 279 N.C. 226, 182 S.E. 2d 553 (1971), found error and remanded for a determination of whether petitioner *"willfully* refused to take the test."

The petition was scheduled for hearing before Judge Clark but, by agreement, was transferred for hearing before Judge Bailey who made findings of fact which, except where quoted, are summarized as follows:

On 27 September 1969, petitioner was arrested for driving on the public highways of this State while under the influence of intoxicating liquor. The arresting officer advised petitioner of his constitutional rights and requested that petitioner submit to a chemical analysis of his breath to ascertain the alcohol content of his blood. Petitioner was advised of his right to counsel and to have a witness present while the breathalyzer test was being administered. Twice defendant was requested to submit to the breathalyzer test and was informed that a refusal to submit to the breathalyzer test would result in the revocation of his operator's license for a period of 60 days. Defendant refused to submit to the test. "[P]etitioner was under the influence of intoxicating liquor but was not so drunk that he did not understand what was being said to him." Based upon these findings of fact, the court concluded as a matter of law "that the petitioner was not so drunk that he was incapable of willfully refusing to take the breathalyzer test and the petitioner willfully refused to submit to such test as required by law."

From a judgment entered 31 July 1972 affirming the revocation order, petitioner appealed.

Attorney General Robert Morgan and Assistant Attorneys General William W. Melvin and William B. Ray for the State.

Vaughan S. Winborne for petitioner appellant.

HEDRICK, Judge.

By his eight assignments of error, petitioner contends that he was deprived of his constitutional right to a fair and impartial hearing, that the trial court erred in the admission and exclusion of evidence, that certain questions and remarks of the trial judge were pregnant with partiality, that the findings of fact and conclusions of law were erroneous and do not support the judgment.

While we do not approve of the gratuitous remarks of the trial judge, our examination of each exception upon which these assignments of error are based fails to disclose prejudicial error. The findings of fact are supported by the evidence and the findings support the conclusions of law which in turn support the judgment which is

Affirmed.

Judges BROCK and VAUGHN concur.

GEORGE J. HODGES v. GRANT JOHNSON, DEFENDANT AND F. F. HODGES, INTERVENOR

No. 7311DC48

(Filed 11 April 1973)

Limitation of Actions § 4— failure of trial court to make findings of fact — error

In a claim and delivery proceeding instituted by plaintiff in 1971 to recover furniture from the home of his mother who died in 1960, the trial judge made no finding of fact as to when plaintiff's cause of action accrued, and in the absence of such a finding of fact there was no basis on which to conclude as a matter of law that plaintiff's cause of action had been barred by the three year statute of limitation of G.S. 1-52(4).

APPEAL by plaintiff from *Lyon, Judge,* 14 August 1972 Session of HARNETT County District Court.

Plaintiff instituted this action on 9 August 1971 by filing a summons and complaint and claim and delivery process seeking to recover certain household and kitchen furniture from the homeplace of his late mother, Maude J. Hodges. The case was heard before Judge Lyon sitting without a jury and plaintiff introduced evidence which tended to show the following:

Following the death of his mother in 1960, plaintiff and his brother, F. F. Hodges, defendant intervenor, agreed on a division of certain items of their late mother's personal property. F. F. Hodges was to receive the living room suite and plaintiff was to receive the rest of the household and kitchen furniture located at the homeplace. Plaintiff's furniture was to be stored in the upstairs rooms of the homeplace. Plaintiff stated at trial that he had no need for any of the furniture until he purchased another house and on 7 August 1971 he sought and was denied access to the furniture by defendant Johnson who was living as a tenant on the property. Two days later plaintiff instituted this action against defendant Johnson.

Defendant F. F. Hodges claiming sole ownership of the disputed furniture intervened and was made a party defendant. At trial defendant Hodges testified that he acquired title to the farm and homeplace upon the death of his mother and that he had been leasing the farm since 1960. Defendant Hodges denied that he had ever made any agreement with plaintiff as to a division of the furniture except that it was understood that plaintiff would get the deep freezer of his late mother.

At trial the parties stipulated that plaintiff, George J. Hodges, was the duly appointed and qualified administrator of the estate of Maude J. Hodges, a resident of Harnett County, who died intestate in March, 1960, and that George J. Hodges as administrator filed his final account with the Clerk of Superior Court of Harnett County on 13 March 1968.

Prior to trial both defendants had asserted as a defense that plaintiff's action was barred by the three-year statute of limitations, G.S. 1-52(4). Their motion for summary judgment based on that assertion was denied by the trial judge. After hearing all the evidence, the trial judge made the following findings of fact and conclusions of law:

"1. That the plaintiff qualified as administrator of the estate of his mother, the late Maude E. (sic) Hodges, in

1960. That he thereafter served as such administrator until the 13th day of March, 1968, when he filed his final account with the Clerk of Harnett County.

2. That this action was instituted by the plaintiff on the 9th day of August, 1971, by the filing of a Summons and Complaint and Claim and Delivery proceedings seeking to recover certain household and kitchen furniture in the homeplace of the late Maude E. (sic) Hodges.

That based upon the foregoing findings of fact, the Court concludes that said action was instituted more than three years after plaintiff's cause of action accrued and is therefore barred by North Carolina General Statute 1-52(4)."

A judgment was entered dismissing the action and plaintiff appealed.

W. A. Johnson for plaintiff appellant.

Richard M. Wiggins for defendant appellee.

MORRIS, Judge.

The trial court dismissed plaintiff's action on the basis of G.S. 1-52(4) which provides that an action must be brought within three years "[f]or taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery." Plaintiff asserts on appeal that the trial judge made no finding of fact as to when plaintiff's cause of action accrued and in absence of such a finding of fact there was no basis on which to conclude as a matter of law that plaintiff's cause of action had been barred by G.S. 1-52(4).

When the trial judge sits without a jury, he is required to do the following three things in writing:

> "'. . . (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly.'" *Coggins v. City of Asheville,* 278 N.C. 428, 434, 180 S.E. 2d 149 (1971).

The record before this Court is devoid of any finding of fact as to when plaintiff's cause of action accrued. We agree with plaintiff that the trial court's failure to make such a finding

was error. Because the trial court's conclusion of law was based on insufficient findings of fact a new trial is necessary.

New trial.

Judges CAMPBELL and PARKER concur.

PEGGY GORDON BENSCH v. JOHN RICHARD BENSCH

No. 7326DC302

(Filed 11 April 1973)

Appeal and Error § 39— failure to docket record on appeal in time

Though defendant's appeal from an order adjudging him in contempt of court for failure to pay child support, alimony and counsel fees was subject to dismissal for failure to docket the record on appeal in time, the record was considered by the court on appeal and found to be without error.

APPEAL by defendant from *Johnson, Judge,* 23 October 1972 Session of District Court held in MECKLENBURG County.

This is a civil action instituted by plaintiff, Peggy Gordon Bensch, on 18 May 1972 against her husband, John Richard Bensch, for custody and support of a minor child, alimony and counsel fees.

On 7 June 1972 an order was entered in the District Court held in Mecklenburg County awarding plaintiff custody of the minor child and requiring defendant to pay support for said child at the rate of $400.00 per month, alimony pendente lite at the rate of $200.00 per month and counsel fees in the amount of $1,000.00.

On 5 October 1972, after notice and hearing, the court made findings and conclusions that defendant had willfully failed to comply with the order of 7 June 1972 in that he was in arrears in the amount of $1,275.00 as child support, $800.00 as alimony, and $1,000.00 as counsel fees and ordered defendant "to appear before this court on October 24th, 1972, at 2:00 o'clock p.m., at which time adjudication of contempt shall be entered and the defendant shall be permitted to purge himself of contempt, or to be committed into the custody of the Sheriff of Mecklenburg County on said date."

On 27 October 1972, after notice and hearing, the court made the following pertinent findings and conclusions:

"3. THAT the defendant testified that he had received monies from sporadic employment from and since October 2nd, 1972, that the defendant had not secured regular employment; that the defendant had no plan to offer; that the defendant applied no monies received from his employment toward the support of his wife and minor child;

4. THAT the defendant is physically and mentally capable of securing employment and capable of earning a substantial income, however, has not secured, nor become gainfully employed.

5. THAT the defendant has been financially able to comply with the orders of the court as heretofore found in that order dated October 5th, 1972, and has failed, neglected, and refused to abide by the court orders heretofore entered;

6. THAT the defendant had knowledge of the entry of all orders and that his willful, knowing and intentional failure to comply with said orders was in direct contempt of this court;

* * *

1. THAT the defendant be and he is hereby found in contempt of this court for failure to comply with lawful orders entered by this court, the defendant, having been financially able to comply with the orders lawfully entered by this court, and that his failure to comply was willful.

2. THAT as of September 30th, 1972, the defendant was in arrears in child support payments in the sum of $1,275.00, and in arrears for alimony payments in the sum of $800.00, and, as of that date, in arrears on attorney fees in the sum of $1,000.00."

From an order entered 27 October 1972 (filed 1 November 1972) committing defendant "to the common jail of Mecklenburg County for a period of 30 days, or until otherwise released by order of the undersigned judge," defendant appealed.

Charles B. Merryman, Jr., for plaintiff appellee.

Barnes & King by W. Faison Barnes and Anne King for defendant appellant.

HEDRICK, Judge.

The record on appeal was docketed in this court on 16 February 1973, which is more than 90 days from the date of entry of the order appealed from. There is nothing to indicate that the time within which to docket the record on appeal has been extended. Therefore, the appeal is subject to dismissal for appellant's failure to comply with the rules of practice in this court.

Nevertheless, we have treated the appeal as a petition for certiorari and allowed the same.

We have carefully reviewed the record in the light of all of defendant's contentions and find no prejudicial error.

The order appealed from is

Affirmed.

Judges CAMPBELL and PARKER concur.

ROSE YOUNG COLLINS v. RICHARD AMBROSE COLLINS

No. 7326DC43 and No. 7326DC271

(Filed 25 April 1973)

1. **Rules of Civil Procedure § 41; Trial § 30— voluntary dismissal — final termination of action**

In an action for temporary and permanent alimony, child custody and support and attorney fees instituted on 17 December 1971, plaintiff's voluntary dismissal of the action on 18 February 1972 was a final termination of that action and no valid order could be made thereafter in that cause. G.S. 1A-1, Rule 41(a)(1).

2. **Rules of Civil Procedure § 41; Trial § 30— voluntary dismissal — no adjudication on the merits**

In an action instituted 22 February 1972 for temporary and permanent alimony, child custody and support and attorney fees, defendant was in no position to complain that the issues raised had been determined in a previous action instituted on 17 December 1971 in which plaintiff had taken a voluntary dismissal since the first such dismissal was not an adjudication upon the merits.

3. **Rules of Civil Procedure § 41; Trial § 30— voluntary dismissal — subsequent contempt proceedings — invalidity of order**

Where an action instituted on 17 December 1971 for temporary and permanent alimony, child custody and support and attorney fees

was completely terminated on 18 February 1972 by plaintiff's voluntary dismissal, no valid order based on that case could be made thereafter; hence, the trial court erred in its order of 26 May 1972 adjudging defendant in contempt for violation of the conditions of the order entered in the December 1971 action.

4. **Divorce and Alimony § 18; Rules of Civil Procedure § 41; Trial § 30— alimony pendente lite — denial on basis of previous action — error**

The trial court committed error where it found facts sufficient to support an award of alimony *pendente lite* but denied the award for the reason that another court in a previous action had found that plaintiff was not the dependent spouse, since the previous action, which had terminated in a voluntary dismissal, did not affect the subsequent action.

5. **Appeal and Error § 16; Courts § 2— jurisdiction of lower court after appeal — jurisdiction over subject matter**

Where both plaintiff and defendant appealed from an order of 26 May 1972 the trial court was without jurisdiction to conduct proceedings in October 1972 for contempt for violation of conditions of the 26 May order, nor would a stipulation by the parties that the court had jurisdiction to hear the question of defendant's contempt confer jurisdiction since the parties cannot, by consent, give a court jurisdiction over subject matter of which it would not otherwise have jurisdiction.

APPEAL by plaintiff and defendant from order of *Johnson, Judge,* 15 May 1972 Session of MECKLENBURG District Court; and appeal by defendant from *Johnson, Judge,* 16 October 1972 Session of MECKLENBURG District Court.

The two appeals in this action were heard at the same time and by order have been consolidated for determination in the Court of Appeals.

This action was instituted by issuance of summons and filing of complaint on 22 February 1972. In her complaint, plaintiff, the wife of defendant, asked for temporary and permanent alimony, custody of and support for the child of the parties, attorney fees, possession of the home owned by the parties as tenants by entirety, and an order restraining defendant from interfering with plaintiff.

On 20 March 1972 defendant filed a motion to dismiss on the ground that plaintiff had instituted a previous action against him setting forth substantially the same allegations set forth in the complaint in this action and that there had been an adjudication in the previous action. Attached to the motion as exhibits are the complaint, order and stipulation of dismissal

in the former action. The exhibits are summarized in pertinent part as follows:

On 17 December 1971, plaintiff filed complaint in Case No. 71-CVD-15102 asking for temporary and permanent alimony, child custody and support and attorney fees. On 31 January 1972, following a hearing on plaintiff's motion for temporary alimony, child custody and support, and attorney fees, Judge Belk entered an order including a finding of fact and conclusion of law that plaintiff was not a dependent spouse and had means to subsist during the pendency of the action; plaintiff was awarded custody of the child with visitation privileges in defendant who was required to pay $225.00 monthly support for the child, beginning 15 January 1972, pay plaintiff's attorney $150.00 and ordered not to harass plaintiff in any way. On 18 February 1972 a stipulation of dismissal in 71-CVD-15102, signed by plaintiff's new attorney was filed, said stipulation notifying defendant that plaintiff "dismisses the complaint without prejudice."

On 20 April 1972 defendant filed answer and as a further defense pleaded the previous action and attached as exhibits the complaint, order and stipulation of dismissal filed in the previous action. On 27 April 1972 Judge Johnson entered an order scheduling a hearing for 17 May 1972.

On 26 May 1972, following a hearing, Judge Johnson entered an order summarized in pertinent part as follows: Finding and concluding that defendant willfully violated the 31 January 1972 order of Judge Belk; finding as a fact that plaintiff is a dependent spouse and is in need of subsistence during the pendency of this action and that defendant is a supporting spouse, but concluding that plaintiff is not entitled to temporary alimony because of the previous order; concluding that plaintiff is entitled to custody of and support for the child and attorney fees and that defendant is in contempt; ordered that plaintiff have custody of the child, that defendant pay $300.00 per month support for the child, that plaintiff and the child have exclusive possession of the home, that defendant make payments on the home, that defendant have no contact with plaintiff or the child, that defendant be committed to jail for 15 days and that defendant pay plaintiff's attorney $1,000.00.

Plaintiff excepted to that portion of the 26 May order denying her temporary alimony; defendant noted numerous ex-

ceptions to the order. Both parties gave notice of appeal and in the appeal entries defendant was ordered to vacate the residence immediately.

On 1 June 1972 defendant filed a petition with the Court of Appeals asking this court to stay the order relating to possession of the residence. On 2 June 1972 this Court entered an order denying the petition.

On 10 July 1972 defendant filed motion asking the court to grant him the privilege of visiting the child.

On 13 October 1972 Judge Johnson entered an order directing that defendant be confined in the Mecklenburg County Jail without bond until 17 October 1972 when defendant would show cause why he should not be adjudged in contempt in violation of the 26 May order.

On 16 October 1972 Judge Johnson entered an order finding that defendant had been in jail since 13 October 1972; directing that defendant be released from jail to appear at 9:00 a.m. on 17 October 1972 and, in the meantime, that defendant not go to plaintiff's residence or bother her in any way.

On 20 October 1972, following a hearing, Judge Johnson entered an order reciting that the cause was before him on (1) order for defendant to show cause why he should not be attached for contempt (the parties having stipulated in open court that the court had jurisdiction to hear the question of defendant's contempt) and (2) defendant's motion for visitation privileges; after finding facts and concluding that defendant was in contempt of the 26 May order, the court ordered: (1) that defendant be imprisoned for 20 days; (2) after serving 20 days that defendant be allowed to visit with his child; and (3) that defendant have no contact in any way with plaintiff or her attorney.

Defendant noted numerous exceptions to the 20 October order and appealed.

James, Williams, McElroy & Diehl, P.A., by William K. Diehl, Jr., for plaintiff appellant.

Hamel & Cannon, P.A., by Thomas R. Cannon for defendant appellee.

BRITT, Judge.

[1] Basic to all questions presented on these appeals is a determination of the validity of the STIPULATION OF DISMISSAL IN 71CVD15102 filed by plaintiff on 18 February 1972 and the effect of the dismissal.

In making this determination, we deem it necessary first to consider authorities prevailing prior to 1 October 1967, the effective date of Chapters 1152 and 1153 of the 1967 Session Laws (codified primarily as G.S. 50-13.1, et seq. and G.S. 50-16.1, et seq.) and 1 January 1970, the effective date of the current Rules of Civil Procedure.

Brady v. Brady, 273 N.C. 299, 160 S.E. 2d 13 (1968) was instituted under former G.S. 50-16 on 3 March 1967. The cause was heard on motion by plaintiff wife for subsistence and counsel fees *pendente lite,* custody and support of the children, and possession of the home. From an order denying her any relief, plaintiff appealed. We quote from the opinion by Chief Justice Parker (page 305) :

> "The trial court indicated that it had some question about its authority to find in favor of the plaintiff because of the previous similar action brought by her and the adverse ruling made at the hearing in that action. The finding made in the previous action was not binding in the present action. Where the defendant asserts no claim and demands no affirmative relief, plaintiff, in an action for alimony without divorce, may take a voluntary nonsuit. *Griffith v. Griffith, supra.* [265 N.C. 521, 144 S.E. 2d 589 (1965)] * * * ."

In *Griffith v. Griffith, supra,* opinion by Jusice Higgins, we find (page 523) :

> "Left for decision, however, is the question whether the court committed error in refusing to permit the plaintiff to take a voluntary nonsuit. Ordinarily, a plaintiff who appeals to a trial court for relief (other than by a proceeding *in rem)* may withdraw the claim and get out of court by taking a voluntary nonsuit. This he may do as a matter of right unless the defendant has asserted some claim or cross action entitling him to affirmative relief. In such event the defendant is entitled to keep the action before the court until his claim is litigated. For citation of authori-

ties, see Strong's North Carolina Index, Vol. 4, Trial, § 29, p. 325. The rule applies to actions for divorce and alimony as in other cases. *Scott v. Scott,* 259 N.C. 642, 131 S.E. 2d 478."

We now consider the effect of G.S. 50-13.1, et seq. and G.S. 50-16.1, et seq. and the current Rules of Civil Procedure on the principle stated above. A *voluntary dismissal* under the current rules is substantially the same as a *voluntary nonsuit* under the former procedure. A careful review of those statutes fails to disclose any provision which would alter the principle stated in *Brady* and *Griffith.* As to the current rules, in the 1972 Cumulative Supplement to 1 Lee, N.C. Family Law, § 53, pp. 35-36, we find: "Under Rule 41(a) (1) of the Rules of Civil Procedure the plaintiff has an absolute right to a voluntary, non-prejudicial dismissal up to the time he rests his case. A second dismissal will, however, be an adjudication upon the merits. N. C. Gen. Stat., § 1A-1, Rule 41(a) (1)." See also 1970 Pocket Part to 2 McIntosh, N. C. Practice and Procedure, § 1647, p. 68.

Under the former practice a judgment of voluntary nonsuit terminated the action and no suit was pending thereafter on which the court could make a valid order. 7 Strong, N. C. Index 2d, Trial, § 30, p. 317. We think the same rule applies to an action in which a plaintiff takes a voluntary dismissal under G.S. 1A-1, Rule 41(a) (1).

Because of the cited authorities, we hold that in the cases now before us plaintiff's voluntary dismissal of the prior action (71CVD15102) on 18 February 1972 was a final termination of that action and that no valid order could be made thereafter in that cause.

We proceed now to pass on the assignments of error brought forward and argued in the briefs.

DEFENDANT'S APPEAL FROM THE 26 MAY 1972 ORDER

[2] First, defendant assigns as error the failure of the court to allow his motions to dismiss the action instituted 22 February 1972 for that the issues raised had been determined in the previous action. For the reasons stated above, the assignment of error is overruled.

[3] Defendant next assigns as error that portion of the 26 May order adjudging him in contempt of court and ordering him confined in jail for 15 days for that this action by the court was based on a finding that defendant had violated the conditions of the order entered in the previous action. The assignment of error is sustained. As stated above, the previous action was completely terminated on 18 February 1972 and no valid order based on that case could be made thereafter.

Finally, defendant assigns as error the award of fees for plaintiff's attorney. This assignment of error has no merit. The award was made for services rendered in the new action and was authorized by G.S. 50-13.6 and G.S. 50-16.4.

PLAINTIFF'S APPEAL FROM THE 26 MAY 1972 ORDER

[4] Plaintiff assigns as error the conclusion of law that she is not entitled to an award of alimony *pendente lite* for the reason that "such an award is barred by the entry of the Order in 71-CVD-15102, on January 31, 1972." The assignment of error is sustained. On competent evidence the court found facts sufficient to support an award of alimony *pendente lite* but denied the award on an erroneous understanding of the law. The present action is affected by the previous action in no way except that plaintiff may not again voluntarily dismiss her action without prejudice.

DEFENDANT'S APPEAL FROM THE 20 OCTOBER 1972 ORDER

[5] This appeal presents the question of whether the trial court had jurisdiction to conduct the contempt proceedings in October 1972 while the case was on appeal.

The record indicates that, pursuant to the court's 26 May orders, defendant surrendered possession of the residence to plaintiff and that she and the child proceeded to occupy the residence until the hearing in October. In the 20 October order, the court found that defendant had failed to make house payments and child support payments as required by the 26 May order but, because the case had been appealed, the court declined to consider the question of defendant's being in contempt on those counts. However, the court found that on 13 October 1972, in deliberate violation of the 26 May order and against the advice of his counsel, defendant went to the residence which had been sequestered for the sole use and possession of plaintiff, obtained

the key, entered the premises, refused to leave when requested by plaintiff, and did not leave until police officers were called and forcibly removed him. The court adjudged said conduct to be contemptuous and thereupon imposed a jail sentence.

G.S. 1-294 provides in pertinent part: "When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."

In *Joyner v. Joyner,* 256 N.C. 588, 124 S.E. 2d 724 (1962), the court held: An appeal from an order awarding custody of a child of the marriage to the wife removes the cause from the Superior Court to the Supreme Court, and the Superior Court thereafter is *functus officio* until the remand of the cause. The Superior Court is without jurisdiction, pending the appeal, to punish the husband for contempt, and its findings in regard to the wilful violation of the order are a nullity.

Among other cases, plaintiff cites *Manufacturing Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577 (1947). The holding in that case pertinent to the instant case is summarized as follows: "An appeal from an interlocutory order stays all further proceedings in the lower court in regard to matters relating to the specific order appealed from, but the action remains in the lower court and it may proceed upon any other matter included in the action upon which action was reserved or which was not affected by the judgment appealed from." The cited case does not help plaintiff as her October proceedings related to the specific order (26 May) appealed from.

While the question is not raised in any brief, we deem it appropriate to determine the effect of the stipulation recited in the 20 October order that the parties had stipulated that the court had jurisdiction to hear the question of defendant's contempt. In *State v. Fisher,* 270 N.C. 315, 154 S.E. 2d 333 (1967), we find:

> "It is well established law that the parties cannot, by consent, give a court jurisdiction over *subject matter* of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver or estoppel. *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673, and the numerous cases there cited; *In re Custody of*

Sauls, 270 N.C. 180, 154 S.E. 2d 327; 20 Am. Jur. 2d, Courts, § 95; 21 C.J.S., Courts, § 85; 1 Strong's N. C. Index, Courts, § 2. * * * "

We hold that the trial court did not have jurisdiction to conduct the contempt proceedings in October 1972, therefore, the order of 20 October 1972 is void. Nevertheless, we think the following language from *Joyner, supra,* page 591, is pertinent: "The appeal stays contempt proceedings until the validity of the judgment is determined. But taking an appeal does not authorize a violation of the order. One who willfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the superior court."

DISPOSITION OF APPEALS

The 20 October 1972 order is vacated. With respect to the 26 May 1972 order, the cause is remanded to the District Court of Mecklenburg County for further proceedings consistent with this opinion.

Remanded.

Judges MORRIS and PARKER concur.

FRANCES W. PARK, EXECUTRIX OF FRANK MORING WILLIAMS v. FRANCES P. CARROLL (NEE FRANCES M. PARK), THOMAS M. PARK, JR., MARGARET P. LUCAS, SUSANNE P. WHITLEY, ELIZABETH B. WARREN, EVELYN S. CROWDER, CAROLYN C. BARBOUR, HELEN C. GLASCOCK, SARA C. SPURLIN, MACON C. MOORE, FRANCES C. JONES

No. 7310SC73

(Filed 25 April 1973)

1. **Wills §§ 58, 72— specific devise — federal estate taxes — charge against residuary bequests**

An item devising "all real estate which remains at my death, which was willed to me by my wife . . . and which was formerly in T. B. Crowder Estate" is a specific devise, not a residuary devise, although it is the last disposing clause in the will; and where the testator failed to provide what portion of the estate should bear the burden of federal estate taxes, such taxes should be charged to residuary bequests in another item of the will.

2. **Executors and Administrators § 28; Wills § 72—debts of estate — order of abatement of bequests and devises**

Where the testator fails to express in his will any direction as to the payment of the debts of the estate (including federal estate taxes), legacies abate in the following order: (1) residuary, (2) general, (3) specific and demonstrative, ratably; after the personalty has been exhausted, the same order applies to the testator's realty.

3. **Wills § 72— equitable contribution — federal estate taxes — residuary legacies and specific devises**

The doctrine of equitable contribution does not apply to require the apportionment of federal estate taxes between residuary legacies and specific devises.

APPEAL by defendants from *Bone, Emergency Judge,* 31 July 1972 Civil Session of WAKE Superior Court.

Plaintiff executrix instituted this action for declaratory judgment seeking to obtain instructions from the court with respect to the interpretation of decedent's will and the resulting liability of decedent's assets for payment of federal estate taxes.

Frank Moring Williams died 5 May 1971, leaving a last will and testament which was duly probated and recorded. His will reads as follows:

"LAST WILL OF FRANK MORING WILLIAMS, Aug. 28, 1970

1. At my death and after paying all debts, a fund of $6,000 shall be set aside for funeral expenses and for a tombstone or stone to be erected at the grave of my deceased wife, Margaret Crowder Williams, and myself. My sister, Frances Williams Park, has instructions as to the burial and stones. This $6,000 to be set aside before any distribution of funds. This amount can be increased if necessary.

2. Any notes or debts owed me by my sister, Frances, are cancelled at my death.

3. My remaining property is hereby willed as follows:

(a) To my sister, Frances Williams Park, $5000 and my ½ interest in the home place property at 1405 Hillsboro Street, Raleigh, N. C.

(b) To my niece, Frances Moring Park, $10,000 and all my personal effects which consist of furniture, silver, clothing, china and glassware, and my automobile, except

for furniture now in the hands of my sister-in-law, Evelyn Sean Crowder, which is hereby willed to her.

3 (c) To my secretary, Mrs. Elizabeth B. Warren, the sum of $2500.

(d) To my nieces and nephew, Frances Moring Park, Margaret Park Lucas, Susanne Park Whitley, and Thomas M. Park, Jr., all of my remaining property (except as shown under paragraph 4) including money, bank accounts, and stocks and bonds, to be divided equally between the four.

4. All real estate which remains at my death, which was willed to me by my wife, Margaret Crowder Williams (deceased) and which was formerly in T. B. Crowder Estate, to be divided ½ to the children of Raymond and Evelyn Crowder and ½ to the children of Ralph and Frances Crowder, the distribution to be equal between the children; that is the children of Raymond and Evelyn Crowder to get ¼ each of the total and the children of Ralph and Frances Crowder to get 1/6 each of the total. This paragraph does not affect in any way the property of the T. B. Crowder Estate which was sold before my death.

5. It is my wish that my sister, Frances Williams Park act as administrator of the Estate (if living). If not living then Will (illegible), C.P.A. of Raleigh, N. C. Administrator to serve without bond. Signed this 28th day of August, 1970.

FRANK MORING WILLIAMS."

The estate of Frank Moring Williams was valued at his death for federal estate tax purposes at $246,869.99. Decedent's realty was valued at $148,863.28 with the Crowder estate's value comprising $129,058.28 of that total. Decedent's personalty was valued at $98,006.71 including stocks and bonds in the amount of $39,771.44, bank deposits and cash in the amount of $56,355.27, and miscellaneous personalty valued at $1,880. Appellants state in their brief that the estate tax return filed by the executrix showed an estate tax liability of $39,604.54.

It was stipulated by the parties that defendants Carolyn C. Barbour, Helen C. Glascock, Sara C. Spurlin, Macon C. Moore and Frances C. Jones who are referred to in item 4 of the will

were related by blood to deceased's wife, but are not related to the deceased by blood. It was further stipulated that defendants Frances P. Carroll (Nee Frances M. Park), Thomas N. Park, Jr., Margaret P. Lucas and Susanne P. Whitley, who are referred to in item 3(d) of the will were related to deceased by blood, being either a niece or nephew.

After pleading and stipulations were duly filed in the trial court and it was found as a fact by the trial judge that the will did not specify what portion of the estate shall be liable for payment of federal estate taxes, the following conclusions of law were then entered: (1) that item 3(d) of the will is a residuary or general bequest; (2) that item 4 of said will is a specific devise of real property; and (3) that the federal estate tax is payable first from the residuary or general estate insofar as the assets permit.

From a judgment ordering the executrix to charge the assets passing under item 3(d) of the will with payment of all federal estate tax due and owing from said estate, the legatees under item 3(d), Frances P. Carroll (Nee Frances M. Park), Margart P. Lucas, Susanne P. Whitley, and Thomas M. Park, Jr., appealed.

Everett, Everett and Creech, by Robinson O. Everett and William A. Creech, for defendant appellants.

Hatch, Little, Bunn, Jones and Few, by James C. Little and Harold W. Berry, Jr., for defendant appellees.

MORRIS, Judge.

[1] Appellants assign as error the trial court's ruling that the devise of real property under item 4 of the will is a specific one. They contend that item 4 is a residuary devise of realty and that the devisees taking thereunder should pay a pro rata share of federal estate taxes. We do not agree.

Appellants predicate their argument on the fact that the testator used the language—"[a]ll real estate which *remains* at my death" (emphasis added), and the fact that item 4 is the last disposing clause in the will thereby occupying the "natural position" for a residuary devise.

In *Morisey v. Brown,* 144 N.C. 154, 56 S.E. 704 (1907), a devise of "the *residue* of my lands in Sampson County" (em-

phasis added) was held to be specific. The Court noted that had the word "residue" stood alone, the devise would have been residuary but the words "in Sampson County" made the devise specific to lands located there. While the testator used the language "[a]ll real estate which remains at my death" in the case at hand, he specified that it was the property "willed to me by my wife," and further specified that it was land "which was formerly in T. B. Crowder Estate."

Appellants concede in their brief that the only realty of which the testator was seized at the time of his death in addition to the one-half interest in the homeplace specifically devised in item 3(a) was the realty inherited from his wife and collectively known as the T. B. Crowder Estate. With the exception of a metes and bounds description, decedent couldn't have been more specific than he was under item 4 of the will.

The fact that item 4 occupies the position of being the last disposing clause in the will does not indicate in this case that it is a residuary devise. Realty passing under item 4 was specifically exempted in item 3(d) of the will. If the testator had acquired any realty after the execution of his will, clearly it would have passed under the residuary clause in item 3(d)— "all of my remaining property," which at the time of testator's death was composed solely of personalty.

If land is identified in the will with sufficient accuracy so that it can be distinguished from other realty owned by the testator, the devise is specific. 6 Bowe-Parker: Page on Wills § 48.9. Clearly the realty passing under item 4 was identified with sufficient accuracy and we hold that the trial judge was correct in ruling the devise to be specific.

[2] In North Carolina where the testator fails to express in his will any direction as to the payment of the debts of the estate (including federal estate taxes), legacies abate in the following order: (1) residuary, (2) general, (3) specific and demonstrative, ratably and, after the personalty has been exhausted, the same order applies to the testator's realty. 1 Wiggins, Wills and Administration of Estates in North Carolina, § 141. Leath, "Lapse, Abatement, and Ademption," 39 N.C.L. Rev. 313 (1961).

Assuming *arguendo,* that the trial court had held the testator's devise under item 4 to be residuary, the personalty pass-

ing under item 3(d) would be resorted to first and would not abate ratably with a residuary devise of realty.

> "It is well settled that unless it clearly appears from the will that it is the intention of the testator to charge the payment of debts upon his real estate, the law will not do so. The personalty must be applied to the payment of debts and exhausted before the realty can be subjected." *University v. Borden,* 132 N.C. 477, 489, 44 S.E. 47 (1903).

This still seems to be the rule in North Carolina in light of G.S. 28-81 which provides for the sale of realty without first exhausting the personal property of decedent only when it is alleged and shown that the personalty will be insufficient to pay the debts of his estate. In North Carolina decisions specifically dealing with the issue, the Court has held that in the absence of a contrary testamentary provision, federal estate taxes are chargeable to the residuary estate and not against specific legacies or devises. *Adams v. Adams,* 261 N.C. 342, 134 S.E. 2d 633 (1964), *Craig v. Craig,* 232 N.C. 729, 62 S.E. 2d 336 (1950), *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222 (1946), reh. denied, 226 N.C. 778, 39 S.E. 2d 599 (1946).

Appellants submit that even though the will is silent as to what portion of the estate should bear the burden of federal estate taxes, the testator's intent as to the payment of those taxes may be gleaned from the four corners of his will and from the "circumstances attendant" at the time of its execution. They argue that their uncle by blood would not wish them, the natural objects of his bounty individually named in the will, to bear the sole financial liability for the estate taxes while the Crowder devisees, related to testator only by affinity, pay nothing.

We note that testator's will was holographic. At the time of its execution, testator probably never contemplated the problem of the payment of federal estate taxes by his estate. Appellant's argument is speculative at best and as stated above, "unless it clearly appears from the will that it is the intention of the testator to charge the payment of debts upon his real estate, the law will not do so." *University v. Borden, supra,* p. 489.

[3] Finally appellants contend that the doctrine of equitable contribution should be applied to the case at hand to produce a

pro rata contribution of estate taxes regardless of whether this Court holds that the devise under item 4 is specific or residuary. In *Nebel v. Nebel,* 223 N.C. 676, 28 S.E. 2d 207 (1943), the doctrine was applied to a situation where three donees had had assessed against them a large federal gift tax liability, each donee being liable for the whole amount. While a hearing for the redetermination of the deficiency was pending, one of the donees secured an adjustment at a lesser sum and paid the whole amount of the adjustment after notice to the other two donees, who had previously failed to appear and make defenses. The Court held that the donee so paying the entire assessment is entitled to contribution from the other two.

> "[O]ne who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them their payment of their respective shares." *Nebel, supra,* pp. 684-685.

No North Carolina decisions have applied the doctrine to the apportionment of federal estate taxes. Moreover, in *Nebel,* each donee was clearly liable for the whole amount of the tax while in the case at hand, the principles of abatement stated above determines the liability of the respective legacies and devises.

One writer has recommended that North Carolina should give serious consideration to the adoption of a statutory order of abatement that would abolish the preference now given to real property, because land no longer constitutes the chief form of wealth and the average estate today is more likely to be concentrated in stocks, bonds, and proceeds of insurance. Wiggins, *supra,* § 141. However, such a change would not affect the decision in this case, since we affirm the trial judge's conclusion that the devise under item 4 of the will is specific and that the residuary bequest in item 3(d) should bear the burden of federal estate taxes.

Affirmed.

Judges CAMPBELL and PARKER concur.

YVONNE V. HENRY v. HECTOR H. HENRY

No. 7326SC132

(Filed 25 April 1973)

Husband and Wife § 13— action for payments due under separation agreement — counterclaim for overpayments — erroneous entry of summary judgment

In this action to recover a sum allegedly due plaintiff under the terms of a separation agreement predicated upon defendant's income from 1965 through 1971 wherein defendant counterclaimed for overpayments allegedly made after the marriages of his daughters and for overpayments based on his income for certain years, there were genuine triable issues of material fact as to plaintiff's claim and as to defendant's counterclaim, and the trial court erred in dismissing plaintiff's complaint and entering summary judgment awarding defendant an amount on his counterclaim.

APPEAL by plaintiff from *Snepp, Judge,* 24 July 1972 Session of Superior Court held in MECKLENBURG County.

This is a civil action wherein plaintiff, Yvonne V. Henry, seeks to recover from defendant, Hector H. Henry, $6,795.68, for defendant's alleged failure to make certain payments to the plaintiff under the terms of a "Deed and Contract of Separation." In her complaint plaintiff alleged that she and defendant entered into a deed of separation on 9 October 1963, which, among other things, provided:

> "The husband agrees to pay to the wife . . . for the support and maintenance of herself and the aforesaid minor children of the parties hereto, the sum of $600.00 per month . . . . * * * The husband shall also make the monthly payments of approximately $193.00, including taxes and insurance, on the house and lot owned by the parties as tenants by the entireties and located at 3535 Providence Road in Charlotte, North Carolina, and the wife and their children shall have the right to reside therein to the exclusion of the husband. * * * At the end of two years, the parties agree to sell said house and lot if the wife elects to do so and the equity will be divided equally between the parties. In the event the wife elects for the parties to sell the house and lot, the payments to the wife shall be increased to $1,000.00 per month; however, the $1,000.00 monthly payments shall be reduced by the sum of $150.00 as each child finishes college, become self-supporting,

marries or dies, whichever event should occur first. * * * The above support payments of the husband are based on his present net income of approximately $33,000.00 per year before taxes. In the event the husband's net income before taxes should exceed $35,000.00 per year, then the support payments of the husband above set forth shall be increased by 10 per cent of such amount earned over and above $35,000.00. In the event the husband's net earnings after taxes should decrease to an amount less than $30,000.00 per year, then the support payments of the husband shall be decreased by 10 per cent of the amount earned less than $30,000.00."

Plaintiff alleged that under the terms of the deed of separation and predicated on the defendant's income for the years 1965 through 1969, the defendant is indebted to the plaintiff in the sum of $3,361.89, and that predicated on his income for 1970 defendant is indebted to the plaintiff in an additional sum of $1,700.00. Plaintiff was allowed to amend her complaint to allege that based on defendant's income from the years 1965 through 1971, the defendant was indebted to her in the total sum of $6,795.68.

Defendant filed answer and admitted execution of the contract and deed of separation referred to in the complaint but denied that he was indebted to plaintiff in any amount. Defendant filed a counterclaim wherein he alleged that one of the children, Janie Henry, was married in August, 1964; that the house and lot described in plaintiff's complaint was sold in August, 1966; and that defendant made payments to plaintiff in the sum of $1,000.00 per month from September, 1966, through October, 1969; and that he made payments in the sum of $850.00 per month from November, 1969, through June, 1970; and that in March, 1970, the other child, Yvette Henry, was married. Defendant further alleged that "during the years 1964, 1965 and 1966 the defendant's net earnings after taxes were less than $30,000.00 per year." In his counterclaim (Paragraph 11, as amended), defendant alleged:

"That by reason of the defendant's net earnings after taxes being below the sum of $30,000.00 in the above set-out years, and as a result of the continued support payments made on behalf of Janie Henry after her marriage, the

defendant has prepaid the plaintiff for the years 1964 through 1969, in the sum of $3,190.92."

Defendant, with respect to the year 1970, alleged:

"That the defendant had net income before taxes for the year 1970 of $20,155.55 above the $35,000.00 set out in the Separation Agreement. Based on the provisions of the Separation Agreement, this would entitle the plaintiff to the sum of $2,015.56 for the year 1970 above the amount payable to her for herself and one child under the terms of the Separation Agreement. However, during the year 1970 the defendant prepaid the plaintiff the sum of $450.00 by paying the plaintiff support for the daughter Yvette for the months of April, May and June after she had been married in March of 1970, leaving a net underpayment for 1970 of $1,565.56."

With respect to the year 1971, defendant filed his "Answer to Amended Complaint" alleging that plaintiff was entitled to an additional payment in the amount of $1,418.25. Defendant demanded judgment on his counterclaim against plaintiff in the sum of $207.11, with interest and costs.

Plaintiff filed a reply to defendant's counterclaim wherein she admitted the marriages of her daughters in August, 1964, and March, 1970; the receipt of $1,000.00 per month from September, 1966, through October, 1969; the receipt of $850.00 per month from November, 1969, through June, 1970; that during the years 1964 through 1966 defendant's net earnings after taxes were less than $30,000.00 per year; and that defendant's income before taxes in 1971 exceeded $35,000.00 by $14,162.49. Plaintiff denied that defendant's net income before taxes in the year 1970 exceeded $35,000.00 by $20,155.55. Plaintiff further denied that she had been prepaid or unjustly enriched in the amount of $3,661.31 during the years 1964 through 1969 as a result of continued support payments made on behalf of Janie Henry after her marriage in 1964 or that she had been prepaid or unjustly enriched in the amount of $450.00 during the months of April, May and June, 1970, as a result of continued support payments made on behalf of Yvette Henry after her marriage in March, 1970.

Plaintiff further alleged that defendant's counterclaim failed to state a claim upon which relief could be granted and that defendant should be equitably estopped to assert the claim

of unjust enrichment because he was cognizant of the marriages of his daughters in August, 1964, and March, 1970, yet continued to make the alleged payments which plaintiff reported as taxable income and which defendant deducted from his income taxes both state and federal, all to the prejudice of plaintiff. As further defenses, plaintiff alleged that all such payments were voluntary and that the three year statute of limitations, G.S. 1-52, bars "any portions of the counterclaim relating to the years 1964, 1965, 1966, 1967 and through May 5, 1968. . . . " Finally, plaintiff asserted "the doctrine of laches, with reference to any portion of the defendant's counterclaim concerned with the period from May 5, 1968 through June 1970, in that the defendant has waited and negligently omitted for an unreasonable time to assert or enforce any equitable rights under the theory of unjust enrichment, which right is denied."

On 10 February 1972 plaintiff filed motion for summary judgment, which motion was denied. Thereafter plaintiff amended her complaint but did not renew her motion for summary judgment. Defendant, on 4 May 1972 filed motion for summary judgment in his favor "for the relief prayed for in the counterclaim . . . as amended . . . . " In support of his motion for summary judgment, defendant filed an affidavit, the pertinent provisions of which, except where quoted, are summarized as follows:

(1) In 1964, defendant's net income after taxes was $27,978.78;

(2) In 1965, defendant's net income after taxes was $29,456.74, entitling defendant to deduct $54.32 from the alimony payments to plaintiff during that year. Defendant's 1965 income tax return erroneously reflects a deduction of $7,200.00 as alimony; whereas, it should have also included "the house payment of $193.00 per month, including taxes and insurance, the water bill, gas bill, power and light bill and all other payments made on behalf of the plaintiff."

(3) In 1966, defendant's net income after taxes was $29,899.38, entitling defendant to deduct $10.06 from the alimony payments to plaintiff during that year. Defendant's 1966 income tax return lists a deduction of $8,800.00 as alimony, which figure is incorrect "in that it should have included the other payments set out in the separation agreement which were applicable prior to the sale of the home." Janie Henry was mar-

ried in August, 1964, but defendant inadvertently made payments of $150.00 per month for her support (after the sale of the home in August, 1966), resulting in an overpayment of $600.00 to plaintiff in 1966.

(4) In 1967, defendant's net business income before taxes was $41,910.48, exceeding $35,000.00 by $6,910.48. Defendant inadvertently continued to make payments of $150.00 per month for the support of his daughter Janie who was married in August, 1964, resulting in a net overpayment to plaintiff of $1,108.96. Defendant's income tax return for 1967 reflected alimony payments of $12,000.00.

(5) In 1968, defendant's net business income before taxes was $41,849.35, exceeding $35,000.00 by $6,849.35. Defendant's 1968 income tax return showed alimony payments of $12,000.00. Defendant inadvertently continued to make payments of $150.00 per month for the support of his daughter, Janie, during the year 1968, resulting in a net overpayment to plaintiff of $1,115.06 for that year.

(6) In 1969, defendant's net business income before taxes was $48,995.99, exceeding $35,000.00 by $13,995.99. Defendant's 1969 income tax returns showed alimony payments to plaintiff of $11,700.00. Defendant inadvertently continued to make support payments of $150.00 per month for his daughter, Janie, through October, 1969, resulting in a net overpayment to plaintiff of $100.40 for that year.

(7) In 1970, defendant's net business income before taxes was $55,155.55, exceeding $35,000.00 by $20,155.55. Defendant's 1970 income tax return showed alimony payments to plaintiff in the amount of $9,300.00. Defendant was not advised of the marriage of his daughter, Yvette, in March, 1970, and continued to make payments for her support in the amount of $150.00 per month until June, 1970, resulting in a net underpayment to plaintiff of $1,565.56 for the year 1970.

(8) "That taking into consideration both the prepayment made by affiant to the plaintiff of $450.00 in the year 1970 and the under payment remaining in favor of plaintiff for the year 1970 of $1,565.56, and taking into consideration all of the prior over payments and prepayments for the years 1964 through 1969, the affiant has over paid the plaintiff through the year 1970 the total sum of $1,625.36."

From the entry of summary judgment 24 July 1972 dismissing "plaintiff's complaint . . . on the merits" and awarding defendant $207.11 on his counterclaim, plaintiff appealed.

Cole & Chesson by James L. Cole for plaintiff appellant.

DeLaney, Millette & DeArmon by Samuel M. Millette for defendant appellee.

HEDRICK, Judge.

It is manifest from the record before us that there are genuine triable issues of material fact as to plaintiff's claim and as to defendant's counterclaim. The trial judge erred in dismissing plaintiff's complaint and in entering summary judgment awarding defendant $207.11 on his counterclaim. G.S. 1A-1, Rule 56.

The judgment is

Reversed.

Judges BROCK and PARKER concur.

IN THE MATTER OF: JANICE CAROL PHILLIPS AND PATRICIA ANNE PHILLIPS; MARY POTTS, DIRECTOR, CHILD WELFARE DIVISION OF THE MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER v. DONALD RAYMOND PHILLIPS, RESPONDENT

No. 7326DC190

(Filed 25 April 1973)

1. **Parent and Child § 1— termination of parental rights — service by publication**

Provision of G.S. 7A-283 permitting service by publication when "the court finds it impractical to obtain personal service" in proceedings to adjudicate whether a child is delinquent, dependent, neglected or undisciplined is not applicable in proceedings to terminate parental rights under G.S. 7A-288.

2. **Parent and Child § 1— termination of parental rights — notice of hearing**

Before a hearing may be conducted to terminate parental rights under G.S. 7A-288, the parent must be notified by personal service of the summons and petition or by procedures established in G.S. 1A-1, Rule 4.

3. Process § 10; Rules of Civil Procedure § 4— purported service by publication — invalidity

Purported service by publication on respondent in a proceeding to terminate parental rights was invalid where petitioner filed no affidavit showing the publication and mailing in accordance with G.S. 1-75.10(2) and the circumstances warranting the use of service by publication, and the trial court found merely that it appeared to be "impractical" to obtain personal service and that the sheriff was unable to find respondent at his last known address in the county, there being no determination that respondent could not after due diligence be served or that his whereabouts or usual abode and his post office address could not be determined with due diligence. G.S. 1A-1, Rule 4(j)(9).

APPEAL by respondent from an order entered by *Griffin, District Judge,* 17 October 1972, District Court, Juvenile Division, MECKLENBURG County.

On 8 May 1972 petitioner filed a petition seeking an order terminating the parental rights of respondent as to his two minor children, and the parental rights of the children's mother, Ruby Baker Phillips. Petitioner alleged, in substance, as follows. The children of respondent were placed in petitioner's custody on 14 August 1967 after having been adjudged neglected or dependent children. The mother has not been heard from since that date. Respondent has made irregular and infrequent contact with petitioner and has not visited the children since May of 1971. Respondent has wilfully refused to provide any financial support for the children for more than four and one half years. Respondent " . . . has refused to tell this agency where he is living or where he is working, and while this agency is informed that in February he resided at 2001 East Fifth Street, Charlotte, North Carolina, he no longer resides there and this agency has not been able to locate him; and that your Petitioner has no knowledge as to where the said Ruby Baker Phillips now resides; and that your Petitioner believes it is impractical to secure personal service upon either of said parents." The proceeding is instituted to terminate the parental rights so that the children may be placed for adoption. Petitioner prayed that summons be issued requiring the parents to appear and that the court authorize service of summons and notice of the hearing by publication in the manner prescribed in Rule 4(j)(9)c of the Rules of Civil Procedure.

On the same day, District Judge Belk entered an order directing that a special hearing on the petition be held on 20 June 1972. The order contained a recital to the effect that it

appeared " . . . to the Court from the records of the Petitioner and the verified Petition that it is impractical to obtain personal service upon the said parents." The court directed that summons be issued and that service of summons and petition be made by publication in the manner prescribed by Rule 4(j)(9)c of the Rules of Civil Procedure.

Summons was issued on 8 May 1972. On 18 May 1972, the Sheriff of Mecklenburg County made his return of service as follows: "Donald R. Phillips or Ruby Phillips is not to be found in Mecklenburg County." Notice of service of process by publication was published on the 8th, 15th and 22nd of May 1972 requiring respondent to make defense not later than 19 June 1972. On 20 June 1972 an order was entered terminating the parental rights of respondent and the mother of the children. The court found as facts "the matters and things set forth in the verified petition filed by the Petitioner. . . . "

On 2 October 1972, respondent filed a verified motion seeking to have the order of 20 June 1972 set aside, contending, among other things, that he was not properly served with process. He alleged that at all pertinent times petitioner was aware of respondent's residence and could have caused him to have been personally served with process; that he had often informed petitioner that he could always be contacted at the home of his stepmother at 1700 Fountainview Avenue, Charlotte, North Carolina, and that with diligent effort he could have been located and given notice of the proceeding.

On 17 October 1972, an order was entered denying respondent's motion. In the order the court made findings of fact, as follows:

> "1. That on May 8, 1972, upon the petition of the Mecklenburg County Department of Social Services, her Honor Claudia W. Belk issued an order fixing a special hearing to consider the termination of parental rights of Donald Raymond Phillips and Ruby Baker Phillips for June 20, 1972; and Judge Belk, in said order, recited that upon examination of the records of the Department of Social Services and the verified petition that it was impractical to obtain personal service upon either Donald Raymond Phillips or Ruby Baker Phillips; and Judge Belk ordered that service of summons of the petition be made upon said respondents by publication.

2. That summons was issued on May 8, 1972, directing the Sheriff of Mecklenburg County to serve Donald Raymond Phillips and Ruby Baker Phillips and directing said parents to answer the petition and giving them notice of the hearing; and that said summons and notice of hearing was returned by the Sheriff of Mecklenburg County on May 18, 1972, with the notation 'Donald R. Phillips or Ruby Baker Phillips is not to be found in Mecklenburg County.'

3. That pursuant to order of Judge Belk, notice of service of process by publication was duly published in the Mecklenburg Times on May 8, 15 and 22, 1972, which notice also required the respondents to make defense to the petition no later than June 19, 1972, and further directed them to attend the special hearing on June 20, 1972.

4. That the special hearing was held by this Court on June 20, 1972, at which time this Court examined the records of the Department of Social Services and found as facts, among other things, that Donald Raymond Phillips, had refused to tell the Department of Social Services where he was living or where he was working; and that the last known address for Mr. Phillips was at 2001 East Fifth Street, Charlotte, North Carolina; and the Court ruled that the Sheriff was unable to find Mr. Phillips at said address or in Mecklenburg County."

The court concluded as a matter of law that respondent was properly before the court by virtue of service by publication in the manner prescribed by the Rules of Civil Procedure and that his parental rights with respect to the children had been duly terminated. Respondent appealed.

Ruff, Perry, Bond, Cobb, Wade & McNair by William H. McNair for petitioner appellee.

Shelley Blum for respondent appellant.

VAUGHN, Judge.

[1] It is apparent to us that the petitioner proceeded and the district court acted on the assumption that, in proceedings to terminate parental rights, service by publication may be authorized when "the court finds it is impractical to obtain personal service. . . . " The quoted language is found in G.S.

7A-283. Petitioner argues that that section expressly provides the procedure for service of process in proceedings to terminate parental rights under G.S. 7A-288. We do not agree. The method of determining the manner of service permitted by G.S. 7A-283 in proceedings to adjudicate whether a child is delinquent, dependent, neglected or undisciplined is not applicable in proceedings to terminate parental rights under G.S. 7A-288.

[2] In cases where the court has adjudicated a child to be neglected or dependent, the court has authority to enter an order terminating parental rights with respect to such child, upon a finding of the existence of any of the several factual circumstances set out in G.S. 7A-288. Before conducting a hearing to consider any case involving termination of parental rights under G.S. 7A-288, the parent *shall* be notified by *personal service* of the summons and petition or "under the procedures established by Rule 4 of the Rules of Civil Procedure of chapter 1A of the North Carolina General Statutes." G.S. 7A-288. Since there was no personal service in the case before us, the court's authority to proceed with the hearing depended upon whether service on respondent was under the procedures established by Rule 4.

Respondent's motion questioned the validity of the purported service of process. It was then incumbent upon the court to hear the evidence, find the facts and determine the validity of the service. To sustain service by publication plaintiff must show that the case is one in which service by publication is authorized and that it was made in accordance with the statutory requirements. *Harrison v. Hanvey,* 265 N.C. 243, 143 S.E. 2d 593.

[3] In cases where service by publication is otherwise authorized the same may be had on a natural person who: *cannot after due diligence* be personally served in the manner prescribed by Rule 4(j) (1); is not inhabitant of or found within the state; is concealing his personal whereabouts to avoid service of process; is a transient person, or his residence is unknown. Rule 4(j) (9). Such person's address, whereabouts, dwelling house or usual place of abode must be unknown and *cannot with due diligence* be ascertained, or there must be "a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph b or under paragraphs a and b of this subsection (9)." If the post office address of the party to be served can with *reasonable diligence* be ascertained, a copy of the notice must

be mailed to the party. "Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2) and the circumstances warranting the use of service by publication." Rule 4(j)(9)c. No such affidavit appears in the record before us. The record contains merely an affidavit that notice was duly published in a qualified newspaper on the dates indicated.

Neither District Judge Belk's order of 8 May 1972 reciting that it appeared to be "impractical" to obtain personal service nor the findings of fact by District Judge Griffin support the conclusion that respondent was properly before the court "by virtue of the service of process . . . in the manner prescribed by the Rules of Civil Procedure . . . . " It is manifest that petitioner failed to comply with Rule 4 as it relates to service by publication. Since service of process was not properly made, the order terminating the parental rights of respondent should have been set aside. *Edwards v. Edwards,* 13 N.C. App. 166, 185 S.E. 2d 20.

The order from which respondent appealed is reversed and the order entered in this cause on 20 June 1972 is vacated.

Reversed.

Judges BROCK and MORRIS concur.

PEGGY SELLS MILLER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM HERBERT MILLER v. B. V. BELK, JR., JAMES E. TODD AND JOEL L. KIRKLEY, JR.

No. 7326SC44

(Filed 25 April 1973)

1. Contracts § 25— breach of contract — damages action — sufficiency of complaint

In an action for damages for breach of contract to purchase a laundry and dry cleaning business, plaintiff's complaint was sufficient to state a claim for relief where it contained allegations that by telephone defendant agreed to purchase plaintiff's business, defendant failed to tender the purchase money as agreed, plaintiff gave defendant notice that he was in default on the contract to purchase and plaintiff subsequently sold the business to another purchaser for

substantially less than the contract price; therefore, entry of default was proper where defendant filed no pleading in response to plaintiff's complaint.

2. **Judgments § 13; Rules of Civil Procedure § 55— appearance by defendant — entry of default without notice — error**

Where plaintiff filed an application for an extension of time in which to answer, filed a motion to vacate entry of default, filed a motion to dismiss the complaint and was present for a hearing in superior court on his motion to vacate, he appeared in the action within the meaning of Rule 55(b)(2), and he should have been served with written notice of plaintiff's application for default judgment at least three days prior to the hearing on the application; failure to provide the statutory notice requires that the default judgment be vacated.

3. **Courts § 10— criminal session — default judgment — no notice — error**

In a civil action to recover damages for breach of contract, G.S. 7A-49.2(a) required that defendant be given notice of the hearing on plaintiff's application for default judgment since the hearing was held at a criminal session of superior court.

APPEAL by defendant Joel L. Kirkley, Jr., from order and judgment of *Friday, Judge,* entered at the 17 April 1972 Schedule "B" Civil Session and at the 31 July 1972 Schedule "C" Criminal Session of MECKLENBURG Superior Court.

On 2 December 1971 plaintiff, individually and as administratrix of her deceased husband's estate, instituted this action to recover damages for breach of an alleged contract to sell and purchase a laundry and dry cleaning business. Summons and complaint were served on defendant Kirkley on 8 December 1971.

On 10 January 1972, defendant Kirkley having failed to file any pleading in response to plaintiff's complaint and having failed to obtain an extension of time within which to file pleading, at plaintiff's request, the assistant clerk entered default against said defendant who was serving as his own counsel at the time.

On 18 January 1972, Kirkley filed a motion to vacate the entry of default. A hearing was held on this motion at the 17 April 1972 Schedule "B" Civil Session of Mecklenburg Superior Court. The court made findings of fact, conclusions of law and on 30 May 1972 entered an order denying the motion to vacate the entry of default. Defendant Kirkley excepted to the order. Plaintiff voluntarily dismissed the action as against defendants Belk and Todd on 31 May 1972.

A hearing was held on 4 August 1972 at the 31 July 1972 Schedule "C" Criminal Session to determine whether plaintiff was entitled to a default judgment against defendant Kirkley. In support of her application for default judgment, plaintiff presented evidence as to damages. The court made findings of fact and conclusions of law and by order dated 4 August 1972 decreed that "plaintiff have and recover of the defendant, Joel L. Kirkley, Jr., the sum of $9,355.44 in compensation for the loss in selling price resulting from the default of defendant Joel L. Kirkley, Jr., and that she recover the sum of $35.00 from the defendant Joel L. Kirkley, Jr., as a result of the wrongful charging of a classified telephone advertisement to her," together with interest and costs of the action.

Defendant gave notice of appeal to this court from the judgment dated and filed 4 August 1972 and "from all intermediate orders and rulings in this cause and in particular that Order signed by Judge Friday dated May 30, 1972."

Gene H. Kendall for plaintiff appellee.

John B. Whitley for defendant appellant.

BRITT, Judge.

Defendant's first principal contention on appeal is that the complaint does not state a claim upon which relief can be granted and that this is necessary to support a default judgment. In determining the sufficiency of a complaint, we are guided by Justice Sharp's discussion on the subject in *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970), as follows:

> Under the "notice theory of 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 . . . . " Moore § 8.13. "Mere vagueness or lack of detail is not ground for a motion to dismiss." Such a deficiency "should be attacked by a motion for a more definite statement." Moore § 12.08 and cases cited therein.
>
> In further appraising the sufficiency of a complaint Mr. Justice Black said, in *Conley v. Gibson, supra* at 45-46, "[W]e follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." "This rule," said the Court in *American Dairy Queen Corporation v. Augustyn,* 278 F. Supp. 717, "generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed. Moore § 12.08 summarizes the federal decisions as follows: " 'A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.' But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*"

In substance the complaint in the instant case alleges the following: On 13 April 1971 plaintiff duly qualified as administratrix of her deceased husband's estate. Thereafter, plaintiff decided to sell a laundry and dry cleaning business which she and her husband had operated prior to his death. The business was advertised for sale and on 14 June 1971 defendant, as attorney and agent for Belk and Todd, submitted to plaintiff's attorney a written offer to purchase the business for $18,000.00. On 24 June 1971 a written offer of $19,000.00 was made by defendant to plaintiff's attorney. Defendant having been informed that a third party had offered $20,000.00 for the business, defendant made an offer of $20,100.00 by phone on 28 June 1971. This offer was accepted. On 29 June 1971, the offer was submitted in writing to plaintiff's attorney, defendant promising to pay $20,100.00 to plaintiff's attorney by noon on 30 June 1971. Plaintiff's attorney made demand for the purchase price at noon on 30 June 1971, and was told by defendant that the money would be paid at 2:00 p.m. on the same date. When demand was made on defendant at 2:00 p.m., plaintiff's attorney was told to return for the money at 4:00 p.m. on the same day. At 4:00 p.m. on 30 June 1971, acting on his own behalf, defendant executed a check on his trust account in the amount of $20,100.00 and presented it to plaintiff's attorney. The check was returned unpaid by the drawee bank marked

"insufficient funds" and plaintiff has been unable to collect the check.

On 30 June 1971 defendant and Belk went to the business premises and told plaintiff that they had bought her business and instructed her to remove personal belongings from the premises and to notify utility companies to take a final reading and give her a final bill. Defendant further instructed plaintiff to deliver possession of the premises to a woman who would assume operation of the business on 1 July 1971. No woman appeared to assume management of the business on that date.

On 2 July 1971 plaintiff's attorney gave written notice to defendant, personally and as attorney and agent for Belk and Todd, that they were in default of their contract to purchase and that plaintiff would seek legal remedies available to her unless the sale be concluded by 5:00 p.m. on 2 July 1971. Defendants did not perform the contract, and the property was sold to a purchaser for $10,744.56. Plaintiff then prayed that the court award her, among other things, compensation for loss in selling price caused by defendants' default.

[1] We think plaintiff alleged sufficient facts to show a contract between defendant and her for the sale and purchase of the business, defendant's failure to perform the contract, and plaintiff's damages resulting from defendant's default. We hold that the complaint is sufficient to state a claim for relief against defendant Kirkley, and the court did not err in denying his motion to vacate the entry of default.

[2] Defendant contends that the court erred in entering default judgment against him for the reason that he was given no notice of the hearing on plaintiff's application for default judgment. This contention has merit.

Judgments entered must comply with the requirements of the general statutes and the Rules of Civil Procedure. *Hill v. Hill,* 11 N.C. App. 1, 180 S.E. 2d 424 (1971). The default judgment in the instant case was entered pursuant to G.S. 1A-1, Rule 55(b)(2), which provides, among other things, that before judgment by default can be entered by a judge against a party who has *appeared* in the action, that party (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on the application.

Prior to the rendering of the default judgment on 4 August 1972, defendant had "appeared" in this action. On 10 January 1972, although belatedly, he filed an application for an extension of time in which to answer; on 18 January 1972, he filed a motion to vacate the entry of default, and on 17 March 1972, he filed a motion to dismiss the complaint. He was present for a hearing in superior court on his motion to vacate in April 1972. However, defendant was not served with written notice of plaintiff's application for default judgment at least three days prior to the hearing on the application as expressly required by Rule 55(b)(2).

[3] Furthermore, the hearing on plaintiff's application for default judgment was held and the default judgment was entered during the 31 July 1972 Schedule "C" *Criminal* Session of Mecklenburg Superior Court. G.S. 7A-49.2(a) requires that notice must be given before motions in civil actions may be heard at criminal sessions of court. Under G.S. 1A-1, Rule 7, plaintiff's application for default judgment is considered a motion in a civil action.

We hold, therefore, that for failure of plaintiff to provide notice as required, defendant is entitled to have the default judgment of 4 August 1972 vacated.

We have considered the other numerous contentions argued by defendant in his brief and find them without merit.

For the reasons stated, the default judgment is vacated and the cause is remanded to the superior court for further proceedings not inconsistent with this opinion.

The order dated 30 May 1972 is affirmed.

The judgment dated 4 August 1972 is vacated and cause remanded.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. FRANKLIN DEWAYNE WRIGHT, JAMES F. O'KELLEY, MICHAEL BRYANT WILLIAMS, LARRY WAYNE SHUE, AND BILLY EUGENE CAPEL

No. 7326SC186

(Filed 25 April 1973)

1. **Criminal Law § 92— consolidation of robbery charges against five defendants**

The trial court did not err in consolidating for trial identical armed robbery charges against five defendants.

2. **Robbery § 4— armed robbery — only one defendant with firearm — other defendants guilty as principals**

There was sufficient evidence to support the jury's verdict finding all five defendants guilty of an armed robbery in which an automobile was taken, notwithstanding only one defendant was shown to have had a firearm at the time the automobile was taken, where the evidence tended to show that the other four defendants were present and aided and abetted in the crime.

APPEAL by defendants from *Friday, Judge,* at the 21 August 1972 Schedule "C" Session of MECKLENBURG Superior Court.

By separate bills of indictment defendants were charged with the armed robbery of James Bernice Erwin (Erwin) on 9 August 1971; the property alleged to have been taken was a 1966 Chevrolet automobile. The cases were consolidated for trial and all defendants pleaded not guilty. (Defendants were also charged with kidnapping but the jury returned verdicts of not guilty as to that charge.) Evidence most favorable to the State tended to show:

Around 11:00 p.m. on 8 August 1971 all five defendants were at a lounge in or near Charlotte operated by one Trent. While there defendant Wright pointed a pistol at the head of a customer; Trent stuck his .32 cal. pistol in Wright's ribs and told him "if I heard a gun go off, that I would fire mine." Defendant Wright then left the lounge and in a few minutes returned with a single barrel shotgun which he stuck in Trent's side; defendant Wright told defendant Capel to get Trent's gun. The other three defendants were "surrounding" Trent. Trent knocked the shotgun upward and it went off, shooting a hole in the ceiling. All five defendants then ran from the lounge. Trent last saw defendants around 11:30 p.m.

On that same night, Erwin and Robert Herrin (Herrin), residents of Florida, were visiting relatives and friends who lived

in the Riverside Trailer Park near Charlotte. Around 12:45 a.m. Erwin and Herrin left the residence they were visiting, got in Erwin's Chevrolet and with Erwin driving proceeded to leave the trailer park. Two men (later identified as defendants Shue and Williams) stopped the car and demanded a ride to Charlotte; Shue had a pistol and pointed it at the car. Shue and Williams got in the back seat and Erwin proceeded to drive for some 100 yards to a telephone booth where he was stopped again. At that point three more men, later identified as defendants Wright, O'Kelley and Capel, got in the car, O'Kelley getting in the right front seat beside Herrin and Wright and Capel in the back seat. Neither Erwin nor Herrin knew either of the defendants.

Erwin proceeded on to a major highway and on toward Charlotte. After driving some twenty minutes, Erwin stated that his car was overheating and needed water. "They" gave Erwin permission to stop at a service station and get water. Erwin proceeded to stop at a station and while getting out of his car told Herrin to get out also and check the oil. Defendant O'Kelley ordered Herrin to stay in the car. While Erwin had the car hood open, the station operator went up to him; Erwin told the operator to "get my tag number, these boys have guns on me." He also told the operator to call the police. The operator went back into the station and picked up the telephone. About that time defendant Capel entered the station, ran his hand into his pocket and told the station operator it would be best for him to "hang up the phone."

After the station operator left him at the front of the car, Erwin heard someone in the car say "They are calling the law, shoot." Defendant Shue got out of the car and tried to throw Erwin down but Erwin got away, ran behind the station and on behind a church. As he was running he heard four, five or six gunshots. After defendant Capel told the station operator to hang up the phone, the operator, who had seen an automatic pistol in the hands of one of the occupants in the back seat, ran around the station and across the road to another station for purpose of calling police. As he was running he heard several gunshots. Herrin testified that defendant Wright was shooting at Erwin and the station operator as they ran.

Following the shooting, defendants Shue and Capel returned to the car, and defendant Shue proceeded to drive it toward Charlotte. Some one-quarter mile from the station, Her-

rin asked to be allowed to get out of the car; defendant Shue slowed down and Herrin jumped out into a ditch. Before jumping Herrin heard someone in the back seat say "Let him have it." As Herrin rolled over in the ditch, he heard gunshots as the car drove away. Herrin walked back to the station where police had arrived.

At about 1:50 a.m. of the same night, Charlotte Police Officer John Williams was on duty and saw defendant Wright come out of an alley and get into and drive off in a Ford pickup truck; the other four defendants were with Wright. Some five minutes later the pickup with the five defendants returned and proceeded down the alley. Officer Williams started down the alley on foot and saw a white car (later identified as Erwin's) in the alley with a small fire burning inside of it. Before the car started burning, Officer Williams saw defendant Wright walk away from the car and saw defendant O'Kelley standing nearby. After returning to his patrol car and radioing the dispatcher, Officer Williams drove down the alley and saw Erwin's car explode. He then radioed for police to be on the lookout for a one-half ton white pickup truck occupied by five white males and driven by defendant Wright.

Thereafter, at about 2:00 a.m., Officer Booth saw a blue and white Ford pickup truck in a driveway at 1709 Academy Street in the City of Charlotte. He and Officer Hagler approached the truck and saw defendants Shue, Williams, O'Kelley and Capel at the rear of the truck. Defendant O'Kelley had a shotgun and at the request of police threw it in the bed of the truck. The four were arrested. Defendant Wright came out of the house onto a lighted porch; he had a pistol in his hand. Defendant Wright then came on to the street and Officer Hagler ordered him to stop and drop the pistol. Defendant Wright put the pistol in his pocket and walked back into the house. The officers followed him into the house and arrested him.

The jury returned a verdict of guilty of armed robbery as to all defendants and from judgment imposing lengthy prison sentences, they appealed.

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

T. O. Stennett for defendant appellant Wright.

Lila Bellar for defendants appellants O'Kelley and Williams.

W. Herbert Brown, Jr., for defendant appellant Shue.

Michael S. Shulimson for defendant appellant Capel.

BRITT, Judge.

[1] Defendants O'Kelley and Williams assign as error the consolidation of their cases for trial with the cases of the other three defendants. There is no merit in this assignment. The court is authorized by G.S. 15-152 to order the consolidation for trial of two or more indictments in which the defendants are charged with crimes of the same class and which are so connected in time or place that evidence at the trial on one of the indictments will be competent and admissible at the trial on the others. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. White,* 256 N.C. 244, 123 S.E. 2d 483 (1962). The assignment of error is overruled.

[2] All defendants except Wright assign as error the failure of the court to allow their motions for nonsuit, contending that the evidence was insufficient to make out a prima facie case of armed robbery as to each of them. The assignment has no merit. The gist of the argument on this assignment appears to be that since neither of the defendants asserting this assignment was shown to have a firearm at the time the automobile was taken from Erwin, the evidence was insufficient to survive their motions for nonsuit.

It is well settled in this jurisdiction that when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to which one actually commits the offense. 2 Strong, N. C. Index 2d, Criminal Law, § 9, p. 492; *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21 (1966); *State v. Kirby,* 3 N.C. App. 43, 163 S.E. 2d 911 (1968). We hold that the evidence was ample to make out a case and support a verdict of guilty of armed robbery as to each defendant.

Defendants assign as error various portions of the court's charge to the jury and the failure of the court to comply fully with G.S. 1-180 in charging the jury. Suffice to say, we have carefully reviewed the charge, with particular reference to the assignments, but conclude that the charge when considered contextually is free from prejudicial error. The assignments of error are overruled.

We have carefully considered the other assignments of error brought forward and argued in the briefs but find them to be without merit, and they, too, are overruled.

We conclude that defendants, and each of them, received a fair trial, free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

LOWE'S CHARLOTTE HARDWARE, INC. v. ARTHUR L. HOWARD AND WIFE, BEVERLY W. HOWARD

No. 7326SC38

(Filed 25 April 1973)

1. **Trial § 4— setting aside nonsuit for failure to prosecute**

There was plenary evidence to support findings by the trial court in its order setting aside a judgment of nonsuit for failure to prosecute, including a finding that no notice that the case would be called was received by plaintiff's counsel.

2. **Reference § 1; Trial § 4— case in reference — nonsuit for failure to prosecute**

The trial court had no authority to enter a judgment of nonsuit for failure to prosecute while an order of reference in the case remained in effect.

3. **Rules of Civil Procedure § 60— motion to set aside judgment — reasonable time**

Where judgment of nonsuit for failure to prosecute was entered on 9 March 1970 and plaintiff's counsel did not receive notice thereof until 10 May 1971, a motion filed on 17 May 1971 pursuant to G.S. 1A-1, Rule 60(b)(6), to set aside the judgment of nonsuit on grounds that plaintiff's counsel had received no notice that the case had been calendared for trial and that the case was still in reference at the time of the judgment was made within a reasonable time.

APPEAL by defendants from *McLean, Judge,* 26 May and 16 June 1972 Sessions of Superior Court held in MECKLENBURG County.

Defendants, Arthur L. Howard and wife, Beverly W. Howard, appealed from an order setting aside a "judgment of nonsuit." Facts necessary for an understanding of this appeal are

contained in the order appealed from and, except where quoted, are summarized as follows:

Plaintiff instituted this action by filing complaint in the Superior Court held in Wilkes County. On 4 October 1968, defendants filed answer and a motion to change venue, which motion was allowed by order of Judge Collier, dated 22 November 1968, transferring this cause to the Superior Court held in Mecklenburg County. An order of reference, appointing Kurt R. Conner, attorney at law, as referee, was also entered by Judge Collier on 22 November 1968. Pursuant to the order of reference, Referee Conner, on 5 December 1968, notified counsel for plaintiff and counsel for defendants of his appointment "and requested that hearings be scheduled in order to examine a long account for building materials and supplies allegedly furnished by the plaintiff . . . . " Conflicts in scheduling have precluded the referee from conducting hearings on this matter despite repeated efforts by counsel for plaintiff and defendants to schedule a hearing. The case was placed on page 36 of the "Spring Clean-up Calendar" of the Superior Court held in Mecklenburg County and was called on 9 March 1970, before Judge Clarkson. "[A]t the time this case was called neither the plaintiff nor counsel for the plaintiff appeared, the Calendar Committee recommended that a judgment of nonsuit be entered, and a judgment of nonsuit was signed and entered by the Honorable Francis O. Clarkson on March 9, 1970." The law firm of McElwee & Hall from North Wilkesboro was listed as "attorney of record" for the plaintiff. No address or other indication that plaintiff's counsel was from "out of town" appeared on the calendar "whereas the addresses of other out of town attorneys were indicated immediately following their name throughout this calendar."

> "10. The procedure by which the Clerk of the Superior Court of Mecklenburg County notified out of town counsel as to the date and time when their cases would be called was for the Calendar Clark [*sic*] and/or her assistant to examine the calendar in question and place a check mark by all out of town attorneys; the Calendar Clerk or her assistant would then go through the calendar and address an envelope to all out of town attorneys and would then place a copy of the calendar in each of said envelopes and place the envelopes containing the calendar in a space in the Clerk's office provided for outgoing mail; that said outgoing mail was then supposed to be picked up by another

employee of the Clerk's office who was supposed to put the correct postage on said envelopes and was supposed to deposit them in the United States mail."

No cross-reference was made to assure that a calendar was mailed to each out of town attorney.

"12. Neither the Mecklenburg County 'Spring Clean-up Calendar' which was called on March 9, 1970, nor any other notice that this case would be called was received by counsel for the plaintiff."

Cases found to be at issue during the call of the clean-up calendar were placed on the tentative trial calendar. "This case was at issue and in reference at the time the judgment of nonsuit was entered." Defendants' counsel was present at the call of this case on 9 March 1970, but the referee was not notified of the entry of judgment on nonsuit, "nor was the reference terminated prior to the entering of said judgment." On 10 May 1971, plaintiff's counsel received notice of the judgment of nonsuit entered 9 March 1970, and on 17 May 1971 filed a motion to set aside that judgment.

Based upon the findings of fact set out above, Judge McLean made the following pertinent conclusions of law:

"1. The plaintiff is justified in being relieved from the operation of the judgment of nonsuit entered by the Honorable Francis O. Clarkson on March 9, 1970, pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure as a result of plaintiff and plaintiff's counsel having no notice that the case would be called on March 9, 1970.

* * *

3. Plaintiff's motion to set aside the judgment entered by the Honorable Francis O. Clarkson on March 9, 1970, pursuant to Rule 60 of the North Carolina Rules of Civil Procedure was made within a reasonable time."

From an order filed 26 May 1972 setting aside the judgment dated 9 March 1970, defendants appealed.

McElwee & Hall by T. V. Adams, and Eric Davis for plaintiff appellee.

Parker Whedon for defendant appellants.

HEDRICK, Judge.

Defendants contend "[t]he decision of the Superior Court to set aside the original judgment was based on findings of fact not supported by the evidence, and by the refusal to find facts supported by competent, uncontradicted evidence."

[1] Findings of fact made by a trial court, if supported by any competent evidence, are binding on appeal even though there is evidence to the contrary. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *Kirby v. Contracting Co.*, 11 N.C. App. 128, 180 S.E. 2d 407 (1971), cert. denied 278 N.C. 701 (1971). There was plenary competent evidence to support the findings of Judge McLean, including the finding that no notice that this case would be called was received by counsel for the plaintiff. This assignment of error is overruled.

Defendants next contend that "[t]he decision of the Superior Court to set aside the original judgment was based on the erroneous conclusion that the trial court lacked jurisdiction over the action, by virtue of its being in reference."

The order of Judge McLean merely recites that "[t]he judgment of nonsuit . . . was void because the matter was in reference by virtue of a consent agreement of the parties at the time the judgment was entered . . . ."

[2] An order of reference, not expressly limited in duration, continues in force until executed or revoked by act of law or discharged by the court. *Tyson v. Robinson*, 25 N.C. 333 (1843). No order terminating the reference was entered in this case; thus, Judge Clarkson was without authority to enter a judgment as of nonsuit while the order of reference remained in effect. *Coburn v. Timber Corp.*, 257 N.C. 222, 125 S.E. 2d 593 (1962).

[3] Finally, defendants contend that Judge McLean erred in setting aside the judgment of nonsuit "in that a reasonable time exceeding one year had passed from the entry of judgment prior to the filing of the motion."

While motions under G.S. 1A-1, Rule 60(b)(1), (2) and (3) must be brought within one year after a judgment is taken or entered, motions under Rule 60(b)(6), to set aside a final judgment for "[a]ny other reason justifying relief from the operation of the judgment" may be brought within "a reasonable time." G.S. 1A-1, Rule 60(b). "The broad language of

clause (6) 'gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice'. 3 Barron and Holtzoff, Federal Practice and Procedure (Wright Ed.) § 1329." *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E. 2d 446, 448 (1971).

The findings and conclusions of Judge McLean clearly demonstrate that plaintiffs' motion was made within a reasonable time and that the entry of the order setting aside the judgment as of nonsuit was appropriate to accomplish justice.

For the reasons stated, the order appealed from is

Affirmed.

Judges BROCK and VAUGHN concur.

LOWE'S CHARLOTTE HARDWARE, INC. v. KENNETH P. FORESTER, JR., AND WIFE, BARBARA B. FORESTER

No. 7326SC39

(Filed 25 April 1973)

APPEAL by defendants from orders entered by *McLean, Judge,* on 26 May and 16 June 1972 in MECKLENBURG Superior Court.

McElwee & Hall by T. V. Adams, and Eric Davis attorneys for plaintiff appellee.

Parker Whedon for defendant appellants.

VAUGHN, Judge.

In all material respects, the facts in this case are identical to those in No. 7326SC38, *Lowe's Charlotte Hardware, Inc. v. Arthur L. Howard and wife, Beverly W. Howard.* An opinion in that case has been filed this day.

The order from which defendant appealed is affirmed.

Affirmed.

Judges BROCK and HEDRICK concur.

WILLIAM EDWARD HARRIS v. BERNICE LEO FREEMAN

No. 7314SC26

(Filed 25 April 1973)

1. **Automobiles § 75— failure to signal intention to stop — no time to give signal**

In an action to recover damages sustained when defendant's truck struck the rear of plaintiff's car which stopped suddenly when the lead car in the line of traffic in which the vehicles were traveling stopped at an intersection with its left turn signal on, the trial court erred in submitting an issue of plaintiff's contributory negligence in allegedly failing to give a signal indicating that he was going to stop where defendant's own evidence established that plaintiff had no time in which to give a signal. G.S. 20-154.

2. **Automobile § 10— failure to give stop signal — not negligence per se**

Failure to give a signal of intention to stop where the operation of other vehicles might be affected in violation of G.S. 20-154 is not negligence *per se*.

APPEAL by plaintiff from *Cooper, Judge,* 15 May 1972 Session of DURHAM County Superior Court.

Plaintiff instituted this action to recover for personal injury and property damage sustained in an automobile collision allegedly due to the negligence of defendant.

At trial before a jury plaintiff introduced evidence which tended to show the following:

On 9 October 1970, at approximately 6:15 p.m., plaintiff was operating his Pontiac automobile in a northerly direction on Alston Avenue in Durham, N. C. At the intersection of Main Street and Alston Avenue, defendant pulled up behind plaintiff, who had stopped in obedience to a traffic light. Both vehicles then continued in a northerly direction on Alston Avenue. There were two cars in front of the plaintiff's vehicle also proceeding northerly along Alston Avenue. From the intersection of Main Street and Alston Avenue to the point of collision is approximately nine blocks. After leaving the intersection of Main Street and Alston Avenue, the lead vehicle two cars in front of plaintiff displayed its left turn signal at each intersection and would veer out of line as if to make a left turn. This happened at least three times although the vehicle never made a left turn. As the lead vehicle reached Drew Street, it displayed a left turn signal again and came to a complete stop. The vehicle

behind it also stopped as did plaintiff whose car was third in line. At the time plaintiff stopped he looked in his rear view mirror and saw defendant's truck coming. Plaintiff held out his left hand for a stop or slow down signal, and, when it appeared that defendant's vehicle was not slowing down, he started waving his hand. When it finally appeared that defendant's vehicle was not going to slow down, plaintiff put his right foot on the brakes and then was hit from the rear. Approximately 30 feet of skid marks were observed leading up to the position where defendant's vehicle had stopped following the collision.

It was stipulated by the parties that the weather was clear, the street was dry, and that plaintiff's vehicle was stopped at the time of the collision.

Defendant testified that he was operating his vehicle in the line of traffic at about 10 to 15 miles per hour and had observed the erratic behavior of the lead vehicle, noting that traffic had built up to about 19 vehicles behind the lead car. He stated that he did not know that the lead car had come to a stop, but when he saw plaintiff's car "nosedive," he slammed on brakes and slid into the rear of plaintiff's car. Defendant also testified that he did not see plaintiff give any signal indicating that he was going to stop and further testified that there would not have been time for plaintiff to give any hand signal because "all anybody had time to do was throw on brakes."

Defense witness Arthur Bateman, driver of the vehicle immediately following that of the defendant, also testified that he did not see plaintiff give any hand signal and that there was "No time interval between the time that the plaintiff's vehicle came to a stop and the impact between his vehicle and the defendant's." Bateman further testified that "[a]ll the cars came to a stop together with every wheel sliding," and that his own vehicle slightly bumped the rear of defendant's vehicle.

The lead car and the car immediately in front of the plaintiff drove off following the collision. No other vehicles in the line of traffic were involved in the collision.

Following the presentation of the evidence by both sides, plaintiff's motion objecting to the submission of the issue of his contributory negligence to the jury was denied. The jury then found defendant negligent and the plaintiff contributorily neg-

ligent and from a judgment dismissing the action, plaintiff appealed.

Bryant, Lipton, Bryant and Battle, by Victor S. Bryant, Jr., for plaintiff appellant.

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

MORRIS, Judge.

Plaintiff asserts on appeal that the trial court erred in submitting the issue of contributory negligence to the jury and in declaring and explaining the law relating to such issue.

In North Carolina, a defendant who asserts the contributory negligence of plaintiff as a defense has the burden of proving it, and a contention that certain acts or conduct of the plaintiff constituted contributory negligence should not be submitted to the jury unless there is evidence from which such conduct might reasonably be inferred. In determining the sufficency of that evidence the defendant is entitled to have any evidence tending to establish contributory negligence considered in the light most favorable to him and, if diverse inferences can reasonably be drawn from it, the evidence must be submitted to the jury upon proper instructions. *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970); *Jones v. Holt*, 268 N.C. 381, 150 S.E. 2d 759 (1966).

[1] In asserting the defense of contributory negligence, defendant alleged in his answer that plaintiff, without first giving a signal or notice of any kind, stopped suddenly thereby causing a collision to occur between the two vehicles. Plaintiff's and defendant's evidence as to whether a signal was given is in conflict. However, defendant testified that plaintiff did not have time to give any arm signal or hold his hand out the window "and all anybody had time to do was throw on brakes." Defense witness Bateman similarly testified that there was no time interval between the time plaintiff's vehicle came to a stop and the collision with defendant.

> "G.S. 20-154, which provides that the driver of a motor vehicle shall not stop without first seeing that he can do so in safety and that he must give a signal of his intention where the operation of other cars might be affected, is not

applicable where the driver has no choice." *Griffin v. Ward*, 267 N.C. 296, 298, 148 S.E. 2d 133 (1966).

In *Griffin*, the driver was confronted with a situation which demanded that he stop because the line of cars in front of him had done so. Because it had been raining and the windows of his car were up, he could not give a hand signal.

In the case at hand, even if a jury should believe that plaintiff failed to give any signal indicating that he was going to stop, defendant's own evidence established that plaintiff had no time in which to give a signal and therefore was under no statutory duty to do so. Plaintiff's alleged failure to follow the requirements of G.S. 20-154 was the sole basis of defendant's plea of contributory negligence and the primary basis of trial judge's instructions on the issue. We hold that there was insufficient evidence to submit such an issue to the jury.

[2] Assuming *arguendo* that the issue of contributory negligence was properly submitted to the jury, and we think it was not, the trial court further erred in giving an instruction to the effect that a violation of G.S. 20-154 is negligence *per se*. The following instruction is taken from the judge's charge to the jury:

"I instruct you that a failure to give such a signal as required by this statute is negligence."

Prior to 1 July 1965 a violation of G.S. 20-154 had been held by the North Carolina Supreme Court to be negligence *per se*. *Cowan v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228 (1964). However, the following proviso was added to G.S. 20-154(b) by Chapter 768 of the 1965 Session Laws effective 1 July 1965:

"[P]rovided further that the violation of this section shall not constitute negligence per se."

In interpreting G.S. 20-154 as amended, this Court has stated:

"Since a violation of G.S. 20-154 is no longer to be considered negligence *per se*, the jury if they find as a fact that the statute was violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the violator has breached his

common law duty of exercising ordinary care." *Kinney v. Goley,* 4 N.C. App. 325, 332, 167 S.E. 2d 97 (1969).

For errors committed in the trial below, there must be a

New trial.

Judges BROCK and PARKER concur.

ALLEN B. WILLIAMS v. DENNIS WAYNE HARTIS AND ELLA A. HARTIS

No. 7326SC230

(Filed 25 April 1973)

1. **Rules of Civil Procedure § 4— service of process — strict construction of statutes**

Statutory provisions prescribing the manner of service of process must be strictly construed, and the prescribed procedure must be strictly followed; and, unless the specified requirements are complied with, there is no valid service.

2. **Rules of Civil Procedure § 4— service of process — delivery to mother away from residence — invalidity of service**

Service of process on the male defendant was invalid where summons and complaint were handed to his mother, feme defendant, with whom he resided in Union County after she voluntarily accompanied a deputy sheriff from her residence to Mecklenburg County where she was served with process herself. G.S. 1A-1, Rule 4(j)(1)a.

3. **Rules of Civil Procedure § 7— failure to state rule number — effect on defense of invalid service of process**

Although worded as a motion the defense of insufficiency of service of process was asserted in defendant's responsive pleading; therefore, the rule requiring that a movant state the rule number under which he is proceeding was inapplicable, and failure of defendant to so state did not constitute waiver of his defense of invalid service of process.

4. **Appearance § 2— enlargement of time to answer — taking of deposition — no general appearance**

By obtaining an enlargement of time within which to file answer or other pleading and taking plaintiff's deposition, the male defendant did not make a general appearance as evisioned by G.S. 1-75.7(1) and thus waive his defense of insufficiency of service of process.

APPEAL by plaintiff from *Grist, Judge,* at the 16 October 1972 Schedule "A" Session of MECKLENBURG Superior Court.

This action to recover damages for personal injuries received by plaintiff in an automobile collision was instituted by issuance of summons and filing of complaint in Mecklenburg County on 28 April 1971. A separate summons was issued for each defendant.

The return on the summons for the feme defendant indicates that Hartsell, a Deputy Sheriff of Mecklenburg County, served the summons and complaint on her on 4 May 1971 "by delivering a copy to her personally at the following place: Mecklenburg-Union County Line in Mecklenburg County, on Johnson Lane." The return on the summons for the male defendant states that the summons and complaint were served by said deputy sheriff "On Dennis Wayne Hartis on the 4th day of May, 1971, at the following place: Mecklenburg-Union County Line in Mecklenburg County on Johnson Lane * * * X leaving copies with his mother—Ella A. Hartis."

On 4 June 1971 a stipulation signed by plaintiff's attorney was filed, the stipulation providing as follows: "The plaintiff, through counsel, hereby stipulates that the defendants' time for moving, answering or otherwise pleading pursuant to Chapter 1A of the General Statutes of North Carolina is hereby enlarged for a period of thirty days, or through the 3rd day of July, 1971."

On 30 June 1971 defendants filed answer in which they pleaded as a "first defense and as a motion to quash return of service" of summons "on the ground that the defendants have not been properly served with process in this action." As a "SECOND DEFENSE" defendants answered the various allegations of the complaint.

In the record on appeal the parties stipulated: "That on August 11, 1972, the deposition of the plaintiff, Allen B. Williams, was taken by defendants' attorney, at the request of defendants' attorneys and with the consent of plaintiff's attorneys, before R. F. Nixon, Court Reporter/Notary Public."

On 6 September 1972, the male defendant filed motion for "a summary judgment pursuant to G.S. 1A-1, Rule 56 on his First Defense alleged in his Answer because there is no genuine issue of material fact on the question of whether or not the defendant Dennis Hartis was properly served with summons and Complaint in this action."

In support of his motion for summary judgment, the male defendant filed affidavits made by him and the feme defendant, his mother. In his affidavit, he asserted that no copy of a summons and complaint in this action was ever handed to him by a deputy sheriff anywhere; that at the time of the institution of this action and on 4 May 1971, he lived with his mother at 1001 Vickie Lane, Matthews, Union County, N. C.; that the only copy of summons and complaint in this action that he ever received was handed to him by his mother.

The feme defendant's affidavit is summarized as follows: At the time this action was instituted and on 4 May 1971 she resided at 1001 Vickie Lane in Matthews, Union County, N. C. On said date a deputy sheriff of Mecklenburg County came to her home and asked her to go with him into Mecklenburg County in order that he might serve her with suit papers. She thereupon got into the automobile with the deputy and rode with him into Mecklenburg County where he left with her a copy of the summons and complaint for herself and a copy for her son, Dennis Wayne Hartis. At the time said deputy gave her the copies of summons and complaint, she was in said automobile and was not at her residence in Union County. At the time of the institution of this action and on 4 May 1971, the male defendant resided with her in her home in Union County.

On 24 October 1972 the court entered an order allowing the male defendant's motion for summary judgment and dismissing the action as to him. Plaintiff appealed.

Hedrick, McKnight, Parham, Helms, Warley & Kellam by Thomas A. McNeely for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman by Charles V. Tompkins, Jr., and F. Fincher Jarrell, for defendant appellee.

BRITT, Judge.

[1, 2] The first question presented by this appeal relates to the validity of the service of process on the male defendant.

We think service of process on the male defendant in this action is controlled by G.S. 1A-1, Rule 4(j)(1)a, which provides in pertinent part as follows:

> "'(j) *Process — manner of service to exercise personal jurisdiction.* — In any action commenced in a court of this

State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process shall be as follows:

(1) Natural Person. — Except as provided in subsection (2) below, upon a natural person:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the *defendant's dwelling house or usual place of abode* with some person of suitable age and discretion then residing therein;' (Emphasis added)"

Statutory provisions prescribing the manner of service of process must be strictly construed, and the prescribed procedure must be strictly followed; and, unless the specified requirements are complied with, there is no valid service. 62 Am. Jur. 2d, Process, § 42, p. 823. Although our research fails to disclose that the Supreme Court of North Carolina has ruled on the specific question presented here, the court has held that when husband and wife were named defendants, delivery of a copy of the summons and complaint to the husband with instructions to deliver the copy to defendant wife was not valid service. *Harrington v. Rice,* 245 N.C. 640, 97 S.E. 2d 239 (1957). We recognize that *Harrington* predates the current Rules of Civil Procedure but it tends to show that the court favors strict construction of statutes providing for service of process.

We hold that the service of process on the male defendant in the case at bar was invalid.

[3] The next question presented is: Did the male defendant waive his defense of invalid service of process?

On this question plaintiff contends first that the defense was waived because the male defendant did not, in his answer or in his motion for summary judgment, state the rule number under which he was proceeding or any of the provisions of G.S. 1A-1, Rule 12(b).

G.S. 1A-1, Rule 12(b), provides in pertinent part that "(e)very defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the

option of the pleader be made by motion: * * * (5) Insufficiency of service of process * * * ."

The General Rules of Practice for the Superior and District courts supplemental to the Rules of Civil Procedure adopted pursuant to G.S. 7A-34 are found in 276 N.C. 735, et seq. Rule 6 of said General Rules provides as follows: "All motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. (See Rule 7 of Rules of Civil Procedure.)" With reference to General Rule 6, see the following cases: *Clouse v. Motors, Inc.*, 14 N.C. App. 117, 187 S.E. 2d 398 (1972); *Lehrer v. Manufacturing Co.*, 13 N.C. App. 412, 185 S.E. 2d 727 (1972); *Mull v. Mull*, 13 N.C. App. 154, 185 S.E. 2d 14 (1971); and *Long v. Coble*, 11 N.C. App. 624, 182 S.E. 2d 234 (1971).

In the instant case, although worded as a motion the defense of insufficiency of service of process was asserted in the responsive pleading; therefore, we hold that Rule 6 of the General Rules of Practice which applies to *motions* is not applicable.

[4] Plaintiff further contends that the male defendant waived his defense of insufficiency of service of process by making a general appearance as envisioned by G.S. 1-75.7(1). Specifically, plaintiff argues that by (1) obtaining an enlargement of time within which to file answer or other pleading and (2) proceeding under G.S. 1A-1, Rule 26, to take plaintiff's deposition, defendant made a general appearance in this action. We think this contention was answered adversely to plaintiff in *Spartan Leasing, Inc. v. Brown*, 14 N.C. App. 383, 188 S.E. 2d 574 (1972), and deem it unnecessary to repeat the reasoning set forth in that opinion.

We hold that by obtaining an enlargement of time within which to file answer or other pleading and taking plaintiff's deposition, the male defendant did not waive his defense of insufficiency of service of process.

The order appealed from is

Affirmed.

Judges MORRIS and VAUGHN concur.

ANDREW J. BULLMAN AND DOROTHY ANN BULLMAN v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 7328IC204

(Filed 25 April 1973)

1. State § 8— finding by Industrial Commission — sufficiency of evidence

Even if there was error in the admission of testimony by plaintiff that defendant stated he was going so fast that he could not stop, the error was not prejudicial since testimony of an eye-witness that defendant employee was operating the Highway Commission truck at 60 mph was sufficient to support the Industrial Commission's finding that the truck was being operated at an excessive rate of speed immediately prior to and at the time of the accident.

2. State § 8— findings and conclusions of Industrial Commission — sufficiency of evidence

Evidence was sufficient to support the Industrial Commission's findings and conclusions that defendant was negligent and plaintiffs were not contributorily negligent where the evidence tended to show that plaintiffs looked and saw no vehicle before driving onto the highway, plaintiffs could see 400 feet down the road, plaintiffs were in their proper lane of travel and had progressed 44 feet before defendant's truck struck them and defendant was traveling 60 mph at the time of impact.

APPEAL by defendant from an opinion and award of the North Carolina Industrial Commission filed 10 November 1972.

This proceeding was instituted by plaintiffs under the provisions of the North Carolina Tort Claims Act, G.S. 143-291 *et seq.*, to recover damages for injury to person and property allegedly resulting when a State Highway Commission truck, negligently operated by Robert Greer Johnson, collided with a truck, owned and operated by plaintiff, Andrew J. Bullman.

The matter was heard by Deputy Commissioner A. E. Leake. Plaintiff Andrew J. Bullman (Andrew) offered evidence tending to show that at about 2:00 p.m., 14 July 1970, he drove his 1948 Chevrolet 1½ ton truck to "Mr. Swilling's grocery store and filling station . . . on Highway 1620 between Leicester and Alexander." Highway 1620 is a paved road, approximately 18 feet wide, and runs in an east-west direction. Swilling's service station and grocery store is located on the north side of highway 1620 and Andrew parked his truck approximately four feet from the edge of the road at about a 45 degree angle toward the northeast. Plaintiff Dorothy Ann

Bullman (Dorothy), Andrew's daughter, and Andrew's grandson were passengers in the cab of the Bullman truck. Andrew testified:

> "After I made my purchase at the store, I started to leave. * * * I started the engine of my truck and got ready to pull back onto RPR 1620. Dorothy looked out her door window. She was seated over on the right side of my truck. She looked out the back glass first, but I told her to look out the door window also so that we should not take any chances. She looked back southwest on RPR 1620 to check for traffic coming in that direction. You could see 400 feet back southwest on RPR 1620.
>
> After I had looked both to my right and to my left on RPR 1620, I went on in the road. I had not seen any traffic coming from either direction, so I pulled into RPR 1620. I intended to travel northeast on this road. I had traveled about 44 feet from where I started down the road and had gotten on the right-hand side of RPR 1620 going northeast in my lane when another vehicle collided with the rear of my truck."

John Crawford Swilling, owner and operator of the service station-grocery store on highway 1620 testified:

> "I had walked outside of the store and was standing at the gas pumps when Mr. Bullman was pulling into RPR 1620. Before he pulled into the road, Miss Bullman, she leaned out the right side looked down the road to her right. Mr. Bullman leaned over and looked to the right also. * * * At this time, when Mr. Bullman pulled out into RPR 1620, he was traveling east towards Alexander. He had already gotten into his proper lane of travel when his truck was hit.
>
> * * *
>
> I saw a State Highway truck after Mr. Bullman pulled into the road. I was standing in the parking lot and there was nothing coming when Mr. Bullman first pulled into the road. The State truck was going east on RPR 1620 at the time. I was standing about 30 feet from the edge of the road when I saw the accident happen. The State truck was 300 feet from me when I first saw it. I could see 300 feet or more from where I was standing down the road. From where Mr. Bullman's truck was parked you could

see 400 feet down the road. The State truck was going approximately 60 miles per hour just prior to the impact."

Dorothy Ann Bullman testified that both she and her father looked to the southwest before pulling onto the highway. She stated:

"I could see 400 feet or more down the road towards Leicester. There was nothing coming from the direction of Leicester when we started to move. * * * I never saw the other vehicle until it hit our truck."

The Bullman truck overturned following the collision and was "heavily damaged." Plaintiffs were taken to Memorial Mission Hospital in Asheville for treatment. Andrew was examined and released that same day but testified that he developed headaches the next day and had to return to the hospital for further examination and x-rays.

Dorothy Bullman was admitted to the hospital and remained there for a period of 13 days. She testified:

"On July 16, 1970, I was operated on for a broken fifth vertebra and it was repaired. They used some bone from my hip to repair the broken vertebra. * * *

I had a great amount of pain while in the hospital. I had to lay flat on my back and couldn't get up for anything. I had an upset stomach for several days and couldn't eat."

Defendant offered evidence tending to show that Robert Greer Johnson, a college student and summer employee of the Highway Commission, was driving the 1967 Ford dump truck, loaded with stone, east on Highway 1620 in the direction of Alexander on the day of the accident. As Johnson crested the hill and approached Swilling's store, he noticed the Bullman truck parked in the store's parking lot. Johnson stated, "When I first saw the Bullman truck moving into the road, my truck was about 120 feet west of the Bullman truck." Johnson sounded his horn but Bullman continued his left turn onto highway 1620 and was "barely creeping" when Johnson again sounded his horn. The Bullman truck continued forward at a slow rate of speed. Johnson, who estimated the speed of his vehicle at 30 to 38 miles per hour, testified: "I just ran over his truck; I couldn't stop in time."

Deputy Commissioner Leake made findings of fact and concluded as a matter of law that the injury to the person and property of Andrew J. Bullman and the injury to the person of Dorothy Ann Bullman were caused by the negligence of Robert Greer Johnson in the operation of the State Highway Commission truck and neither plaintiff was contributorily negligent. Based on these findings and conclusions, plaintiff Andrew J. Bullman was awarded $1,000.00 for personal injuries and $500.00 for property damage; and plaintiff Dorothy Ann Bullman was awarded $7,500.00 for personal injuries.

Defendant appealed to the Full Commission, which in an opinion filed 10 November 1972 adopted as its own the decision and order of Deputy Commissioner Leake and affirmed the award. Defendant appealed.

Clarence N. Gilbert for plaintiff appellees.

Attorney General Robert Morgan and Associate Attorney E. Thomas Maddox, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the admission of testimony of plaintiff Andrew J. Bullman that the driver of the Highway Commission truck, Robert Greer Johnson, stated after the accident: "I hit you. I was a-coming so fast I couldn't stop."

Citing *Jones v. Aircraft Co.*, 251 N.C. 832, 112 S.E. 2d 257 (1960) and Stansbury, N. C. Evidence 2d, § 169, defendant contends the statement of the agent was inadmissible against the principal since it was in regard to a past occurrence not forming part of the *res gestae.*

Assuming arguendo that the statement made by the driver-employee was not part of the *res gestae,* its admission was not prejudicial error since the testimony of John Crawford Swilling that the Highway Commission truck was being operated at 60 miles per hour is sufficient to support the Commission's findings that the truck was being operated at an excessive rate of speed immediately prior to and at the time of the accident. *Osborne v. Ice Co.*, 249 N.C. 387, 106 S.E. 2d 573 (1959). Where there is any competent evidence to support a finding of the Industrial Commission, such finding is conclusive on appeal. *Mackey v. Highway Comm.*, 4 N.C. App. 630, 167 S.E. 2d 524 (1969); G.S. 143-293.

[2] Defendant next assigns as error the conclusion of the Commission that appellant was negligent and that appellees were not contributorily negligent.

Findings of fact of the Industrial Commission, if supported by any competent evidence, are binding on appeal even though there is evidence which would support a contrary finding. *Stroud v. Memorial Hospital,* 15 N.C. App. 592, 190 S.E. 2d 392 (1972). The record contains sufficient competent evidence to support the material findings and conclusions of the Commission.

For the reasons stated, the opinion and award of the Industrial Commission is

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. DAHL THOMAS CARNES

No. 7326SC152

(Filed 25 April 1973)

1. **Witnesses § 8— adverse witness — scope of examination — limitation proper**

N. C. law permits a broad scope of cross-examination of a witness who has offered testimony detrimental to a defendant's case, but the trial court in a common law robbery case did not improperly restrict the scope of defendant's cross-examination or his efforts to impeach an adverse witness.

2. **Criminal Law § 46— flight of alleged accomplice — testimony not prejudicial**

Testimony of a detective dealing with the absence from trial of an alleged accomplice was not prejudicial to defendant, particularly where defendant himself testified with respect to the matter.

3. **Criminal Law § 169— exclusion of testimony — failure to show what testimony would have been — no error**

The court on appeal is unable to determine that exclusion of testimony tending to establish defendant's reputation was prejudicial where the record does not show what the testimony would have been.

4. **Criminal Law § 117— instruction on accomplice testimony — no error**

Trial court's instruction concerning the scrutiny of the testimony of an accomplice was proper.

State v. Carnes

APPEAL by defendant, Dahl Thomas Carnes, from *Snepp, Judge,* 11 September 1972 Session of Superior Court held in MECKLENBURG County.

The defendant, Dahl Thomas Carnes, was tried under a bill of indictment charging him with the common law robbery of Judith Thompson Barbaree on 22 November 1971. Barbaree testified as follows: She was the manager of Uncle John's Pancake House (now The Homestead Family Restaurant) located at 2501 East Independence Boulevard in Charlotte on 22 November 1971. She had known defendant for several years and he had been a regular customer of the restaurant for at least a year. "[H]e came in the restaurant three, four or five times a day every day except maybe Sunday. He came in those three, four or five times a day with friends he had, mostly just to drink coffee. . . . He had done that during the week prior to November 22, 1971. Prior to November 22, 1971 he had come in to drink coffee practically every day for a year."

On the morning of the robbery Miss Barbaree noted that the defendant was in the restaurant having coffee with a George Spivey. She usually went to the bank around 9:00 or 9:30 a.m. to deposit the previous day's receipts but on this particular day she was not able to go until around 11:30 a.m. Spivey left several minutes before she did, and defendant walked out with her. She went to her car where an assailant grabbed the bag containing the money. There was a brief struggle and the robber fled on foot with the moneybag. Defendant, who had gone to his car nearby, chased the assailant on foot upon hearing Miss Barbaree holler. Miss Barbaree also gave chase and she attempted to flag down a truck to secure aid in pursuing the robber, but the truck swerved toward her and she was forced to jump out of its path. She stated that George Spivey was the driver of the truck. Meanwhile, defendant had returned to his car. He caught up with Miss Barbaree, told her to return to the restaurant and call the police, and that he would pursue the robber in his car.

Jeff Young, who was also charged with this robbery, testified for the State. He stated that Spivey drove him to the Pancake House on this particular morning at around 9:00 or 9:30 a.m. and that Spivey introduced him to defendant Carnes. He stated: "After I got in the car the defendant Carnes told me how he planned to do the job and everything, explained that to me. He told me that he was going to have to go in

there and let me know when Miss Barbaree would be ready to come out and he was going to stop her and talk to her and give me time enough to come snatch the money bag. I didn't know exactly when Miss Barbaree was going to be coming out but we had it set up. Spivey was standing out, outside the Pancake House at the door so he could see when she got ready to come out and he would leave and go to his truck so he could be able to pick me up and that I would know after he moved, going towards the truck, I would know she was coming then." Young stated that he stayed in the car for about two hours waiting to put the plan into effect. He further stated that he fled on foot after robbing Miss Barbaree. Several other witnesses were called to corroborate various aspects of Young's testimony.

Defendant took the stand in his own behalf and testified as follows: He was in the restaurant at about 9:30 a.m. on the morning of 22 November with George Spivey. He testified that a Mr. Marus, a friend of his who was in the real estate business, was to have met him and Spivey to discuss Marus' handling the sale of Spivey's house. He said that he went outside with Miss Barbaree when she was going to the bank at 11:30 a.m. He heard Miss Barbaree holler and he chased the robber on foot and then in his car. He believed the robber was fleeing in a 1969 Mustang but he was unable to apprehend him. He denied ever meeting with anybody before going into the restaurant. He stated that Spivey left 30 to 40 minutes before he did and that he had never seen Young until the moment of Young's attack against Miss Barbaree. In essence he denied having any part in the robbery.

From a verdict of guilty defendant appealed.

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

Paul L. Whitfield for defendant appellant.

BROCK, Judge.

[1] Defendant brings forth four assignments of error. The first assignment alleges that the trial court improperly restricted the scope of defendant's cross-examination and his efforts to impeach an adverse witness. Defendant is correct in

arguing that North Carolina law permits a broad scope of cross-examination of a witness who has offered testimony detrimental to a defendant's case. *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277. *See* 1 Stansbury, N. C. Evidence, §§ 35, 38, 42 (Brandis Revision 1973), and 7 Strong, N. C. Index 2d, Witnesses, § 8. But the exceptions relied upon by the defendant do not indicate that the court unreasonably limited the scope of his cross-examination or infringed upon his reasonable opportunity to impeach the adverse witness.

[2] The second assignment of error is directed to the testimony of a Charlotte detective dealing with the absence of the alleged accomplice Spivey. Defendant has failed to demonstrate how the testimony relating to Spivey's absence from trial may have prejudiced his case. We note also that defendant himself testified on cross-examination, without objection, concerning Spivey's absence. This assignment of error is overruled.

[3] The next assignment of error is directed to the trial court's failure to allow testimony tending to establish defendant's reputation. Conceding *arguendo* that this testimony should have been admitted, defendant has failed to include in the record what the testimony would have been. This court therefore is unable to determine that its exclusion was prejudicial. *State v. Love,* 269 N.C. 691, 153 S.E. 2d 381. *See* 3 Strong, N. C. Index 2d, Criminal Law § 169.

[4] The final assignment of error relates to the charge. Defendant excepts to the refusal of the court to give his requested instruction concerning the scrutiny of the testimony of an accomplice. The instruction given by the court was similar to the one approved by the Supreme Court in *State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633. The court's instruction on this point is adequate and complete. Defendant also argues that the trial judge failed to give equal stress to the contentions of defendant. It appears to us that the charge of the court fairly summarized the evidence and fairly reviewed the contentions of the parties.

In our opinion defendant's trial was free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

PHILLIP H. BRAY v. HOMER R. WADFORD

No. 7310DC42

(Filed 25 April 1973)

Contracts § 14— loan of money to purchase stock — partial payment for stock — abandonment of stock contract — lender is not third-party beneficiary

Where defendant agreed to sell his stock in a corporation to one Tolley for $10,000 and other consideration, Tolley entered into an agreement with plaintiff whereby plaintiff was to loan $15,000 to Tolley for the purpose of obtaining all of the stock of the corporation and plaintiff gave Tolley a check for $15,000 pursuant to such agreement, Tolley paid defendant $5,000 of the money received from plaintiff in partial payment for defendant's stock and the contract between Tolley and defendant was thereafter abandoned, plaintiff was not a third-party beneficiary of the contract entered into between Tolley and defendant and could not recover the $5,000 paid to defendant as money had and received.

APPEAL by defendant from judgment entered 25 August 1972 by *Horner, District Judge,* District Court of WAKE County.

This action was tried by the court without a jury. In pertinent part the evidence may be summarized as follows.

Defendant owned one-third of the outstanding stock of Triangle Distributors, Inc. (Triangle). On 25 May 1970, he signed a letter of intent wherein he agreed to sell all of his stock to one Edward D. Tolley for a cash payment of $10,000.00, title to a designated automobile and release from all personal liability and personal guarantees with respect to the corporation. Tolley paid defendant $5,000.00 on 28 May 1970. Payment was made by a check signed by Tolley which was drawn on a personal account in his name. Since that time Tolley has neither paid nor tendered the balance due. Defendant was not relieved of personal liability with respect to the corporation. Creditors of the corporation "were coming after me (defendant) personally."

At the time of the defendant's agreement with Tolley, Triangle's stock was owned equally by defendant, Tolley and one Spencer. Plaintiff's exhibit three is an undated letter from Spencer to Tolley wherein Spencer agreed to sell all of his stock for $7,000.00 in addition to being relieved of all personal guarantees with respect to the corporation. Tolley gave Spencer a check for $3800.00 dated 12 June 1970 but plaintiff did not

know whether this was a part payment for Spencer's stock or a payment of a note that was due Spencer. Tolley never acquired Spencer's stock.

Plaintiff introduced the minutes of what appears to have been a meeting of the officers of Triangle held on 16 September 1970 and attended by: Tolley, President; Spencer, Vice President; Homer Wadford and, as designated in the minutes, "Prospective Stock Holder: Phillip H. Bray," the plaintiff here. The minutes indicate that the following matters, among others, were acted upon: Plaintiff was employed as general manager; Tolley was placed in charge of sales; due to the existing financial situation it was agreed to sell up to 1,000 additional shares of stock "at par value or $100.00 per share;" and a stockholders meeting was set for 23 September 1970.

Plaintiff introduced a contract dated 25 May 1970 between plaintiff and Tolley. The agreement contains the following:

> "Phillip H. Bray agrees to loan Edward D. Tolley $15,000.00 (Fifteen Thousand dollars) for the purpose of obtaining 100% ownership of the business known and operating as 'Triangle Distributors, Inc.' It is further understood that Phillip H. Bray will receive 49% ownership of the above named business from Edward D. Tolley; leaving Edward D. Tolley with 51% ownership of this business."

The agreement went on to recite that the $15,000.00 loan to Tolley by plaintiff had been borrowed by plaintiff and would be repaid equally by plaintiff and Tolley. Tolley agreed to transfer 49% ownership to plaintiff as soon as possible and not later than 90 days from the date of the agreement.

At the time defendant signed the letter of intent to Tolley, he had never met plaintiff. Defendant testified that he did not know of the agreement between plaintiff and Tolley until after suit was filed. Plaintiff testified that several weeks after the letter was written, he was introduced to defendant by Tolley as "this is Phil Bray. Phil and I are the ones that are buying your interest." Neither party sought to make Tolley a party to the law suit.

Except where quoted, the pertinent findings of fact by the district court judge are summarized as follows.

The agreement between Tolley and defendant was entered into pursuant to the agreement between Tolley and plaintiff.

Defendant knew there was a third party with an interest in the contract but did not know his identity. "(T)hat . . . plaintiff . . . caused to be paid by check to the defendant the sum of $5,000.00 on account in partial payment for defendant's stock." All of the stock in the corporation was owned in equal shares by Tolley, Spencer and defendant. Two months after the contract between Tolley and defendant, and after defendant learned that plaintiff was "the third party," defendant told plaintiff and Tolley that their deal was off and that he and one Lewis were going to take over the company. On 16 September the corporation agreed to issue a $100,000.00 in additional capital stock, "thus rendering the agreement incapable of being fulfilled. . . . " Defendant treated the agreement as abandoned and never transferred any of his stock to plaintiff or Tolley and has refused to refund the $5,000.00 paid on account.

The court made the following conclusions of law.

"1. The plaintiff, Phillip H. Bray, was a third-party beneficiary to the agreement between Edward D. Tolley, Sr. and defendant, Homer R. Wadford.

2. That the agreement was abandoned as of September 16, 1970.

3. That the defendant is indebted to the plaintiff for money had and received, and the plaintiff is entitled to recover from the defendant the sum of $5,000.00 with interest thereon from the 16th day of September, 1970."

Upon these findings and conclusions the court entered judgment against defendant for $5,000.00 with interest from 16 September 1970. Defendant appealed.

Sanford, Cannon, Adams & McCullough by J. Allen Adams, H. Hugh Stevens and Richard G. Singer for plaintiff appellee.

Reynolds, Farmer & Russell by E. Cader Howard for defendant appellant.

VAUGHN, Judge.

Defendant excepted to the court's finding of fact " . . . plaintiff, on the 28th day of May 1970, *caused to be paid* by check to the defendant the sum of $5,000.00 on account in partial payment for defendant's stock." (Emphasis added.) Although the legal significance of the finding excepted to is obscure,

we agree that it is not supported by the evidence. It may well be conceded that plaintiff advanced Tolley a sum of money for the purposes expressed in the agreement between plaintiff and Tolley dated 25 May 1970. Even if we assume, however, that the money turned over to Tolley by plaintiff was the source of some or all of the money used by Tolley to make the 28 May 1970 payment to defendant, there is nothing in this record to sustain a judgment for plaintiff against defendant for the sum so paid.

Reversed.

Judges BROCK and HEDRICK concur.

DON F. DOGGETT AND ANNIE MARGARET DOGGETT, PLAINTIFFS v. ROBERT EARL WELBORN AND MARY BRADLEY WELBORN, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. DONALD BENNETT MATHIS AND PIEDMONT-CAROLINA MOTORS, INC. THIRD-PARTY DEFENDANTS

No. 7329DC177

(Filed 25 April 1973)

1. **Rules of Civil Procedure § 56— summary judgment — failure to file affidavits**

Where plaintiffs did not file opposing affidavits or reasons why affidavits justifying their opposition to the summary judgment motion could not be presented but rested instead on the mere allegations of their pleadings, summary judgment was properly entered for defendant based on the pleadings and on the deposition of plaintfif. G.S. 1A-1, Rule 56(e).

2. **Automobiles § 76— smoke bank — zero visibility — hitting stopped vehicle — contributory negligence as matter of law**

Summary judgment was properly entered for defendant in a personal injury and property damage action where plaintiff's own deposition showed her to be contributorily negligent as a matter of law in that she followed a gray truck into a smoke bank and continued to drive at 15-20 mph, though she could not see to or beyond the front of her own vehicle, until she collided with the truck which was standing on the highway after having collided with a third vehicle in front of it.

APPEAL by plaintiffs from *Gash, District Judge,* 2 October 1972 Session of District Court held in RUTHERFORD County.

Plaintiffs sought to recover for bodily injury, pain and suffering and property damage sustained when the automobile which plaintiff Annie Margaret Doggett was operating collided with a 1949 Ford pickup truck operated by Edmond Leroy Geer. The court granted motions for summary judgment dismissing plaintiffs' action.

Robert G. Summey for plaintiff appellants.

Hamrick & Bowen by James M. Bowen for defendant appellees.

Morris, Golding, Blue and Phillips by James F. Blue, Jr., for third party defendant appellees.

VAUGHN, Judge.

Plaintiffs alleged that defendant Robert Earl Welborn was driving an automobile, owned by Mary Bradley Welborn, east on U.S. 74 By-Pass near Spindale on the date and at the time in question and that as a result of his negligence, Welborn collided with a vehicle operated by Doyle Reid Hill and that this collision resulted in a chain reaction of several successive accidents. Plaintiffs alleged defendant's negligence in causing the first collision was the proximate cause of the successive accidents, including Miss Doggett's collision with Mr. Geer's truck. Defendants' fourth defense alleged that Miss Doggett's injuries, if any, were caused by the negligence of third-party defendants, Donald Bennett Mathis and his employer, Piedmont-Carolina Motors, Inc., when Mathis ran into the rear of Miss Doggett's vehicle. Both the defendants and the third-party defendants moved for summary judgment, pursuant to G.S. 1A-1, Rule 56, on the grounds that there was no genuine issue as to any material fact, plaintiff Annie Margaret Doggett was guilty of contributory negligence as a matter of law, and plaintiff Don F. Doggett was bound by the negligent acts and omissions of the plaintiff Annie Margaret Doggett. The movants offered the deposition of plaintiff Miss Doggett in support of their motion.

[1] The function of the motion for summary judgment is to determine if there is any genuine issue as to any material fact and, if there is no such issue, to provide for an efficient disposition of the matter. "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. The issue is denominated 'genuine' if it may be maintained by substantial evidence." *Koontz v. City of Winston-Salem,* 280 N.C. 513, 518, 186 S.E. 2d 897, 901, petition for rehearing denied, 281 N.C. 516. " . . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S. 1A-1, Rule 56(e). The burden rests upon the movants to establish the lack of a triable issue of fact.

Summary judgment is proper when it appears that even if the facts as claimed by plaintiff are taken as true, there can be no recovery. Here, defendants, by taking plaintiff's deposition, obtained her version of the facts. This deposition was used to supplement the motions for summary judgment. Plaintiffs saw fit to rest on the mere allegations of their pleadings and neither filed opposing affidavits nor reasons why affidavits justifying their opposition to the motion could not be presented.

The substance of the deposition given by plaintiff, Annie Margaret Doggett, which was offered by defendants, is as follows.

While operating a 1966 model Dodge automobile with the consent of Don F. Doggett, her father and owner of the vehicle, she entered U. S. Highway 74 By-Pass headed east and observed a large "smoke bank" across the highway ahead of her. The smoke was caused by a fire at a city dump. She slowed her vehicle from 55 miles per hour to 15 to 20 miles per hour as she drove into the smoke bank. At first she didn't realize the smoke was so dense. She proceeded into the smoke and maintained a speed of 15 to 20 miles per hour for a distance of approximately ten to fifteen car lengths until she collided with a gray pickup truck which she knew had preceded her into the smoke bank. The truck had collided with other vehicles in front of it and had stopped in a position placing it partially in Miss Doggett's lane of travel. She could not see anything from the time she entered the smoke, not even the end of the hood of the automobile which she was operating. From the time she entered

the smoke bank until she collided with the pickup truck, she was driving "blind" in the smoke. She did not see the gray pickup truck which she struck until the moment of impact. Without conceding that there was evidence to establish a genuine issue as to negligence on the part of any of the defendants, we sustain the entry of summary judgment against plaintiffs on the grounds stated by the trial court: contributory negligence as a matter of law on the part of plaintiff driver.

[2] The failure of an operator of a motor vehicle who is operating within the maximum lawful speed prescribed by G.S. 20-141(b) to stop his vehicle within the radius of the lights thereof or within the range of his vision is not, standing alone, negligence *per se.* G.S. 20-141(e). Plaintiffs urge that this familiar rule precludes a determination that their driver was negligent as a matter of law. We hold to the contrary. The negligence of plaintiffs' driver was not limited to failure or inability to stop within the range of her vision. She drove when she had no vision. She had ample opportunity to stop. With seeming indifference for her own safety, however, she continued to drive down the highway while so blinded by smoke that she could not see to or beyond the front of her own vehicle. She knew the gray truck which she struck had preceded her into the smoke but could not see it until the moment of impact. "Such is the stuff of which wrecks are made." Stacy, C. J., in *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735.

Affirmed.

Judges BRITT and MORRIS concur.

CALVIN T. COUCH AND WIFE, BESSIE N. COUCH; CHARLIE H. COUCH AND WIFE, EDNA W. COUCH; HAROLD C. COUCH AND WIFE, LOUISE COUCH; AND LULA COUCH (WIDOW) v. JAMES R. COUCH AND WIFE, ARLENA R. COUCH; AND THOMASINE COUCH JOHNSON

No. 7315SC155

(Filed 25 April 1973)

1. **Partition § 7— actual partition — conclusiveness of trial court's findings**

In an action by tenants in common seeking an actual partition of their property, there was sufficient competent evidence to support

findings of the trial court, and the clerk's order confirming the report of the commissioners who divided the land was properly affirmed.

2. **Witnesses § 10— expert witnesses — no subpoena — award of witness fee error**

The trial court erred in awarding expert witness fees and taxing the losing party with the amount of the fees as a part of the costs where the expert witnesses did not testify in obedience to a subpoena.

APPEAL by respondents from *Cooper, Judge,* 18 September 1972 Session, Superior Court, ORANGE County.

This proceeding was instituted under the provisions of Chapter 46 of the General Statutes. The parties are tenants in common of the property described in the petition, and petitioners seek an actual partition of the property. Respondents in their answer averred that there was valuable timber on the lands and that in order to simplify the actual partition of the lands, the timber should be sold first. The clerk entered an order appointing a surveyor and retained jurisdiction to appoint commissioners to sell the timber and partition the land. Subsequently an order was entered appointing a commissioner to sell the timber. This was done, the sale confirmed, and a report filed. The timber sale is not in dispute.

The clerk appointed commissioners to divide the land. They filed their report, and respondents filed exceptions. The clerk entered an order confirming the report, and respondents appealed. The matter came on for hearing in the Superior Court and was heard by the court without a jury. Both petitioners and respondents presented evidence. The court found facts and affirmed the order confirming the commissioners' report. Respondents appealed.

Edwards and Manson, by W. Y. Manson, and Arthur Vann for petitioner appellees.

Dalton Hartwell Loftin for respondent appellants.

MORRIS, Judge.

[1] Although appellants in their brief raise nine questions, they properly conceded in oral argument that if the findings of the court are supported by evidence the judgment must be affirmed.

"Where an actual partition of lands has been ordered, whether the division made by the commissioners was fair and equitable or unequal in value is a question of fact to be determined by the Judge of the Superior Court upon an appeal from a judgment of the clerk affirming the report of the commissioners. *Byrd v. Thompson,* 243 N.C. 271, 90 S.E. 2d 394. The findings of the judge are conclusive and binding if there is any evidence in the record to support them. *McMillan v. McMillan,* 123 N.C. 577, 31 S.E. 729." *West v. West,* 257 N.C. 760, 762, 127 S.E. 2d 531 (1962).

It is true that the evidence before Judge Cooper was in sharp conflict. Nevertheless, there was sufficient competent evidence to sustain his findings.

[2] Appellants also contend that the court erred in entering an order allowing expert witness fee to the witness testifying for petitioners. We note that the court also allowed an expert witness fee to the witness who testified for respondents. Both fees were in the same amount and taxed as part of the costs. The record does not disclose whether the witnesses were under subpoena. However, counsel for all parties agree by brief that neither witness was under subpoena. Since neither expert witness testified in obedience to a subpoena, the court was without authority to allow either of them an expert fee or to tax the losing party with the amount of the fee as a part of the costs. *State v. Johnson,* 282 N.C. 1, 191 S.E. 2d 641 (1972). See also G.S. 7A-314 and G.S. 6-53. The order awarding expert witness fees must, therefore, be vacated.

The judgment affirming the order of the clerk confirming the commissioners' report is affirmed.

The order awarding expert witness fees is vacated.

Judges BROCK and PARKER concur.

DOROTHY S. NOBLE v. ARTHUR FRANK NOBLE II

No. 7310DC246

(Filed 25 April 1973)

Trial § 6— division of entirety property — stipulation — award beyond scope of stipulation

In an action for alimony without divorce where the parties stipulated that all controversy between them had been settled except for a division of property which they submitted to the court for "arbitration," the trial court went beyond the scope of the stipulation in its findings, conclusions and adjudication that defendant was the sole owner of the property in question since there was nothing in the pleadings or in the stipulation to put plaintiff on notice that the action would become one to try title to real estate or to declare the deed to plaintiff and defendant, which indicated that they were tenants by the entireties and of which plaintiff was in possession, void.

APPEAL by plaintiff from *Winborne, Judge*, 6 November 1972 Session of District Court held in WAKE County.

Plaintiff, Dorothy S. Noble, instituted this action for alimony without divorce on 28 January 1972. Defendant, on 7 February 1972, filed an answer and a counterclaim for divorce from bed and board. Prior to the commencement of trial, the parties stipulated:

> "[T]hat all things and controversies have been settled saving and except a division of property as between the parties; that the parties stipulate to submit that question to the Court for arbitration, and each party reserves the right to appeal said arbitration as to the findings of fact and conclusions of law reached by the Court."

Thereafter, the trial judge heard testimony of the parties and made findings and conclusions thereon and entered judgment which included the following: "1. The Defendant is the sole owner of the Dare County property and as soon as practical the Plaintiff will execute a deed for same to the Defendant."

Plaintiff excepted to the quoted portion of the judgment and the findings of fact and conclusions of law supporting the same and appealed.

Vaughan S. Winborne for plaintiff appellant.

Gulley & Green by Jack P. Gulley for defendant appellee.

HEDRICK, Judge.

The only question presented for our determination is whether the court erred in finding as a fact, concluding as a matter of law and adjudging that defendant is the sole owner of the Dare County property and ordering plaintiff to execute a deed for said property to defendant.

The evidence tended to show: Plaintiff and defendant were married to each other on 19 June 1960 and separated on 21 December 1971. Defendant acquired the Dare County real estate prior to the marriage. On 29 November 1960, plaintiff and defendant executed a deed for said property to third parties and they, on the same day, executed a deed for the property to defendant and plaintiff. Defendant did not have the deeds recorded but placed them in a drawer at his home in Raleigh. He never delivered the deeds to plaintiff and she paid nothing for an interest in the property. Around Christmas of 1971 plaintiff accidentally found the deeds and on 31 January 1972 had them recorded in Dare County.

The court found as fact that "The Dare County deed to Defendant and wife, Plaintiff, was recorded by the Plaintiff on January 31, 1972, without the delivery, consent or knowledge of the Defendant"; the court concluded "[t]hat the Dare County property was conveyed into joint names by an alleged deed of gift," that there was no actual or implied delivery of said deed by defendant to plaintiff, that said deed was not recorded in sufficient time to constitute a valid deed of gift, and that defendant is the full and rightful owner of the Dare County property and is entitled "to right, title and possession of same."

Assuming, but not deciding, that pursuant to the stipulation the trial court had jurisdiction to "arbitrate" property rights between the parties, we think the court went beyond the scope of the stipulation in its findings, conclusions and adjudication with respect to the Dare County real estate. A stipulation should not be construed so as to extend its terms beyond that which a fair construction justifies; and a stipulation must be construed in the light of the circumstances surrounding the parties and in view of the result which they were attempting to accomplish. 50 Am. Jur., Stipulations, § 8, p. 609.

In the case at bar, when the stipulation was entered into plaintiff was in possession of a recorded deed indicating that

she and defendant owned the Dare County property as tenants by the entireties. It would have been a reasonable assumption on her part that "a division of property" would be based on that fact. There is nothing in the pleadings or in the stipulation to put plaintiff on notice that this action would become an action to try title to real estate or to declare the deed to plaintiff and defendant void. This is not to say that defendant may not, in a *proper* action, have the courts pass upon the validity of the challenged deeds, but we do not think their validity was properly before the court in this action.

We hold that the findings of fact, conclusions of law, and adjudication in the judgment pertaining to the Dare County property are invalid and the judgment is modified accordingly. In all other respects, the judgment is affirmed.

Modified and affirmed.

Judges BRITT and PARKER concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA v. THE NORTHWESTERN BANK

No. 7330SC74

(Filed 25 April 1973)

1. **Venue § 2— transitory action — residence of either party as proper venue**

An action against defendant for money damages for its alleged failure to procure the signature of a joint payee of a check and for breach of "the accepted banking practice" of honoring its warranty to redeem such check upon dishonor and notice of dishonor is transitory; therefore, either the county of residence of the plaintiff or defendant is the proper venue.

2. **Venue § 2— domestic corporation — residence**

For the purpose of suing or being sued, a domestic corporation is a resident of the county where it has its registered or principal office. G.S. 1-79.

3. **Venue § 2— domestic corporation — county of registered or principal office as proper venue**

Where both plaintiff and defendant are corporations, neither has its registered or principal office in Jackson County where the action was instituted, but defendant, a domestic corporation, has its princi-

pal and registered office in Wilkes County, Wilkes County is the proper venue. G.S. 1-79; G.S. 1-82.

APPEAL by defendant from *Falls, Judge,* 9 October 1972 Session of Superior Court held in JACKSON County.

Plaintiff, First Union National Bank of North Carolina (payor bank) instituted this action in the District Court held in Jackson County, to recover of defendant, The Northwestern Bank (depositary bank) $11,538.03 for its alleged failure to procure the signature of a joint payee of a check and for breach of the "accepted banking practice" of honoring its warranty to redeem such check upon dishonor and notice of dishonor. Upon motion of defendant, the case was transferred to the Superior Court held in Jackson County.

Plaintiff is a national bank with its principal and registered office in Mecklenburg County and with branch offices in several counties in this State including Jackson County. Defendant is a state bank with its principal and registered office in Wilkes County and with branch offices in several counties, but none in Jackson County.

Defendant, before filing a responsive pleading, made motion for a change of venue to Wilkes County. By order filed 11 October 1972, defendant's motion was denied. Defendant appealed.

Holt & Haire, P.A., by R. Phillip Haire, for plaintiff appellee.

W. G. Mitchell for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of its motion for change of venue.

[1] The present action being transitory, either the county of residence of the plaintiff or defendant is the proper venue. *Thompson v. Horrell,* 272 N.C. 503, 158 S.E. 2d 633 (1968); G.S. 1-82.

[2] For the purpose of suing or being sued, a domestic corporation is a resident of the county where it has its registered or principal office. G.S. 1-79.

[3] Both plaintiff and defendant are corporations. Neither has its registered or principal office in Jackson County. Defendant, a domestic corporation, has its principal and registered office in Wilkes County. Therefore, under G.S. 1-79 and G.S. 1-82, Wilkes County is the proper venue.

Security Mills v. Trust Co., 281 N.C. 525, 189 S.E. 2d 266 (1972), cited by the plaintiff, is not applicable to the present situation. The cited case stands for the proposition that under 12 U.S.C. § 94, a national bank is "located" and may be sued in the appropriate State court of each county where it maintains a branch office.

For the reasons stated, the order denying defendant's motion to remove the cause to Wilkes County is

Reversed.

Judges BROCK and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES ROSS CURTIS

No. 7315SC188

(Filed 9 May 1973)

1. **Robbery § 4— armed robbery — sufficiency of evidence**

There was sufficient evidence that defendant aided and abetted in the armed robbery of one Bailey to take the case to the jury where the evidence tended to show that though the actual shooting and robbery were committed by another, defendant was present at the scene of the crime and participated in a beating given the victim.

2. **Criminal Law § 102— introduction of evidence by defendant — right to close jury argument lost**

The trial court in an armed robbery prosecution properly ruled that defendant lost his right to conclude the arguments to the jury where defendant called a witness and examined him, but did not glean any helpful information from him. Rule 10, General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure.

3. **Criminal Law § 102— jury argument — incompetent matters — exclusion proper**

Comments of defendant's counsel with respect to the disposition of the cases of other alleged participants in the crime were incompetent matters in the nature of speculation or conjecture, and no prejudicial error was shown by the trial court's refusal to allow defense counsel to argue the matters before the jury.

4. **Criminal Law § 168; Robbery § 5— recapitulation of evidence — slight misstatement — no reversible error**

In recapitulating the evidence a misstatement by the trial judge of the testimony of two witnesses was merely a slight inaccuracy and, since it was not called to the court's attention in apt time for correction, there was no reversible error.

5. **Robbery § 5— armed robbery — failure to submit lesser offense of common law robbery — no error**

The trial court in an armed robbery case did not err in failing to submit to the jury the lesser included offense of common law robbery where all the evidence in the case tended to show that the armed robbery charged was committed by defendant and others acting in concert and that defendant aided and abetted in the use and threatened use of the firearm, and where there was no evidence tending to show the commission of common law robbery.

APPEAL by defendant from *Cooper, Judge,* 14 August 1972 Session of Superior Court held in ALAMANCE County.

Defendant was charged in a bill of indictment, proper in form, with the felony of armed robbery, a violation of G.S. 14-87. Defendant pleaded not guilty.

Pertinent evidence for the State tended to show that at about 12:30 a.m. on 16 June 1972, David Bailey left the Desert Inn and went to the Farmer's Drive-In in Alamance County. There, Bailey met the defendant Curtis and asked Curtis to take him home. Curtis was with three other men, Russell Lee Clay, Jr., Jerry White and Robert Torrain. All four men got into Clay's car with Bailey and drove on Highway 87 toward Cole's Drive-In where Bailey hoped to find someone else to drive him to his home. Cole's Drive-In was closed, so the defendant reversed his direction, going back toward Bailey's home. During this part of the ride, Bailey fell asleep in the front seat. When Bailey awoke, the hood of the car was raised, and three of the men were outside of the car. One of the men told Bailey the car wouldn't start, but when Bailey turned the ignition switch the engine started immediately. The three men opened the car door and pulled Bailey out of the car. Bailey told the men that he would give them his money if they wanted it, but the men began beating Bailey with their fists. At about the same time, one of the men began shooting a pistol at Bailey, and Bailey's billfold, containing about $19.00, was ripped from his rear pants pocket. After the wallet was taken from his person, Bailey was wounded twice by the bullets fired at him. Another car appeared in the distance, coming down the road toward the robbery scene, and the three men got in their car and drove away.

Russell Lee Clay, Jr., testified for the State. His testimony tended to show that he, Jerry White, Robert Torrain, and the defendant left the Farmers Drive-In in Clay's mother's car in order to drive David Bailey home. The defendant was driving the car. Clay went to sleep. When he awoke the car was stopped, and when he alighted from the car, he saw Robert Torrain and the defendant beating Bailey. Torrain told Clay that "he was going to rob the M.F." After the defendant stopped beating Bailey, Bailey started to get up off the ground, whereupon Torrain shot at Bailey, knocking him back onto the ground. Clay grabbed Torrain's arm to keep him from shooting Bailey and the gun fired into the air. During this time, the defendant was standing close to Clay and Torrain. On the night after the robbery, Clay and the defendant were taken to the police station, and Clay observed that defendant had blood on his T-shirt.

Deputy Sheriff David Wilson of the Alamance County Sheriff's Department offered testimony which tended to corroborate the testimony of Bailey and Clay. Over objection, after a voir dire examination and findings of fact and conclusions of law based thereon, that the defendant had been advised of his constitutional rights and that a statement given by him was freely, voluntarily and understandingly made, Deputy Sheriff Wilson related to the jury a statement made by the defendant to Wilson on 17 June 1972. The statement tended to show that at the Farmer's Drive-In, Jerry White was drunk and that he never left the car that night. Robert Torrain came out of the Farmer's Drive-In with Bailey, and told Curtis "to come on." Curtis, Torrain, Clay, White and Bailey drove to a house to play poker at Bailey's suggestion, and Bailey left the car at the house and went to the door, but Bailey did not go in the house, and walked back to the car. While Bailey was at the door of the house, Torrain said, "He has some money, let's take it away from him." After Bailey got back in the car, Curtis drove back towards the Farmer's Drive-In, but when he stopped the car in order to urinate, the engine cut off and wouldn't restart. While Curtis was working on the engine, the car started, and, "I heard someone get hit. Robert and the white man got out, then Russell Clay, Jr., all three of us started beating the white man. Russell Clay, Jr. asked him for his money, he said he didn't have any. Robert said he should kill him. Robert shot one time at him, or in the air, I don't know which. * * * Robert shot the pistol twice. I saw blood in the stomach area, that is all. * * * "

After the State rested its case, the defendant moved for judgment as of nonsuit: Motion denied. Thereafter, the defense attorney requested that Robert Torrain be brought before the court as a witness. Torrain then took the witness stand as a defense witness. On the advice of his attorney, who was present in the courtroom, Torrain exercised his right to refuse to answer any question which would tend to incriminate him. The defendant then rested his case, and the trial judge ruled: " . . . that the defendant through his examination of Robert Torrain has introduced evidence in the case, and therefore, the State is entitled to the last speech to the jury."

The jury returned a verdict of guilty as charged, and defendant was sentenced to 20 years imprisonment. Defendant appealed to the Court of Appeals, assigning error.

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

Dalton & Long, by W. R. Dalton, Jr., for defendant appellant.

MORRIS, Judge.

Defendant's assignments of error numbered 1 and 2 are directed to the action of the trial court in sustaining the solicitor's objections to certain questions asked of the State's witness Russell Lee Clay, Jr. on cross-examination. Defendant has cited no authority on the questions presented. We have carefully reviewed the excluded testimony and are of the opinion that no harmful error was committed therein.

[1] By assignments of error numbered 3 and 5 defendant presents the question whether there was sufficient evidence of armed robbery to take the case to the jury. Defendant argues that in his confessory statement read to the jury by Deputy Wilson, the defendant said, "I was trying to keep Robert from shooting him," and that this evidence logically shows that the defendant was not aiding and abetting Torrain in his use of the pistol. However, we are of the opinion that viewed in the light most favorable to the State, there was ample evidence that Robert Torrain, having in his possession and with the use and threatened use of a firearm whereby the life of David Bailey was endangered and threatened, took and carried away the billfold of David Bailey, containing $19.00, from his presence and person, and that the defendant aided and abetted Torrain in the commission of the crime. G.S. 14-87.

[2] Defendant's assignment of error numbered 4 presents the question whether the trial court properly denied the defendant the final argument to the jury.

Rule 10, "General Rules of Practice For the Superior and District Courts Supplemental to the Rules of Civil Procedure Adopted Pursuant to G.S. 7A-34," reads as follows:

> "In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final."

Formerly, the provisions of Rule 10 were included in Rules 3 and 6, "Rules of Practice in the North Carolina Superior Courts," 213 N.C. 836. Those rules were interpreted in McIntosh, N. C. Practice 2d, § 1492, where it was said that it is " . . . now fixed by the rules of court that where any question arises as to the opening and conclusion of the argument, it is within the discretion of the court to determine it, and his decision is conclusive, except where the defendant introduces no evidence, he shall have 'the right of reply and conclusion.' " By virtue of former Rule 6, cases which came within the purview of former Rule 3 ("when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel") were reviewable on appeal because "[t]his is a substantial legal right, of which the defendants could not be deprived by an exercise of judicial discretion." *State v. Raper*, 203 N.C. 489, 166 S.E. 314 (1932).

Although new Rule 10 substantially tracks the wording of former Rules 3 and 6, the exception provided in former Rule 6, that cases under former Rule 3 were not to be finally decided by the trial court and were reviewable, has been deleted.

We do not decide whether the language of Rule 10 precludes the right of appeal from the decision of the trial judge with respect to the party having the right to close the argument to the jury, because it is clear that in this case the court properly allowed the State to close the argument. Defendant called a witness, examined him, and elicited from him information that the witness knew some of the alleged participants and had seen the other. Since defendant put on evidence, he lost his right to conclude the arguments to the jury. The fact that he was not able to glean helpful information from the witness does not restore to him the right to close the arguments.

[3] Defendant's assignment of error numbered 6 presents the question whether the trial judge committed error by not permitting defendant's counsel to argue to the jury that Russell Lee Clay, Jr., had already been "acquitted" by the solicitor and that Robert Torrain would be tried for the crime with which defendant was charged only if the defendant should be acquitted by the jury. The control of the argument of the solicitor and counsel is largely in the discretion of the presiding judge, and counsel may not, by insinuating questions or other means, place before the jury incompetent matters, not legally admissible in evidence or travel outside the record, injecting facts not included in the

evidence. *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971) *vacated for resentencing,* 408 U.S. 939; *State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432 (1960). We hold that the excluded comments of defendant's counsel were incompetent matters in the nature of speculation or conjecture, that no prejudicial effect has been shown by not permitting defense counsel to argue those matters, and that the presiding judge properly ruled in that regard.

[4] Assignments of error numbered 7, 8 and 10 are to portions of the judge's charge to the jury. After recapitulating the evidence given by Russell Lee Clay, Jr. and stating that Clay awoke in the car when he heard gunfire and got out of the car, the judge then said: "That Mr. Torrain said, 'We are going to rob him.' " Similarly, in recapitulating Deputy Wilson's testimony as to the contents of Clay's statement to Wilson, the judge stated: "That Mr. Torrain said they were going to rob the man." Defendant contends these were material misstatements of the evidence, constituting prejudicial error.

The evidence adduced at the trial tended to show that Russell Lee Clay, Jr. had in fact said, " . . . he was going to rob the M.F.," and that Deputy Wilson had corroborated that testimony, saying, "[t]hat Robert said he was going to rob" the prosecuting witness. The rule in regard to misstatements of fact in charging the jury is set forth in *State v. Frizzelle,* 254 N.C. 457, 119 S.E. 2d 176 (1961):

> " 'Ordinarily an inadvertence in stating the facts in evidence (in charging the jury) should . . . be brought to the attention of the trial court in apt time. But where the misstatement is of a material fact not shown in evidence, it is not required that the matter should have been brought to the trial court's attention.' (Parentheses added.) Strong, N. C. Index, Vol. 1, Appeal and Error, § 24, p. 102; *Baxley v. Cavenaugh,* 243 N.C. 677, 92 S.E. 2d 68."

See also, *State v. Blackshear,* 10 N.C. App. 237, 178 S.E. 2d 105 (1970); *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969). We are of the opinion that the misstatements in this case were "mere inaccuracies." There was other evidence at the trial given by Deputy Wilson that the defendant said in his statement to Wilson, " . . . Robert said to us, 'He has some money, let's take it away from him.' " Thus, the misstatement by the judge of Clay's and Wilson's testimony was merely a

slight inaccuracy, and since it was not called to the court's attention in apt time for correction, there was no reversible error.

[5] In his assignment of error numbered 10 defendant asserts that the trial judge erred in failing to submit to the jury the possible verdict of guilty of common law robbery. Common law robbery is a lesser included offense of armed robbery. *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809 (1971); *State v. Barksdale,* 16 N.C. App. 559, 192 S.E. 2d 659 (1972), *cert. denied,* 282 N.C. 673.

> " 'The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor.' " *State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954).

We hold that all the evidence in this case tends to show that the armed robbery charged was committed by the defendant, and others, acting in concert, and that the defendant aided and abetted in the use and threatened use of the firearm wielded by Robert Torrain, and that there is no evidence tending to show the commission of common law robbery. For that reason, it would have been error for the trial court to charge on the unsupported lesser degree of the crime. This assignment of error is overruled.

Defendant has had a fair trial, free from prejudicial error.

No error.

Judges BROCK and PARKER concur.

STATE OF NORTH CAROLINA v. DAVID DOBY

No. 7326SC299

(Filed 9 May 1973)

1. **Criminal Law § 96— nonresponsive testimony — reason for going to arrest scene — instruction to disregard**

In a prosecution for possession of heroin, nonresponsive testimony by a police officer that officers went to the grill where defendant was arrested because an informant had told them that someone in the grill had heroin and nonresponsive testimony by another officer that officers were responding to some information received, *held* not prejudicial to defendant where the court sustained defense objections to such testimony by both officers and instructed the jury not to consider the first officer's answer, the second officer not having said enough to warrant a similar instruction.

2. **Criminal Law § 98— defendant in custody on second day of trial — no prejudice**

In this prosecution for possession of heroin, defendant was not prejudiced by the fact he was in custody on the second day of the trial whereas he had not been in custody on the first day, defendant having been arrested on an armed robbery charge at the conclusion of the first day of the trial, where defendant was taken into custody outside the presence of the jury, and no mention was ever made as to why he was in custody the second day.

APPEAL by defendant, David Doby, from *Hasty, Judge,* 1st week of 1 January 1973 Schedule "A" Regular Criminal Session of Superior Court held in MECKLENBURG County.

David Doby was charged with unlawful possession of heroin (Case No. 71CR65608) and unlawful possession of a "hypodermic syringe and needle for the purpose of administering habit-forming drugs . . . " (Case No. 71CR65609). The trial judge granted defendant's motion to dismiss Case No. 71CR65609.

The State's evidence tended to show that: At approximately 9:30 p.m. on 4 November 1971 three policemen entered the First Ward Grill on East Seventh Street in Charlotte. They had received information from an informant that someone then in the grill had some heroin. One of the officers, D. W. Young, walked to the far end of the establishment, looked in a rest room there, and then began to walk back the way he had come. He stopped to observe the occupants in some booths located along one wall. Defendant was seated with his back to Officer Young. Young testified: "At this particular time, I noticed Mr.

Doby had his left hand closed down beside him and I noticed him stick his hand down and open his fingers, and a package fell out on the floor underneath the table. I immediately walked to the table, reached down, picked up the package, and placed Mr. Doby under arrest for possession of heroin. While I was standing by the rest room, there was nothing blocking my view of Mr. Doby's hand." The package contained glassine packages and the contents were later positively identified as heroin. Defendant was searched and a syringe and needle were found on his person. Testimony was received from another officer which corroborated Officer Young's testimony.

Defendant did not offer evidence.

The jury found defendant guilty of unlawful possession of heroin as charged (Case No. 71CR65608), and he was sentenced to a term of not less than three nor more than five years.

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

Walter H. Bennett, Jr., for defendant appellant.

BROCK, Judge.

[1] Defendant contends that " . . . on two occasions witnesses for the State [the investigating police officers] in nonresponsive answers to questions from the Solicitor gratuitously offered prejudicial evidence of information from third parties." He refers to questions which sought to establish why the police officers initially went to the grill. The first officer stated that an informant had told them that someone in the grill at that time had some heroin and the second officer just stated that they were responding to some information received. The judge properly sustained both defense objections. He instructed the jury not to consider and to completely disregard the first officer's answer. He did not repeat this admonition when the second officer responded to the solicitor's question but he did not allow the solicitor to pursue the point.

Defendant argues that these responses prejudiced his case and that the judge's reaction did not cure this prejudice. The Supreme Court has held that a statement of incompetent evidence by a witness may be rendered harmless if the trial judge promptly withdraws the evidence from the jury's consideration and instructs them to disregard it. *State v. Bruce,* 268 N.C.

174, 150 S.E. 2d 216; *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193. The court here properly instructed the jury after the information was volunteered by the first officer and the second officer never did say enough to warrant another similar instruction by the judge.

[2] Defendant next contends that he was prejudiced in the eyes of the jury because he was in custody on the second day of the trial whereas he had not been on the first day. At the conclusion of the first day of the trial he was arrested and charged with an armed robbery which was unrelated to this action. He argues that because he was forced to enter the courtroom from a door used by prisoners and court officials and because he was directed by a uniformed deputy, who was holding his arm, he was then unable to receive a fair trial by an impartial jury. He was not handcuffed and no particular mention was ever made as to why he was in custody the second day.

State v. Barnes, 4 N. C. App. 446, 167 S.E. 2d 76 rejected an argument similar to the one posed here. Defendants there were taken into custody during the course of the trial by order of the court and they contended that they had been prejudiced in the eyes of the jury. They cited two cases *(State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568 and *State v. McNeill,* 231 N.C. 666, 58 S.E. 2d 366) where the Supreme Court had held that the defendants had been prejudiced when they and some of their witnesses were taken into custody during the trial. Judge Parker distinguished these two cases by saying: "These cases establish that if a witness is taken into custody during the course of the trial under such circumstances as to lead the jury to the conclusion that the judge was of the opinion that the witness was guilty of perjury, such action constitutes prejudicial error as being an expression of opinion by the court as to the credibility of the witness." *State v. Barnes, supra* at 449. The reasoning of *Simpson* and *McNeill* does not support defendant's argument.

The analogy between the *Barnes* case and the case before us is a strong one. In both cases the record indicated that the defendants were taken into custody outside the presence of the jury. Judge Parker comments that "[i]t is not unusual for defendants in criminal cases to be in custody while they are being tried. It is not even clearly evident from the present

record that the jury was ever aware that appellants had been placed in custody. Certainly nothing in the record justifiably supports the conclusion that the jury heard or observed anything from which they could gain the impression that the trial judge was indicating any opinion as to the guilt of the appellants.

"It should also be noted that the appellants elected not to take the stand. Therefore no question as to their credibility was presented. It is recognized that the court has inherent power to assure itself of the presence of the accused during the course of the trial. For this purpose the trial judge has discretion to direct that an accused previously free under bond be taken into custody during the course of the trial. *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39. The only limitation is that this must not be done in such manner or under such circumstances as to convey to the jury the impression that the court is expressing an opinion as to the probable guilt of the accused or as to his credibility if he becomes a witness. Nothing in the record would indicate that this occurred during the trial here under review." *Id.* at 449-50, 167 S.E. 2d at 78-79. The *Barnes* case posed the same question as the one raised here and the disposition of that case is controlling here. This assignment of error is overruled.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. PEGGY STEELE

No. 7326SC128

(Filed 9 May 1973)

1. Searches and Seizures § 3— error in affidavit — sufficiency of affidavit to support warrant

Statement in an affidavit concerning defendant's prior narcotics conviction was error because it was based on erroneous information though the error was not known to the officer making the affidavit; however, the error was immaterial because the trial court found that the affidavit was nevertheless sufficient on its face to support a finding of probable cause for the issuance of the search warrant for narcotics, and evidence obtained as a result of the search under the warrant was properly admitted.

2. **Searches and Seizures § 4; Criminal Law § 175— legality of entry — review of findings on appeal**

There was competent evidence to support the trial court's finding that police legally entered defendant's residence after knocking and identifying themselves and searched the apartment for narcotics, and this finding is not disturbed on appeal.

3. **Criminal Law § 84— search under warrant — glassine bags — contents not analyzed — admissibility of bags**

Defendant was in no position to object to the admission into evidence of nine of the ten glassine bags found on her person where the evidence tended to show that all ten bags were wrapped together when removed from defendant, that a chemical analysis was made on only one of the bags and that bag was found to contain heroin and that a visual examination only was made of the contents of the other bags since all the bags were competent to show what the search of defendant's premises produced and since the evidence of the contents of the one tested glassine bag was sufficient for a conviction of possession of a quantity of narcotic drugs.

APPEAL from *Grist, Judge,* at the 17 July 1972 Schedule "C" Session of Superior Court held in MECKLENBURG County.

Defendant was charged in two indictments with (1) unlawful possession of a quantity of narcotic drugs (heroin) and (2) unlawful possession of a hypodermic syringe and needle.

The State's evidence tended to show the following. On 7 September 1971, based on information from a confidential informant, Officer G. W. Nesbitt of the Charlotte Police Department obtained a search warrant to search the premises at Apartment 97, Fairview Homes, 1216 Oaklawn Avenue in Charlotte, N. C. for narcotic drugs. At 3:00 a.m. on that date, Officer Nesbitt, accompanied by several other members of the Charlotte Police Department, proceeded to this residence. Officer Nesbitt knocked on the front door, defendant answered the door, partially opened it, and asked who was there. Officer Nesbitt identified himself as a policeman, whereupon defendant turned and ran up the stairs to the second floor. Officer Nesbitt followed defendant up the stairs to a bedroom where he saw defendant put in or remove something from her bra. Officer Nesbitt then read the search warrant and proceeded to search the apartment. A search of the apartment produced no narcotic drugs, but did produce a hypodermic syringe and needle. Defendant was arrested and taken to the Mecklenburg County Jail. At the jail, defendant was searched by a matron and a quantity of powder wrapped in plastic was found in her bra. The plastic package

taken from defendant contained 10 glassine envelopes. A chemical analysis of one of the envelopes revealed that it contained heroin.

Defendant's evidence tended to show the following: that she was living at her mother's apartment on Oaklawn Avenue; that on 7 September 1971 at 3:00 a.m., she had just returned home from visiting some nightclubs with two friends; that she heard noise from the rear of the apartment and heard one of her friends scream; that she ran up the stairs and when she turned around an officer was facing her; that the police had broken down the rear door to the apartment, and that suddenly there were officers upstairs and down; that no one displayed or read a search warrant to her; that one of the officers conducted a search of her person to which both she and her mother objected; that she was placed under arrest when one of the officers purported to find hypodermic syringes; that she had a package wrapped in smooth foil in her bra, but that package was not the same as the one introduced by the State; that she had found a package under a bush and put it in her bra, but that she did not know its contents; that it cost $35 to replace the rear door to the apartment; that defendant had not used drugs for 2 years.

At the conclusion of the State's evidence, the trial court allowed defendant's motion for judgment as of nonsuit as to the charge of possession of a hypodermic syringe and needle. Upon a verdict of guilty to the charge of unlawful possession of a quantity of narcotic drugs, defendant was sentenced to 2-3 years imprisonment. Defendant appealed.

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

Peter H. Gerns for defendant.

BROCK, Judge.

[1] Defendant excepts to the trial court's refusal to suppress the evidence obtained as a result of the search of the premises at 1216 Oaklawn Avenue. Defendant contends that the search warrant was invalid because it was based on an affidavit by Officer Nesbitt which contained erroneous information, *i.e.*, that defendant had previously been convicted of a narcotics violation.

When this issue was raised at trial a *voir dire* was conducted. The trial judge found as a fact that the information in Officer Nesbitt's affidavit concerning defendant's prior narcotics conviction was error because it was based on erroneous information, and that this error was not known to the officer. However, this error is immaterial because the trial court found that Officer Nesbitt's affidavit was nevertheless sufficient on its face to support a finding of probable cause for the issuance of the search warrant. *See State v. Moye,* 12 N.C. App. 178, 182 S.E. 2d 814. The search warrant and affidavit are not a part of the record before us. We, therefore, accept the findings of the trial court with respect thereto. This assignment of error is overruled.

[2] Defendant excepts to the trial court's findings of fact and conclusion of law on *voir dire* that the police had entered the defendant's apartment legally, and also to the trial court's failure to suppress the evidence found as a result of the search following the entry. The court's findings of fact are binding on this Court if supported by any competent evidence, even though there is evidence to the contrary. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.,* 279 N.C. 313, 182 S.E. 2d 373. The trial court conducted a *voir dire* on this issue and there was competent evidence to support its findings of fact and conclusion of law. Evidence obtained from the legal entry and search of the apartment was properly admissible at trial. This assignment of error is overruled.

[3] Defendant excepts to the introduction into evidence of nine of the ten glassine bags found on defendant. A chemical analysis was made on only one of the glassine bags, and that bag was found to contain heroin. The chemist who conducted the test testified that he made a visual examination of the substance in each glassine bag, but made no chemical analysis of the contents of more than one of the bags. Nevertheless, the ten glassine bags were wrapped together when taken from defendant's person. They were competent in evidence to show what the search produced and to corroborate the officer's testimony. The evidence of the contents of the one tested glassine bag was sufficient for a conviction of possession of a quantity of narcotic drugs. This assignment of error is overruled.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. ARCHIE PINKHAM

No. 733SC274

(Filed 9 May 1973)

Criminal Law § 99— court's interrogation of medical witness — expression of opinion

In this prosecution for crime against nature, the trial court expressed an opinion in violation of G.S. 1-180 when he interrogated defendant's medical witness concerning the witness's opinion that the alleged victim had not been sexually violated per anum on the day of the alleged crime.

APPEAL by defendant from *Perry Martin, Judge,* at the 4 December 1972 Session of CARTERET Superior Court.

By indictment proper in form defendant was charged with the crime against nature on the person of Thomas Crooms, a ten year old boy. Principal evidence for the State was provided by Crooms who testified that he was penetrated by defendant twice *per anum* and once *per os.* Defendant was found guilty as charged, and from judgment imposing prison sentence of not less than seven nor more than ten years, he appealed.

Attorney General Robert Morgan by William F. O'Connell, Assistant Attorney General, and Robert R. Reilly, Associate Attorney, for the State.

Bennett and McConkey, P.A., by John P. Simpson for defendant appellant.

BRITT, Judge.

Defendant assigns as error the court's extensive questioning of defendant's witness, contending that the court violated the provisions of G.S. 1-180. The assignment of error is well taken.

The evidence showed that the alleged offense occurred around 3:00 p.m. and that Crooms was carried to the hospital that evening where he was examined around 10:30 p.m. by Dr. Van dooren, a urologist. The State did not call Dr. Van dooren as a witness but defendant did.

After describing his examination of Crooms, the witness stated that in his opinion "Thomas Crooms was not sexually

violated per anum." Following a brief cross-examination of Dr. Van dooren by the solicitor, the record reveals the following:

"(COURT: You say that in Defendant's Exhibit A, that the boy was brought in for examination with reference to sexual molesting, where did you get information from?

A. He was brought in by police who said that he was suspected by that police officer of having been sexually molested. His mother was with him and she made the same statement.

COURT: Well, you have on your medical report that you have that his penis was intact. That wouldn't have anything to do with crime against nature, whether his penis was intact, would it?

A. Well, when I examine a patient, I make a thorough examination altogether.

COURT: Well, did you make an internal examination of his rectum or colon?

A. Well, I examined his rectum and I examined his anus.

COURT: How did you examine his rectum?

A. By spreading his buttocks and looking and by inserting my finger in his rectum. There was no evidence of blood or anything.

COURT: Well, there wasn't any evidence of blood either after you took your finger out, was there?

A. No, sir.

COURT: His rectum was large enough for you to put your finger in, wasn't it?

A. Yes, sir.

COURT: Did he give any outcry?

A. He shuddered, he didn't like it.

COURT: He didn't cry out or holler?

A. No, I don't have a big finger either.

COURT: Well, now, since you say you examined him internally or in that manner, how do you arrive at your opinion, if you have an opinion, that his rectum had not been entered earlier that day?

A. I didn't say his rectum. I said his anus had not been.

COURT: How do you arrive at that opinion?

A. If that man is anywhere normal and he would molest a child his age he would tear his anus.

COURT: How did you examine his anus?

A. By spreading.

COURT: And doing what?

A. And looking, and inserting my finger. There was no blood.

COURT: You were able to insert your finger into his anus?

A. Yes, sir.

COURT: Was there any bleeding after you did this?

A. No, sir.

COURT: Then how is it that you can say that it is your opinion that he was not, you could enter his anus with your finger and you have an opinion that his anus had not been entered earlier that day with something else?

A. Because a man's penis is a lot bigger than his finger.

COURT: How do you know that?

A. Because I have seen enough of them.

COURT: Do you have an opinion as to how large an object his anus would take without tearing or bleeding?

A. A boy this age?

COURT: The boy Thomas Crooms, yes.

A. Well, by the way this boy acted, it couldn't be anything much bigger than the circumference of the finger.

I have seen quite a few molested boys in my practice and they usually tear them up, because usually a child molester is not a very gentle individual to begin with.

COURT: But, this boy appeared to be very calm to you?

A. Yes, he was.

COURT: So, really, Dr., you are not professionally in a position to say either way, whether or not this boy had been entered or partially entered, either in his anus or his mouth?

A. I cannot say about his mouth, about his anus I can.

COURT: All right, do you gentlemen have any further questions?)"

It is well established in this jurisdiction that in the trial of criminal actions the court may ask a witness questions designed to obtain a proper understanding and clarification of the witness' testimony or to bring out some fact overlooked, but the court may not ask defendant or a witness questions tending to impeach him or to cast doubt upon his credibility. 2 Strong, N. C. Index 2d, Criminal Law, § 99, p. 634; *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971); *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24 (1968); *State v. Lowery*, 12 N.C. App. 538, 183 S.E. 2d 797 (1971). We hold that in the instant case, the court's questions tended to impeach defendant's witness or to cast doubt on his credibility, entitling defendant to a new trial. It is so ordered.

New trial.

Judges BROCK and PARKER concur.

STATE OF NORTH CAROLINA v. DAN FOUST

No. 7315SC289

(Filed 9 May 1973)

1. Arrest and Bail § 3; Constitutional Law § 30— arrest without warrant

Defendant was not entitled to quashal of the warrant charging him with resisting arrest where he was arrested without a warrant

and was not taken before a magistrate as provided by G.S. 15-46, since that statute does not prescribe mandatory procedures affecting the validity of a trial.

2. **Arrest and Bail § 6; Disorderly Conduct § 2— resisting arrest — public drunkenness — sufficiency of evidence**

In a prosecution for public drunkenness and resisting arrest evidence was sufficient to withstand nonsuit where it tended to show that defendant was a passenger in a car whose driver was arrested for drunken driving, defendant who appeared to be drunk himself got out of the car and cursed at police, defendant was then arrested for public drunkenness but he refused to get into the police car, could not be controlled and spat in policeman's face.

APPEAL by defendant from *Cooper, Judge,* 16 October 1972 Criminal Session, ALAMANCE Superior Court.

In one warrant defendant was charged with (1) public drunkenness and (2) illegal possession of tax-paid whiskey. In a second warrant he was charged with resisting arrest. The alleged offenses occurred on 5 September 1971. In district court defendant was acquitted of the illegal possession of whiskey charge but was found guilty of the other charges. From judgment imposed, he appealed to superior court.

In superior court the public drunkenness charge and the resisting arrest charge were consolidated for trial and a jury returned a verdict of guilty as to both charges. Thereafter, on motion of defendant, judgment was arrested as to the public drunkenness charge and it was dismissed "by reason of chronic alcoholism." From judgment imposing suspended sentence in the resisting arrest case, defendant appealed.

Attorney General Robert Morgan by C. Diederich Heidgerd, Associate Attorney, for the State.

Walter G. Green for defendant appellant.

BRITT, Judge.

[1] In his first assignment of error, defendant contends the court erred in not allowing his motion to quash the warrant charging him with resisting arrest for the reason that he was arrested without a warrant and was not taken before a magistrate as provided by G.S. 15-46. The contention is without merit. In *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970), our Supreme Court held that G.S. 15-46 and G.S. 15-47 do not prescribe mandatory procedures affecting the validity of a trial.

See also *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384 (1967) and *State v. Able,* 13 N.C. App. 365, 185 S.E. 2d 422 (1971). The assignment of error is overruled.

[2] Defendant assigns as error the failure of the court to grant his motions for nonsuit. The evidence, viewed in the light most favorable to the State, tended to show: Around 5:15 p.m. on Sunday, 5 September 1971, Graham police officers observed an automobile being driven in an unusual manner on a public street in the City of Graham. They stopped the car and the operator, who appeared to be drunk, was arrested. While the operator was being placed under arrest, defendant, a passenger in the car, got out of the car with the smell of alcohol on his breath, cursed at police, staggered, "foamed at the mouth" and spoke with a "thick tongue." Defendant was told that he was under arrest for public drunkenness after which he continued to curse and refused to get into the police car. The initial arresting officer had trouble controlling the defendant and another policeman assisted. Defendant pushed the assisting policeman and spat in his face.

A peace officer may arrest without a warrant when the person to be arrested has committed a misdemeanor in the presence of the officer or when the peace officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor in his presence. G.S. 15-41(1). *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972); *State v. Fenner,* 263 N.C. 694, 140 S.E. 2d 349 (1965). Under the evidence in the instant case, the questions (1) whether defendant committed a misdemeanor in the presence of the officer, or the officer had reasonable grounds to believe he did, and (2) whether defendant resisted arrest were for the jury. The assignment of error is overruled.

We have carefully considered the numerous other assignments of error brought forward and argued in defendant's brief but finding them without merit, they all are overruled.

No error.

Judges BROCK and PARKER concur.

STATE OF NORTH CAROLINA v. COLUMBUS SHARPE

No. 737SC173

(Filed 9 May 1973)

1. **Criminal Law § 99— questioning of defendant by trial court — prejudicial error**

In this homicide prosecution wherein defendant contended he shot deceased in self-defense while being assaulted by deceased, his brother and some of his friends, the trial court committed prejudicial error in questioning defendant as to whether there were about as many people with him as there were with deceased and his brother.

2. **Homicide § 28— self-defense — place of business — instructions**

In this homicide prosecution wherein defendant claimed self-defense, the trial court erred in instructing the jury that "a person's place of business is considerably different from his home. So if you have heard some law or know of some law about the right to protect your home as a castle, you will disregard that, as that does not apply as far as the operation of a business is concerned."

APPEAL by defendant from *Martin (Perry), Judge,* 7 August 1972 Session of Superior Court held in EDGECOMBE County.

Defendant was placed on trial for murder in the second degree and was convicted of involuntary manslaughter as a result of the fatal shooting of one Willie Ray Jones. Judgment imposing a prison sentence of ten years was entered.

Attorney General Robert Morgan by Charles M. Hensey, Assistant Attorney General for the State.

Joel K. Bourne for defendant appellant.

VAUGHN, Judge.

Defendant's assignments of error based on the denial of his motions for nonsuit are without merit.

Defendant brings forward numerous other assignments of error. We will discuss only the two we consider so prejudicial as to require a new trial.

[1] Defendant operated a place called Willoughby's. It was described as a place to have a good time. There was a pool table and a piccolo. The State offered evidence which would have permitted a verdict of guilty of murder in the second degree, manslaughter or involuntary manslaughter. The defendant offered evidence, which he contended, tended to show that he killed in

self-defense. The credibility of the evidence is, of course, for the jury. Defendant offered evidence to the effect that, during an interval while he was away from his place of business, deceased had abused the person left in charge of the business, forced his way behind the counter and taken a quarter from the cash register. Defendant returned to the premises and went behind the counter. Robert, a brother of deceased, began to curse and attempted to get behind the counter to defendant. Defendant was scared. Robert told defendant he was going to kill him just as soon as he could get back there. Deceased said "damn right." Deceased had a pool stick in his hand. Friends of deceased were with them. Defendant kept telling them to get back. Defendant was afraid. He picked up his rifle. Deceased acted like he was trying to hit defendant with the pool stick. There were others with sticks. "They" pushed a screen back on defendant and "I fell back and started shooting." Defendant shot, but did not kill, Robert and then shot deceased. After cross-examination by the solicitor, the court undertook to cross-examine defendant. The court's interrogation takes up several pages of the record on appeal. Although it may well be that some of the court's questions were for legitimate clarification, the prejudice to defendant and the error in the following exchange between the court and the defendant is apparent.

> "Q. So after you shot Robert you just turned around to your left and shot Willie?
>
> A. No. He come up under there with a pool stick and that's when I must have shot him. I didn't have any way to get out and I was scared and didn't know what to do. I knew I couldn't fight five or six guys in there and they were going to kill me for nothing.
>
> Q. Well, let's see. Jimmy Taylor, William Taylor, Linwood Taylor, Terry Joyner and J. C. Horne, were in there with you, weren't they?
>
> A. Yes.
>
> COURT: So there were just about as many people with you as there were with the Joneses, weren't there?
>
> A. Just about."

[2] During the course of his charge to the jury the court, without further amplification, injected the following.

"The defendant, Columbus Sharpe, has testified. He says that he is 29 years of age, that he is the operator of this store; that he rents it or leases it from someone, and that he has the right to be upon the premises. But the court charges you that a person's place of business is considerably different from his home. So if you have heard some law or know of some law about the right to protect your home as a castle, you will disregard that, as that does not apply as far as the operation of a business is concerned. . . . "

Although His Honor's meaning is not clear to us, the possibility of prejudice to the defendant from this remark, absent additional and proper instructions as to defendant's duty, or lack of duty, to retreat cannot be ignored. Moreover, "no duty to retreat devolves upon a person who is assailed, without any fault of his own, *in his home or place of business or on his premises.*" *State v. Lee,* 258 N.C. 44, 127 S.E. 2d 774. (Emphasis supplied.) See also *State v. Pennell,* 224 N.C. 622, 31 S.E. 2d 857. *State v. Grant,* 228 N.C. 522, 46 S.E. 2d 318.

New trial.

Judges CAMPBELL and HEDRICK concur.

KATIE MAYO SMITH v. BARBARA ANN ELKS BY HER GUARDIAN AD LITEM, MARY R. ELKS, AND MARY R. ELKS, INDIVIDUALLY

No. 732SC135

(Filed 9 May 1973)

Automobiles § 62— striking of pedestrian — absence of negligence

In this action to recover for personal injuries received by plaintiff pedestrian when she was struck by defendants' automobile while attempting to cross a highway, plaintiff's evidence was insufficient to raise an inference that the accident was proximately caused by the negligence of defendant driver.

APPEAL by plaintiff from *Tillery, Judge,* 30 October 1972 Session of Superior Court held in BEAUFORT County.

This is a civil action wherein plaintiff, Katie Mayo Smith, seeks to recover of the minor defendant, Barbara Ann Elks through her guardian *ad litem* Mary R. Elks, and from defend-

ant Mary R. Elks individually, damages for personal injuries suffered by plaintiff, a pedestrian, when she was struck by a 1970 Dodge automobile driven by the minor defendant.

The material evidence offered by plaintiff tended to show the following:

Plaintiff's home is located on the north side of highway 264 in Beaufort County. Highway 264 is a paved highway running in an east-west direction, between the town of Chocowinity in the east and the town of Grimesland in the west. On 12 July 1971, plaintiff, age 61, left the home of her sister-in-law located on a dirt lane off the south side of highway 264 several hundred feet east of plaintiff's residence and began walking home. After reaching highway 264, plaintiff walked in a westerly direction on the south shoulder of the highway, facing the eastbound traffic. The day was clear and sunny and there were no obstructions to visibility on the shoulder of the road. In the vicinity of the accident, the road was straight for a distance of about one-half mile in each direction. When plaintiff decided to cross to the north side of highway 264, she stopped and looked both east and west. Plaintiff stood on the shoulder of the road two or three minutes allowing oncoming traffic to clear. Plaintiff saw an oil truck some distance down the road but saw no other vehicles as she began crossing. When plaintiff reached "about the middle of the highway," she was struck by the left front portion of the automobile owned by defendant Mary R. Elks and driven by the minor defendant Barbara Ann Elks. Plaintiff testified, "I didn't see Barbara's car. She did not blow her horn. She did not give me no warning she was coming. Like I told you, I did not see her."

Plaintiff's daughter, Edna Teal, testified that after the accident, the minor defendant

> " . . . said something about my mother at the edge of the highway before she started across. She said she saw my mother walk on up and stop beside the road and then she said my mother took a step forward and stepped up on the concrete like she was going across and then she stepped back and she said, therefore, she thought she won't going to cross the road.
>
> She said he kept her same speed."

Plaintiff's son-in-law, Vernon Teal, testified:

"I had a conversation in the presence of my wife with the defendant, Barbara Elks.

Well, she said that my wife's mother was walking side the highway, on the edge of the highway, or near the edge, and said her mother took a step forward and looked, then she took a step back, and she kept her same speed because she wasn't looking for her to cross at that time."

As a result of the accident, plaintiff was seriously and permanently injured. She was hospitalized for a period of 66 days and incurred medical expenses totaling approximately $6,500.00. Plaintiff continues to suffer pain.

At the close of plaintiff's evidence, defendants' motion for a directed verdict was allowed, and from a judgment directing a verdict for defendants, plaintiff appealed.

LeRoy Scott for plaintiff appellant.

Edward N. Rodman for defendant appellees.

HEDRICK, Judge.

Plaintiff contends the court erred in allowing defendants' motion for a directed verdict. We do not agree.

When the evidence is considered in the light most favorable to the plaintiff, it is insufficient to raise an inference that the accident resulting in the injuries to the plaintiff was proximately caused by the negligence of the minor defendant in the operation of the automobile owned by defendant Mary R. Elks.

The judgment is

Affirmed.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. ULYSSES PERRY

No. 738SC370

(Filed 9 May 1973)

Assault and Battery § 5; Robbery § 1— charge of armed robbery — guilty of assault with deadly weapon — judgment arrested

Where defendant was charged with armed robbery but found guilty of assault with a deadly weapon inflicting serious bodily injury, the trial court should have granted his motion in arrest of judgment since assault with a deadly weapon inflicting serious injury is not a lesser included offense of armed robbery.

APPEAL by defendant from *Webb, Judge,* 28 November 1972 Session of Superior Court held in WAYNE County.

Defendant, Ulysses Perry, was charged in an indictment, proper in form, with the armed robbery of Glenore Polk Waters on 25 July 1971.

The jury found defendant guilty of assault with a deadly weapon inflicting serious bodily injury.

From a judgment imposing a prison sentence of from three to five years, defendant appealed.

Attorney General Robert Morgan and Associate Attorney Russell G. Sherrill III for the State.

J. Faison Thomson, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of his motion in arrest of judgment.

In *State v. Stepney,* 280 N.C. 306, 318, 185 S.E. 2d 844, 852 (1972), Justice Huskins speaking for the North Carolina Supreme Court said:

> "An assault with a deadly weapon inflicting serious injury is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of the armed robbery charge. It is only when *all* essentials of the lesser offense are included among the essentials of the greater offense that the law merges them into one and treats the less serious charge as a 'lesser included offense'."

See also *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971).

Therefore, since a defendant may not lawfully be convicted of an offense not embraced within the offense charged in the bill of indictment, *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967), the judgment entered on the verdict in the present case must be arrested.

If the State is so advised, it may proceed against the defendant on a proper bill of indictment charging him with assault with a deadly weapon inflicting serious bodily injury.

Judgment arrested.

Judges BROCK and PARKER concur.

STATE OF NORTH CAROLINA v. RONALD GLENN CREDLE

No. 732SC148

(Filed 9 May 1973)

Homicide § 30— instructions on involuntary manslaughter not required

The trial court in a homicide case did not err in failing to instruct the jury that involuntary manslaughter was one of their possible verdicts where all the evidence tended to show that defendant took a pistol from his back pocket and shot the victim twice after defendant, a customer, had gotten into a dispute with the victim, a storekeeper, during the course of which the victim ordered defendant out of his store, advanced upon defendant, and hit him with a billy club, there being no evidence suggesting that defendant fired the two shots involuntarily or by reason of culpable negligence.

APPEAL by defendant from *Tillery, Judge,* 21 August 1972 Session of Superior Court held in BEAUFORT County.

Defendant was indicted for first-degree murder. At the close of the State's evidence the court allowed motion for nonsuit as to the charge of first-degree murder. The case was submitted to the jury on charges of second-degree murder and voluntary manslaughter. The jury found defendant guilty of voluntary manslaughter. From sentence imposed, defendant appealed.

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

John H. Harmon for defendant appellant.

PARKER, Judge.

The sole assignment of error is directed to the court's failure to instruct the jury that involuntary manslaughter was one of their possible verdicts. In this there was no error. All of the evidence showed that defendant took a pistol from his back pocket and shot his victim twice after the defendant, a customer, had gotten into a dispute with the victim, a storekeeper, during the course of which the victim ordered defendant out of his store, advanced upon defendant, and hit him with a "billy club." Defendant testified:

> "John Alva Smith hit me with the billy club before I shot him the first time. After I shot him the first time, I backed off, then he hit me again. And I shot him the second time after he hit me. I then turned around and ran, because I was scared."

None of the evidence suggests that the two shots fired by defendant were fired involuntarily or by reason of culpable negligence. Involuntary manslaughter was therefore not involved. *State v. Johnson,* 8 N.C. App. 579, 174 S.E. 2d 626. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545. Here, there was no such evidence.

No error.

Judges BROCK and MORRIS concur.

ALAN PARKER, EXECUTOR OF THE ESTATE OF HERBERT E. MURPHY, DECEASED v. JENNIE M. PARKER AND HAZEL M. HILTON

No. 733SC318

(Filed 9 May 1973)

Appeal and Error § 44— failure to file brief — dismissal of appeal

When an appellant fails to file a brief, exceptions in the record will be taken as abandoned and the appeal may be dismissed. Court of Appeals Rules 28 and 48.

APPEAL by defendant, Jennie M. Parker, from *Blount, Judge,* 30 October 1972 Session of Superior Court held in PITT County.

Civil action for declaratory judgment submitted upon stipulated facts. From judgment entered, defendant Jennie M. Parker gave notice of appeal.

Harrell & Mattox by Fred T. Mattox for plaintiff.

James, Hite & Cavendish by M. E. Cavendish for defendant appellant Jennie M. Parker.

PARKER, Judge.

No briefs have been filed. When an appellant fails to file a brief as required by the Rules of this Court, exceptions in the record will be taken as abandoned and the appeal may be dismissed. Rules 28 and 48 of the Rules of Practice in the Court of Appeals.

Appeal dismissed.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. HENRY WILLIAMS

No. 737SC383

(Filed 9 May 1973)

Constitutional Law § 32— failure to appoint counsel — written waiver of counsel

The trial court did not err in failing to appoint counsel to represent defendant in his preliminary hearing and trial for felonious larceny where defendant in writing waived his right to counsel prior to his preliminary hearing and again before trial, and the court found that defendant acted with full awareness of his right to counsel and the consequences of waiver thereof.

APPEAL by defendant from *Martin (Perry), Judge,* 11 December 1972 Session of Superior Court held in EDGECOMBE County.

Defendant was convicted of the felony of larceny. Prior to preliminary hearing and again before trial he, in writing, waived his right to counsel. After judgment imposing a prison sentence was entered, defendant gave notice of appeal. Upon defendant's affidavit of indigency, Judge James, on 22 January 1973, appointed counsel to perfect appeal.

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

Joel K. Bourne for defendant appellant.

VAUGHN, Judge.

Defendant contends that, despite his waiver, the court should have appointed counsel to represent him at the preliminary hearing and at trial. This argument is without merit. A defendant may waive counsel. In the present case defendant's waivers were in writing and fully support the court's findings of record to the effect that defendant acted with full awareness of his right to counsel and the consequences of waiver thereof.

Defendant's argument that the prison sentence of not less than eight nor more than ten years constitutes cruel and unusual punishment in violation of the Constitution of North Carolina

is without merit. All of defendant's assignments of error have been considered and we find no prejudicial error.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. GEORGE LEWIS GRIFFIN

No. 732SC54

(Filed 9 May 1973)

ON *certiorari* to review the order of *Cohoon, Judge,* at the 6 March 1972 Session of Superior Court held in MARTIN County.

Defendant was charged in an indictment with felonious larceny of five white hogs having a value in excess of two hundred dollars.

Upon a plea of not guilty, the State offered evidence tending to show the following. On 14 February 1972, William H. Revels had 56 hogs on the Purvis farm, a farm which he manages about one mile from Everetts, N. C. On 16 February 1972, Revels checked his hogs and discovered that five white hogs weighing approximately 200 pounds each were missing. Based on an average weight of 200 pounds each, the value of these hogs was approximately $275. Revels testified that on 14 February 1972 he had seen a truck in the vicinity of his farm with two men in it, and that he later saw the same truck in Everetts.

John Locke testified that on 14 February 1972 he had given defendant a ride to Williamston. During this ride defendant asked Locke whether he had a truck. Defendant told Locke that he had five hogs he needed to move, and that he would pay for help and the use of a truck in moving them. Locke borrowed his brother-in-law's truck, and, at defendant's direction, drove out to a barn (later identified as being on the Purvis property where Revels raised his hogs) at about 4:30 p.m. on 14 February 1972. Locke stopped the truck near the barn for two or three minutes. Another truck approached and defendant told Locke to turn around and drive back to Everetts, where they could get another man to help them load the hogs. At about 7:30

p.m. on 14 February 1972, Locke drove defendant and one Willie Pugh back out to the barn on the Purvis farm and helped them load five hogs weighing approximately 200 pounds each into the truck. They stored the hogs overnight in a burned-out old house, and on 15 February 1972 Locke sold the hogs for defendant at a hog market near highway 258. The hogs sold for $237, and defendant gave Locke $100 of this money for his assistance. Locke was also charged with larceny for his part in the described events.

Defendant presented evidence which tended to show the following: that defendant had ridden to Williamston with Locke on 14 February 1972; that he did not go to the Purvis farm and help load the hogs; that he did not help Locke and Pugh put hogs in a house on the night of 14 February 1972; that he never gave Locke any money for the sale of hogs and never received any money from the hog sale.

From a jury verdict of guilty of felonious larceny and a sentence of 7-10 years, defendant appealed.

Attorney General Morgan, by Deputy Attorney General Vanore, for the State.

Milton E. Moore for defendant.

BROCK, Judge.

We have carefully reviewed the record and find no prejudicial error. Defendant was charged in an indictment, proper in form; he was represented by competent counsel; and he was given an opportunity to present evidence and cross-examine witnesses. The trial court's charge to the jury fairly presented the case, and the sentence imposed is within the statutory limits.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. MILTON HAROLD STOKES

No. 732SC111

(Filed 9 May 1973)

APPEAL by defendant from *Tillery, Judge,* at the 11 September 1972 Session of Superior Court held in BEAUFORT County.

Defendant was charged in an indictment with (1) felonious breaking and entering; (2) felonious larceny; and (3) felonious receiving.

The evidence for the State tended to show the following: that on the night of 4 March 1972 at about 9:30 p.m., defendant and two other persons went to Talley Implement Company in Washington, N. C.; that defendant and one of the persons accompanying him cut the lock off the rear door of Talley Implement Company with bolt cutters; that defendant and this accomplice took three mini-bikes, two Hondas and a "Sensation" model, from the premises; that the mini-bikes were taken to defendant's residence near Chocowinity, N. C., and hidden in a barn; that later defendant and another person rented a U-Haul-It Truck and transported two of the bikes to New York; that two of the bikes were recovered from New York and that the third mini-bike, the "Sensation" model, was recovered from a barn on the property where defendant lives.

Defendant's evidence tended to show the following: that on 4 March 1972 defendant did not go to Talley Implement Company; that he did not break into or steal anything from Talley Implement Company; that he knows nothing about the stolen mini-bikes; that he did buy a "Sensation" model mini-bike for $30 and stored it in a barn near his house; that he did rent a U-Haul-It truck as an accommodation to a friend who was not old enough to rent one; that the purpose of renting the truck was to move his friend's sister to a new residence; that he helped his friend pack the truck, and went on that same night to New York, leaving the truck in North Carolina.

The jury returned a verdict of guilty of felonious breaking and entering and of felonious larceny. Defendant was sentenced to two consecutive terms of 6-8 years.

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

Thomas E. Archie for defendant.

BROCK, Judge.

We have examined defendant's assignments of error and find them to be without merit. An examination of the record reveals no prejudicial error. Defendant was charged in an indictment, which was proper in form; he was represented by competent counsel; he was found guilty by a jury after a fair trial and adequate instructions by the trial court; and the sentences imposed are within the statutory limits.

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

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. GENNELL WAYNE TOLER

No. 732SC283

(Filed 9 May 1973)

ON *certiorari* to review judgment of *Cohoon, Judge,* entered at the 13 March 1972 Session of Superior Court held in BEAUFORT County.

Defendant was charged with operating a motor vehicle upon a public highway while his operator's license was permanently revoked. He was convicted in the District Court and was sentenced for a term of twelve months. He appealed to the Superior Court, where he was tried de novo, was found guilty by the jury, and was sentenced for the term of eighteen months. The Court of Appeals allowed his petition for writ of certiorari to perfect a late appeal.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

T. R. Thompson, Jr., for defendant appellant.

PARKER, Judge.

We have carefully examined all assignments of error and have considered all questions discussed in defendant's brief and find no prejudicial error in defendant's trial or in the judgment imposed. There was ample evidence to sustain the verdict. The sentence imposed was within statutory limits. G.S. 20-28; G.S. 14-3. It was permissible for the Superior Court to impose a sentence in excess of the one imposed in the District Court. *State v. Tuggle,* 17 N.C. App. 329, 194 S.E. 2d 50.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. ACIE WEST

No. 738SC371

(Filed 9 May 1973)

APPEAL by defendant from *Webb, Judge,* 27 November 1972 Session of Superior Court held in WAYNE County.

Attorney General Robert Morgan by Ralf F. Haskell, Associate Attorney General, for the State.

J. Faison Thomson, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant entered pleas of guilty to bills of indictment charging two counts of felonious larceny and two counts of felonious breaking and entering. After appropriate inquiry, the court adjudged that the pleas were freely, understandingly and voluntarily entered. Judgments were entered imposing two concurrent prison sentences of ten years each which, in turn, were to run concurrently with a sentence then being served by defendant in the federal prison system. A five years sentence, to begin at the expiration of the ten years sentence, was also imposed. Defendant was represented at trial and on this appeal at the expense of the State. We have examined defendant's

assignments of error and find them to be without merit. The judgments from which defendant appealed are affirmed.

Affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. TYES MILLER

No. 738SC258

(Filed 9 May 1973)

APPEAL by defendant from *Webb, Judge,* 27 November 1972 Session of Superior Court held in WAYNE County.

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

J. Thomas Brown, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant's pleas of guilty to three misdemeanors were duly accepted by the court. Lawful sentences were then imposed. Defendant, at State expense, appealed. Court appointed counsel, with appropriate candor, admits that he can find no error but urges the court to examine the record for possible error. We have done so and find none.

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. TYRONE WISE

No. 733SC166

(Filed 9 May 1973)

APPEAL by defendant, Tyrone Wise, from *Blount, Judge,* 11 October 1972 Session of Superior Court held in CRAVEN County.

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

Robert G. Bowers for defendant appellant.

HEDRICK, Judge.

The only exception in the record is to the judgment. Such an exception presents the face of the record for review. The record affirmatively shows that the defendant, represented by privately employed counsel, freely, understandingly, and voluntarily entered a plea of *nolo contendere* to a bill of indictment, proper in form, charging him with feloniously assaulting Jim Smith with a deadly weapon, to wit: a hammer, with intent to kill, inflicting serious injury. The prison sentence of eight to ten years is within the limits prescribed by statute for the offense charged. The judgment is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

CENTENNIAL INSURANCE COMPANY v. HALEY TRANSFER AND STORAGE, INC.,

---

FEDERATED MUTUAL IMPLEMENT AND HARDWARE INSURANCE COMPANY v. HALEY TRANSFER AND STORAGE COMPANY, GREAT AMERICAN INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, CHEROKEE INSURANCE COMPANY AND GLOBE INDEMNITY COMPANY

No. 7318SC126

(Filed 23 May 1973)

1. Carriers § 10; Insurance § 78— goods in transit — shipper's insurance — insurer's right of subrogation

Even though a policy on goods in transit issued to the shipper provided that the insurance should not inure to the benefit of the carrier, the insurer did not waive its right of subrogation by payment of its obligation to the shipper.

2. Carriers § 10; Insurance § 78— goods in transit — shipper's insurance — insurer's subrogation right against carrier — benefit to carrier clause in bill of lading — qualifying clause in policy

Insurance carried by the shipper on goods destroyed by fire in the carrier's warehouse did not inure to the benefit of the carrier and thus defeat the insurer's subrogation rights against the carrier by reason of a provision in the bill of lading that any carrier liable on account of loss or damage to property in its possession shall have the benefit of any insurance on the property "so far as this shall not avoid the policies or contracts of insurance" where the shipper's policy provided that it should not inure to the benefit of the carrier or it would be null and void.

3. Carriers § 10; Insurance § 78— benefit of insurance to carrier clause in bill of lading — policy provision allowing acceptance of ordinary bills of lading — insurer's right of subrogation

Although a bill of lading for goods in transit contained a benefit of insurance to carrier clause, the right of the shipper's insurer to subrogation against the carrier for loss of the goods was not barred by a provision of the policy granting the shipper the privilege of accepting ordinary bills of lading from the carrier but prohibiting the shipper from entering into any special agreement releasing the carrier from its common law or statutory liability.

4. Carriers § 10— goods in warehouse not "stopped or held in transit" — liability of carrier for damage

Goods destroyed by fire in the carrier's warehouse were not "stopped or held in transit" at the request of the shippers within the meaning of a bill of lading provision relieving the carrier of liability for damage to such goods except in cases of negligence by the carrier where the goods were being held by the carrier for consolidation with other goods and shipment to the purchaser and the shipper had not instructed the carrier to hold the goods and not deliver them because of insolvency of the purchaser or any other reason.

5. Carriers § 10— freight forwarder — liability for goods destroyed by arsonist

Defendant was acting in the capacity of a freight forwarder, not a warehouseman or freight consolidator, and thus had the liability of a carrier for goods destroyed by an arsonist's fire in its warehouse, where defendant's trucks pick up merchandise at the plants of shippers and take the merchandise to defendant's warehouse for consolidation with other goods and shipment to the consignees, defendant delivers the consolidated shipment to a rail carrier and signs the rail bill of lading, and defendant offers break-bulk and distributing services with respect to the consolidated shipments.

6. Carriers § 10— bill of lading — contract as carrier, not warehouseman — liability for loss of goods

Where defendant contracted as a carrier, not as a warehouseman or freight consolidator, in the bill of lading which it issued to a shipper, defendant is subject to the rule that a carrier is liable for

the loss of goods in transit in the absence of a special contract unless the carrier can show the loss was attributable to an act of God, the public enemy, the fault of the shipper, or inherent defect in the goods shipped.

APPEAL by Centennial Insurance Company and Federated Insurance Company from *Exum, Judge,* 11 September 1972 Session, Superior Court, GUILFORD County.

On and before 8 April 1968, Carolina Seating Company and its corporate affiliate, Selrite, Inc., and Dunton Hardware Company sustained a loss by reason of damage to goods being stored by Haley Transfer and Storage Company (hereinafter referred to as Haley). Haley's warehouse and the goods stored therein were destroyed by a fire set by an arsonist on 8 April 1968. Centennial Insurance Company (hereinafter referred to as Centennial) insured Carolina Seating Company and Selrite, Inc. under its manufacturer's transportation policy No. 235-010-494. Centennial paid its insured the entire reasonable value of its goods and brought suit as subrogee against Haley. Federated Mutual Implement and Hardware Insurance Company (hereinafter referred to as Federated) at the time of the loss, provided coverage to Dunton Hardware against risk of physical loss or damage to goods owned by it and in transit. It paid to Dunton the sum of $4,250, the value of the goods destroyed, and, as subrogee, brought suit against Haley including in its complaint an alternative claim against Haley's insurers, Great American Insurance Company, Security Insurance Company of Hartford, Cherokee Insurance Company, and Globe Indemnity Company. The claims against Haley's insurers are not involved in this appeal. The Federated case was consolidated with the Centennial case for trial. After hearing the evidence, the court entered findings of fact and conclusions of law. The court concluded in each case that Haley, "with regard to the goods in question, was not acting in the capacity of a common carrier, but was acting in the capacity of a warehouseman or 'freight consolidator' ", and as a warehouseman or freight consolidator, was not liable for the destruction of the goods by an arsonist, there being no evidence of any negligence on the part of Haley. Additionally, the court held that plaintiffs should be denied recovery by virtue of the terms of the bill of lading, in that: (a) the terms relieved the carrier or party in possession while the goods were "stopped or held in transit," and the court concluded that the goods were "stopped or held in transit" at the time of the loss, and (b) [as to Centennial] the terms provided

that any carrier or party liable on account of loss or damage to goods shall have the full benefit of any insurance that may have been effected upon said goods unless allowing such benefit would avoid the policy or contract of insurance. Each plaintiff had paid its insured and did not seek to avoid its coverage.

Each appellant excepted to each conclusion of law as not being supported by the findings of fact. In addition, Federated excepted to a finding of fact as will appear in the opinion.

Haworth, Riggs, Kuhn and Haworth, by John Haworth, for plaintiff appellant Centennial Insurance Company.

Craighill, Rendleman and Clarkson, P.A., by Hugh B. Campbell, Jr., for plaintiff appellant Federated Mutual Implement and Hardware Insurance Company.

Hudson, Petree, Stockton, Stockton and Robinson, by J. Robert Elster, and Schoch, Schoch, Schoch and Schoch, by Arch Schoch, for defendant appellee Haley Transfer and Storage, Inc.

MORRIS, Judge.

Some of the findings of fact pertinent to this appeal are identical in both judgments. Since they do not occupy the same numerical position in both orders, we have renumbered them for the purposes of this opinion.

(1) "At all times pertinent hereto, the defendant Haley operated a business in High Point, North Carolina, whereby Haley received shipments of goods at its warehouse in High Point, North Carolina, from furniture manufacturers; consolidated shipments of various shippers to common destinations so as to obtain decreased freight charges by shipping in carload lots; and provided storage for such shipments while carload shipments were being assembled. After a sufficient quantity of goods going to the same general destination were assembled and consolidated, Haley would deliver such shipment to a common carrier for delivery to destination. Haley made a charge for such services which was billed to and paid by the shipper or consignee as agreed upon as to each shipment when it was accepted by Haley. Haley did not base its charges upon uniform published rates."

(2) "In addition to the services described in Finding of Fact No. [1], Haley operated a pickup service for shippers in High Point, North Carolina, whereby Haley maintained trucks and employed drivers to pick up merchandise at the plants of various shippers and to deliver such merchandise to Haley's High Point warehouse for consolidation and shipment. Haley made a separate charge for such pick-up service which was billed and paid by the shipper or consignee and which was agreed upon as to each shipment."

(3) "At all times pertinent hereto, Haley had neither applied for nor had been granted I.C.C. authority to operate either as a common carrier or a freight forwarder."

(4) (a) "With respect to said goods, the defendant Haley, through its employees, had upon receipt of the goods, signed a 'short-form bill of lading' which contained the following language: 'The property described below, in apparent good order, except as noted (contents and conditions of contents of packages unknown), marked consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western and Illinois Freight Classifications in effect on the date hereof, if this is a rail or a rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.' "

(b) "The 'Official, Southern, Western and Illinois Freight Classification,' which is incorporated by reference into the bill of lading, contains the following pertinent provisions:

> 'Sec. 1 (a). The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.
>
> (b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or, the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes. . . .
>
> Sec. 2 (c). Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effectuated upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: provided, that the carrier reimburse the claimant for the premium paid thereon.'

A copy of the 'Official, Southern, Western, and Illinois Freight Classifications' provisions as contained in the Uni-

form Domestic Straight Bill of Lading and incorporated by reference in the aforesaid short form bill of lading appears in evidence as Exhibit 40."

(5) The merchandise was destroyed by a fire which occurred on 8 April 1968, and which was set by an arsonist who was later convicted. The fire occurred without negligence on the part of Haley.

(6) "Once goods had been consolidated by Haley into carload lots and delivered to a common carrier, Haley had no further participation in the ultimate delivery of said goods. Haley did not participate in the distribution of said goods at destination." (To this finding of fact Federated excepted. Centennial did not.)

As to Centennial, the court found that the property was picked up at Carolina Seating Company's plant at High Point by Haley's truck and driver and delivered to Haley's warehouse for consolidation and shipment on or about the date stated, consigned to the party stated, and had been sold for the price stated in the complaint. Charges for shipment as to part of the merchandise were to be collected from the consignee. As to the rest of the merchandise, charges were to be prepaid by the shipper, Carolina Seating.

Also as to Centennial, the court found that the insurance policy issued by Centennial contained the following provisions:

"The insurance policy issued by the plaintiff contained, among other provisions, the following clauses:

'BENEFIT OF INSURANCE. Warranted by the assured that this insurance shall not inure directly or indirectly to the benefit of any carrier, bailee or other party, by stipulation in bill of lading or otherwise and any breach of this warranty shall render this policy of insurance null and void.'

'IMPAIRMENT OF CARRIER'S LIABILITY. Any act or agreement by the assured, prior or subsequent hereto, whereby any right of the assured to recover the full value of, or amount of damage to, any property or interest lost or damaged and insured hereunder, against any carrier, bailee or other party liable therefor, is released, impaired or lost, shall render this policy null

> and void, but the insurer's right to retain or recover the premiums shall not be affected.'

An endorsement to said policy, designated as Form D, contained the following clause:

> '7. Privilege is granted the assured to accept the ordinary bills of lading or receipts issued by the carrier, but it is agreed that the assured will not enter into any special agreement releasing the carrier from its common law or statutory liability.' "

The court further found that no claim was made against any consignee nor had any payment been received from any consignee by Carolina Seating Company and Selrite, Inc.

As to Federated, the court found that Dunton Hardware had stored in Haley's warehouse awaiting shipment to Arcadia, Kansas, certain pieces of furniture which Dunton had purchased from furniture manufacturers in the High Point area.

Centennial argues that under the stipulated facts, liability on Haley should be assessed as against a carrier under the bill of lading signed by Haley. Federated agrees with Centennial and, in addition, urges that Haley is a freight forwarder and, therefore, liable as a carrier. Haley argues that it is a freight consolidator and liable only as a warehouseman, that the bill of lading was only a receipt for the merchandise. Haley further argues that the terms of the bill of lading relieved it of liability as the party in possession, or even if it were held to be a carrier, while the goods were stopped in transit and the goods here were stopped in transit. Further, Haley says that the bill of lading terms provided that any carrier or party liable on account of loss or damage to goods shall have the full benefit of any insurance that may have been effected upon said goods unless allowing such benefit would avoid the policy or contract of insurance, and that, as to Centennial only, Haley gets the benefit of insurance and is relieved of liability.

[2] We will discuss the questions raised in inverse order. First, as to Centennial, is Haley relieved of liability, if any it has, by reason of the terms of the bill of lading with respect to any insurance effective on the goods destroyed while in its possession?

The "Official, Southern, Western and Illinois Freight Classification" was incorporated by reference into the bill of lading. The pertinent portion of that classification is § 2(c); "Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effectuated upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: provided, that the carrier reimburse the claimant for the premium paid thereon."

Centennial's policy contained a provision providing "that this insurance shall not inure directly or indirectly to the benefit of any carrier, bailee or other party, by stipulation in bill of lading or otherwise, and any breach of this warranty shall render this policy of insurance null and void." The policy also provided that if the insured did anything whereby its right to recover against the carrier was released, thus defeating insurer's right of subrogation, the policy would be null and void.

[1] Centennial paid the insured the full coverage afforded by the policy. However, even though the policy provided the insurance should not inure to the benefit of the carrier, Centennial did not waive the right of subrogation by payment of its obligation to the shipper, its insured. *National Garment Co. v. New York, C. & St. L.R.Co.*, 173 F. 2d 32 (8th Cir. 1949).

The struggle to solve the question of who shall bear the loss of insured goods in transit has been a protracted one with shipper, carrier, and insured engaged in a three-way struggle, each trying to shift the loss.

In *Richard D. Brew & Company, Inc. v. Auclair Transportation, Inc.*, 106 N.H. 370, 372-373, 211 A. 2d 897 (1965), the New Hampshire Supreme Court quoted with approval the following from Patterson, Essentials of Insurance Law (2d ed. 1957):

> "In the beginning, the insurer of goods in transit was, on paying the insured, subrogated to the insured's claim, as shipper, against the carrier. Then the carrier inserted a stipulation in the bill of lading requiring the shipper to give it the benefit of any insurance that he might have, and this clause was held to cut off the insurer's right of subrogation even though the loss was due to the carrier's negligence. [*Phoenix Ins. Co. v. Erie & Western Transp. Co.*,

117 U.S. 312 [6 S.Ct. 750, 29 L.Ed. 873] (1886)]. This decision, which caused all the trouble, was an erroneous application of the perfectly sound principle that the insurer is subrogated only to the extent of the insured's claim against the third party. The carrier did not and could not by stipulation extinguish his liability to the shipper; and if the idea of subrogation is sound, the loss should ultimately fall upon the person who had the greater measure of control over it. However, the decision stood, and the insurers countered by inserting a condition, in policies on goods in transit, that the policy should be void if the insured should contract with the carrier that the latter should have the benefit of the insurance. The carrier has not been successful in counteracting the effect of these stipulations; and under most recent decisions, the ultimate loss falls upon the carrier."

One of the earlier cases in this field was *Adams v. Hartford Fire Ins. Co.*, 193 Iowa 1027, 188 N.W. 823 (1922). In that case the insurance to the shipper was made void by any act defeating subrogation, and the bill of lading contained the usual benefit of insurance to carrier clause plus a new qualifying clause "so far as this shall not avoid the policies or contracts of insurance." The shipper sued the insurance company to recover for loss and damage to the shipment while in transit. The Court held that the qualifying clause excepted this insurance policy from the benefit clause of the bill of lading, that subrogation had not been defeated, and the shipper could recover against the carrier.

The Court in *National Garment Co. v. New York, C. & St. L.R.Co., supra,* discussed the Adams case and followed it. In its opinion, the Court said:

"The doctrine of subrogation was adopted by equity to put the burden of loss on the one primarily responsible for it. This right of subrogation arises out of the nature of the contract of insurance as a contract of indemnity, the carrier being primarily and the insurer secondarily liable. The insurer's right of subrogation exists as a matter of equity, and is not dependent upon the reservation of the right in the contract of insurance. But, since it is derived from the shipper, it may be defeated by an unqualified provision in the shipping contract giving the carrier the benefit of any insurance effected on a shipment by the owner. (Citations

omitted.) The carrier, however, may not require a shipper to carry insurance for the carrier's benefit. Such a provision in the bill of lading is void. (Citation omitted.) The insurer, since its obligation under a policy of insurance is wholly contractual, has the right to impose such conditions upon its liability as it sees fit to incorporate in its agreement with the shipper. The insurer and the shipper may make a valid contract of insurance, protecting the insured against loss, preserving the insurer's right of subrogation against the carrier upon the payment of the loss, and worthless to the carrier. And that is what occurred in the present case. Since the insurance company was liable to the shipper on its policy of insurance, its recognition of that liability by payment of the shipper's claim was neither voluntary nor unconditional. It had no defense at law to the shipper's claim, and it did not waive its right of subrogation by payiny an obligation which the law required it to pay."

[2] Other cases holding that the carrier was not entitled to the benefit of the insurance where the bill of lading gave the carrier the benefit of insurance upon the goods "so far as this shall not avoid the policies or contracts of insurance," and the policy of insurance issued to the shipper provided that it should not inure to the benefit of the carrier, are: *Graysonia, N. & A. R. Co. v. Newberger Cotton Co.*, 170 Ark. 1039, 282 S.W. 975 (1926); *Dejean v. Louisiana Western R. Co.*, 167 La. 111, 118 So. 822 (1928); *Staple Cotton Co-op. Asso. v. Yazoo & M.V.R. Co.*, 189 Miss. 387, 197 So. 828 (1940); *Towmotor Co. v. Frank Cross Trucking Co.*, 205 Pa. Super. 448, 211 A. 2d 38 (1965). We think the cases so holding are well reasoned and reach a logical result.

[3] Defendant, however, says that even so, an endorsement to Centennial's policy bars its claim. The endorsement provides:

> "7. Privilege is granted the assured to accept the ordinary bills of lading or receipts issued by the carrier, but it is agreed that the assured will not enter into any special agreement releasing the carrier from its common law or statutory liability."

We do not think that the endorsement is inconsistent with the plain intent of the insurer. A similar provision was before the Court in *Maxwell Textile Co. v. Globe & R. Fire Ins. Co.*, 132 Misc. 679, 230 N.Y.S. 340 (1928), aff'd 225 App. Div. 279,

232 N.Y.S. 586 (1929), aff'd per curiam 251 N.Y. 535, 168 N.E. 417 (1929). In holding the provision ineffective to bar insurer's rights, the Court said:

> "When the policy is read as a whole, it is evident the defendant was attempting to preserve to the fullest extent its right of subrogation against the carrier and to guard itself against any special agreement on the part of the assured, whereby its right of action against the carrier might be released, impaired, or lost. The contract must be construed so as to make of it a harmonious whole. To this end the specific prohibition against destroying or impairing the defendant's right of subrogation must be deemed an exception to words of general permission to accept ordinary bills of lading." 225 App. Div. at pp. 281-282.

We hold that neither the benefit provision in the bill of lading nor the above-quoted endorsement to Centennial's policy bars Centennial's claim.

[4] Both plaintiffs urge that the trial court erred in concluding that even if defendant is liable as a common carrier, defendant was entitled to judgment because the goods were "stopped or held in transit" at request of the shippers.

The "Official, Southern, Western and Illinois Freight Classification," incorporated by reference into the bill of lading, contained the following provision:

> "§ 1.(b) . . . Except in cases of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring *while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request* or resulting from a defect or vice in the property, or for country damages to cotton, or from riots or strikes . . ." (Emphasis supplied.)

If the goods were stopped in transit by the shipper, then Haley would be liable only for its negligence, and it is stipulated that the loss was occasioned by an arsonist and not by reason of any negligence on the part of Haley. "The right of stoppage in transitu is a right which a seller of goods on credit has to recall them or retake them while they are in the possession of

a carrier or other middleman who received them for delivery to the buyer, on the discovery of the insolvency of the buyer." 46 Am. Jur., Sales, § 526, p. 682. It is an equitable right first recognized in an early English case, *Wiseman v. Vandeputt,* 2 Vern. 203, 23 Eng. Reprint 732, and recognized as a common law right by the courts of this country and by the courts of this State. In *Farrell v. R.R.,* 102 N.C. 390, 9 S.E. 302 (1889), the Court recognized the right and said:

> "The plaintiff's right is based upon this alleged right to stop the property *in transitu.* This right 'arises solely upon the insolvency of the buyer, and is based upon the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer (which, as we have seen . . . is such a constructive delivery as divests the vendor's lien), he discovers that the buyer is insolvent, he may retake the goods if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people.' . . . It is 'highly favored on account of its intrinsic justice.' Benjamin on Sales, 2 Vol., secs. 1229-1231." Farrell, at pp. 399-400.

The court found as a fact and the parties stipulated that "[t]he defendant's driver who received the merchandise delivered it to Haley's warehouse in High Point, North Carolina, where it was being *held by Haley for consolidation and shipment by rail carrier.*" (Emphasis supplied.) Nothing in the record indicates that the shipper had instructed Haley to hold the goods and not deliver them to the consignee because of insolvency of the consignee or any other reason. The goods were being held by Haley for consolidation and shipment to the purchaser. There is nothing in the facts found by the court which would support the court's conclusion of law that the goods were stopped in transit upon request of the shipper at the time of the loss. This conclusion was error.

[5] Plaintiff Federated also contends that the court erred in concluding that Haley was acting in the capacity of a warehouseman or "freight consolidator." Plaintiff takes the position that the undisputed facts and the facts found by the court categorize defendant as a freight forwarder, thus placing upon it the liability of a carrier. We agree.

"The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title." Part IV of the Interstate Commerce Act, 49 U.S.C.A., § 1002(a) (5).

Defendant contends that this section has no application because § 1002(c) specifically excludes the defendant's operations in providing that the provisions of the chapter, including the definition of freight forwarder, do not apply "to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed." We think it obvious from the facts of this case that defendant does not come within the exclusion.

Defendant further urges that it is not a freight forwarder because it does not perform or provide for "the performance of break-bulk and distributing operations with respect to such consolidated shipments." The court found that defendant did not participate in the ultimate delivery of the goods or "participate in the distribution of said goods at destination." There is no evidence that defendant actually participated in the ultimate delivery or distribution. There is evidence, however, that the services were offered by Haley. In Dunton Hardware's answers to interrogatories posed by Federated, Dunton, through its officer, said that, "Haley would pick up the furniture from the manufacturer's call that the furniture was ready to go out. Haley would then take the furniture to its warehouse there in High Point and hold it until it could consolidate a full carload shipment. It would then forward the carload shipment on to

Kansas City, Missouri, to its distributor there. The distributor would break down the car and forward our merchandise. Or, if enough weight, would stop the car at Arcadia for part unloading." Dunton specified "Haley" as its complete shipping directions. The president of defendant testified that they would hold Dunton's merchandise until they had enough to warrant making a stop car for Dunton. Then they would load the merchandise in a Kansas City car with Dunton merchandise near the doorway. The car would be stopped for partial unloading by Dunton. The final destination for the car was Kansas City. There were two consignees. Dunton Hardware and the distribution agent in Kansas City. The president also testified that the Interstate Commerce Commission had determined that Haley had chosen its distributors and, therefore, was acting as a freight forwarder without a certificate.

The federal courts have held that in order to qualify as a freight forwarder it is not necessary that all the functions authorized by § 1002, supra, be performed, so long as a party proffers all of the services described. *Metropolitan Shipping Agents of Illinois, Inc. v. United States,* 342 F. Supp. 1266 (D.N.J. 1972); *National Motor Freight Traffic Association v. United States,* 205 F. Supp. 592, (D.D.C. 1962), aff'd 371 U.S. 223, 83 S.Ct. 311, 9 L.Ed. 2d 273 (1962), reh. denied and opinion clarified 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed. 2d 709 (1963). In its discussion of Haley's operations in a cease and desist order dated 17 December 1971 [Investigations of Operations, 340 ICC 350 (1971)], the Commission stated Haley's operations as:

> "Haley's operation resembles, and is employed by shippers as, an economical substitute for freight forwarding in the sense that the latter may anticipate that upon tender to respondent their traffic will move to destination without further effort or intervention on their part. Upon call, Haley will dispatch a local carrier to pick up the shipments and transport them to its dock, will obtain the railcar, and sign the rail bill of lading, and consign the carload to a 'distributor' at one of the cities it serves. Break bulk, distribution, and collection of the freight charges are performed by the latter according to the instructions entered on the manifest accompanying the carload." 340 I.C.C., at p. 351.

The Commission further stated that if the nature of the operations of the company was understood by the public it served as rendition of a complete transportation service, then the Commission would not hesitate to disregard the absence of formal relationships with other participants in the process. The stipulated facts, read carefully, certainly leave no doubt but that the shippers expected complete transportation when they shipped via Haley. It seems obvious to us that Haley held itself out to the public as more than a warehouseman or freight consolidator. It appears that to obtain complete service to destination, a shipper had only to tender goods to Haley with a document indicating the consignee. To the shipping public, Haley's undertaking constituted the essence of freight forwarding. It proclaimed to the shipper that the goods would move to its destination at volume rates without further effort on the part of the shipper. We are of the opinion that the court erred in concluding that defendant is a warehouseman or freight consolidator and not a freight forwarder.

[6] Finally, we are of the opinion that Haley is liable under its bill of lading. It takes the position that the bill of lading was only a receipt for the goods. A bill of lading is also a contract to transport and deliver the goods as therein stipulated. *Griggs v. York-Shipley, Inc.*, 229 N.C. 572, 50 S.E. 2d 914 (1948). The fact that the bill of lading also constituted a contract is evidenced by its terms:

> "The property described below, in apparent good order, except as noted (contents and conditions of contents of packages unknown), marked consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property overall or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western and Illinois Freight Classifications in effect on the date

hereof, if this is a rail or a rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns."

Haley contracted as a carrier and is subject to the well-known rule that a carrier is liable for the loss of goods in transit, in the absence of a special contract, unless the carrier can show the loss was attributable to an act of God, the public enemy, the fault of the shipper, or inherent defect in the goods shipped. *Cigar Co. v. Garner,* 229 N.C. 173, 47 S.E. 2d 854 (1948), as to intrastate shipments. *Missouri P. R. Co. v. Elmore & Stahl,* 377 U.S. 134, 12 L.Ed. 2d 194, 84 S.Ct. 1142 (1964), reh. denied 377 U.S. 984, 12 L.Ed. 2d 752, 84 S.Ct. 1880 (1964), as to interstate shipments [attempt to circumvent common law liability by contract is, by statute, not allowed]. If for no other reason, Haley is liable as a carrier under its own bill of lading.

For the reasons stated, the trial court's judgments must be reversed as to each conclusion of law and judgments entered in accordance with this opinion.

Judges CAMPBELL and HEDRICK concur.

THE WINDFIELD CORPORATION v. McCALLUM INSPECTION COMPANY

No. 731SC160

(Filed 23 May 1973)

1. Contracts § 12— ambiguous agreement — court interpretation

Where the terms of a contract were ambiguous with respect to defendant's responsibility for installing plastic pipe as part of a water system, interpretation by the court was required where dispute arose upon that point of the contract.

2. Contracts § 12— ambiguous agreement — extrinsic evidence

If contract terms are ambiguous, extrinsic evidence relating to the agreement may be competent to clarify its terms.

3. Appeal and Error § 57— findings supported by competent evidence — conclusiveness on appeal

Finding by the judge in a nonjury trial that defendant contracted to furnish and install plastic pipe as part of a water system in plaintiff's residential development was supported by extrinsic evidence that defendant was responsible for digging the ditch in which to lay the pipe and that defendant arranged with subcontractors for the pipe installation and assumed responsibility for at least part of repair work required because of leaks in the system; such finding is conclusive on appeal since it was supported by competent evidence.

4. Contracts § 12— construction of ambiguity

Where defendant prepared a contract in which it agreed to furnish labor and materials for the installation of a water system in plaintiff's subdivision, ambiguity with respect to defendant's responsibility to install certain plastic pipe must be resolved against it, and the trial court did not err in holding that defendant was obligated to install as well as to furnish the pipe.

5. Damages § 12— special damages — necessity for specific pleading

A sum which plaintiff allegedly spent in its efforts to repair the water system installed by defendant was an item of special damages which should have been specifically pleaded; failure of plaintiff to so plead requires that the portion of the judgment awarding the special damages be vacated.

APPEAL by defendant from *Tillery, Judge,* at the 1 May 1972 Civil Session of PASQUOTANK Superior Court.

Plaintiff instituted this action to recover damages for alleged breach of a contract in which defendant agreed to furnish labor and materials for the installation of a water system in plaintiff's Glen Cove Subdivision in Pasquotank County. Defendant counterclaimed for a balance allegedly due it. Jury trial was waived.

The contract is in the form of a proposal made by defendant to plaintiff on 23 September 1968 and accepted by plaintiff on 24 September 1968, substantially set forth as follows:

PROPOSAL SUBMITTED TO:

Name: Windfield Corp. Date: Sept. 23, 1968

Street: 4565 Virginia Beach Blvd.

Job Name: Glen Cove

City: Virginia Beach Street: Route 168

State: Virginia City: Weeksville
State: N. C.

We hereby submit specifications and estimates for:

Drill and construct 4-4″ wells (shallow) to meet with N. C. Code, complete with 8 hour pumping test	1900.00
Furnish and install 4— 1 H.P. submersible pumps complete with wire (to top of well) control box, pipe & seal hooked to tank	1300.00
Furnish 1—5,000 gal. standard pressure tank (ordered 6-27-69)	1866.00
Labor & Material for hooking tank to pump & water main	1025.00
11,800 feet of 4″ plastic P.V.C. rigid pipe	22396.40
108—4″ tees—4x4x2 at 9.36 ea.	1010.88
8—4″ tees—4x4x4 at 9.36 ea.	74.88
108—2x¾ bushings at .77 ea. (Male XFIPT)	83.16

* * *

108—plugs (MIPT) at $.36 each	38.88
6—4″ 90 deg. ells	47.70
10—4″ 45 deg. ells	75.00
1—4″ adapter	4.00
4—4″ caps	14.20
6—gal. pipe cleaner	50.40
6—gal. pipe cement	71.82
11,800 ft. of ditching for pipe lines	4012.00

Pump house, tank foundations, electrical work and surveying for pipeline to be done by owner.

We hereby propose to furnish labor and materials—complete in accordance with the above specifications, for the sum of THIRTY-EIGHT THOUSAND, three hundred & three dollars & twenty-four cents (dollars) (33,970.32) (L.Y.O.J.F.) with payment to be made as follows: .....

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance. Our workers are fully covered by Workmen's Compensation Insurance.

Authorized Signature: Lester L. Young

Lester L. Young, Operations Manager

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Signature: The Windfield Corp.

Signature: F. P. Gabriel, Jr., Pres.

ACCEPTED:
Date: Sept. 24, 1968

(It will be noted that the total of the amounts listed above is $33,970.32.)

The controversy between the parties centers primarily on the following items in the proposal: "11,800 feet of 4" plastic P.V.C. rigid pipe—22396.40" and "11,800 ft. of ditching for pipe lines—4012.00." Plaintiff contends that the contract contemplated that defendant would furnish *and install* the 4" water lines in "a workmanlike manner according to standard practices." Defendant contends that it agreed to supply the 4" water lines and dig the ditches for the lines but that it was plaintiff's responsibility to "lay" and connect the pipe.

Plaintiff's evidence in pertinent part tended to show:

On 13 May 1970 George Merjos (Merjos) purchased all of plaintiff's outstanding stock. At that time the Glen Cove Subdivision water system was near completion and the only portion of the system then visible was the pump house, a large 5,000 gallon storage tank and two pumps. On 14 May 1970 Merjos received from one Lester Young (Young), who was supervising the job for defendant, a letter stating that the job would be completed within ten days after the electrician finished the wiring. After the electrical hook-up was completed, Young tested the main water system for leaks; any wet spots observed along the side of the road or water bubbling through the dirt indicated a leak. Two or three leaks were found the first part of June 1970. Near the end of June 1970, a second test was conducted; pressure was again applied and Young found ten leaks. Young and a crew of men repaired these leaks during the first or second week of July 1970. The water was again turned on and an additional sixteen leaks were found. Young informed Merjos that a job in Maryland would require most of his (Young's) time; therefore, it was agreed that a Mr. Ricks would repair the leaks and that defendant would pay one-half the bill and plaintiff would pay the other half. The sixteen leaks were repaired; water was turned on and 26 new leaks were found. A Mr. Brinson was hired to fix these. Plaintiff then retained Brinson on a salary basis to live at the development and repair leaks. By November 1970 a total of 137 leaks had been repaired.

On 4 December 1970 plaintiff employed an engineer to appraise the existing water system. The engineer concluded that the water system in Glen Cove "wasn't functional." When asked by counsel if in his opinion the water system at the time inspected could have been repaired, the engineer replied, "[I]n my opinion it could not economically be repaired."

Plaintiff's evidence further indicated that defendant did not install the four-inch plastic pipes for the water system but arranged for two subcontractors to install the pipes and paid for the cost of installation. Testimony tended to show that four-inch plastic P.V.C. rigid pipe schedule PR160 in quantities exceeding 5000 feet had a value of between 65 and 70 cents per foot in 1968. Defendant's president indicated that he didn't "know anything about the prevailing price in 1968" and had

no knowledge whether defendant paid 75 cents or $1.89 per foot for the pipe.

With respect to the 4" water lines, defendant's evidence tended to show: Defendant furnished 11,800 feet of 4" plastic P.V.C. schedule 40 rigid pipe NSF which had a suggested list price of $1.89 per foot in the Glen Cove area in 1968; the 11,800 feet of ditching called for in the proposal and acceptance was performed. Prior to the installation of any 4" pipe and after defendant had completed the ditching, defendant's supervisor, Mr. Young, consulted with plaintiff's manager concerning the installation of the pipe. Defendant wanted the pipe installed as soon as the ditches were ready and since plaintiff did not have anyone to put the pipe in the ground, at the request of plaintiff's manager, Young arranged for the pipe to be laid. Defendant did not pay the subcontractors for laying the pipe. After conducting a pumping test, a few leaks—less than a dozen—were found which defendant at its own expense repaired, not out of duty since defendant was not responsible for installing the pipe but to accommodate plaintiff. Defendant participated in sharing the cost of repairing leaks on two occasions.

From the stipulations and evidence offered the court found facts summarized in pertinent part as follows: The proposal and acceptance hereinafter termed "the written contract" obligated the defendant to furnish materials and labor for the construction and installation of a water system at Glen Cove and obligated plaintiff to pay $33,970.32 therefor. The written contract is ambiguous with respect to whether defendant undertook to install 11,800 feet of four-inch plastic pipe; the price of $22,396.40 referred to as cost for pipe is substantially more than some of the evidence indicates material without labor would cost. The assumption of responsibility for installation of the pipe by defendant is some evidence of the intention of the parties with respect to duty to install it. The court finds that defendant contracted to furnish and install the said pipe. The pipe comprising the water distribution system was not laid "in a workmanlike manner and according to standard practices." The defective manner of installation resulted in numerous leaks. Other defects were found to exist as a result of defective drilling and construction of wells and installation of submersible pumps and storage pressure tanks. The water system as completed by defendant is not functional and constitutes a breach of the contract between the parties for which

plaintiff is entitled to damages. Before learning of defendant's breach of the contract, plaintiff paid a total of $26,970.32 to defendant. The water system properly installed would be worth $33,970.32 to plaintiff and the parties stipulated that the water system as installed had a value of at least $4,334.92.

The court concluded as a matter of law that: Defendant "was obligated to construct and install the water system in a workmanlike manner and according to standard practices." Defendant breached its contract with plaintiff and as general damages, plaintiff "is entitled to recover the difference in value between the water system as contracted for ($33,970.32) and the value of that portion of the water system which has some usefulness ($4,334.92), which difference is $29,635.40, less the unpaid portion of the contract price ($7,000.00), for total general damages of $22,635.40." Plaintiff is entitled also to recover as special damages $4,409.63 incurred by plaintiff in repair bills.

From judgment entered that plaintiff recover of defendant the sum of $27,045.03 together with interest and costs of the action and that defendant's counterclaim be dismissed, defendant appealed.

Leroy, Wells, Shaw, Hornthal & Riley by J. Fred Riley for plaintiff appellee.

J. Kenyon Wilson, Jr., for defendant appellant.

BRITT, Judge.

[1] Basic to a determination of this case is a construction of the contract set out above and particularly that provision of the contract with reference to "11,800 feet of 4" plastic P.V.C. rigid pipe." Defendant contends that the contract is "clear and unambiguous as to the Installation or Laying of the plastic pipe" since "the contract is silent on this point." Plaintiff argues that the written contract is ambiguous with respect to defendant's responsibility for installing the pipe. We think the contract on this point is vague and therefore necessitated interpretation by the court.

[2] If contract terms are ambiguous, extrinsic evidence relating to the agreement may be competent to clarify its terms. *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113 (1962);

Owens v. Little, 13 N.C. App. 484, 186 S.E. 2d 182 (1972); 2 Strong, N. C. Index 2d, Contracts, § 12, p. 312. Extrinsic evidence tended to show that defendant was responsible for digging the ditch in which to lay the pipe; that defendant arranged with subcontractors for the pipe installation and assumed responsibility for at least a part of the leakage repair work. Plaintiff introduced testimony tending to establish that at the time the pipe was bought it had a sales price of 65 or 70 cents per foot (not more than $8,260 for 11,800 feet) while defendant's evidence tended to establish the cost of the pipe at $1.89 per foot.

[3] It is well recognized that in a nonjury trial the findings by the court have the force and effect of a jury verdict and are conclusive on appeal if supported by any competent evidence notwithstanding that there is evidence which would sustain findings to the contrary. *Mayo v. Casualty Co.,* 282 N.C. 346, 192 S.E. 2d 828 (1972); *Vaughn v. Tyson,* 14 N.C. App. 548, 188 S.E. 2d 614 (1972). After considering all of the evidence the able trial judge found that defendant contracted to furnish *and install* the plastic pipe and this finding being amply supported by the evidence is conclusive on appeal.

[4] Further, it is undisputed that the controverted part of the contract was prepared by defendant. Well recognized in the law of contract construction is the principle that an ambiguity in a written contract is to be construed against the party who prepared the instrument. *Yates v. Brown,* 275 N.C. 634, 170 S.E. 2d 477 (1969); *Koppers Co., Inc. v. Chemical Corp.,* 9 N.C. App. 118, 175 S.E. 2d 761 (1970). We hold that the trial court did not err in concluding that the contract between plaintiff and defendant obligated defendant to furnish and install the pipe for the water system.

[5] Appellant next contends that the judge erred in awarding special damages as compensation for repair bills incurred by plaintiff. This contention has merit.

In Paragraph V of the complaint as amended, plaintiff alleged that the value of the water system for which it contracted was $33,970.32 and that the value of the system actually installed was $4,334.92. In Paragraph VI, plaintiff alleged that as a direct result of defendant's breach of contract, plaintiff sustained special damages due to its inability to sell to the public lots complete with usable water systems; that said losses

were reasonably foreseeable by defendant. In Paragraph VII, plaintiff alleged that it had sustained damages totaling $50,000.00. In its prayer for relief, plaintiff asked for judgment against defendant in the sum of $50,000 plus costs.

In *Oberholtzer v. Huffman,* 234 N.C. 399, 400, 67 S.E. 2d 263 (1951), we find: "Special damages, that is, damages which are the natural but not necessary result of the alleged wrongful act of the defendant, must be pleaded with sufficient particularity to put the defendant on notice. *Conrad v. Shuford,* 174 N.C. 719, 94 S.E. 424; *Binder v. Acceptance Corp.,* 222 N.C. 512, 23 S.E. 2d 894." See also *Perkins v. Insurance Company,* 274 N.C. 134, 161 S.E. 2d 536 (1968).

We think the $4,409.63 which plaintiff allegedly spent in its efforts to repair the water system comes within the category of special damages which must be specifically pleaded. This was not done. The record discloses that on 15 May 1972, plaintiff filed a motion pursuant to Rule 15(b) of the Rules of Civil Procedure to amend its complaint to specifically allege this item but the record fails to disclose that the motion was ever allowed. Plaintiff argues that the court by including an award of $4,409.63 in its judgment inferentially allowed the motion to amend; we are unable to accept this argument.

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

Our decision is that the judgment awarding general damages in the net amount of $22,635.40, plus interest and costs of the action, and dismissing defendant's counterclaim, is affirmed; but that portion of the judgment awarding special damages in the amount of $4,409.63 is vacated.

Modified and affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. LEVON GRAVES

No. 7317SC350

(Filed 23 May 1973)

1. **Assault and Battery §§ 9, 15— defense of third person — failure to instruct**

Where defendant saw one Samuel Graves force his former girl friend from a dance hall and down the street several blocks, knew that Samuel had threatened to kill the girl and that he was a dangerous man with a propensity for violent conduct, observed that Samuel was acting in a wild and irrational manner as if he had been drinking or taking some drugs and observed that Samuel reached for his pocket just before defendant shot him, the trial court committed prejudicial error in failing to instruct upon the right of defendant to go to the defense of a third person to prevent a felonious assault.

2. **Assault and Battery § 13— defense of third person — competency of evidence**

Under proper factual circumstances evidence of threats is admissible upon a plea of defense of others; therefore, the trial court in a felonious assault case erred in excluding evidence that defendant was present and saw the prosecuting witness assault one Oscar Wrenn with a knife and that the prosecuting witness had threatened to kill his former girl friend, since this evidence had a direct bearing upon the reasonableness of defendant's belief that the girl was in danger of serious injury or death and would tend to justify his action in her defense.

APPEAL by defendant from *Seay, Judge,* 16 October 1972 Session of Superior Court held in ROCKINGHAM County.

Defendant Levon Graves, was tried upon a bill of indictment charging him with felonious assault on Samuel D. Graves.

The evidence for the State in substance tends to show that:

On 20 November 1971, Samuel Graves (not related to defendant Levon Graves) came into a "beer joint" known as Price's Danceland in Reidsville where defendant and his brother were standing by a piccolo. He talked with defendant about nothing in particular and then went outside. Shortly thereafter Beverly Henderson, Samuel's former girl friend, passed him and entered the beer joint. Samuel reentered Price's Danceland and " . . . caught hold of Beverly . . . and [I] pulled her out. . . . " Defendant was inside but Samuel was not sure just where. Samuel took Beverly by the arm and told her he wanted to talk to her. He was attempting to get her to go back with

him as his girl friend and walked several blocks with her holding her by the arm. She refused and told him she " . . . wanted to go home. I mean come back uptown." As Samuel and Beverly came through an alley, he saw defendant and another boy at the other end of the alley. Samuel picked up something like a wooden basket and grabbed Beverly and started toward Price's. They met Beverly's brother, Arthur Henderson, who told him to let his sister go and said he was going for the police. Samuel caught Arthur Henderson by the arm and the three of them went around the corner. When they went around the corner, a car pulled up and defendant jumped out. He was talking so fast that Samuel could not understand him. Arthur Henderson went one way and Beverly the other and defendant shot Samuel in the left arm with a shotgun. Samuel did not have a knife or gun in his pocket and did not make a motion toward his pocket.

On cross-examination, Samuel admitted that he did not ask Beverly if she wanted to accompany him and she was crying " . . . because I would not let her go." He further admitted that "I knew that she wanted to get loose. But I did not turn her loose."

He admitted that he had been convicted for breaking and entering and larceny, for assault with a knife upon one Oscar Wrenn, for shooting James Brown with a shotgun, and several other criminal offenses.

Again upon cross-examination, Samuel admitted that he had threatened Beverly about going with Levon (defendant) and had been to her home arguing with her about this and hit her several times.

The evidence for defendant presented a somewhat different story. Defendant testified in substance as follows:

At the time of this occurrence he was dating Beverly Henderson every weekend, they were engaged to be married, and later she became his wife. He was at Price's Danceland when Samuel Graves came in and talked to him about Beverly Henderson and that " . . . she had done him wrong. . . . "

Shortly thereafter Beverly came into Price's and he asked her a question but before she could answer, Samuel came up and grabbed her around the neck. When defendant protested

Samuel hit him and shoved him back and defendant was scared of him because he knew his reputation.

Samuel forced Beverly out of the door. She was crying. He followed them down the street and looked for a policeman but there were none in sight. When they came back through the alley, Samuel asked if anybody wanted to do anything and he told him that nobody wanted to mess with him. Samuel ran his hand in his pocket and defendant jumped back. Samuel took off up the street with Beverly. Defendant was scared and got a shotgun out of his car trunk and put it on the back seat. When Samuel and Beverly reached a vacant lot near Price's, defendant and Henry Alston drove up in the car and defendant saw them and turned around and got the gun and jumped out. Defendant knew Samuel had threatened to kill Beverly because Samuel had told his sister. When defendant jumped out, he told Samuel to turn Beverly loose and then in his own words on cross-examination, "I shot him because when he run his hand in his pocket I didn't know if he was going to hurt my girl or me. I didn't know what he had in his pocket." Also on cross-examination, defendant testified that " . . . I knew that he was a dangerous man" and "I did not see any weapon but I knowed that he carried a weapon."

Beverly Henderson Graves, now defendant's wife, testified in substance:

When she entered Price's Danceland all of a sudden Samuel Graves put his hand around her neck and when she tried to remove his hands, told her " . . . to leave them alone or he would break my neck." He grabbed her by the neck and pulled her out of the place and pushed and shoved her down the street with his left hand around her neck and his right arm with her right arm. She was crying and telling him to turn her loose but he would not, saying she had done him wrong. As they went down the street, someone asked " . . . why don't you turn that girl loose . . . " and he said " . . . mind your own business, it don't concern you." Her girl friend protested and he threatened to kill her. He acted wild and pushed her (Beverly) against a fence with his hand around her neck and said " . . . I ought to kill you right here. . . . " She was crying and telling him to turn her loose and he kept saying she had done him wrong and Levon (defendant) was going to get his too. Her brother came down the street and told Sam to turn her

loose. Sam grabbed her brother by the arm and pulled them both into a vacant lot. Then Levon came in a car driven by a friend. " . . . Levon got out of the car and told Sam to turn me loose and Sam, he had hold of me then, and he dropped this hand from my arm and started to reach for something in his pocket and Levon shot him. . . . At that time he was holding me with his right hand. . . . When he [Levon] told Sam to turn me loose, Sam dropped his hand from me and started to reaching for his pocket. . . . "

She testified that she was scared of him and did not know what he would do. Sam was mistreating her and that was the reason Levon shot him. He had threatened her a lot of times.

Arthur Henderson, brother of Beverly, testified that he tried to get Samuel to release Beverly who was crying and trying to get loose and that " . . . it looked to me like Samuel was starting in his pocket . . . when Levon shot him. . . . [H]e looked like he had been drinking or taking something. . . . [H]e looked wild . . . like he was losing his mind, like he was crazy. . . . "

Henry Alston testified that he was driving the car and pulled in the vacant spot where Samuel and Beverly were and that is when Levon got the gun out of the rear of the car and jumped out; that Levon told Samuel to turn her loose and when Samuel went in his pocket, Levon shot him; that Samuel looked like he had been smoking marijuana or drinking beer or something and was high.

The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury, and defendant appeals from a judgment of imprisonment entered upon the verdict.

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

Gwyn, Gwyn & Morgan by Melzer A. Morgan, Jr., for defendant appellant.

BALEY, Judge.

[1] The defendant assigns as error the failure of the court to charge the jury that he as a private citizen had the right to interfere in order to prevent Samuel Graves from committing a felonious assault on Beverly Henderson.

A private citizen has a right to go to the defense of another *if he has a well grounded belief that a felonious assault is about to be committed upon such other person.* In fact, it is his duty to interfere to prevent the supposed crime. *State v. Hornbuckle,* 265 N.C. 312, 144 S.E. 2d 12; *State v. Robinson,* 213 N.C. 273, 195 S.E. 824; *State v. Clark,* 134 N.C. 698, 47 S.E. 36. It is a matter for the jury to determine from the evidence under proper instructions if a defendant has such a well grounded belief that it will justify intervention in the defense of another. *State v. Robinson, supra.*

There is ample evidence in this case from which a jury could conclude that a felonious assault was about to be committed by Samuel Graves upon his ex-girl friend, Beverly Henderson, and that the defendant had reason to believe that such an assault was imminent and was attempting to prevent it. The defendant had witnessed the entry of Samuel Graves into Price's Danceland and had seen Beverly Henderson forced to accompany Samuel against her will for several blocks. He knew that Samuel had threatened to kill Beverly and that he was a dangerous man with a propensity for violent conduct. Testimony given by defense witnesses indicated that Samuel was acting in a wild and irrational manner as if he had been drinking or taking some drugs and appeared to reach for his pocket just before defendant fired his gun.

The language in *State v. Hornbuckle, supra,* at 314-15, 144 S.E. 2d at 14, is here applicable: "In 41 C.J.S. Homicide, § 385, page 188, *et seq.,* it is said: 'Where there is evidence which tends to support the issue that the homicide or assault was committed by accused in defense of the person of another, the court should fully, correctly, and explicitly instruct as to the law on this point as applied to the facts of the case.' "

In this case the court in its charge to the jury gave a summary of the contentions of the defendant but failed to explain and declare the law arising upon the defendant's evidence with respect to the right of the defendant to go to the defense of a third person. It is prejudicial error when the court fails to instruct the jury on a substantial feature of the case arising on the evidence. G.S. 1-180; *Bulluck v. Long,* 256 N.C. 577, 124 S.E. 2d 716.

[2] The defendant also contended that the court erroneously excluded evidence offered by him tending to show that he was

present and saw the prosecuting witness assault Oscar Wrenn with a knife and that the prosecuting witness had threatened to kill Beverly Henderson. This bears directly upon the reasonableness of defendant's belief that his girl friend was in danger of serious injury or death and would tend to justify his action in her defense.

By statute evidence of threats is admissible in assault cases upon a plea of self-defense. G.S. 14-33.1. Logically under proper factual circumstances such evidence is admissible upon a plea of defense of others.

Other assignments of error with respect to exclusion of evidence are not considered as they may not arise in a subsequent trial.

The defendant is entitled to a new trial and it is so ordered.

New trial.

Judges BROCK and BRITT concur.

UNITED ARTISTS RECORDS, INC. v. EASTERN TAPE CORPORATION, G & G SALES, INC., J. M. PETTUS, J. H. PETTUS, FRED G. DIXON, CHARLES DIXON, SUPER HITS, INC., SOUND DUPLICATOR SERVICE, INC., RANDY C. DIXON, WHOLESALE SALVAGE, INC., AND JOHN DOE 8 THROUGH JOHN DOE 200

COLUMBIA BROADCASTING SYSTEM, INC. v. EASTERN TAPE CORPORATION, G & G SALES, INC., J. M. PETTUS, J. H. PETTUS, FRED G. DIXON, CHARLES DIXON, SUPER HITS, INC., SOUND DUPLICATOR SERVICE, INC., RANDY C. DIXON, WHOLESALE SALVAGE, INC., AND JOHN DOE 8 THROUGH JOHN DOE 200

MCA, INC. v. EASTERN TAPE CORPORATION, G & G SALES, INC., J. M. PETTUS, J. H. PETTUS, FRED G. DIXON, CHARLES DIXON, SUPER HITS, INC., SOUND DUPLICATOR SERVICE, INC., RANDY C. DIXON, WHOLESALE SALVAGE, INC., AND JOHN DOE 8 THROUGH JOHN DOE 200

No. 7326SC28

(Filed 23 May 1973)

Costs § 1; Contempt § 7— violation of restraining order — contempt proceeding — indemnification of plaintiffs — counsel fees — costs

In a contempt proceeding in which defendants were found to be in civil contempt for violation of a temporary restraining order, the trial judge had no authority to require defendants to compensate plaintiffs for their damages arising from the contemptuous conduct, to award counsel fees to plaintiff, or to tax the costs of the proceeding against defendants.

APPEAL by plaintiffs from *Snepp, Judge,* 31 July 1972 Session of Superior Court held in MECKLENBURG County.

This appeal arises out of actions seeking injunctive relief and compensatory damages for alleged unfair competitive practices. Plantiffs are corporations engaged in the manufacture and sale of phonograph recordings. Plaintiffs alleged and the defendants admitted that the defendants had copied, by means of magnetic recording devices, phonograph records originally produced by the plaintiffs, and that the defendants sold the magnetic recordings under the defendants' own labels in competition with the plaintiffs.

On 6 January 1971, a temporary restraining order was entered in the action brought by United Artists Records, Inc.

(formerly Liberty/UA, Inc.) enjoining the defendants from any further appropriation of the performances recorded by the plaintiff and any further sale of the magnetic recordings in competition with the plaintiff. The temporary restraining order was affirmed on appeal to this Court [*Liberty/UA, Inc. v. Tape Corp.*, 11 N.C. App. 20, 180 S.E. 2d 414 (1971), *cert. denied*, 278 N.C. 702], and thereafter similar restraining orders were entered in the MCA, Inc. action and the Columbia Broadcasting System, Inc. action.

On 19 May 1972, the actions were consolidated for a hearing on orders issued, commanding the defendants to appear before the court and show cause why they should not be adjudged in contempt of the restraining orders previously granted. At the hearing, after finding the facts, the trial judge concluded that the defendants in all three cases were guilty of criminal contempt of the restraining orders issued in each case, and guilty of civil contempt of the restraining orders issued in each case. Judgment was entered fining the defendants G & G Sales, Inc., Eastern Tape Corporation and William T. Anderson $250 each for the criminal contempt violations, and sentencing the defendant J. H. Pettus to 20 days in the county jail for criminal contempt. All four defendants were ordered to submit to the court within 15 days evidence to satisfy the trial judge that the defendants were no longer "engaged in any conduct constituting civil and continuing contempt of the preliminary injunctions entered in these cases."

On 22 May 1972, the plaintiffs moved in the cause that the defendants G & G Sales, Inc., Eastern Tape Corporation, J. H. Pettus and William T. Anderson "be required to compensate plaintiffs for their damages arising from the contemptuous conduct as found by the court, and for expenses in proving said contempt to the satisfaction of the court," and accompanied their motion with an affidavit filed by one of the counsel for plaintiffs setting forth the amount of attorney expenses related to the prosecution of the contempt show cause orders.

On 4 August 1972, Judge Snepp entered an order denying the motion of the plaintiffs, and stating:

> "The court concludes that as a matter of law such damages and expenses cannot be allowed by reason of the conduct of the persons and corporations found to be in contempt by

the court. The motion is therefore denied as a matter of law and not as a matter of discretion."

The plaintiffs appealed from the disallowance of their motion, assigning error.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Harold N. Bynum, for plaintiff appellants.

Mraz, Aycock, Casstevens & Davis, by Gary A. Davis; Levine, Goodman and Murchison; and Richards, Shefte & Pinckney for defendant appellees.

MORRIS, Judge.

Plaintiffs' appeal presents the single question whether a trial judge has authority to award remedial damages, costs, and attorneys fees resulting from defendants' conduct in violating a court order, the violation having been found by the court to constitute civil contempt.

Plaintiffs contend that the power to grant indemnifying fines to a private plaintiff is inherent in the courts of North Carolina. We disagree. In *In re Rhodes,* 65 N.C. 518 (1871), an injunction had been entered, ordering Sheriff Rhodes to redeliver certain goods to named persons prior to an execution sale. The sheriff failed to deliver the goods as ordered, was adjudged in contempt of court, and ordered to " 'pay into the Court two thousand dollars for the use of the defendants (in that action,) as damages for the unlawful detention of the same, . . . ' " The Court held that since the trial judge had no jurisdiction of the cause, the contempt order was invalid. In a dictum statement, the Court continued:

> "We think it our duty also, to notice another point in the present case, lest our silence may be considered an approval of the order fining the Sheriff. Supposing the Judge to have had jurisdiction of the case, and that his order of the 12th of May, was lawful, he might have fined the Sheriff for a contempt of Court, in disobeying it. But a fine for contempt is a punishment for a wrong to the State, and goes to the State. We know of no law by which a Judge can direct a fine for a contempt of his Court, to be paid to a party to a suit, or can assess in favor of such party, damages which he has sustained by the delay or refusal of the Sheriff to obey an order in the cause."

In *Morris v. Whitehead,* 65 N.C. 637 (1871), the Court said, " . . . even if he had jurisdiction of the case, he had no authority to fine the defendant Wood for contempt, and order the fine to be paid to the plaintiff, as his damages from the breach of the injunction, assessed by the Court. . . . " We have found no further cases in North Carolina dealing with this subject matter. In other jurisdictions, there is both authority that indemnity may be secured in contempt proceedings, and authority to the contrary. See 17 C.J.S., Contempt, § 94; 17 Am. Jur. 2d, Contempt, § 113. At least one law review writer has attempted to discount the North Carolina dictum rules set forth in the *Rhodes* and *Whitehead* cases, *supra.* See Dobbs, *Contempt of Court: A Survey,* 56 Corn. L. Rev. 183 (1971).

However, we are of the opinion that the rule quoted above from *In re Rhodes, supra,* and reiterated in *Morris v. Whitehead, supra,* correctly states the law in North Carolina concerning the lack of authority in a trial judge to award indemnifying fines. In North Carolina, a proceeding for civil contempt is one instituted to preserve and enforce the rights of a private party to an action, and to compel obedience to a judgment or decree intended to benefit such parties. *Blue Jeans Corp. v. Clothing Workers,* 275 N.C. 503, 169 S.E. 2d 867 (1969) ; *Galyon v. Stutts,* 241 N.C. 120, 84 S.E. 2d 822 (1954). Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. *Blue Jeans Corp. v. Clothing Workers, supra; Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157 (1938). A contempt proceeding, whether civil or criminal, is *sui generis,* and criminal in nature in that the party who is charged with committing a forbidden act may be punished if found guilty, and that punishment may be awarded only for wilful disobedience. *Mauney v. Mauney,* 268 N.C. 254, 150 S.E. 2d 391 (1966) ; *In re Hege,* 205 N.C. 625, 172 S.E. 345 (1934). Although the distinction between civil and criminal contempt is often unclear, the primary purpose of a civil contempt proceeding is "to *punish* as for contempt when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court— . . . " , G.S. 5-8, and the primary purpose of a criminal contempt proceeding is to *punish* for contempt any person guilty of committing an act or omission specified in G.S. 5-1.

Thus, it may be seen that contempt in North Carolina is treated as an offense against "the majesty of the law," is essentially criminal in nature, and is superintended or controlled pursuant to statutory authority solely by means of punishment. Although it may be that the punishment differs for criminal and civil contempt, our statutory provisions for contempt embodied in G.S. 5-1, et seq., do not provide for any other means of enforcing the courts' power of contempt than by punishment, as befits the criminal nature of the proceedings. We hold that, by virtue of the criminal nature of contempt proceedings and the statutory provisions for enforcement of the contempt power by punishment only, a trial judge in North Carolina has no authority to award indemnifying fines or other compensation to a private plaintiff in a contempt proceeding.

We are also of the opinion that the trial judge correctly ruled that he had no authority to award attorneys fees to the plaintiff, even though the plaintiffs prevailed in the contempt proceeding. It is settled law in North Carolina that ordinarily attorneys fees are not recoverable either as an item of damages or of costs, absent express statutory authority for fixing and awarding them. *Bowman v. Chair Co.*, 271 N.C. 702, 157 S.E. 2d 378 (1967). Although provisions for the award of attorneys fees to the prevailing plaintiff exist in other jurisdictions, we have found no case law or statutory authority providing for such allowance in North Carolina. See 17 C.J.S., Contempt, § 96; 17 Am. Jur. 2d, Contempt, § 114; Annot., 43 A.L.R. 3d 793; Annot., 55 A.L.R. 2d 979. The case of *Blair v. Blair*, 8 N.C. App. 61, 173 S.E. 2d 513 (1970), is not authority for the plaintiffs' argument. Counsel fees may be awarded to a dependent spouse in an action for the support or custody of a minor child, by virtue of G.S. 50-13.6. And, where the petitioning spouse is no longer a dependent spouse, counsel fees in a proper case may be awarded by virtue of the court's authority to protect the interests of minor children in an action for the support or custody of a minor child. *Andrews v. Andrews*, 12 N.C. App. 410, 183 S.E. 2d 843 (1971). In *Blair*, the lawful authority of the court to award counsel fees under the facts in that case was enforced by means of the court's contempt power. In the case before us, no such authority to award counsel fees arises on the facts.

Finally, we hold that the trial judge correctly ruled that he had no authority to tax costs of the contempt proceeding

against the defendants. Court costs in North Carolina are recoverable only in the manner and to the extent provided by statute. McIntosh, N. C. Practice 2d, § 2531. As was stated previously, contempt proceedings are *sui generis* and criminal in nature. Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which G.S. 6-18 (when costs shall be allowed to plaintiff as a matter of course), or G.S. 6-20 (allowance of costs in discretion of court) would apply. See *Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E. 2d 326 (1963). The purpose of the proceeding is to compel obedience to an order or decree intended to benefit one of the parties to the litigation by punishment. As such, the effect of a proceeding as for contempt may be remedial in the sense that it aids the private party in the enforcement of an order in his favor, but in no sense does it provide a civil remedy or action to redress a private wrong nor is it equitable in nature.

We hold that the trial court properly denied the plaintiffs' motion. The order entered by Judge Snepp, denying the motion of the plaintiffs, is

Affirmed.

Judges CAMPBELL and BRITT concur.

DAVID LEE SIMMS v. MASON'S STORES, INC., (NC-1)

No. 7329SC59

(Filed 23 May 1973)

1. **Process § 12; Rules of Civil Procedure § 4— insufficiency of service on domestic corporation**

Where the deputy sheriff for Buncombe County delivered the summons and complaint in this assault action to one Vera Wallin, a security officer who was standing near a cash register in defendant's place of business, whom the deputy had seen as a court witness for defendant, and on whom the deputy had served subpoenas on prior occasions, the attempted service of process upon defendant was void and the trial court did not obtain jurisdiction over the person of the defendant thereby, since Ms. Wallin was not an officer, director or managing agent of defendant's store, nor was she a person apparently in charge in the manager's office, an agent authorized to

accept service by appointment or an agent authorized to accept service by law. G.S. 1A-1, Rule 4(j) (6).

2. **Appearance § 2— jurisdiction over the person — waiver — request for extension of time to answer**

Defendant did not make a general appearance and thus waive its defense of insufficiency of service of process and its objection to the jurisdiction of the court over the defendant's person when it moved for and obtained an enlargement of time in which to file answer or other pleading.

APPEAL from *Fountain, Judge,* 17 July 1972 Session of Superior Court held in TRANSYLVANIA County.

This is a civil action commenced on 29 June 1971 for damages caused by an alleged assault on the plaintiff by the defendant's employee while acting in the course of his employment.

On 11 August 1971, upon defendant's motion therefor, the Clerk of Superior Court of Transylvania County entered an order extending the time to file "answer or otherwise plead" for an additional 30 days. Thereafter, defendant filed answer, denying the material allegations of the plaintiff's complaint, and setting forth as a "First Defense" the following motion:

> "1. The defendant pursuant to Rule 12, N.C.R.C.P. moves to dismiss this cause of action or in lieu thereof to quash the return of the purported service of Summons issued, for that any purported service on the defendant is defective and void, and, therefore, the defendant has not been properly served with process in this action and this court has not acquired jurisdiction over the defendant."

The evidence at the hearing on the defendant's motion, consisting of an affidavit and supplemental affidavit of Vera Wallin, the affidavit of Deputy Sheriff Ervin L. Penland, and the testimony of Vera Wallin, tended to show the following facts:

Defendant is a corporation with its place of business in Buncombe County, North Carolina. On 13 July 1971, Ervin L. Penland was employed as a Deputy Sheriff for Buncombe County, and at about 8:30 p.m. on that date and in the course of his duties, Deputy Penland undertook to serve the summons and complaint in this action on the corporate defendant at its place of business in Buncombe County.

Deputy Penland's affidavit tends to show that as he entered the defendant's place of business, he saw Vera Wallin standing near a check-out counter near the entrance to the store, and, thinking that Vera Wallin was an employee of defendant, Deputy Penland approached her and inquired "if the manager was in the store." Vera Wallin said that neither manager was in the store. Penland then asked Ms. Wallin "if I could leave the summons and complaint . . . with her and if she would deliver the summons and complaint to the manager . . . She said that she would." Penland's affidavit also tended to show that he had "assumed, as a result of her appearing in court on behalf of Mason's Stores, Inc., and as a result of seeing her in the store on several occasions, that Vera Wallin was an employee of Mason's Stores, Inc."

Vera Wallin's affidavits and testimony tend to show that on 13 July 1971, she was employed by Link Security, Inc., a corporation located in Danville, Virginia, as a security officer, and that on 13 July 1971, Ms. Wallin was assigned to the corporate defendant's store for the purpose of preventing shoplifting on the premises. In her capacity as security officer, Ms. Wallin was not under the supervision or control of any officer or employee of Mason's Stores, Inc., and was not authorized by appointment or by law to accept service of process on behalf of Mason's Stores, Inc.

Mason's Stores, Inc., had an office area located approximately 100 feet from the cash register area where Ms. Wallin was located on 13 July 1971. On that date one of the two store managers was on duty in the store. Deputy Penland approached Ms. Wallin and handed her a summons and complaint in another action. Then Deputy Penland stated, "I might as well give these to you also," and delivered to Ms. Wallin a copy of the summons and complaint in this action. During this time Deputy Penland made no inquiry concerning the whereabouts of the store manager or any other person in charge of the store office. On the next day, Ms. Wallin handed the summons and complaint to the corporate defendant's store manager.

Upon the evidence presented, the court made findings of fact that:

> "On July 13, 1971, . . . Vera Wallin was not an officer, director or managing agent of defendant Mason's Stores,

Inc. (NC-1), and she was not a person who was apparently in charge of any such office.

Copy of the summons and complaint were not delivered to an officer, director or managing agent of defendant, nor was copy thereof left in the office of such officer, director or managing agent of defendant with a person who was apparently in charge of the office."

The trial judge concluded that the service of process was fatally defective and void and that no jurisdiction over the person of the defendant had been acquired. Judgment was entered, dismissing the action against the defendant. Plaintiff appealed, assigning error.

Morris, Golding, Blue and Phillips, by James W. Williams, for plaintiff appellant.

Uzzell and DuMont, by J. William Russell, for defendant appellee.

MORRIS, Judge.

Plaintiff's assignments of error raise the following questions on appeal: (1) Whether the service of process upon defendant was ineffective and void; and (2) whether the defendant waived any objection to the jurisdiction of the court over it by obtaining an enlargement of time in which to file "answer or otherwise plead?"

[1] We turn first to the question dealing with the service of process. G.S. 1A-1, Rule 4(j) (6) provides:

"(j) *Process—manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process shall be as follows:

(6) Domestic or Foreign Corporation.—Upon a domestic or foreign corporation:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing

agent with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or process or by serving process upon such agent or the party in a manner specified by any statute."

In order to obtain jurisdiction over a domestic corporation, Rule 4(j)(6) specifies that a copy of the summons and complaint may be served (1) upon an officer, director or managing agent of the corporation; (2) by leaving copies of the summons and complaint *in the office* of an officer, director or managing agent *with the person who is apparently in charge of the office;* (3) by delivering the summons and complaint to an agent authorized to accept service by appointment; (4) by delivering the summons and complaint to an agent authorized to accept service by law; or (5) by delivery of the summons and complaint upon an agent authorized to accept service by appointment or by law in the manner provided by any other effective statute.

Upon the facts before us, it is readily apparent that service was not made upon an officer, director, or managing agent of Mason's Stores, Inc. (NC-1). Nor was service effected by leaving process in the manager's office with a person who was apparently in charge of the office. The evidence indicates that Deputy Penland never looked in the office of the manager; rather, he delivered the process to Vera Wallin as she stood by the front of the store near a cash register. Judge Fountain found upon conflicting evidence that Deputy Penland served Vera Wallin with process in an unrelated lawsuit, then delivered the process in this action to her, saying "I might as well give these to you also." At best, the plaintiff's evidence shows that Deputy Penland asked if the manager of the store was present, and finding that he wasn't, Deputy Penland delivered the process to Vera Wallin having no knowledge of her authority to accept service, and failing to inquire as to her authority.

Nor was service effected by delivering the process to an agent authorized to accept service by appointment. This provision of Rule 4(j)(6) contemplates service on agents either expressly or impliedly appointed by the corporation as agents

to receive process. Wright and Miller, Federal Practice and Procedure: Civil, § 1101.

> " . . . The agency for the receipt of process may be implied from the surrounding circumstances. But the mere appointment of an agent, even with broad authority, is not enough; it must be shown that the agent had specific authority, express or implied, for the receipt of service of process." 2 Moore's Federal Practice ¶ 4.22[1], p. 1116.

The evidence produced by the plaintiff was inadequate to show any implied authority on the part of Vera Wallin to accept service of process. Deputy Penland's affidavit recited, in pertinent part, that:

> " . . . It has been my duty on several occasions to serve subpoenas on her (Vera Wallin) with regard to shoplifting cases in which Mason's Stores, Inc., was involved. . . . I assumed, as a result of her appearing in court on behalf of Mason's Stores, Inc., and as a result of seeing her in the store on several occasions, that Vera Wallin was an employee of Mason's Stores, Inc. . . . "

At most, the above recitals show that Deputy Penland had served subpoenas on Vera Wallin on prior occasions, that Vera Wallin had appeared as a witness in court on behalf of Mason's Stores, Inc., and that Penland assumed Vera Wallin was employed at Mason's Stores, Inc. This evidence fails to meet the plaintiff's burden of showing the required specific agency to accept service of process.

Nor was service effected by delivering the process to an agent authorized to accept service by law. The phrase "an agent authorized . . . by law to be served" includes within its scope state statutes vesting authority in certain persons to receive process, agencies implied in law, and agencies by estoppel. 2 Moore's Federal Practice ¶ 4.22[1], p. 1118. We hold that plaintiff's evidence was insufficient to carry the burden of showing any statutory agency, agency implied in law, or by estoppel.

Since there is no other effective statute providing an alternative method for service of process on Mason's Stores, Inc., we conclude that the attempted service of process upon the corporate defendant was ineffective and void, and that no

jurisdiction over the person of the defendant was obtained thereby.

[2] Plaintiff next contends that the defendant waived its defense of insufficiency of service of process and its objection to the jurisdiction of the court over the defendant's person by making a general appearance in the action when defendant obtained an enlargement of time in which to file answer or other pleading. However, "[s]pecial appearances are no longer necessary in any case. 'Rule 12 has abolished . . . the age old distinction between general and special appearances.' A voluntary appearance does not waive the objection of lack of jurisdiction over the person. . . . " 2A Moore's Federal Practice ¶ 12.12, p. 2324. The plaintiff's argument has been answered adversely to him in two prior decisions of this Court, and we hold that the plaintiff's contention is not well taken. See *Williams v. Hartis,* 18 N.C. App. 89, 195 S.E. 2d 806 (1973); *Leasing, Inc. v. Brown,* 14 N.C. App. 383, 188 S.E. 2d 574 (1972).

The judgment of the trial judge, dismissing the cause for want of jurisdiction over the person of the defendant, is affirmed.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. CATHERINE MURCHINSON

No. 7213SC836

(Filed 23 May 1973)

1. **Criminal Law § 78— stipulations**

A stipulation is a judicial admission and ordinarily is binding on the parties.

2. **Criminal Law § 78— stipulation signed by defendant — reading to jury — failure to show circumstances of signing**

In a prosecution for possession of heroin and possession of a hypodermic syringe and needle for the purpose of administering a controlled substance, the trial court erred in permitting the solicitor over defendant's objection to read to the jury a stipulation signed

by defendant that an analysis of the contents of a syringe and bottle cap found in her possession showed they contained heroin where the State showed only that defendant signed the stipulation on some previous occasion before another judge but made no further showing as to the circumstances under which it was signed, there being no showing as to whether defendant signed the stipulation in open court or in chambers, whether she was then represented by counsel or whether she knowingly and intelligently waived her right to counsel.

APPEAL by defendant from *Hall, Judge,* 14 August 1972 Session of Superior Court held in BLADEN County.

Defendant was charged with (1) felonious possession of a controlled substance, heroin, and (2) unlawful possession of a hypodermic syringe and needle for the purpose of administering a controlled substance. (A third charge of unlawful possession of marijuana was nonsuited and is not involved on this appeal.) Defendant pled not guilty to all charges. The State's evidence showed: After obtaining a search warrant, the validity of which is not questioned on this appeal, SBI agents and local officers went to defendant's home, where they arrived about 7:30 p.m. On proceeding into the house, the officers found six or seven men in the front room. SBI Agent Richardson went immediately to the bedroom, opened the door, and found defendant and two other persons in the room. Defendant had a needle and syringe in her hand. One of the other occupants of the room was wiping his arm with a kleenex. Defendant turned and put the needle and syringe in her bra. Agent Richardson asked defendant to come with him and took her to the kitchen. Someone called him from the other room, and when he turned his head, defendant went around a partition in the wall. He followed and saw her take the needle and syringe out of her bra and place them on a television table along with a roll of money. Agent Richardson picked up the needle and syringe and defendant came back and got the money. On the television table there was also found a bottle cap which had a smutty residue in the bottom. The needle and syringe were introduced in evidence as State's Exhibit No. 2 and the bottle cap was introduced in evidence as State's Exhibit No. 6.

On the basis of a stipulation which had been signed by the defendant prior to the trial and which is more fully discussed in the opinion, the trial court permitted the solicitor, over defendant's objections, to read to the jury portions of a report of an analysis of "a colorless liquid submitted as Item

1" and of "the bottle cap submitted in Item 2" which showed that both items contained heroin. In reading from the report, the solicitor stated to the jury that "Item 1 is State's Exhibit No. 2" and "Item 2 . . . is State's Exhibit No. 6." These statements of the solicitor were not challenged.

Defendant did not introduce evidence. The jury found her guilty of possessing heroin and guilty of possessing a hypodermic syringe and needle for the purpose of administering controlled substances. From judgments imposing prison sentences in each case, defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Jean A. Benoy for the State.

Moore & Melvin by Reuben L. Moore, Jr., for defendant appellant.

PARKER, Judge.

Over defendant's objection, the court permitted the solicitor to read to the jury the following stipulation which was signed by the defendant:

> "I stipulate and agree that T. H. McSwain if present would testify as to the results of analysis contained above. I further stipulate that said analysis is correct and I agree that this analysis shall be received in evidence without further authentication."

The record does not indicate that the entire report of the analysis, which is referred to in the stipulation as the "analysis contained above," was introduced in evidence and there is no copy of the report in the record on this appeal. Over defendant's objections the solicitor was permitted to read to the jury portions of the report which stated that an "analysis of a portion of a colorless liquid submitted as Item 1" and "analysis of the bottle cap submitted as Item 2" showed that both contained heroin. Insofar as the record before us indicates, the only connection made between the "Items" referred to in the report of the analysis and the State's exhibits introduced at the trial came as result of the solicitor's statements. These statements, however, were not challenged at the trial and in their brief on this appeal defendant's attorneys state: "The solicitor read into evidence a stipulation signed by the defendant which stipulated that the syringe contained the controlled substance

heroin and that the bottle cap contained the controlled substance heroin. . . . " Accordingly, for purpose of deciding the principal question presented by this appeal, we will accept the record as adequately showing that the "analysis contained above," as referred to in the stipulation, was an analysis of the articles, or more correctly an analysis of the contents of the articles, introduced in evidence as State's Exhibits 2 and 6 and which the State's evidence indicated were found in defendant's possession.

[1] A stipulation is a judicial admission and ordinarily is binding on the parties who make it. *Farmer v. Ferris,* 260 N.C. 619, 133 S.E. 2d 492. "A stipulation of fact is an adequate substitute for proof in both civil and criminal cases." *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476. "Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence." 2 Stansbury's North Carolina Evidence, Brandis Revision, § 166, p. 1. The making of stipulations as to facts about which there can be no dispute is to be encouraged as a proper means of expediting trials in both criminal and civil cases. The holding of a pretrial conference in criminal cases to consider, among other matters, the advisability of making such stipulations has been recommended in the American Bar Association Standards for Criminal Justice. See: Standards Relating to Discovery and Procedure Before Trial, § 5.4(a). Those Standards further provide, however, that admissions, by the accused "should bind the accused only if included in the pretrial order and signed by the accused as well as his attorney." § 5.4(b).

[2] The record in the case now before us is silent concerning the circumstances under which the stipulation set forth above was signed by the defendant, except for the following:

"MR. GREER (the Solicitor): Your Honor, at this time I would like to read a stipulation.

"MR. MOORE (Defense Counsel): Your Honor, we object to the reading of a stipulation.

"MR. GREER: Your Honor, the stipulation is signed by the defendant.

"THE COURT: Before I rule on the objection, did she sign the stipulation?

"MR. MOORE: Yes, sir, Your Honor.

"MR. GREER: Yes, sir. She signed it on the 19th of April, 1972, before James H. Bailey, Judge Presiding.

"THE COURT: I am going to overrule the objection."

Other than the above, the record is barren as to the events occasioning the signing of the stipulation. Defendant was arrested in February 1972 on the charges upon which she was tried in August 1972. What the occasion was and why she appeared before Judge Bailey and signed the stipulation on 19 April 1972 does not appear. Whether this occurred in open court or in chambers is not disclosed. Whether she was then represented by and received advice of counsel, or if not, whether she signed the stipulation after knowingly and intelligently waiving her right to counsel, is not known. What is clear is that in the stipulation the defendant admitted one of the essential facts which it was necessary for the State to establish in order to convict her of the offenses with which she was charged. In our opinion, and we so hold, it was error for the trial court to overrule defendant's objections to the reading of the stipulation to the jury upon the mere showing that she had signed the stipulation on some previous occasion before another judge without any further showing as to the circumstances under which it was signed. For this purpose the holding of a voir dire examination from which the trial court could make findings of fact would seem the proper method to determine the facts and circumstances under which the stipulation was signed. It may well be that after such an investigation is had and factual findings are made it will be found that the stipulation is properly binding on the defendant. That determination cannot be made in the absence of such findings. For failure of the trial court to make such findings, defendant is entitled to a new trial.

Defendant's motions for nonsuit were properly overruled. While it is true as defendant contends that absent the stipulation the State failed to show that she possessed heroin, it is the admitted evidence, whether competent or incompetent, which must be considered in passing on motions for nonsuit. *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777.

New trial.

Judges BRITT and VAUGHN concur.

MASTROM, INC. D/B/A PROFESSIONAL MANAGEMENT
v. JERRY E. WARREN

No. 7326SC316

(Filed 23 May 1973)

1. **Contracts § 7; Master and Servant § 11— covenant not to compete — prerequisites**

Restrictive covenants not to engage in competitive employment are in partial restraint of trade and to be enforceable must be (1) in writing, (2) supported by valid consideration, and (3) reasonable as to terms, time and territory.

2. **Contracts § 7; Master and Servant § 11— covenant not to compete — consideration**

When the employment preexists the execution of an employment contract containing a covenant not to compete, there must be some additional consideration to the employee to support his covenant not to compete.

3. **Contracts § 7; Master and Servant § 11— covenant not to compete — absence of consideration**

Covenant not to compete contained in an employment contract executed by defendant employee after he had been employed by plaintiff employer for over three years was unsupported by consideration and unenforceable where defendant performed the same services and the terms of his employment remained the same after he signed the contract, and the provision of the contract relating to compensation imposed no obligation on the employer to increase defendant's compensation but provided only that raises would be given in the discretion of the employer.

APPEAL by plaintiff from *Snepp, Judge,* 11 December 1972 Session of Superior Court held in MECKLENBURG County.

This is a civil action instituted by plaintiff, Mastrom, Inc., doing business as Professional Management, to enjoin defendant from violating the terms of an anticompetitive covenant contained in a contract of employment with defendant. Facts pertinent to the resolution of the issues raised by this appeal are summarized as follows:

Plaintiff corporation is engaged in financial and management counseling of members of the medical and dental professions. On or about 16 June 1968, defendant was employed by plaintiff as a consultant at a starting salary of $415.00 per month. By 1 December 1969 defendant had received raises totaling $185.00 per month, making his total monthly compensa-

tion $600.00. Thereafter, plaintiff received semi-annual raises, effective 1 June and 1 December of each year until 1 December 1971. On or before 1 November 1971, Stanley E. Burgin, area manager of the corporate plaintiff, presented defendant with an employment contract and informed defendant that he would receive a pay raise if he signed the contract but would not receive a pay raise if he refused to sign. On 10 November 1971, defendant signed the contract and thereafter received pay raises of $25.00 per month in December, 1971, March, 1972, June, 1972, and September, 1972. The anticompetitive covenant contained in the employment contract in pertinent part provides:

> "Employee agrees that he will not take unfair advantage of the Employer's disclosure of its systems and procedures, and will not take unfair advantage of having been placed in a direct personal and confidential relationship with the Employer's clients. Specifically, the Employee agrees that, if his employment terminates for any cause after he has been employed for ninety (90) days he will not, for a period of three (3) years thereafter, solicit, contract for or render the same or similar services to any individual, firm, partnership, association or corporation who or which has been, within one year prior to the date of such termination, a client of the Employer serviced either by the Employee or by a consultant supervised by the Employee."

On 1 December 1972 plaintiff tendered his resignation to be effective that same day. Stanley Eugene Burgin testified that since that time:

> "Every one of the firms serviced by the defendant, Mr. Warren, within the last year have terminated. There were sixty-six clients representing ninety-two doctors and dentists in and around the area of Charlotte serviced by his firm and approximately twenty-five per cent of his firm's clientel [*sic*] was lost in the days' span of December 1st through December 5th."

On 6 December 1972, plaintiff brought this action seeking to enforce the covenant not to compete contained in the employment contract. Pursuant to appropriate notice, plaintiff moved for a temporary injunction against defendant and following a hearing on 15 December 1972, Judge Snepp made findings of fact in pertinent part as follows:

"5. That the Defendant was employed by the Plaintiff on June 16, 1968 and remained in the employ of the Plaintiff until November 30, 1972.

6. That during the entire period of employment, the Defendant performed the same type of services and retained the same status with the Plaintiff employer.

* * *

8. That at the time the Defendant signed said contract, his terms of employment with the Plaintiff remained the same in all respects.

9. That the Plaintiff had a pattern of reviewing each employee's salary on a periodic basis.

* * *

11. That the raise the Defendant received on December 1, 1971, was the result of a periodic review by the Plaintiff and was not given as consideration for the Defendant's signing said Employment Contract on November 10, 1971.

12. That paragraph 7 of said contract which purports to be the consideration of the Plaintiff employer for said contract is indefinite as to time and amount and merely states that raises will be given in the discretion of the employer.

13. That the covenant not to compete was the primary purpose of the Plaintiff having said contract signed."

Based upon these findings, the court concluded that the provision in the employment contract governing compensation is "so vague and indefinite as to be unenforceable," is "illusory," and that "the contract is without consideration on the part of the Plaintiff and is therefore unenforceable." The injunctive relief prayed for by plaintiff was denied; whereupon, plaintiff appealed.

Elam and Stroud by William H. Elam and Wade and Carmichael by J. J. Wade, Jr., for plaintiff appellant.

Thomas E. Cummings for defendant appellee.

HEDRICK, Judge.

Plaintiff contends that "[t]he Trial Court committed error . . . in finding the employment contract void and unenforceable and in denying the preliminary injunction." We disagree.

[1] Restrictive covenants not to engage in competitive employment are in partial restraint of trade and to be enforceable must be (1) in writing, (2) supported by valid consideration, and (3) reasonable as to terms, time and territory. The absence of any of these requirements is fatal. *Greene Co. v. Kelley,* 261 N.C. 166, 134 S.E. 2d 166 (1964).

[2] The contract of employment containing the covenant not to compete was executed by defendant more than three years after the commencement of his employment with plaintiff. "When the employment preexists the execution of the contracts, there must be some additional consideration to the employee to support his covenant not to compete. *Greene Co. v. Kelley* . . . [*supra*]." *Wilmar, Inc. v. Liles* and *Wilmar, Inc. v. Polk,* 13 N.C. App. 71, 77, 185 S.E. 2d 278, 282 (1971), cert. denied, 280 N.C. 305, 186 S.E. 2d 178 (1972).

[3] Paragraph 7 of the employment contract provides:

> "COMPENSATION: The Employer agrees to compensate Employee for his services rendered hereunder in accordance with the rates of compensation determined by designated officers of the Employer in accordance with policies of the Board of Directors. Tenure, proficiency and overall work load will be fairly taken into consideration by the Employer in establishing Employee's compensation for services rendered."

This provision of the employment contract fails to impose any obligation on plaintiff to increase or even refrain from decreasing the compensation to be paid to defendant. As appears from plaintiff's own evidence, "Each raise was based on merit, and it's totally in Mr. Burgin's discretion when he gives a raise." Therefore, evidence tending to show that defendant's raise was dependent on whether he signed the contract and that defendant did subsequently receive periodic raises after executing the contract does not relate these raises to the anticompetitive covenant or remedy the fact that the purported consideration, as recited in the employment contract, is illusory.

Defendant, as a further defense, stated that at the time he executed the contract:

> "[H]e had been employed by the Plaintiff for over three years and was already completely familiar with the practices and procedures of the Plaintiff";

and that

> "[H]is terms of employment with the Plaintiff remained the same."

Stanley Eugene Burgin testified:

> "He has known the defendant, Jerry Warren, four and a half years and has supervised him at Professional Management for this entire period of time. While under the employment of Mastrom, Inc., Mr. Warren was afforded training and educational facilities by company divisional seminars, educational type programs, company-wide training sessions, plus information distributed from the company home office.
>
> In his opinion, Mr. Warren's skills would make him a highly qualified and/or unique person in . . . profession."

Obviously, defendant had acquired a knowledge of plaintiff's business methods, territories and clientele prior to the execution of the employment contract and the conclusion is inescapable that:

> "[I]n actuality the restrictive covenant not to compete here sought to be enforced is not an ancillary contract at all. It is the main purpose of the contract and not a subordinate feature. It becomes and is, therefore, a naked contract not to compete not protected as to enforceability by the exceptions afforded ancillary contracts in restraint of trade permissible in connection with the sale of a going business, a contract of employment, or a lease." *Wilmar, Inc. v. Liles* and *Wilmar, Inc. v. Polk, supra,* at 79.

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

Affirmed.

Judges CAMPBELL and PARKER concur.

PAULINE PARRISH SMITH, ADMINISTRATRIX OF WELDON PARRISH, DECEASED v. JIMMY DALE KILBURN

No. 738SC67

(Filed 23 May 1973)

1. **Automobiles § 45— liquor bottle found at accident scene — relevancy of testimony**

In this action for the wrongful death of a pedestrian struck by defendant's automobile, testimony concerning a liquor bottle found at the accident scene by the investigating officer was relevant where the officer testified that he detected an odor of alcohol on defendant's breath and that a cork stopper he found in defendant's automobile fit the bottle and the stamp or paper on the cork meshed with that on the neck of the bottle.

2. **Death § 1— wrongful death action — reading from death certificate**

The trial court in a wrongful death action did not err in allowing to be read to the jury portions of decedent's death certificate stating the date of death, place of injury, time decedent was pronounced dead and that the cause of death was multiple injuries.

3. **Trial § 33— recapitulation of evidence — absence of facts discrediting witness**

The trial court in a wrongful death action did not err in failing to include in its recapitulation of the evidence certain facts brought out on cross-examination of plaintiff's witness which reflected on the witness's credibility where defendant did not request instructions on such subordinate issue.

APPEAL by defendant from *Bone, Judge,* at the 21 August 1972 Session of Superior Court held in WAYNE County.

This is a civil action to recover damages for the wrongful death of plaintiff's intestate, Weldon Parrish. Plaintiff is the daughter and administratrix of Weldon Parrish.

Plaintiff offered evidence which tended to show the following: that on 14 July 1968 at about 1:00 a.m., Weldon Parrish and one William Gurganus were walking in a westerly direction on the south side of Stronach Avenue, a two-lane public roadway in Goldsboro, North Carolina, which runs in an east-west direction; that there was no sidewalk along this part of Stronach Avenue, but only a dirt shoulder; that plaintiff's intestate was walking next to the street, or perhaps on the edge of the south side of Stronach Avenue; that William Gurganus was walking next to plaintiff's intestate on the extreme left side of the shoulder; that the two had been out looking for "some whiskey";

that they were unable to find any whiskey, and that plaintiff's intestate was sober; that Gurganus had had something to drink prior to this time, but that he was not drunk; that Gurganus neither saw nor heard any car until defendant's car hit Parrish; that defendant was driving westward in the north side lane of Stronach Avenue; that defendant's car struck deceased while he was walking along the edge of the eastbound lane (south side lane) of Stronach Avenue or on the dirt shoulder; that after the collision, deceased's body was lying partially on the road and partially on the dirt shoulder; that, after the collision, defendant's car stopped in the eastbound lane (south side) of Stronach Avenue, facing west in the direction it had been traveling; that a police officer investigating the scene of the accident smelled the odor of alcohol on defendant's breath; that the police officer found a curved cork stopper in defendant's car and an alcoholic beverage bottle in the vicinity of the collision; that the cork had part of a paper label on it that matched the paper on the neck of the bottle, and that the cork fit the bottle; that a highway patrolman testified that defendant admitted to him that he struck the deceased in the eastbound lane of Stronach Avenue; that defendant further told the highway patrolman that he was driving west on Stronach Avenue, that there were some people walking on the righthand side of the street on Stronach Avenue and he pulled to his left to go around these people and sounded his horn, that just as he got into the left lane a man walked out in front of his car from behind some bushes and he hit him; that the bushes defendant referred to were 6-8 feet from the edge of Stronach Avenue; that Stronach Avenue did not have a centerline; that deceased was employed and had a life expectancy of 23.8 years.

Defendant offered no evidence.

The issues of negligence, contributory negligence, and damages were submitted to the jury. From a judgment awarding plaintiff $20,000, defendant appealed.

Herbert B. Hulse and Sasser, Duke & Brown, by John E. Duke, for plaintiff-appellee.

Dees, Dees, Smith, Powell & Jarrett, by William W. Smith, for defendant-appellant.

BROCK, Judge.

Defendant assigns as error the admission of certain testimony by Officer B. F. Smith, and the court's refusal to allow defendant's motion to strike that testimony. Officer Smith investigated the accident and testified that he detected an odor of alcohol on defendant's breath. Officer Smith then testified, over objection, that he found a curved cork stopper in defendant's automobile. This cork was about an inch long and had part of a stamp or piece of paper attached to it. Officer Smith testified that he found an alcoholic beverage bottle at the scene of his investigation, and "determined that the cork stopper . . . would fit the bottle and the stamp or paper on the neck of the bottle."

[1] Defendant contends that this testimony was irrelevant and immaterial in that the bottle found was not linked to the defendant. Officer Smith testified that he detected an odor of alcohol on defendant's breath and that he found a bottle cork in defendant's car. An alcoholic beverage bottle was discovered at the scene of the investigation. The cork stopper fit this bottle and the paper on the cork, according to Officer Smith, meshed with that on the neck of the bottle. There is a reasonable nexus between this testimony and defendant. The matching cork was found in defendant's automobile. The testimony was properly admitted. *See* Stansbury, North Carolina Evidence (Brandis Revision), § 78. This assignment of error is overruled.

[2] Defendant excepts to the introduction into evidence of the death certificate of plaintiff's intestate, the reading of portions of this certificate to the jury, and the court's refusal to allow defendant's motion to strike such evidence. The following information was read from the death certificate to the jury: "Name of deceased: Weldon D. Parrish; date of death, July 14, 1968; immediate cause—multiple injuries; place of injury—Stronach Avenue, Wayne County, North Carolina. Decedent pronounced dead at 1:15 a.m., July 14, 1968." A death certificate is competent in evidence to prove the fact of death, the time and place where it occurred, the identity of the deceased, the bodily injury or disease which was the cause of death, and other matters relating to the death. 3 Strong, N. C. Index, Death, § 1, p. 200. The statements read to the jury were competent evidence. The death certificate itself was not included in the record on appeal. Therefore, we presume that it contained no statements from unidentified sources, repeated or summarized in the certificate, which would be incompetent in evidence. This assignment of error is overruled.

[3] Defendant excepts to the trial court's failure to include in his recapitulation of the evidence to the jury certain facts brought out on cross-examination of plaintiff's witness William Gurganus. These facts reflected on the witness' credibility and included such information as: the witness was in jail at the time of the trial; witness had been convicted of some criminal offenses; witness did not tell investigating police officers that he had witnessed the accident; witness had not known that an earlier trial was held on this case, and that he had not testified at it.

In the instructions to the jury, recapitulation of all the evidence is not required. The trial judge is only required to state the evidence to the extent necessary to explain the application of the law thereto. *State v. Hardee,* 3 N.C. App. 426, 165 S.E. 2d 43. The omissions defendant excepts to in the trial court's recapitulation of the evidence involved a subordinate issue in the case, the credibility of a particular witness, which was not necessary to explain the application of the law to the evidence. Defendant did not request instructions on this subordinate issue. This assignment of error is overruled.

We have carefully reviewed defendant's other assignment of error to the trial court's charge to the jury, and we find no prejudicial error.

Defendant also excepts to the trial court's refusal to set aside the verdict and grant defendant a new trial. Defendant contends that plaintiff was awarded excessive damages. We find no merit in this contention.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. THOMAS WELLON LASSITER

No. 7318SC399

(Filed 23 May 1973)

1. **Criminal Law § 155.5— ineffective order extending time for docketing appeal**

In an assault and robbery case the trial judge was without authority to enter a second order extending the time to docket the record on appeal where the ninety-day period following the date of the judgment appealed from had already expired, and defendant's appeal was subject to dismissal; however, the Court on appeal treated it as a petition for certiorari, granted it, and considered the case on its merits. Rules 5 and 48, Rules of Practice in the Court of Appeals.

2. **Rape § 18; Robbery § 4— armed robbery — assault with intent to commit rape — sufficiency of evidence**

In a prosecution for armed robbery and assault with intent to commit rape, evidence was sufficient to withstand defendant's motions for nonsuit where it tended to show that defendant approached the ticket window of a movie house, displayed a gun and demanded money, then walked to the nearby college campus where he accosted a student, held a razor at her throat, threatened to kill her if she screamed and told her that he wanted to have intercourse with her.

3. **Criminal Law § 113— evidence competent for restricted purpose — no limiting instruction — no error**

The trial court did not err in failing to instruct that evidence of defendant's prior convictions for assault, breaking and entering, and forgery could be considered only for the limited purpose of impeaching his testimony where defendant at no time during the trial requested such limiting instruction.

4. **Criminal Law § 161— exceptions deemed abandoned**

Exceptions not set out in defendant's brief or supported by reason or argument are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals.

5. **Rape § 6— lesser included offense — instructions proper**

In a prosecution charging defendant with assault with intent to commit rape, though the trial court did not instruct the jury that it must find that the victim was put in bodily fear before it could convict defendant of the lesser offense of assault with a deadly weapon, the trial court's instructions as to the factual findings necessary for conviction were correct since the evidence in this case disclosed an actual battery, rendering the question of whether the victim was put in fear inapposite.

APPEAL by defendant from *Crissman, Judge*, 23 October 1972 Criminal Session of Superior Court held in GUILFORD County.

By separate bills of indictment, proper in form, defendant was charged with (1) the armed robbery of Emlia Christina Lopez and (2) assault with intent to commit rape upon Katherine W. Hann. Without objection the two cases were consolidated for trial and defendant pled not guilty to both charges.

In substance the State's evidence showed: Shortly before 3:00 p.m. on 2 September 1972 defendant appeared in front of the ticket window of a movie house near the campus of U.N.C.-G. in Greensboro. Miss Lopez was on duty in the ticket booth. Defendant had a black handgun in his left hand. He said: "Don't scream. Don't push no buttons. This is a hold up." She gave him the currency in the ticket booth, later determined to be sixty-seven dollars. Defendant pointed the pistol at her and told her to stand up and to expose herself to him. He stated: "I don't mind killing you, and I don't mind blowing up this theater." He told her to go get a car and he would be waiting for her out front. On the pretext of going for a car Miss Lopez went into the theater and reported what had occurred. The police were immediately notified by telephone. Bob Walker, a bystander, who was attempting to make a phone call from a phone booth near the ticket window, overheard a portion of the conversation between defendant and Miss Lopez and in particular heard him threaten to kill her. Mr. Walker watched defendant as he walked away from the theater and informed the police as soon as the squad car arrived. Defendant walked from the theater onto the nearby campus of U.N.C.-G. About a block from the theater he came upon Katherine Hann, a student, as she was walking across campus. He came up behind her, placed his arm around her, held a razor at her neck, and told her to keep walking and not to scream. He told her that if she did scream, he would kill her, and he kept repeating this. Still holding the razor to her neck, he told her that he wanted to have sexual intercourse with her, and asked where they could go. When defendant saw a couple walking toward them in front of the science building, he put the razor inside of his hand, and Miss Hann was able to duck under his arm and run. She received a scratch on her neck and a cut on the middle finger of her left hand. Almost immediately a police car drove up and defendant ran. Miss Hann pointed him out to the officer, who pursued on foot. Defendant was apprehended a few minutes later as he attempted to hide in a culvert. The officers took a straight razor from him and found $70.41 in his right front

pocket and a ten dollar bill in his left pocket. No gun was found. Miss Lopez, Miss Hann and Mr. Walker, all positively identified defendant from the witness stand.

Defendant testified and denied he had robbed Miss Lopez or assaulted Miss Hann. He testified that he lived in Durham and had come to Greensboro that morning to visit a relative; that he had won the money that morning in a crap game; that he was walking across the campus and when the cop's car pulled up beside him he ran because he was on probation, had been drinking, and was not supposed to be in Greensboro. He denied ever owning a gun and denied that the razor which had been introduced in evidence was his or that it had been found in his possession.

The jury found defendant guilty of common-law robbery and guilty of assault with intent to commit rape. Judgments were imposed in each case sentencing defendant to prison. In apt time defendant gave notice of appeal.

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

Wallace C. Harrelson for defendant appellant.

PARKER, Judge.

The judgments appealed from were dated 3 November 1972. By order dated 5 January 1973 the trial judge, upon a finding of good cause shown, extended the time for docketing the record on appeal until 10 March 1973. This order, which expressly referred to the judgments in both the robbery and the assault cases, was entered within ninety days after the date of the judgments appealed from as authorized by Rule 5 of the Rules of Practice of this Court. However, the record on appeal was not docketed in this Court within the extended time allowed by the trial judge's order of 5 January 1973. Instead, on 9 March 1973 the trial judge signed a second order which purported further to extend the time for docketing the record on appeal until 30 March 1973. This order made reference only to the sentence imposed in the robbery case, no reference being made to the judgment in the assault case. The record on appeal purporting to present an appeal from the judgments in both cases was finally docketed in this Court on 30 March 1973.

[1] Within ninety days after the date of a judgment appealed from, but not thereafter, the trial tribunal may for good cause shown extend the time for docketing the record on appeal not exceeding sixty days. Rule 5. When the second order extending time to docket was signed in this case on 9 March 1973, the ninety-day period had already expired and the trial tribunal no longer had authority to enter a valid order further extending the time. *Lambert v. Patterson,* 17 N.C. App. 148, 193 S.E. 2d 380. For failure to comply with the Rules of Practice in this Court, this appeal is subject to dismissal. Rules 5 and 48. Nevertheless, in this case we have elected to treat defendant's appeal as a petition for certiorari, to allow the petition, and to consider fully the merits of all questions sought to be raised.

[2] Defendant's first assignment of error, addressed to denial of his motions for nonsuit, is without merit. There was ample evidence to require submission of both cases to the jury. Indeed, it would be difficult to imagine more compelling evidence to show defendant's guilt of all elements of each of the offenses for which he was tried.

Defendant's second assignment of error, that the trial judge failed to define adequately the words "reasonable doubt" in the charge to the jury, is also without merit. The definition as given in the charge was in the form approved by decisions of our Supreme Court. Moreover, in the absence of a request, the court is not obligated to define reasonable doubt. *State v. Foster,* 8 N.C. App. 67, 173 S.E. 2d 577. No such request was made.

[3] On cross-examination, defendant testified he had been convicted of an assault upon his aunt, of breaking and entering, and of forgery. The court, in summing-up defendant's testimony in its charge to the jury, made a brief and accurate reference to this testimony. Defendant's third assignment of error is that the court failed to go further and to instruct the jury that prior convictions of the defendant could be considered only for the limited purpose of impeaching his testimony and for no other purpose. However, no such limiting instruction was requested at any time during the trial.

> "It is a well recognized rule of procedure that when evidence competent for one purpose only and not for another is offered it is incumbent upon the objecting party to request the court to restrict the consideration of the

jury to that aspect of the evidence which is competent." *State v. Ray,* 212 N.C. 725, 194 S.E. 482; *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310.

Defendant's third assignment of error is overruled.

[4] The exceptions which are the basis of appellant's fourth assignment of error are not set out in appellant's brief, nor is any reason or argument stated or authority cited in support of such exceptions. Accordingly, these exceptions are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals.

[5] Defendant's fifth assignment of error relates only to the assault case. In this assignment the defendant contends that the court committed error in the portion of its charge to the jury in which the court instructed the jury as to what factual findings would be required in order for the jury to find defendant guilty of the lesser offense of assault with a deadly weapon in event they should fail to find him guilty of assault with intent to commit rape. In this connection defendant argues that the court erred in failing to instruct that before the jury could convict defendant of assault with a deadly weapon it was necessary for them to find beyond a reasonable doubt that the victim of the assault, Miss Hann, was put in fear of bodily injury. We find this assignment of error also without merit. While under the evidence in the present record it is inconceivable that Miss Hann was not actually put in fear of bodily injury, under the circumstances disclosed by the evidence in this case it was not essential that the jury so find as a prerequisite to finding defendant guilty of an assault. In this State a criminal assault may be accomplished either by an overt act on the part of the accused evidencing an intentional offer or attempt by force and violence to do injury to the person of another or by a "show of violence" on the part of the accused sufficient to cause a reasonable apprehension of immediate bodily harm on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed. *State v. Roberts,* 270 N.C. 655, 155 S.E. 2d 303; *State v. Hill,* 6 N.C. App. 365, 170 S.E. 2d 99. Where, as in the present case, the evidence discloses an actual battery, whether the victim is "put in fear" is inapposite. *State v. Hill,* 266 N.C. 103, 145 S.E. 2d 346. As was pointed out by Bobbitt, J. (now C.J.) in that case, the decision in *State v. Allen,* 245 N.C. 185, 95 S.E. 2d 526, which is cited and relied on by the defendant in the present case, relates to an entirely different factual situation.

Defendant's remaining assignments of error are formal and are without merit. Defendant has had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. FREDERICK EARL CANNADY
STATE OF NORTH CAROLINA v. WILLIE BURNICE HINNANT

No. 737SC157 and No. 737SC158

(Filed 23 May 1973)

1. **Property § 4— feloniously and maliciously — not synonymous terms**

Use of the word "feloniously" in an indictment based on G.S. 14-49(b) charging defendants with damaging real and personal property of another by use of an explosive was not a sufficient substitute for the word "maliciously" as used in the statute, since the word "feloniously" implies that the act charged to have been done proceeded from an evil heart and wicked purpose but does not allege the necessary element of actual ill will, hatred or animosity of the accused toward the person whose property was injured.

2. **Property § 4— failure of indictment to allege malicious damage — indictment fatally defective**

Without the essential element of malicious damage to property being alleged in the indictments charging defendants with "unlawfully, wilfully and feloniously" damaging real and personal property of another by the use of an explosive, regardless of the method with which the damage was caused, the defendants were not apprised of the crime charged and the bills of indictment were defective.

3. **Constitutional Law § 31; Criminal Law § 95— confessions of codefendants — admissibility**

In this case where there were two defendants and each confessed to the crime charged, the State was able to delete all portions of each confession which otherwise would have implicated the defendant other than the declarant; therefore, hearsay evidence was in no way used to convict either defendant, and the admission of both confessions into evidence was not error.

APPEAL by defendants from *Martin (Perry), Judge,* 14 August 1972 Session of NASH Superior Court.

Each defendant was charged with violation of G.S. 14-49 in that on the night of 31 March 1972 they placed one and one-half sticks of dynamite in front of the Stanhope Grocery and Hardware Company, which dynamite caused an explosion which severely damaged both the building and personal property contained therein.

Trial by jury resulted in verdicts of guilty as to each defendant. Defendant Cannady was sentenced to a term of imprisonment for not less than twenty nor more than twenty-five years. Defendant Hinnant was sentenced to a term of imprisonment of not less than fifteen nor more than eighteen years.

Attorney General Robert Morgan by Associate Attorney Norman L. Sloan for the State.

Moore, Diedrick & Whitaker by L. G. Diedrick for defendant appellant Cannady.

Frederick E. Turnage for defendant appellant Hinnant.

CAMPBELL, Judge.

Each defendant was charged in a separate bill of indictment as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Frederick Earl Cannady alias Jim [Willie Burnice Hinnant] late of the County of Nash on the 31st day of March 1972 with force and arms, at and in the county aforesaid, did *unlawfully, wilfully and feloniously* damage real and personal property belonging to another by the use of an explosive, to wit: the Stanhope Grocery and Hardware Company against the form of the statute in such case made and provided and against the peace and dignity of the State." (Emphasis added.)

The indictments alleged violations of G.S. 14-49(b) which provides:

> "Any person who *wilfully and maliciously* damages or attempts to damage any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a felony." (Emphasis added.)

Defendants contend that the indictments are fatally defective in that they failed to allege all the essential elements of the offense; that is, that the crime was maliciously committed. The State, on the other hand, argues that the use of the word "feloniously" is a sufficient substitute for the word "maliciously."

It has been held in some jurisdictions that the words "feloniously" and "maliciously" have the same meaning—with criminal intent. *Aikman v. Commonwealth,* 18 S.W. 937 (Ky. 1892). In the *Aikman* case the defendant was indicted for arson which was a crime not defined by statute. Although malice was an essential element of the crime of arson at common law, the court held that the word "feloniously" was sufficient to supply the full meaning of the word "maliciously." "An act, to be malicious, need not be confined to an ill will towards the person. It is so if done with a deliberate evil intent." 18 S.W. at 938.

However, if the statutory use of the word "malicious" in defining a crime attaches to that word the specific, technical meaning of ill will, animosity, then an indictment framed without the use of the word "maliciously" is fatally defective. *Coates v. Commonwealth,* 235 Ky. 683, 32 S.W. 2d 34 (1930). In *Coates* the defendant was tried for the statutory offense of "maliciously" shooting at another. The court held that since there are various statutory degrees of the offense, malice is the element that distinguishes the two lower offenses from the higher offense. Therefore, an indictment framed without using the word "malicious" is void notwithstanding the ruling of *Aikman v. Commonwealth, supra.* See *State v. Smith,* 119 Tenn. 521, 105 S.W. 68 (1907), in which the court upheld the validity of an indictment without the use of the word "maliciously" because it believed the legislative intention was not to give that word a meaning of ill will.

With respect to the meaning of G.S. 14-49(b), North Carolina law is settled. "The gist of the offense created by G.S. 14-49 is malicious injury or damage to property, real or personal, by the use of high explosives. The word 'malicious' as used in the statute connotes a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant." *State v. Conrad,* 275 N.C. 342, 352, 168 S.E. 2d 39, 46 (1969).

Where the gist of the offense is malicious damage to property, the indictment must allege malice toward the owner of the

property, or its possessor. "Malicious" means more than intending wrong; it connotes actual ill will or resentment toward the owner or possessor of the property. It is an element of preconceived revenge. *State v. Martin,* 141 N.C. 832, 53 S.E. 874 (1906); *State v. Jackson,* 34 N.C. 329 (1851); *State v. Robinson,* 20 N.C. 129 (1838).

[1] Although the word "feloniously" implies that the act charged to have been done proceeded from "an evil heart and wicked purpose," *State v. Morgan,* 98 N.C. 641, 3 S.E. 927 (1887), it does not allege the necessary element of actual ill will, hatred, or animosity of the accused toward the person whose property was injured. Although the indictments contain the word "wilfully" that word does not have an equivalent meaning to the word "maliciously" and does not save the indictments. *State v. Morgan, supra; State v. Massey,* 97 N.C. 465, 2 S.E. 445 (1887).

[2] The significance of the error in this indictment is illustrated by comparing G.S. 14-49(b) to other statutes: G.S. 14-49(b) creates the crime of wilfully and maliciousy damaging real or personal property by use of explosives; G.S. 14-127 creates the crime of wilfully and wantonly injuring real property; and G.S. 14-160 creates the crime of wilfully and wantonly injuring personal property. The latter two crimes are misdemeanors, and are statutory enactments designed to avoid the element of malicious ill will required by the common-law crime of malicious mischief. G.S. 14-49(b), however, is made a felony due to the nature of the cause, and follows the common-law crime of malicious mischief by requiring malicious ill will. Without the element of malicious damage to property being alleged in the indictment, regardless of the method with which the damage was caused, the defendants were not apprised of the crime charged and the bill of indictment was defective.

G.S. 15-153, designed to free indictments from the requirement of technicality and formality, does not dispense with the requirement that all the essential elements of an offense must be charged. *State v. Williams,* 1 N.C. App. 312, 161 S.E. 2d 198 (1968). For the fatal error of failing to allege all the elements of the offense, the indictments in the instant case are void.

[3] Although judgment must be arrested, we deem it expedient in the event there be another trial to discuss one other assignment of error. Each defendant contends that the admission into

evidence of the other's confession denied him the right to confrontation secured by the Sixth Amendment to the United States Constitution. *Roberts v. Russell,* 392 U.S. 293, 20 L.Ed. 2d 1100, 88 S.Ct. 1921 (1968).

However, in the instant case the State was able to delete all portions of each confession which otherwise would have implicated the defendant other than the declarant. Therefore, hearsay evidence was in no way used to convict either defendant, and the admission of both confessions was not error. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968); *State v. Mathis,* 13 N.C. App. 359, 185 S.E. 2d 448 (1971).

The legal effect of arresting the judgment is to vacate the verdict and sentence; and the State may proceed against the defendants, if it so desires, upon a new and sufficient bill of indictment. *State v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81 (1955).

Bill quashed. Judgment vacated.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. BOBBY STITT

No. 7326SC108

(Filed 23 May 1973)

1. **Constitutional Law § 34; Criminal Law § 26— three offenses arising from one transaction — no double jeopardy**

Where defendant and two others approached a store and robbed the manager and two customers, defendant was not subjected to double jeopardy where he was charged in three indictments with three separate offenses—the armed robbery of each man, tried on all three charges in one trial and found guilty of common law robbery on all three indictments.

2. **Criminal Law § 140— conviction for three offenses — consecutive sentences imposed**

Where cases are consolidated for trial and there is a conviction or plea of guilty on several counts, the trial court may enter a judgment on each count and have the judgments run concurrently or consecutively as it may direct; therefore, defendant cannot complain where the trial court entered judgment imposing three consecutive

active sentences of five years upon defendant's conviction of common law robbery on three indictments for armed robbery.

3. **Criminal Law § 88— cross-examination of defendant and codefendants**

Cross-examination of codefendants, even if improper did not prejudice defendant, nor could defendant complain of improper cross-examination of himself by the State where he objected to only one question, that objection was sustained, and the court instructed the jury to disregard the question.

4. **Criminal Law § 66; Robbery § 3— identity of defendant — competency of evidence**

Though the three witnesses to an alleged robbery gave testimony which was not positive as to defendant's identification, it was nevertheless competent and the trial court properly submitted the case to the jury.

5. **Criminal Law § 92— three defendants — conviction of one defendant only — no error**

In a prosecution charging defendant and two others with armed robbery where the jury would have been fully justified in finding all the defendants guilty upon the evidence presented, their failure to return a verdict as to the codefendants does not vitiate the verdict of guilty returned as to defendant, since criminal verdicts as between two or more defendants tried together need not demonstrate rational consistency.

APPEAL by defendant from *Hobgood, Judge,* 14 August 1972 Session of MECKLENBURG County Superior Court.

Defendant Bobby Stitt was tried along with two other defendants upon three indictments charging armed robbery. Through court-appointed counsel, defendant Stitt entered a plea of not guilty to all charges.

At trial the State introduced evidence which tended to show the following:

On 12 April 1972 at approximately 10:30 p.m., Edward Bowers, assistant manager of the Little General Store located at 3200 Monroe Road, Charlotte, N. C., was standing at the check-out counter engaging in conversation with two customers, Roland Harris and John Dietz. No one else was in the store at the time. Defendant Stitt and two others (codefendants in the trial below) entered the store and one of them announced: "Don't move. This is a holdup." One of the defendants stated that they had a gun and would use it if necessary. No gun was actually observed, but Dietz testified that one of the defendants stuck something in his back which he thought was a gun. The defendants then proceeded to remove approximately $100

from the cash register and also took several packs of cigarettes from under the counter. Bowers and the two customers were forced to surrender their own money and various items of jewelry. The defendants then ran from the store.

All three defendants presented alibi evidence in their defense. At the close of all the evidence, the court granted defendants' motion to dismiss as to the charges of armed robbery, and the cases were submitted to the jury on counts of common law robbery and simple assault. Defendant Stitt was found guilty of common law robbery upon all three indictments. The trial court declared a mistrial as to the other defendants upon the jury's failure to reach a verdict on the charges against them. From judgments imposing three consecutive active sentences of five years, defendant Stitt appealed.

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

Hamel and Cannon, P.A., by William F. Hamel, for defendant appellant.

MORRIS, Judge.

The record on appeal was not docketed within the time provided by Rule 5, Rules of Practice in the Court of Appeals of North Carolina, and the appeal is subject to dismissal. We have, however, elected to treat the appeal as a petition for a writ of certiorari. We have allowed the petition and will consider the case on its merits.

No reason or argument is presented or authority cited in defendant's brief with respect to his assignments of error Nos. 1, 2, 3 and 13, and such assignments of error are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

Defendant, by his assignment of error No. 14, contends that the trial court erred in sentencing him to three five-year terms running consecutively. He argues that because the three charges arose out of the same facts and circumstances, he should be charged with one offense, not three, and that the action of the trial court placed him in double jeopardy by the imposition of multiple punishments for the same crime. We do not agree.

[1, 2] Defendant was charged in three indictments with three separate offenses: (1) the armed robbery of Edward Bowers; (2) the armed robbery of Roland Harris; and (3) the armed robbery of John Dietz. He was tried on all three charges in one trial and was clearly not subjected to double jeopardy for the same offense. It is well settled in North Carolina that where cases are consolidated for trial and there is a conviction or plea of guilty on several counts, the trial court may enter a judgment on each count and have the judgments run concurrently or consecutively as it may direct. *State v. Austin,* 241 N.C. 548, 85 S.E. 2d 924 (1955).

[3] Defendant next contends that the trial court erred in allowing improper cross-examination by the State of both the defendant and the codefendants as to matters relating to prior criminal misconduct. All the questions asked of the codefendants were within the proper scope of cross-examination. However, assuming arguendo that they were improper, we fail to see how any prejudice could be imputed to defendant Stitt, especially in view of the fact that the jury failed to return a verdict as to the codefendants. Furthermore, the only objection interposed during the entire cross-examination of defendant Stitt by his counsel was to the question of whether he was a deserter from the U. S. Army, and this objection was promptly sustained by the trial court with an instruction to the jury to disregard such question. This assignment of error is overruled.

[4] Defendant also contends that the trial court erred in refusing to suppress the identification evidence given by the three prosecuting witnesses and in allowing the case to go to the jury, because that evidence was conflicting and confusing. Defendant made no timely objection and request for a voir dire and the fact that the testimony as to the identity of a defendant is not positive does not render that testimony incompetent, but only goes to its weight. 2 Strong, N. C. Index 2d, Criminal Law, § 66; 1 Stansbury's N. C. Evidence, Brandis Revision, § 129. Also contradictions and discrepancies even in the State's evidence are for the jury to resolve and taking the evidence in the light most favorable to the State and giving it the benefit of every reasonable inference, it was proper for the trial court to submit the case to the jury. *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22 (1968).

[5] Finally we examine defendant's contention that the trial court erred in failing to order a mistrial and in entering judgments as to defendant Stitt in light of the fact that the jury failed to reach a verdict as to the other defendants upon basically the same evidence at trial. Each of the prosecuting witnesses testified as to the presence of each of the three defendants in the store. Each was subjected to a rigorous cross-examination revealing varying degrees of positiveness on their part as to the identity of the defendants. However, even though the evidence was basically the same as to each defendant, most modern authorities agree that criminal verdicts as between two or more defendants tried together need not demonstrate rational consistency. Annot. 22 A.L.R. 3d 717, 723 (1968). It has similarly been held that consistency between verdicts on several counts of a bill of indictment is not necessary, and a conviction will be upheld even though it is not rationally compatible with an acquittal on other counts in the same bill. *State v. Davis*, 214 N.C. 787, 1 S.E. 2d 104 (1939); *State v. Lindquist*, 14 N.C. App. 361, 188 S.E. 2d 686 (1972). While the jury would have been fully justified in finding all the defendants guilty upon the evidence in this case, their failure to return a verdict as to the codefendants does not vitiate the verdict of guilty returned as to defendant Stitt.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. DANNY EDWARD COBB

No. 7318SC404

(Filed 23 May 1973)

1. Criminal Law §§ 15, 91— newspaper publicity — continuance and change of venue denied — no error

The trial court in a prosecution charging defendant with felonious possession of a firearm by a felon did not abuse its discretion in denying defendant's motions for continuance or change of venue on the ground of undue publicity resulting from news coverage concerning defendant and the case where there were only two news publications about the matter, both appearing nearly four months before defendant's trial.

2. **Criminal Law § 26— carrying concealed weapon — possession of firearm by felon — no double jeopardy**

In a prosecution charging defendant with felonious possession of a firearm by a felon, defendant was not subjected to double jeopardy, though he had been tried and acquitted in district court on the charge of carrying a concealed weapon, a charge stemming from the same transaction from which the charge in the instant case arose, since the warrant in the former action and the indictment in the present action were drawn pursuant to different statutes and elements of the two offenses were separate and distinct.

3. **Constitutional Law § 35— possession of firearm by felon — statute not ex post facto**

Where defendant was convicted of the felonious possession of methadone on 6 October 1970, G.S. 14-415.1 prohibiting possession of firearms by a felon became effective on 1 October 1971, and defendant allegedly violated that statute on 31 July 1972, the trial court properly denied defendant's motion to dismiss the indictments since the statute was not *ex post facto* with respect to the offense charged.

4. **Criminal Law § 75— volunteered incriminating statement — admissibility without voir dire**

The trial court did not err in permitting a police officer to testify as to incriminating statements made by defendant without first conducting a *voir dire* where the testimony indicated that the defendant volunteered the information upon his arrest before officers had an opportunity to give him the Miranda warnings.

APPEAL by defendant from *Exum, Judge,* 27 November 1972 Session of GUILFORD Superior Court, Greensboro Division.

In a bill of indictment proper in form defendant was charged with felonious possession of a firearm by a felon, a violation of G.S. 14-415.1. He pleaded not guilty.

Evidence for the State tended to show: On 31 July 1972 at approximately 10:40 p.m., Greensboro police officers observed defendant riding as a passenger in a white over blue Plymouth on Seneca Drive in Greensboro near the driveway into the Ramada Inn. Having in their possession a search warrant for defendant's person, the vehicle and a room at the Ramada Inn, the officers stopped the vehicle in which defendant was riding. When the officers were approximately twenty-five feet from the car, they saw defendant lean to his left in the front seat and make a motion with his right arm toward the center of the car. Defendant got out of the car and the officers approached him, identified themselves as police officers and advised defendant that they had a search warrant which they read to him. In a search of the car, the officers found a .32 caliber pistol loaded

with six live rounds of ammunition under the arm rest located in the middle of the front seat, and two live rounds of ammunition in the car's glove compartment.

Defendant was placed under arrest for carrying a concealed weapon and before officers could advise him of his rights, he "blurted out" a statement about where he got the gun. Defendant was then advised of his rights.

At trial defendant stipulated that on 6 October 1970 he stood charged with possession of methadone, a narcotic drug; that he pleaded nolo contendere and based on that plea, he was sentenced to prison for twelve months. Defendant offered no evidence in the instant case.

From a jury verdict of guilty of possession of a firearm by a felon and judgment imposing a prison sentence of not less than two nor more than five years, defendant appealed.

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

Frye, Johnson & Barbee by Ronald Barbee for defendant appellant.

BRITT, Judge.

[1] In his first assignment of error, defendant contends that the court erred in denying his motion to transfer, vacate or continue the case because of undue publicity in a local newspaper concerning defendant and the case before trial. Defendant argues that the news coverage precluded him from receiving a fair and impartial trial. We find no merit in defendant's contention.

Motions for a change of venue and for a continuance are addressed to the court's discretion, G.S. 1-84, and the burden is on defendant to show abuse of discretion or prejudice. *State v. Cox* and *State v. Ward* and *State v. Gary,* 281 N.C. 275, 188 S.E. 2d 356 (1972). The trial judge noted that there were only two news publications about the matter, one on 2 August 1972 and one on 4 August 1972; that defendant's trial was not until 27 November 1972; and that the court felt certain twelve jurors could be found who had not seen or heard of the news articles. The record fails to show any abuse of discretion. The assignment of error is overruled.

[2] By his second assignment of error, defendant contends that the court erred in denying his motion to dismiss the indictment on the grounds of former jeopardy and collateral estoppel. In support of this contention, defendant points out that on 11 October 1972 he was tried in the District Court of Guilford County on the charge of carrying a concealed weapon, a charge stemming from the same transaction from which the charge in the instant case arose. Defendant was found not guilty of carrying a concealed weapon. Subsequently, the Grand Jury returned a true bill of indictment charging defendant with possession of a firearm by a felon. Defendant argues that he was found not guilty of carrying a concealed weapon in district court for that the State had failed to prove that he possessed said gun and that said acquittal should bar the subsequent charge since an element of carrying a concealed weapon is possession. There is no merit in this contention.

The test of former jeopardy is whether a defendant lawfully could have been convicted under the former charge of any offense of which he might, but for the prior proceeding, be convicted under the present indictment. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967) ; 2 Strong's, N. C. Index 2d, Criminal Law, § 26, p. 517.

The warrant charging defendant with carrying a concealed weapon was drawn under G.S. 14-269 and the indictment in the case at bar was drawn pursuant to G.S. 14-415.1. Elements of the two offenses are separate and distinct. One difference is that under G.S. 14-269 *concealment* of the weapon must be shown; defendant's contention that he was acquitted of carrying a concealed weapon because possession was not shown is not supported by the record. Further, G.S. 14-415.1(c) provides in part: "The indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section." The assignment of error is overruled.

[3] Defendant next assigns as error the trial court's denial of his motion to dismiss the indictment because of the *ex post facto* doctrine. Defendant was convicted of the felonious possession of methadone on 6 October 1970; G.S. 14-415.1 became effective on 1 October 1971; and the date of the crime alleged in the instant case is 31 July 1972. Defendant argues that since the offense and the conviction which made him a felon occurred prior to

the enactment of G.S. 14-415.1, the statute is *ex post facto* with respect to the offense charged in the instant case. The assignment of error is without merit.

In *Williams v. United States,* 426 F. 2d 253 (1970), the court had occasion to construe the federal firearms act which is similar to our State felony firearms act of which G.S. 14-415.1 is a part. The court held that a statute which made it unlawful for a person indicted or convicted for a crime punishable by imprisonment for a term exceeding one year to transport a firearm or ammunition in interstate commerce, as applied to an accused convicted and sentenced prior to the effective date of the statute, was not an *ex post facto* law. We agree with the court's ruling in *Williams.* The assignment of error is overruled.

[4] In his fourth assignment of error, defendant contends that the court erred in permitting a police officer on direct examination to testify over defendant's objections to incriminating statements made by defendant without first conducting a voir dire into the circumstances under which the statements were made.

The testimony of Officer Heffinger challenged by this assignment is summarized as follows: When the officer took possession of the gun and unloaded it, he informed defendant that he was under arrest for carrying a concealed weapon. Thereupon, defendant stated that the gun had been pawned to him several days previously by a person he knew only as Fred. The statement made by defendant was not in response to any question asked him by the officer.

In *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), the court said: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Volunteered statements are admissible at trial without the necessity of a voir dire to determine admissibility where there is no indication that the statements were made under some sort of pressure. *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). The assignment of error is overruled.

We have considered defendant's other assignments of error and finding them to be without merit, they too are overruled.

No error.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. JOHN JUNIOR SNUGGS

No. 7320SC330

(Filed 23 May 1973)

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

In a prosecution charging defendant with felonious breaking and entering and larceny of lawnmowers and larceny of a truck, evidence was sufficient to be submitted to the jury where it tended to show that defendant was apprehended while a passenger in the truck shortly after it and the lawnmowers were stolen and that defendant and the driver of the truck fled on foot from police officers shortly after they had been detained for questioning.

2. **Burglary and Unlawful Breakings § 6— reference to defendant in jury charge — no prejudicial error**

Trial court's instruction to the jury that "if you found that locks were broken off the door and the door knocked down or opened without permission, that that would be a breaking or an entry by the defendant," though erroneous in its reference to defendant, was not so prejudicial as to require a new trial and the remainder of the charge was correct.

3. **Larceny §§ 5, 8— possession of recently stolen property — incorporation of instruction by reference**

One who breaks or enters a building with the intent to commit larceny therein is guilty of the offense of felonious breaking or entering, and evidence that one has possession of property soon after it is stolen raises a presumption of that person's guilt of the larceny of such property; thus, it was proper for the trial court to adopt by reference its previous instruction on the doctrine of possession of recently stolen property in charging the jury on the elements of the offense of felonious breaking and entering.

4. **Criminal Law § 163— earlier instruction incorporated by reference — failure to except to earlier instruction**

Where defendant challenged the trial court's instruction incorporating by reference the definition of the doctrine of possession of recently stolen property theretofore employed by the court in its charge on the offense of larceny, but defendant did not except to that earlier instruction, his allegation that it was inadequate was untimely and without merit.

APPEAL by defendant from *Winner, Judge,* 4 December 1972 Session of Superior Court held in MOORE County.

Defendant, John Junior Snuggs, was charged in separate bills of indictment, proper in form, with felonious larceny of one 1966 Chevrolet truck from the High Falls Oil Company, Incorporated, and with felonious breaking or entering and larceny

of lawnmowers from a store building belonging to one Bronzie Lawson, Sr., trading as Midway Saw Service. Defendant pleaded not guilty but was found guilty as charged.

From judgments imposing consecutive active prison sentences of ten years for the offense of breaking or entering, from one to ten years for the offense of felonious larceny of the lawnmowers, and two years for the offense of felonious larceny of the 1966 Chevrolet truck, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Sidney S. Eagles, Jr., for the State.

Boyette and Boyette by Mosley G. Boyette, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of his motions for judgment as of nonsuit.

When the evidence is considered in the light most favorable to the State, it tends to show the following:

During the night of 12 March 1972, a 1966 Chevrolet "furniture truck," property of High Falls Oil Company, was stolen from the Mid-State Furniture Company. Ten lawnmowers, of the value of $2,500.00, property of one Bronzie Lawson, Sr., trading as Midway Saw Service, were stolen from his shop between 5:30 or 6:00 p.m., Saturday, 11 March 1972 and Monday morning, 13 March 1972. Lawson testified: "On Monday the door of my building was tore off, tore up, completely down. I gave no one permission to go there and enter the building."

Deputy Sheriff Carson Lee Hicks of Davidson County was on patrol with two other officers between the hours of 2:00 and 3:00 a.m., 13 March 1972. While in pursuit of a Ford automobile, the patrol car passed a 1966 Chevrolet "moving van truck" which then stopped at the roadside. The officers radioed ahead for another patrol car to stop the Ford automobile, then returned to where the truck had stopped. Defendant was seated on the passenger side of the truck. The officers asked the driver why he had stopped, and he replied that the truck was out of gas. Upon being asked what he was carrying in the truck, the driver replied that he was carrying furniture. Deputy Sheriff Hicks testified:

"[W]e got to the back of the truck and we were standing looking at it and we asked could we look into the back of the truck, and the driver . . . agreed to let us look, and in the meantime he [defendant] was still on the passenger side at the bed of the truck, and every time the driver would answer any of our questions, we'd ask him something, he'd [defendant would] nod or shake his head, and every time the driver would proceed to answer a question, he'd also try to tell him not to talk. He never did say it out loud, but he'd nod his head. He shook his head when certain questions were asked."

Upon opening the rear of the truck, the officers discovered eleven lawnmowers and no furniture. Deputy Sheriff Hicks testified:

"We asked the driver where did he get it, because he told us he was hauling furniture, and that's when . . . [defendant] told him to not tell us anything, so he proceeded on and said it belonged to the boy in front of us in the car which we had stopped at the time, the other deputies did, and he said he thought it was furniture, that he didn't know it was lawnmowers, and we talked to them about that and asked him did he know anything about what they were hauling, and he said, he didn't never say nothing, he shook his head, no sir, and I asked him to go back to the car with us, we was going to have to hold them and question them further about it till we seen what was in the other car, and that's when I mentioned the radio to the sergeant, and both of them broke and ran. They both broke on us and ran while we was standing talking to them on the radio."

"They was both side by side when they ran. He [defendant] nodded his head and must have entered this signal. They sure moved out."

The Chevrolet truck in which defendant was riding was identified as the vehicle belonging to High Falls Oil Company, Incorporated, and the lawnmowers found in the truck were identified as the property of Bronzie Lawson, Sr.

Defendant offered no evidence.

[1] While flight of an accused person does not create a presumption of guilt, it is admissible as a circumstance to be con-

sidered with other circumstances in determining his guilt or innocence. *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485 (1963); *State v. Kirby,* 7 N.C. App. 366, 172 S.E. 2d 93 (1970). Defendant's flight, coupled with the evidence of his possession of recently stolen goods was sufficient to require submission of this case to the jury. *State v. Frazier* and *State v. Givens,* 268 N.C. 249, 150 S.E. 2d 431 (1966).

[2] Defendant contends the court expressed an opinion, in violation of the mandate of G.S. 1-180, when in instructing the jury on the four elements of the offense of felonious breaking or entering, the court stated:

> "The court would instruct you that if you found that locks were broken off the door and the door knocked down or opened without permission, that that would be a breaking or an entry by the defendant."

The court's inadvertent interjection of the phrase "by the defendant" in the challenged instruction was obviously erroneous. Nevertheless, defendant concedes that "[t]he court in other portions of his charge, instructed the jury correctly on this phase of the case. . . ."

We have scrutinized the court's charge in light of this assignment of error and find and hold that when considered contextually the charge is free from prejudicial error.

Defendant contends the trial court erred when, in charging the jury on the essential elements of the offense of felonious breaking or entering, the court adopted by reference its earlier instruction that possession of recently stolen property is a circumstance to be considered in determining whether one is guilty of the offense of larceny.

[3] One who breaks or enters a building with the intent to commit larceny therein is guilty of the offense of felonious breaking or entering, G.S. 14-54(a), and evidence that one has possession of property soon after it is stolen raises a presumption of that person's guilt of the larceny of such property. *State v. Ledbetter,* 5 N.C. App. 497, 168 S.E. 2d 427 (1969). Thus, it was proper for the court to adopt by reference its previous instruction on the doctrine of possession of recently stolen property in charging the jury on the elements of the offense of felonious breaking and entering.

[4] Based on his next assignment of error, defendant contends the court inadequately defined the doctrine of possession of recently stolen property and failed to apply it to the evidence in this case.

The challenged instruction incorporates by reference the definition of the doctrine theretofore employed by the court in its charge on the offense of larceny. Defendant failed to except to this earlier instruction and his allegation that it is inadequate is untimely and without merit. Further, when considered contextually, it is clear that the trial court properly applied the doctrine of possession of recently stolen property to the evidence in the case.

Defendant has additional, formal assignments of error which we have carefully considered and find to be without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. RONALD SIMS McILWAIN

No. 7320SC278

(Filed 23 May 1973)

1. **Criminal Law § 76— confession — waiver of counsel — specific finding — finding that defendant signed waiver of rights**

The trial court did not err in the admission of defendant's confession without making a specific finding of fact that defendant waived his right to counsel where the court found that defendant "was properly warned of his constitutional rights as required by the Miranda decision," that defendant knowingly signed a waiver of rights before two witnesses, and that defendant freely, understandingly and voluntarily made the confession after having been fully advised of his legal and constitutional rights.

2. **Criminal Law § 114— statement of contention as contained in confession — no expression of opinion**

In a prosecution for breaking and entering and larceny, the trial court did not express an opinion on the evidence in charging on defendant's contention as contained in his confession that he acted only

as a watchman during perpetration of the crimes where the court immediately thereafter instructed the jury that defendant denied being at the scene of the crime and claimed that his confession was made under duress. G.S. 1-180.

3. **Burglary and Unlawful Breakings § 6— instructions on aiding and abetting — elements of the crime of breaking or entering — intent to commit larceny**

In a prosecution for felonious breaking or entering and larceny, the trial court did not err in failing to instruct the jury in its charge on aiding and abetting that the breaking or entering must have been with intent to commit larceny where the court correctly instructed the jury as to the elements of breaking or entering in other portions of the charge.

4. **Burglary and Unlawful Breakings § 6; Larceny § 8— instructions as to not guilty verdict for both crimes**

In this prosecution for felonious breaking or entering and larceny, the trial court did not err in instructing the jury that the two crimes were so interrelated that if the jury found defendant not guilty of breaking or entering it must also find him not guilty of larceny.

APPEAL by defendant from *Hobgood, Judge,* 16 October 1972 Session of Superior Court held in UNION County.

Defendant, Ronald Sims McIlwain, was charged in three bills of indictment, proper in form, with felonious breaking or entering and larceny from the home of H. C. Deal, felonious larceny from the Harris Teeter Super Markets, Inc., and felonious larceny from Eckerds Drug Store.

Defendant pleaded guilty to the indictments charging felonious larceny from the Harris Teeter Super Markets, Inc., and Eckerds Drug Store.

Upon defendant's plea of not guilty to the charges of felonious breaking or entering and larceny from the home of H. C. Deal, the State offered evidence tending to show the following:

On 12 July 1972, between the hours of 10:00 a.m. and 12:00 o'clock noon, the H. C. Deal residence in Union County was broken into and the following items were removed: a 6,000 BTU window air conditioner, three clocks, and a transistor radio. On 22 July 1972 Sheriff Frank Fowler of Union County, who was conducting an investigation of the housebreaking and larceny at the Deal residence, saw defendant in a room at the Sheriff's office. After advising defendant of his constitutional rights and procuring a written waiver thereof from defendant,

Sheriff Fowler began questioning defendant about the housebreaking at the H. C. Deal residence. Defendant signed a written statement admitting breaking and entering and larceny of goods from the Deal residence and accompanied officers to the Deal home. Sheriff Fowler testified: "He told us how they entered through the back door and that he was the driver of the car. That he pulled up and let them load in the carport."

Defendant testified and denied participation in the crime. Defendant stated:

> "I signed the statement read by Sheriff Fowler. The statement is not true. I signed the statement because I was made promises of leniency, promises of a bond cut so I might be able to get out of jail. I was also promised to be taken to the hospital because I was real sick. I was withdrawing from heroin addiction."

Defendant was found guilty as charged and from judgments imposing consecutive active ten year prison sentences for the offenses of breaking or entering and larceny from the H. C. Deal residence and ten years each on the charges of felonious larceny from the Harris Teeter Super Markets, Inc., and Eckerds Drug Store, said sentences to run concurrently with the former sentences, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Howard P. Satisky for the State.

Joe P. McCollum, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant contends the trial court erred in admitting into evidence a written confession signed by defendant "[s]ince there was no finding of fact by the trial judge . . . that the defendant waived his right to counsel. . . ."

The trial court conducted a *voir dire* examination to determine the admissibility of the confession. Defendant's testimony on *voir dire* controverted testimony of Sheriff Fowler and Deputy Sheriff Coffey. Thereafter, the trial court made findings that defendant "was properly warned of his constitutional rights as required by the Miranda decision" and that "the defendant signed State's Exhibit 1, Entitled 'Waiver of Rights,' before witnesses, Rufus H. Coffey and John Mayberry; that the defend-

ant has testified by believable evidence that he signed the waiver; that he knew what he was signing at that time. . . ." The court further found as a fact that defendant freely, understandingly and voluntarily made the confession after having been fully advised of his legal and constitutional rights.

The conflicting testimony adduced at the *voir dire* presented a question of credibility of the witnesses which was for the determination of the trial judge. His findings of fact, supported by competent evidence, are conclusive on appeal. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971); *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970).

[2] Defendant contends that the trial court commented on the evidence in violation of the mandate of G.S. 1-180, when the court, in charging the jury, restated defendant's contention (as contained in his confession) that during the perpetration of the housebreaking and larceny, defendant was the watchman and did not break into and remove goods from the Deal residence. Immediately thereafter, the court instructed the jury that defendant denied being at the scene of the crime and claimed that his confession was made under duress.

Considered contextually, the portion of the charge upon which this assignment of error is based is free from prejudicial error.

[3] Defendant contends the trial court erred in its charge by failing to instruct the jury "in its discussion of aiding and abetting that the breaking and entering must be with intent to commit larceny."

In various portions of the charge before and after the instruction upon which this assignment of error is based, the court correctly instructed the jury as to all of the essential elements of the offense of felonious breaking or entering. This assignment of error is overruled.

[4] Defendant contends the trial court erred in instructing the jury that the crimes of felonious breaking or entering and felonious larceny were so interrelated that if the jury found defendant not guilty of felonious breaking or entering it must also find him not guilty of felonious larceny.

We do not agree. The trial court correctly defined each element of the separate offenses charged in the bill of indictment

and correctly instructed the jury to return a verdict of not guilty of either offense if the State failed to prove beyond a reasonable doubt the essential elements of each offense.

Finally, defendant requests this court to review the record in the two cases in which defendant pleaded guilty to the indictments charging felonious larceny of goods from the Harris Teeter Super Markets, Inc., and Eckerds Drug Store.

The record affirmatively shows that defendant, represented by court-appointed counsel, freely, understandingly and voluntarily entered pleas of guilty to separate bills of indictment, proper in form, charging him with felonious larceny of goods valued in excess of $200.00, from the Harris Teeter Super Markets, Inc., and Eckerds Drug Store. The prison sentences imposed are within the limits prescribed by statute for the offenses charged.

The result is: in the case charging defendant with breaking or entering and larceny, we find no error; in the cases charging felonious larceny, the judgments are affirmed.

Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN WILLIE JACKSON

No. 7318SC260

(Filed 23 May 1973)

1. **Criminal Law § 66— out of court identification of defendant — admissibility of evidence as to procedure**

In a prosecution charging defendant with felonious breaking or entering and assault with intent to commit rape where the evidence tended to show that on the same afternoon of the alleged offense the victim picked defendant's photograph out of several hundred shown her at the police department and on the following day pointed defendant out to police on the street where he was working with several others, the out of court identification procedure was in all respects proper and the court's admission of the testimony describing such procedure was not error.

2. **Criminal Law §§ 42, 84— defendant's clothing — seizure under warrant — admissibility of evidence without voir dire**

Where a detective testified that he obtained a search warrant for defendant's residence after defendant had been arrested, defendant objected to testimony describing the fruits of the search, the trial judge examined the search warrant produced by the State and held it to be proper, there was no necessity for a *voir dire*, and it was not error to admit into evidence articles of clothing seized after a search of defendant's premises.

3. **Rape § 1— definition of rape proper**

The trial court's definition of rape as forcible sexual intercourse with a woman against her will was proper.

4. **Burglary and Unlawful Breakings § 7; Rape § 6— necessity for submitting lesser degrees of crime charged**

In a prosecution for felonious breaking and entering and assault with intent to commit rape where defendant did not testify or offer evidence or by cross-examination elicit evidence in conflict with testimony as to any element of the crimes charged, the trial court did not err in failing to submit to the jury the lesser included offenses of non-felonious breaking or entering or assault on a female.

APPEAL by defendant from *Exum, Judge*, 18 September 1972 Session of Superior Court held in GUILFORD County, High Point Division.

Defendant, John Willie Jackson, was charged in separate bills of indictment, proper in form, with felonious breaking or entering and assault with intent to commit rape.

Defendant pleaded not guilty, whereupon, the State offered evidence tending to show the following:

At about 1:35 p.m., 19 April 1972, the victim named in the indictment was alone in her residence at 1018 West College Drive in High Point and was preparing to take a shower. One door of the residence was unlocked. The victim undressed and was about to step into the shower when she remembered that she needed some clothing. She wrapped a towel around her body and was removing clothing from a drawer when she saw a negro male standing in her home. The witness testified:

> "I asked him what he was doing in my home and he lunged toward me and I tried to close the sliding door the rest of the way, closed the door on his arm. His arm was sticking into the bathroom about up to here (indicating elbow). His arm was bare. There was no sleeve on it. * * *

> After that, he pushed me back and hit me on the left side of my head, grabbed my arm here, pushed me to the floor, took my towel and put it over my face."

The victim began screaming and was told that she would be killed if she continued to move or scream. The assailant stood on her ankles and was "fooling around with his clothes." He then dragged her by the arm and threw her onto the bed. She testified:

> "During this time, I was screaming and saying, 'Oh, God, no, don't do this,' and at the time he threw me on the bed he said, 'I will kill you,' and he put his hands and fingers on my throat and I thought he was going to choke me. * * * Then he took the towel again and put it over my face. After that, he undid his clothing, his pants, and he proceeded to try to have—I know he undid his pants because I heard his zipper opening and he proceeded to try to have sexual relations with me. Yes, he did get on top of me. Yes, I was lying on my back. In relationship to my body, his was right on top of me. Yes, he tried to have sexual relations with me. No, no part of his body actually penetrated mine."

Defendant abandoned his attack on the prosecutrix and fled from the house when he heard a car door slam.

The police were called immediately and arrived at the victim's home within approximately ten minutes. That same afternoon the prosecutrix picked defendant's photograph out of several hundred shown to her at the police department, and on the following day she pointed defendant out to the police on the street where he was working with several other black males.

Defendant offered no evidence and was found guilty as charged in each bill of indictment. From judgments imposing prison sentences of from 12 to 15 years on the charge of assault with intent to commit rape and 10 years on the charge of felonious breaking or entering, to run concurrently with the former sentence, defendant appealed.

Attorney General Robert Morgan and Ruth G. Bell, Attorney, for the State.

Richard S. Towers, Assistant Public Defender, for defendant appellant.

HEDRICK, Judge.

[1] Based on assignments of error one and two, defendant contends the trial court erred in not finding that the victim's in-court identification of the defendant was tainted by "questionable and illegal extrajudicial viewings of the defendant."

Defendant did not object to the victim's in-court identification of him as the man who broke into her home and attempted to rape her. Where a defendant fails to object to an in-court identification of him as the perpetrator of the crime charged, there is no necessity or requirement that the trial judge make findings as to whether such identification is tainted by some out of court identification procedure.

The two exceptions upon which these assignments of error purport to be based relate to the admissibility of evidence concerning the out of court identification procedure. Clearly, the out of court identification procedure followed by the police was in all respects proper, and the court's admission of the testimony describing such procedure was not error.

[2] Based on assignments of error three and four, defendant contends the court erred in not conducting a *voir dire* hearing to determine the validity of a search warrant used by officers in searching defendant's home and in admitting into evidence certain articles of clothing seized in the search. We do not agree.

Detective Pike testified that after defendant was arrested, he obtained a search warrant for defendant's residence. The record reveals that when defendant objected to testimony describing the fruits of the search, the trial judge examined the search warrant produced by the State, held it to be proper, and overruled the objection.

Under the circumstances, therefore, there was no necessity for a *voir dire;* and it was not error to admit into evidence articles of clothing seized after a search of defendant's premises.

Defendant contends the trial court erred in failing to instruct the jury that testimony of police officers as to statements made to them by the victim were admissible for the purpose of corroboration.

Although the word "corroboration" was not employed by the court in the challenged instruction, the import of the charge is clear and without prejudicial error.

[3] Next, defendant contends the court erred in defining rape as forcible sexual intercourse with a woman against her will. In *State v. Flippin,* 280 N.C. 682, 684, 186 S.E. 2d 917, 919 (1972), Justice Branch defines rape as "the carnal knowledge of a female person by force and against her will." In 6 Strong, N. C. Index 2d, Rape and Allied Offenses, § 1, it is stated:

> "The terms 'carnal knowledge' and 'sexual intercourse' are synonymous, and are effected in law if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male."

This assignment of error has no merit.

[4] Defendant contends the trial court erred in failing to instruct the jury on the lesser included offenses of non-felonious breaking or entering and assault on a female.

Defendant did not testify or offer evidence, nor did he by cross-examination elicit evidence in conflict with testimony as to any element of the crimes charged. Disbelief of any of the evidence relating to the essential elements of the crimes charged would require a verdict of not guilty. Therefore, under the circumstances, the court did not err in failing to submit to the jury the lesser included offenses of non-felonious breaking or entering or assault on a female. *State v. Flippin, supra.*

Defendant has additional assignments of error which we have carefully examined and hold to be without merit. The defendant had a fair trial free from prejudical error.

No error.

Judges CAMPBELL and PARKER concur.

MECKLENBURG COUNTY v. ETTA C. LEE, ADMINISTRATRIX C.T.A. OF THE ESTATE OF ANNA P. CAMPO (69E1511)

No 7326SC50

(Filed 23 May 1973)

1. **Public Welfare— old age assistance — county's general claim against estate — statute of limitations**

A county's general claim against the estate of a recipient of old age assistance to recover for such assistance is governed by the statute of limitations of G.S. 1-22, not by the three-year statute of limitations after the recipient's death provided by G.S. 108-29 (formerly G.S. 108-30.1) for the enforcement of an old age assistance lien against the recipient's real property; therefore, the county's action to enforce its general claim was not barred by the statute of limitations where letters of administration for the recipient's estate were issued within ten years after her death, the action was instituted within one year after qualification of the administratrix, the county's claim was presented to the administratrix within six months after the first notice to creditors as required by G.S. 28-47, and the county's complaint was filed within three months after being notified that the administratrix rejected its claim as required by G.S. 28-112.

2. **Public Welfare— old age assistance lien barred by statute of limitations — general claim against estate — no res judicata**

Determination that a county's action to enforce an old age assistance lien against the deceased recipient's real property was barred by the statute of limitations of G.S. 108-29 does not constitute res judicata to the county's subsequent action to enforce its general claim against the estate on account of such assistance.

APPEAL by defendant, Etta C. Lee, from *Grist, Judge,* 4 August 1972 Schedule "A" Non-Jury Session of Superior Court held in MECKLENBURG County.

Anna P. Campo received old age assistance payments totalling $6,687.00 from Mecklenburg County from October 1951 until her death in July 1965. G.S. 108-30.1 (G.S. 108-29 after 1969) provided for a general lien in favor of the county on the real property of a recipient of such aid to the extent of the total amount of such assistance paid. Pursuant to the statute, Mecklenburg County filed proper notices and claims of lien against Mrs. Campo on 10 March 1952.

Mrs. Campo died testate on 3 July 1965 and devised all her property to her children. There was no administration of the estate at this time. On 18 July 1968 Duke Power Company

instituted an action to condemn a portion of the land that Mrs. Campo had devised to her children.

Mecklenburg County filed an answer in this proceeding claiming the condemnation award of some $6,020.00 to satisfy unpaid ad valorem taxes and to partially satisfy the lien on the property created by the above mentioned old age assistance payments. Judgment in this action was rendered on 9 April 1971 and the judge stated: "[T]hat more than three years having elapsed following the death of . . . Anna P. Campo without any action or proceeding being instituted by Mecklenburg County to assert its right or enforce any lien which it had against the real property of . . . Anna P. Campo, any such lien is now barred by the three year statute of limitations contained in G.S. Sec. 108-30.1." The ad valorem taxes due were allowed to be paid to the county and the balance was ordered to be paid to Mrs. Campo's personal representative.

Etta C. Lee qualified as administratrix c.t.a. on 9 March 1971. On 27 July 1971 the county filed a claim with the administratrix to recover the old age assistance payments from Mrs. Campo's estate, but Mrs. Lee "denied and positively disallowed" such a claim on 2 September 1971. The county filed their complaint on 11 October 1971. Judgment was filed in August of 1972 determining that the county had a " . . . valid and subsisting claim against the estate of Anna P. Campo in the amount of $6,687.00, with interest thereon from and after July 3, 1965, until paid; that said claim is not barred by the failure of the plaintiff to institute action to enforce its lien against the real property of the defendant's testate within three years following her death; and that the plaintiff's claim against said estate shall have equal priority in the order of payment with the sixth class under G.S. Sec. 28-105, as provided in G.S. Sec. 108-32." The administratrix c.t.a., Mrs. Lee, appeals from this judgment.

Ruff, Perry, Bond, Cobb, Wade & McNair, by William H. McNair, for plaintiff appellee.

Levine, Goodman & Murchison, by William F. Burns, Jr., for defendant appellant.

BROCK, Judge.

[1] The first argument advanced by the administratrix c.t.a., Mrs. Lee, is that the county's claim against Mrs. Campo's estate

is barred by the three year statute of limitations found in G.S. 108-30.1 (G.S. 108-33 after 1969).

G.S. 108-30.1 provided for a lien upon the real property of persons who receive old age assistance payments and it created a limitation of three years from the death of the recipient within which time a county could enforce the lien. This statute also provided that the payment of this assistance created a general claim against the estate of the recipient, and no limitation was set for the assertion of this claim. Mrs. Lee argues that the statute of limitations for the lien should also be applied to the claim against the estate. This court has however previously stated that "[s]ince the assistance was terminated by death of the recipient . . . the claim must be enforced according to the law pertaining to administration of estates." *Brunswick County v. Vitou,* 6 N.C. App. 54, 57, 169 S.E. 2d 234, 235.

The question now is what statute of limitations applies and when did it begin to run. There is no specific statute of limitations provision given in Chapter 28 of the General Statutes (Administration of Decedent's Estates); therefore, it is necessary to turn to the general statutes of limitation, G.S. 1-22 is the appropriate statute. It reads in part: "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person." Letters of administration were issued in this estate within ten years of Mrs. Campo's death and this action was instituted within one year after the qualification of the administratrix c.t.a. [It should be noted that there is no authority in North Carolina which *compels* a creditor to seek affirmatively to administer an estate in order to toll the running of the statute of limitations although G.S. 28-6(3) permits a creditor to seek letters of administration.]

In the case at hand an administratrix for the estate was not appointed until 9 March 1971. G.S. 28-47 provides that within twenty days of the granting of letters the administrator shall notify all creditors to present their claims within six months from the first publication of such notice. Assuming such notice was given here, the county did present their

claim within the six month period. The administratrix rejected the claim and the county filed their complaint approximately one month later. This complied with G.S. 28-112 which requires the creditor to prosecute his claim within three months after being notified of the rejection by the personal representative of the decedent.

[2] The second argument made by the administratrix c.t.a. is that the determination that the county's lien was barred by the statute of limitations in the first proceeding constitutes res judicata to the subsequent claim against the estate. The issue was not the same in the two actions. The first action was to enforce a specific lien against real estate. This action is to recover for a claim against the estate of the deceased recipient. This assignment of error is overruled.

We are advertent to the action of the legislature in repealing G.S. 108-29 through 108-37.1, effective 16 April 1973. Session Laws 1973, Chap. 204. However, this repealing act by its terms does not apply retroactively.

Affirmed.

Judges MORRIS and VAUGHN concur.

DUKE POWER COMPANY, PETITIONER v. GEORGE H. PARKER AND WIFE, HILDA W. PARKER; W. O. McGIBONY, TRUSTEE FOR THE FEDERAL LAND BANK OF COLUMBIA; FEDERAL LAND BANK OF COLUMBIA, RESPONDENTS

No. 7329SC94

(Filed 23 May 1973)

Eminent Domain § 5— condemnation of right-of-way for power lines — instructions as to damages

In this proceeding brought by a power company to condemn a right-of-way and easement for its transmission lines, the charge of the court, when read as a whole, did not instruct the jury to arrive at its determination of damages as though the fee title to the right-of-way was being condemned.

APPEAL by petitioner from *Wood, Judge,* 11 September 1972 Session of Superior Court held in HENDERSON County.

This is a condemnation proceeding instituted by Duke Power Company as petitioner to acquire a right-of-way and easement for transmission lines between its Pisgah Forest Substation and the Skyline Substation in Henderson County.

Commissioners were appointed by the Clerk of Superior Court in Henderson County, and they returned an award for damages in the amount of $12,000. Petitioner excepted to the commissioners' report. The clerk confirmed it, and petitioner demanded a trial by jury.

The date of the taking of the right-of-way was 26 October 1970, and petitioner acquired possession on 17 February 1971. The easement and right-of-way crossed a portion of an 88-acre tract of land owned by respondents in the Mills River Township, Henderson County, approximately 10 miles from the Hendersonville city limits. The principal right-of-way is 150 feet wide by 1105.8 feet centerline distance and consists of 3.81 acres. The easement includes tree cutting rights on each side of the extension lines of the right-of-way, and a 30 foot access right-of-way consisting of 1.29 acres.

The rights acquired by petitioner are subject to respondents' right to use the right-of-way property in any manner not inconsistent with the rights acquired by petitioner. The fee of the property remained in respondents.

The parties stipulated that the only issue to be answered by the jury was: "What amount are the respondents, land owners, entitled to recover of the petitioner, Duke Power Company, for the taking of the right of way across their lands?"

Petitioner presented evidence which tended to show the following: that the highest and best use of the property immediately prior to the taking was for residential homesites; that one realtor and appraiser testified that in his opinion the difference between the fair market value of the entire tract immediately before the taking of the right-of-way and immediately after the taking was $4,350; that another realtor and appraiser agreed that the best use of the property was for residential homesites, and stated that in his opinion the difference in value before/after the taking of the right-of-way was $4,800.

Respondents presented evidence which tended to show the following: that the best use of the property was for residential

homesites; that a landowner testified that in his opinion the difference in the fair market value before and after the taking of the right-of-way was $25,050; that a dairy farmer familiar with respondents' property stated that in his opinion the difference in value was $20,230; that two realtors testified as to their opinion of the difference in value—one stating the difference to be $24,350, another stating it to be $21,600.

A jury granted an award of $16,500 damages to respondents. Petitioner appealed.

Crowell and Crowell, by Harold J. Pinales, and William I. Ward, Jr., for petitioner-appellant.

Prince, Youngblood & Massagee, by George Carson, II, for respondents-appellees.

BROCK, Judge.

Petitioner assigns as error the instructions of the trial judge to the jury upon the measure of damages applicable to the condemnation of an easement for transmission lines. Defendant argues that the trial judge, in effect, instructed the jury to arrive at its determination of damages as though the fee title to the right-of-way was being condemned. Petitioner cites *Power Co. v. Rogers,* 271 N.C. 318, 156 S.E. 2d 244.

In our opinion the error in *Power Co. v. Rogers* is not present in the case before us. We agree with petitioner that the instructions given by the trial court would have been more satisfactory had they included the rule as stated in *Light Co. v. Carringer,* 220 N.C. 57, 16 S.E. 2d 453, as follows:

> "The measure of permanent damages for the appropriation of a right of way for the construction of an electrical overhead system is the difference between the fair market value of the tract as a whole before the right of way was taken and its impaired market value directly, materially and proximately resulting to the respondents' land by the placing of a power line across the premises in the manner and to the extent and in respect to the uses for which the easement was acquired."

Nevertheless, we find that the trial judge instructed as follows:

"Now, the Court instructs you that the yard stick or guide to be used in determining what the fair and ample compensation for the taking of the property of the respondents in this case constitutes the difference between the fair market value of the entire tract of land which was some 88 acres immediately before this property was taken and its fair market value of the property immediately after the right of way was taken."

Further in the charge the trial judge instructed:

"Members of the jury, in arriving at the fair market value of the tract of land immediately after the taking, you will consider the fact that the Power Company is taking only an easement in the land appropriated rather than a fee simple title."

We recognize petitioner's criticism of certain portions of the judge's charge and conceded technical defects. However, when we read the charge as a whole, as we must do, it is our opinion that the jury understood they should not award damages as though the fee title in the right-of-way was being condemned, but should award only those damages resulting from the imposition of the easement upon the property.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. RONNIE W. CARVER

No. 7322SC235

(Filed 23 May 1973)

Constitutional Law § 32— refusal of court to appoint counsel — defendant not indigent — no error

The trial court did not err in failing to appoint counsel for defendant who was charged with assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death where the evidence tended to show that the 21-year-old married defendant was not an indigent in that he was working and making $90 a week, buying an automobile and out on a cash bond, that defendant had more than four months from the time of his arrest to procure an attorney and prepare his case for trial but did not do so and that

even so the court then gave defendant time to get an attorney and upon his failure to procure one, gave him every opportunity to state his side of the case.

APPEAL by defendant from *Long, Judge,* 23 August 1972, Criminal Session of IREDELL County Superior Court.

Defendant was charged in a proper bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, a felony in violation of G.S. 14-32(a) punishable by imprisonment for not more than ten years. The defendant entered a plea of guilty and was sentenced to imprisonment for a term of not less than two and one-half years nor more than four years in the common jail of Iredell County and assigned to work under the supervision of the State Department of Corrections.

The evidence on behalf of the State disclosed that on the evening of 31 March 1972 about 9:00 p.m., Melvin Lackey, accompanied by Kay Dancey, were in an establishment known as Hattie's located between Mooresville and Davidson. Lackey placed an order at the counter and then took the order and joined Kay Dancey in one of the booths. Another young man joined them, and then the defendant came over to the booth and inquired whether another boy had said anything to Lackey about him. Lackey told him that he had not, and then the defendant told Lackey that he did not like the strange look he had given the defendant's wife. Lackey at that time told him that he did not know the defendant or that he was married. Lackey then requested the defendant to leave the booth. Without further provocation the defendant reached in his coat pocket, took out an open knife and proceeded to cut Lackey extensively. It required some 200 stitches at the hospital to close the wounds received by Lackey.

Lackey swore out a warrant for the defendant's arrest on 3 April 1972; and pursuant thereto, the defendant was arrested on 12 April 1972. The defendant waived a preliminary hearing on 5 May 1972 and was released on a $750 cash bond. At the 21 August 1972 Criminal Session of Superior Court of Iredell County, the Grand Jury returned a true bill against the defendant charging him with a felonious assault.

The case was called for trial at 10:00 a.m. on Wednesday, 23 August 1972. Upon the call of the calendar, the defendant

stated to the court that he did not have an attorney to represent him, and he desired one. The court made inquiry of the defendant as to whether or not he was an indigent. The court found that the defendant was employed and had been regularly employed since April at wages of $90.00 a week; that the defendant was married, and his wife did not work and they had no children; that the parents of the defendant had an income of $10,000.00 a year; that the defendant owns a 1969 Ford automobile on which he was making monthly payments of $65.00 a month, and he owes no other bills. The trial judge then adjudicated that the defendant was not an indigent entitled to an attorney appointed by the court.

The court then continued the case until 2:00 o'clock that day in order to enable the defendant to employ an attorney.

Upon the call of the case in the afternoon, the defendant again informed the court that he desired an attorney. He stated that he had not gone to see an attorney but had telephoned one, and the attorney he had telephoned had agreed to represent him if he could get up some money.

Thereafter, without an attorney representing him, the defendant entered a plea of guilty. The defendant was questioned extensively by the court concerning his plea of guilty and indicated by his answers that he knew the charges made against him; the punishment therefor; and that he had had ample time and opportunity to have the case prepared. The trial judge then adjudicated that the plea of guilty entered by the defendant was entered freely, understandingly and voluntarily without undue influence, compulsion or duress and without any promise of leniency. The court thereupon ordered the plea of guilty to be entered of record.

At the conclusion of the testimony on behalf of the State, the court again inquired of the defendant as to whether or not he wished to go on the witness stand and testify. The defendant declined to do so. The court then inquired as to whether the defendant wished to tell the court his side of the affair without going on the witness stand in order to be of some help to the court before judgment was passed. The defendant again declined to tell the court anything about his side of the case, but among other things, stated, "I work everyday, pay bills like everybody else." He also told the court that the victim Lackey aggravated the defendant's wife. In this regard he

stated, "Like we'd be sitting there, he would come by and stop and stand and stare at her and wink." The defendant stated that he was twenty-one years of age, and there was nothing else he would like for the court to know about the affair.

Subsequent to the judgment entered, the defendant procured an order from Judge Collier appointing him counsel to perfect the appeal.

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

Collier, Harris, Homesley & Jones by Walter H. Jones, Jr. and T. C. Homesley, Jr. for defendant appellant.

CAMPBELL, Judge.

The only question presented by this appeal is whether or not it was error not to appoint an attorney at the taxpayer's expense for the defendant. The trial court found that the defendant was not an indigent, and the evidence adduced at the trial was adequate and sufficient to support this finding. This twenty-one-year-old married man was working everyday, making $90.00 a week, buying an automobile, out on a cash bond, had more than four months from the time of his arrest to procure an attorney and prepare his case for trial. Despite all of this, he did nothing until the actual day of trial. Even then, the court leaned over backwards in order to assist the defendant and gave him time to get an attorney. He did not do so, and the court then gave the defendant every opportunity to state his side of the case. The record is replete with showing the defendant as being slow in looking after his legal matters and very negligent in this regard. We do not think there is any constitutional guarantee that will prevent a defendant from being negligent in looking after his criminal court cases. We find nothing in this record which indicates a violation of any of the defendant's constitutional rights.

The trial court went out of its way in an effort to be helpful, understanding and protective of the defendant. We find the defendant's trial to be free of prejudicial error.

Affirmed.

Judges VAUGHN and HEDRICK concur.

BERTIE R. RUSSELL, EMPLOYEE v. PHARR YARNS, INC., EMPLOYER; LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 7327IC76

(Filed 23 May 1973)

1. **Master and Servant § 55— accident, injury not synonymous**

The words "accident" and "injury" are not synonymous with respect to claims under the Workmen's Compensation Act.

2. **Master and Servant § 65— workmen's compensation — back injury — usual work performed in usual manner**

Injury arising out of lifting objects in the ordinary course of an employee's business is not caused by accident where such activity is performed in the ordinary manner, free from confining or otherwise exceptional conditions and surroundings.

3. **Master and Servant §§ 65, 96— workmen's compensation — back injury — review of order denying compensation**

Order of the Industrial Commission denying compensation is affirmed on appeal where there was competent evidence before the Commission upon which to base a finding that plaintiff was performing her regular duty of hanging cones of yarn on defendant-employer's machines in the usual manner and that up to the time that plaintiff felt the stabbing pain in her back, nothing unusual or out of the ordinary occurred which caused the pain.

APPEAL by plaintiff from Order of the North Carolina Industrial Commission filed 2 August 1972 denying compensation.

Plaintiff-employee was a "doffer and creeler," which job consisted of hanging cones of yarn on defendant-employer's machines. At about 8:00 p.m. on 15 July 1971 plaintiff was removing cones of yarn from a box on wheels, which she rolled in front of her, and placing the cones of yarn on the machines. As she reached down into the box for two cones, she felt a severe pain in her back. A physician testified that she had been treated after the date of the injury for a herniated disc.

Plaintiff testified that she had been performing this type of work for about three years, and usually emptied the boxes of cones four to five times a workday. The boxes usually contain about 50 to 60 cones when full.

Plaintiff was uncertain about the cause of the injury. She did state that, "[a]s I was bringing the bobbins up, the only thing unusual that happened from the way that I normally do it is that I felt a slight tug." When asked by the Deputy Commis-

sioner to testify as to what she knew happened, she stated, "I was coming up out of the box . . . and I felt this jabbing pain in my back."

The Commission found:

"4. She had most of the yarn hung when she reached down into the bottom of the cart, grasped two cones, and began to raise up. Upon raising up to the point that her upper torso was horizontal with the floor she felt a jabbing pain in her back. The pain was intense enough to cause her to scream and drop the cones.

5. Up to the time that claimant felt the stabbing pain in her back nothing unusual or out of the ordinary occurred which caused the pain. She was performing her regular duties in the usual manner.

6. Claimant was not injured by accident within the meaning of the North Carolina Workmen's Compensation Act because no unusual event, constituting an interruption of her usual routine of work, caused the back injury."

Harris & Bumgardner by Don H. Bumgardner for plaintiff appellant.

Hedrick, McKnight, Parham, Helms, Warley & Kellam, by Richard T. Feerick for defendant appellee.

CAMPBELL, Judge.

[1, 2] The words "accident" and "injury" are not synonymous. *Rhinehart v. Market,* 271 N.C. 586, 157 S.E. 2d 1 (1967); *Gray v. Storage, Inc.,* 10 N.C. App. 668, 179 S.E. 2d 883 (1971). Thus, an accident has occurred only where there has been an interruption of the usual work routine or the introduction of some new circumstance not a part of the usual work routine. A hernia or back injury suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. *Gray v. Storage, Inc., supra.* Injury arising out of lifting objects in the ordinary course of an employee's business is not caused by accident where such activity is performed in the ordinary manner, free from confining or otherwise exceptional conditions and surroundings. *Rhinehart v. Market, supra.*

Countless cases of back or hernia injuries can be cited in which the plaintiffs did not recover an award because there was no unusual circumstance about the performance of the job which showed that an accident had occurred. See for example, *Lawrence v. Mill,* 265 N.C. 329, 144 S.E. 2d 3 (1965) (plaintiff reached into a tool box to retrieve an object weighing about 47 pounds, as he had done on other occasions) ; *Byrd v. Cooperative,* 260 N.C. 215, 132 S.E. 2d 348 (1963) (lifting 100-pound bags of fertilizer) ; *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 124 S.E. 2d 109 (1962) (truck driver unloading 12 one-pound packages of coffee in the usual manner) ; *Turner v. Hosiery Mills,* 251 N.C. 325, 111 S.E. 2d 185 (1959) (plaintiff leaned over back of hosiery machine to make an adjustment to the machine) ; *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289 (1957) (plaintiff twisted his back when picking up a basket of chickens).

In *Holt v. Mills Co.,* 249 N.C. 215, 105 S.E. 2d 614 (1958), the plaintiff injured his back while "doffing twisters." His job required the taking off of yarn-filled bobbins from the spinning frames and the placing of empty bobbins in the frames. The full bobbins were placed in boxes and transported on a manually pushed truck to a storage room where they were lifted from the truck and placed on a shelf. Plaintiff reached into the lower level of the hand truck to lift a box of yarn bobbins, weighing about 100 pounds, while in a "stooped and bent" position; as he lifted the weight, he felt a pain in his groin. It was held that the evidence did not show the occurrence of an accident, and plaintiff was not entitled to a compensation award.

Hernia or back injuries, of course, have been compensable in other cases. In *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342 (1963) ; *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175 (1960) ; and *Edwards v. Publishing Co.,* 227 N.C. 184, 41 S.E. 2d 592 (1947), the plaintiffs were injured when lifting objects while in an unusually twisted, cramped, or awkward position.

In *Davis v. Summitt,* 259 N.C. 57, 129 S.E. 2d 588 (1963) ; *Faires v. McDevitt and Street Co.,* 251 N.C. 194, 110 S.E. 2d 898 (1959) ; *Rice v. Chair Co.,* 238 N.C. 121, 76 S.E. 2d 311 (1953) ; and *Moore v. Sales Co.,* 214 N.C. 424, 199 S.E. 605 (1938), the plaintiffs were performing physically strenuous tasks without the assistance from other workmen which was normally used.

In *Harris v. Contracting Co.*, 240 N.C. 715, 83 S.E. 2d 802 (1954), the plaintiff's feet slipped, and he fell injuring his back.

[3] Upon review of an order of the Industrial Commission, this Court does not weigh the evidence, but may only determine whether there is evidence in the record to support the finding made by the Commission. *Garmon v. Tridair Industries,* 14 N.C. App. 574, 188 S.E. 2d 523 (1972). If there is any evidence of substance which directly or by reasonable inference tends to support the findings, the court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. *Keller v. Wiring Co., supra.* In the instant case there was competent evidence upon which to base a finding that the plaintiff was performing her regular duties in the usual manner, and that "up to the time that the claimant felt the stabbing pain in her back nothing unusual or out of the ordinary occurred which caused the pain."

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RALPH WAYNE RANKIN

No. 7318SC257

(Filed 23 May 1973)

Larceny § 7— larceny from the person — sufficiency of evidence

In a prosecution charging defendant with larceny of $15 from the person of Lucille Langston, evidence was sufficient to be submitted to the jury where it tended to show that defendant was present when one Crawford snatched the victim's purse; he immediately ran away with the purse snatcher; he accompanied the purse snatcher on foot down the street some several minutes later; he entered a department store with the purse snatcher for the purpose of making a purchase; and he fled when accosted by police officers.

Judge HEDRICK dissenting.

APPEAL by defendant from *Crissman, Judge,* 23 October 1972, Regular Criminal Session of GUILFORD Superior Court, Greensboro Division.

State v. Rankin

Defendant, Ralph Wayne Rankin, was charged in a bill of indictment, proper in form, with the larceny of $15.00 from the person of Lucille M. Langston on 7 October 1972. Defendant was found guilty as charged and from a judgment imposing a prison sentence of from eight to ten years, he appealed to this Court.

Attorney General Robert Morgan by Associate Attorney Norman L. Sloan for the State.

Assistant Public Defender Dallas C. Clark, Jr., for defendant appellant.

CAMPBELL, Judge.

Defendant assigns as error the denial of his motion for judgment as of nonsuit.

The evidence, when considered in the light most favorable to the State, tends to show the following:

At about 2:30 p.m. on 7 October 1972, Mrs. Lucille M. Langston, an employee of the Greene Insurance Agency located on Lewis Street in the City of Greensboro, was returning to the place of her employment after having eaten lunch at the S & W Cafeteria. Mrs. Langston walked along Elm Street to Coe's Grocery Store, then turned up "a little driveway . . . instead of going around the grocery store and up to the Lewis Street entrance" of the Greene Insurance Agency. Mrs. Langston testified:

> " . . . I was almost to the parking area where my car was parked when someone jerked at my pocketbook and said, 'Give me your money.' I had not seen that person before my pocketbook was jerked. I did not know anyone was behind me. The person who jerked my pocketbook was standing right behind me when I turned. He jerked it again after I turned and I let the pocketbook loose and I let him have it.
>
> When I turned around I saw three men standing five or six feet apart. But the one grabbed the pocketbook and he opened it and took the billfold out and then he threw the pocketbook back down. Then he took the money out of the billfold and threw it on the ground. . . .
>
> Two of the men that were in the parking lot never spoke. The one that took the pocketbook spoke after he

threw it on the ground. He said, 'You better not come this way.' Then they all started running. I got a look at all three of them. The two that did not grab for the pocketbook were about as far as from me to the solicitor. The one that grabbed the pocketbook was right at me. The three that were in the parking lot are seated over there, they are the defendants. They left running around the buildings. . . . "

Mrs. Langston identified one Crawford as the man who snatched her pocketbook and took the money. She identified defendant Rankin and one Speed as the other two men in the parking lot.

Raymond McDonald, sitting in an automobile near the scene, heard Mrs. Langston hollering and "went to her and asked what had happened." McDonald saw three men run from the scene and went to Coe's grocery and requested that someone telephone the police. McDonald testified that about five minutes later he observed these three men walking north on South Elm Street. McDonald and a police officer who had arrived on the scene followed the three men into Blumenthal's Department Store and asked them to come outside. While the officer made a radio call from his police car to headquarters, the three men crossed the street to a bus stop. When the officer told Crawford that he was under arrest, all three fled.

The defendant was not only present when Crawford snatched the pocketbook, but he shows by all of his actions and conduct that he was encouraging the actual purse snatching. This is shown by his immediate running with the purse snatcher; his accompanying the purse snatcher on foot down the street some several minutes later; his going into Blumenthal's Department Store with the actual purse snatcher for the purpose of making a purchase. The jury could find that all three were participating and were spending some of the proceeds of the crime. The second running when accosted by the police officers was an additional circumstance to be considered. We think a jury question was presented.

There was no exculpatory statement introduced by the State which was binding upon the State and which eliminated this defendant as one of the participants in the crime. We, therefore, conclude that this case is clearly distinguishable from *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485 (1963). It is

more analagous to *State v. Washington,* 17 N.C. App. 569, 195 S.E. 2d 1 (1973). We have considered the other assignments of error and find no merit in them. The defendant was afforded a fair trial and no prejudicial error appears.

No error.

Judge VAUGHN concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

While the evidence tends to show that defendant was present when Crawford *actually* committed the crime charged and that defendant fled with the "purse snatcher" and Speed, in my opinion there is no evidence from which the jury could find that the defendant actually committed the crime or that he "by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary." *State v. Ham,* 238 N.C. 94, 97, 76 S.E. 2d 346, 348 (1953).

In short, the evidence tends to show only that defendant was present when a crime was committed and that he fled and remained with the person who committed the offense.

In *State v. Washington,* 17 N.C. App. 569, 195 S.E. 2d 1 (1973), cited by the majority as being analogous, the evidence contained the additional element that Washington clearly aided and abetted Oakley in the theft of the jewelry by repeatedly attracting the attention of the only clerk in the store.

The introduction by the State of statements tending to exculpate the defendant in *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485 (1963) was not controlling and the absence of such statements in the present case in my opinion is not determinative. I vote to reverse.

STATE OF NORTH CAROLINA v. WILLIE RUFUS BATTLE

No. 737SC217

(Filed 23 May 1973)

1. **Criminal Law § 99— questioning of witness by court—prejudicial expression of opinion**

Lengthy questioning by the court of defendant's wife as to the activities of defendant during the time of the alleged robbery, defendant's employment in Washington, D. C., the number of children of defendant and the witness, the witness's possession of a photograph of the children, the circumstances surrounding the couple's presence in Rocky Mount where the crime was allegedly committed and defendant's employment in Rocky Mount violated the rule that no judge is at any time permitted to cast doubt upon the testimony of a witness.

2. **Criminal Law § 113— jury instruction — overemphasis on State's contentions**

The trial court in an armed robbery case, having elected to give the contentions of the parties, overemphasized those of the State to the prejudice of the defendant.

3. **Criminal Law § 66— identification of defendant — insufficiency of findings on voir dire**

Although the court conducted a *voir dire* upon defendant's timely objection to testimony by the victim of an armed robbery identifying defendant as the perpetrator of the crime, the court's findings were inconclusive as to the essential questions presented.

APPEAL by defendant from *Martin (Perry), Judge,* 2 October 1972 Session of Superior Court held in NASH County.

The State's evidence tended to show that shortly after 9:00 p.m., on 25 May 1972, defendant, armed with a pistol, robbed one Estill in a motel room at Rocky Mount. Defendant offered evidence tending to show that he was in his residence in Washington, D. C., at the time of the robbery; that on 25 May 1972, he worked in the vicinity of Washington, D. C., for his regular employer, Herman Daniels, who owned Daniels' Trash Company. The jury returned a verdict of guilty of armed robbery and judgment was entered imposing a prison sentence. Defendant was represented at trial and on appeal by court appointed counsel.

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

Dill, Fountain & Hoyle by William S. Hoyle for defendant appellant.

VAUGHN, Judge.

We will discuss only so much of the evidence as is thought to be necessary to indicate why there must be a new trial.

Estill, the victim, had testified that, during the robbery, the man who robbed him stated that he had four children and that when he talked with defendant at the police station defendant told him he had four children. Defendant's wife testified, among other things, that she and defendant had only two children; after working all day, defendant returned to their Washington residence about 6:30 p.m., on 25 May 1972, ate dinner, watched television and retired for the night about 10:30 p.m.; defendant did not leave Washington during the month of May and that they came to Rocky Mount in June, leaving their two children in Washington with the witness's mother. After cross-examination by the solicitor, the court undertook to examine the witness as follows.

"BY THE COURT:

Q. What type of work do you do in Washington?

A. I was working for the Telephone Company.

Q. About when did you quit there?

A. Last year.

Q. How old are you?

A. Twenty-four.

Q. You say the man's name your husband worked for was what?

A. He worked for Daniels Trash Company.

Q. Daniels Trash Company?

A. Yes.

Q. Have you ever seen Mr. Daniels?

A. No.

Q. You don't know if he is a white man or a black man, or a red man, or a yellow man, do you?

A. My husband said he was black.

Q. Does your husband always bring his pay check home to you?

A. Yes.

Q. Do you keep those records for him?

A. Yes.

Q. Do you have any records showing when he got his last check in Washington, D. C.?

A. I don't have it with me but it was in June.

Q. Where would you have it?

A. All our furniture and all that stuff is still in Washington.

Q. You left your furniture, your records and your children and everything in Washington?

A. Yes. We just came for a visit.

Q. You are just visiting down here now?

A. Yes.

Q. But your husband is working here now?

A. Well, he took a job because he got into this trouble. It was only a visit and we were going back to Washington.

Q. Do you have a picture of your children or anything like that?

A. I have one of my daughter. I have a picture of my daughter.

Q. But not all of your children together?

A. I have only two.

Q. You don't have a picture of them together?

A. No.

Q. Do you know whether or not your husband drew unemployment at any time after he left Washington?

A. No, he didn't.

Q. He did not?

A. No.

BY THE COURT: All right, Thank you."

[1] The sound rule that no judge at any time is permitted to cast doubt upon the testimony of a witness is firmly fixed in this jurisdiction. The judge must exercise great care to see that nothing he does or says during the trial can be understood by the jury as an expression of an opinion on the facts or conveys an impression of judicial leaning. *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128; *State v. Kimrey,* 236 N.C. 313, 72 S.E. 2d 677; *State v. Lynn,* 246 N.C. 80, 97 S.E. 2d 451. We hold that the court's participation in the examination of the witness constitutes prejudicial error.

[2] In other assignments of error defendant contends that the court committed error in the manner in which he stated the contentions of the parties. We hold that the court, having elected to give the contentions of the parties, overemphasized those of the State to the prejudice of the defendant.

[3] Defendant brings forward assignments of error attacking the admission, over timely objection, of testimony by the victim identifying defendant as the person who committed the robbery. Although a *voir dire* was conducted, the court's findings were inconclusive as to the essential questions presented. At the next trial, if proper and timely objection is made, the court will determine the admissibility of the evidence in the manner required and as set out in numerous decisions of the Supreme Court. See *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583; *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283; *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844.

New trial.

Judges CAMPBELL and HEDRICK concur.

DOUGLAS EUGENE LAWRENCE v. STATE OF NORTH CAROLINA

No. 7327SC254

(Filed 23 May 1973)

Constitutional Law § 32— indigent defendant — possible punishment in excess of six months — right to court appointed counsel

Where eleven charges were made against defendant, six for issuing worthless checks in amounts below $50 and five for checks in amounts above $50, the indigent defendant was entitled to court-appointed counsel under G.S. 7A-451(a)(1) since, upon his fourth conviction for any of the charges against him, defendant could have been incarcerated for as long as two years as a general misdemeanant. G.S. 14-107.

ON *certiorari* from the order of *McLean, Judge,* entered at the 20 November 1972 Session of GASTON County Superior Court.

Defendant Lawrence was tried at the 4 January 1972 Criminal Session of Gaston County District Court on eleven charges of issuing worthless checks in violation of G.S. 14-107. Lawrence was not represented by counsel, and in open court he pleaded guilty to all eleven charges. Upon his pleas of guilty, judgments were entered sentencing Lawrence to active terms of four months on five of the charges and 30 days on the rest, all to run consecutively.

On 7 September 1972, defendant filed a petition for writ of habeas corpus alleging that he was illegally and unconstitutionally imprisoned on the grounds that (1) his constitutional rights had not been explained to him at the time of his arrest and at trial and (2) that his request for court-appointed counsel upon grounds of indigency had been improperly denied. Defendant's petition was heard by Judge McLean and denied on 22 November 1972. This Court allowed defendant's petition for writ of certiorari on 9 January 1973.

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

Ramseur & Gingles, by Ralph C. Gingles, Jr., for plaintiff appellant.

MORRIS, Judge.

The only question for our determination is whether defendant was entitled to court-appointed counsel at his trial.

On 12 June 1972 the Supreme Court of the United States held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin,* 407 U.S. 25, 37, 92 S.Ct. 2006, 2012, 32 L.Ed. 2d 530, 538 (1972). In denying defendant Lawrence's petition for writ of habeas corpus, Judge McLean held that since defendant was tried for the misdemeanor offenses prior to the *Argersinger* decision, and since the authorized punishment did not exceed six months' imprisonment or a five hundred dollar fine, defendant was not entitled to court-appointed counsel. At the time defendant Lawrence was tried and sentenced G.S. 7A-451(a)(1) provided that an indigent defendant was entitled to court-appointed counsel in "[a]ny felony case, and any misdemeanor case for which the authorized punishment exceeds six months imprisonment or a five hundred dollars ($500.00) fine."

Defendant contends that (1) *Argersinger* should be applied retroactively, and (2) irrespective of the application of *Argersinger,* taking the eleven charges against him together, which could and did result in imprisonment for more than six months, he was denied his rights under G.S. 7A-451(a)(1) as then in force.

In answer to defendant's second contention it was held in *State v. Speights,* 280 N.C. 137, 185 S.E. 2d 152 (1971), that an indigent defendant's Sixth Amendment right to counsel was not violated by the refusal of the trial court to appoint counsel to represent him in a trial of two petty misdemeanors arising out of the same incident even though the combined punishment for both offenses could have exceeded six months' imprisonment. Each offense was examined separately, and since neither exceeded the six months' limit, defendant was not entitled to appointed counsel.

Here defendant pleaded guilty to eleven counts of violating G.S. 14-107. G.S. 14-107 provides, in pertinent part, the following:

> "Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished as follows:

(1) If the amount of such check or draft is not over fifty dollars ($50.00), the punishment shall be by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days. *Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor.*

(2) If the amount of such check or draft is over fifty dollars ($50.00), the punishment shall be by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months, or both. *Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor.*" (Emphasis supplied.)

As to punishment upon conviction of a misdemeanor, G.S. 14-3(a) provides, in pertinent part:

"[E]very person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term *not exceeding two years,* or by both, in the discretion of the court." (Emphasis supplied.)

Of the eleven charges against defendant Lawrence under G.S. 14-107, six were for issuing worthless checks in amounts below $50 and five were for amounts above $50. In any event, upon his fourth conviction for any of these, defendant could have been incarcerated for as long as two years as a general misdemeanant. We are of the opinion that defendant, faced initially with eleven charges of violating G.S. 14-107 consolidated for trial, was entitled to court-appointed counsel, absent a knowing and intelligent waiver. This result, in our opinion, is required by reason of the punishment provisions of G.S. 14-107, and decision is not inconsistent with *State v. Speights, supra.* For the reason stated, defendant must be given a new trial.

We do not reach the question of whether *Argersinger* applies retroactively, nor do we discuss the fact that the record

does not meet the requirements of *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969), with respect to the voluntariness of the pleas of guilty.

New trial.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. ELTON T. BARNES

No. 732SC345

(Filed 23 May 1973)

1. **Criminal Law § 161— exceptions not noted in record**

Exceptions not duly noted in the record but appearing only under the purported assignments of error will not be considered. Court of Appeals Rule 21.

2. **Criminal Law § 166— reference in brief to numbered exceptions in record**

Appellant must in his brief point out the numbered exception upon which he is relying and indicate upon what page of the printed record the exception may be found. Court of Appeals Rule 28.

3. **Criminal Law § 163— assignments of error to charge**

An assignment of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on the failure to charge should set out appellant's contention as to what the court should have charged, a mere reference in the assignment of error to the record page where the exception appears being insufficient.

4. **Narcotics § 4— possession of marijuana with intent to distribute — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for possession of more than 5 grams of marijuana with intent to distribute where it tended to show that a wildlife officer saw defendant and two others near two parked cars, that when the officer approached defendant walked into some woods carrying a cardboard box from which vegetable matter wrapped in green paper protruded and returned from the woods without the box, that defendant was barefooted, that 20 minutes later the wildlife officer and an S.B.I. agent followed prints of bare feet to a box containing a package of vegetable matter wrapped in green paper, and that the vegetable matter weighed more than two pounds and consisted of 50-60 percent marijuana.

APPEAL by defendant from *Tillery, Judge,* 8 November 1972 Session of WASHINGTON Superior Court.

Defendant was tried on a bill of indictment charging that on 22 July 1972 he did possess with intent to distribute an amount of marijuana in excess of five grams. Having been found guilty by a jury, defendant was sentenced to imprisonment for the term of not less than three nor more than five years.

The State's evidence tended to show the following: On the morning of 22 July 1972 James Ginn, an employee of the North Carolina Department of Conservation and Development, drove into a wooded area near Plymouth, North Carolina, on a dirt path. Upon leaving his car, he heard someone holler, "Watch out, it's a game warden." He then saw three persons standing near two automobiles. He also saw the defendant walking into the woods carrying a cardboard box out of which was protruding "a big bundle wrapped in a green type paper and it had a vegetable material sticking from it. One end of the package was torn open." Barnes, the defendant, was not wearing shoes; he was the only person that the witness noticed was barefooted. Barnes returned from the woods without the box.

Ginn returned to Plymouth, found an S.B.I. agent, and drove to the area again. He was gone about twenty minutes. They discovered prints of bare feet in the sand, followed the prints, and found a box containing a package wrapped in green paper, one end torn open, which package contained a vegetable material.

An S.B.I. chemist testified that he tested the vegetable material and found it to consist of about 50-60 percent marijuana. The package weighed more than two pounds.

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

Hutchins & Romanet by Robert Wendel Hutchins for defendant appellant.

CAMPBELL, Judge.

Judgment was entered on 10 November 1972, at which time defendant gave notice of appeal. Defendant procured an order extending time to docket the appeal for an additional 30 days and thus had 120 days within which to docket the record on appeal with this Court, or until 12 March 1973. The record was

not filed with this Court until 19 March 1973. This did not comply with the rules of this Court.

[1] Additionally, defendant has recorded five assignments of error, only two of which are supported by exceptions duly noted in the record. Those two exceptions, however, are not properly numbered as required by Rule 21 of the Rules of Practice in the Court of Appeals. Exceptions not duly noted in the record, but appearing only under the purported assignments of error will not be considered. *Midgett v. Midgett,* 5 N.C. App. 74, 168 S.E. 2d 53 (1969).

[2] While the defendant did take exception to, and assigned as error, the trial court's failure to enter judgment as in case of nonsuit and to direct a verdict of not guilty, these exceptions are not preserved in the brief. Rule 28 requires the appellant, in his brief, to point out the numbered exception upon which he is relying and indicate upon what page of the printed record the exception may be found. *State v. McDonald,* 11 N.C. App. 497, 181 S.E. 2d 744 (1971).

[3] Further, although the defendant assigns as error a portion of the trial court's charge such assignment of error is defective not only because it is not based upon an exception in the record, but also because it is not properly set out in the record. An assignment of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged. A mere reference in the assignment of error to the record where the exception appears will not present the alleged error for review. *State v. Brown,* 9 N.C. App. 534, 176 S.E. 2d 907 (1970).

The rules of this Court are to assist the Court to locate the error complained of and expedite the work of the Court. Just sending up a mass of material and requesting the Court to look it over is not helpful.

If the Rules of Practice in the Court of Appeals are not complied with, the appeal may be dismissed. However, since the appeal itself is an exception to the judgment which presents for review error appearing on the face of the record, we undertake to perform such a review.

The indictment is validly drawn; the defendant entered a plea of not guilty upon which the case was tried; the verdict

conforms to the issues in the case; and the judgment and sentence is in accordance with the maximum allowed by statute.

[4] The State's evidence was sufficient to go to the jury. The State is not required to prove exclusive possession or control of a controlled substance. *State v. Sutton,* 14 N.C. App. 161, 187 S.E. 2d 389 (1972).

The evidence of possession, which was circumstantial in nature, was sufficient evidence to place the defendant within such close juxtaposition to the narcotic drug as to justify the jury in concluding that the same was in his possession. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972).

The facts in the instant case are distinguishable from those in *State v. Chavis,* 270 N.C. 306, 154 S.E. 2d 340 (1967), in that here the officer saw both the box and the marijuana in defendant's possession.

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. STEVE ALVIN PATTON

No. 7319SC372

(Filed 23 May 1973)

1. Criminal Law § 113— instructions — failure to define words of common meaning

It is not error for the court to fail to define and explain words of common usage and meaning to the general public, including essential elements of the crime charged, in the absence of a request for special instructions.

2 Disorderly Conduct and Public Drunkenness § 2— failure of court to define "drunk" or "intoxicated"

In a prosecution for public drunkenness, the trial court erred in failing to define what would constitute being "drunk" or "intoxicated" in order to sustain a conviction for a violation of G.S. 14-335.

APPEAL by defendant from *McConnell, Judge,* 16 October 1972 Session of CABARRUS Superior Court.

Defendant was tried *de novo* in Superior Court, having been convicted in District Court of two offenses: appearing in a public place in an intoxicated condition in violation of G.S. 14-335, and carrying a concealed weapon in violation of G.S. 14-269. He was sentenced to imprisonment for 20 days for the public drunkenness charge, and to imprisonment for four months for the concealed weapon charge, the sentences to run concurrently.

The evidence tended to show that on 16 March 1972 at about 12:30 a.m. at the Truckers Center, a restaurant in Concord, North Carolina, defendant and two other men ordered something to eat. They "became a little unruly" and argued with the management about the delay in filling their order. When asked to leave, they argued with the manager, but then did leave. The defendant was within the observation of the restaurant manager for about fifteen or eighteen minutes. The manager observed "a strong odor of alcohol."

After they had left, defendant and his companions began to enter again. The manager saw defendant take an object from his pocket and hold it across his waist. The manager then pushed the first man out the door and into the defendant. Thereupon the defendant dropped a straight razor on the ground.

Just as the manager was pushing the three men out the door, a deputy sheriff arrived and observed that defendant was unsteady on his feet. He saw defendant drop the razor on the ground. The deputy noticed "a strong odor of alcohol about" the defendant, who, in the deputy's opinion, "was under the influence and intoxicated."

The defendant testified that he and his two companions had driven from Winston-Salem that evening, that they had drunk a six-pack of beer, but that he was not drunk.

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

Davis, Koontz & Horton by Clarence E. Horton, Jr. for defendant appellant.

CAMPBELL, Judge.

The evidence taken in the light most favorable to the State is sufficient to require submission of the case to the jury. *State v. Fenner,* 263 N.C. 694, 140 S.E. 2d 349 (1965).

In its charge to the jury the court stated:

> " . . . I charge you that if the State has satisfied you from the evidence, and beyond a reasonable doubt that on this the 16th day of March, 1972, the defendant Steve Alvin Patton, was on the premises of Trucker's Center, and you find further beyond a reasonable doubt that it was a public place, and at the time he was publicly drunk, or intoxicated, that he consumed some alcoholic beverage to cause him to become intoxicated or drunk, if the State has so satisfied you from the evidence and beyond a reasonable doubt, it would be your duty to return a verdict of public drunkenness, or intoxication. . . ."

Defendant asserts as error the failure of the court to define in that portion of the charge the words "drunk" or "intoxicated." G.S. 1-180 imposes upon the trial judge the affirmative duty to explain the law of the case sufficiently enough for the jury to understand it, and make an intelligent determination of the evidence with respect to the law. The trial judge is not required, however, to instruct with any greater particularity upon any element of the offense than is necessary to enable the jury to apply that law to the evidence bearing on the element. *State v. Thacker,* 5 N.C. App. 197, 167 S.E. 2d 879 (1969).

[1] It is not error for the court to fail to define and explain words of common usage and meaning to the general public, in the absence of a request for special instructions. *State v. Withers,* 2 N.C. App. 201, 162 S.E. 2d 638 (1968). This rule applies equally to essential elements of the crime charged as well as to other legal terms contained in a charge. *State v. Godwin,* 267 N.C. 216, 147 S.E. 2d 890 (1966); *State v. Jones,* 227 N.C. 402, 42 S.E. 2d 465 (1947).

Any member of the jury, if he or she had observed the defendant at the restaurant at the time in question, would have been qualified to testify in court as to his opinion whether the defendant was intoxicated. *Bryant v. Ballance,* 13 N.C. App. 181, 185 S.E. 2d 315 (1971), *cert. denied,* 280 N.C. 495, 186 S.E. 2d 513 (1972). They would not need to be experts to understand the meaning of the word "drunk" or to find from the evidence of defendant's actions whether or not he was drunk.

As a witness, however, the one testifying would be subject to examination by the defendant as to what, in the opinion of such witness, would constitute being drunk or intoxicated.

[2] The state of being "drunk" or "intoxicated" varies greatly in the opinion of different persons. What would constitute this status in the eyes and opinion of one person might be far different from that of another person. In view of this situation we do not think it proper for the jury to be turned loose without further guidance from the trial judge, and a definition of what would constitute being "drunk" or "intoxicated" in order to sustain a conviction for a violation of G.S. 14-335.

In the instant case no instruction or guidance was given by the trial judge to the jury, and we think this constitutes error. Some guidance is required and being "drunk" within the meaning of G.S. 14-335 is defined in *State v. Painter*, 261 N.C. 332, 134 S.E. 2d 638 (1964).

We have reviewed the other assignments of error and find no merit in them.

In Case No. 72-CR-3300 (public intoxication) we find error, and the defendant is entitled to a new trial.

In Case No. 72-CR-3301 (carrying a concealed weapon) we find no error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. LOIS JEAN WOOTEN

No. 738SC62

(Filed 23 May 1973)

1. **Evidence § 14— physician-patient privilege — requiring physician to testify**

In this prosecution for possession of heroin, the trial court did not err in ruling that a physician should be required in the interest of justice to give testimony concerning a matchbox containing heroin found on defendant's person when she was undressed in a hospital emergency room in order that the physician could determine the cause of her unconsiousness. G.S. 8-53.

2. **Evidence § 14— requiring nurse to testify — harmless error**

Even if the trial court erred in allowing a nurse to testify as to a matchbox containing heroin found on the unconscious defendant's

person in a hospital emergency room without finding that such testimony was necessary to a proper administration of justice, such error was not prejudicial where a physician properly gave substantially the same testimony.

3. **Criminal Law § 84; Searches and Seizures § 1— undressing of defendant in hospital emergency room — no search**

There was no "search" of defendant within the purview of G.S. 15-27 and constitutional provisions forbidding unreasonable searches when a nurse undressed the unconscious defendant at a physician's direction in a hospital emergency room and discovered heroin on defendant's person.

APPEAL by defendant from *Cowper, Judge,* 12 June 1972 Session of WAYNE Superior Court.

By indictment proper in form defendant was charged with felonious possession of heroin. The evidence tended to show:

During the early evening of 28 October 1971 the 22 year old defendant, unconscious, was taken by a rescue squad to the emergency room of Wayne County Memorial Hospital. Not knowing what was wrong with defendant and in order to examine her, a physician on duty instructed a female licensed practical nurse to undress defendant. As the nurse was undressing defendant "from the top" and removed her brassiere, a small matchbox fell from the brassiere. The nurse opened the box and saw that it contained cellophane packets of a white powdery substance. On instructions from the treating physician, the nurse handed the box and its contents to a deputy sheriff who was in the emergency room at the time. The deputy did not instruct the nurse to undress defendant nor to deliver the box and contents to him. After defendant was undressed, a physician examined her and found vein scars on her arm. The physician concluded that defendant had received an overdose of narcotics and administered subcutaneously 15 milligrams of nalline to counteract the effects of the drugs received. Shortly thereafter defendant responded and regained consciousness; without the nalline or similar medication, she would not have regained consciousness. A chemical analysis of the substance found in the matchbox disclosed that it was heroin.

A jury found defendant guilty as charged. From judgment imposing prison sentence of four years with recommendation that defendant be treated for drug addiction, defendant appealed.

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

George F. Taylor for defendant appellant.

BRITT, Judge.

Defendant assigns as error the admission of testimony by the nurse and treating physician, particularly their testimony with respect to the matchbox and its contents. She contends that the evidence was inadmissible (1) by virtue of G.S. 8-53 and (2) for the reason that it resulted from an illegal search and seizure.

[1] We consider first the evidence provided by the treating phyisican in the light of G.S. 8-53 which provides:

> "No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the court, either at the trial or prior thereto, may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice."

The trial court ruled that "in the interest of justice that Doctor Nation be required to answer" the questions with regard to defendant whom he saw and treated on 28 October 1971 in the emergency room of the Wayne Memorial Hospital. We hold that the ruling of the trial court substantially complies with the proviso of the statute, rendering the evidence provided by the physician admissible as far as G.S. 8-53 is concerned.

[2] As to the evidence provided by the nurse, it has been held that G.S. 8-53 applies to nurses when they are assisting or acting under the direction of a physician or surgeon, if the physician or surgeon at the time is subject to the statute. *Sims v. Insurance Company,* 257 N.C. 32, 125 S.E. 2d 326 (1962); *State v. Bryant,* 5 N.C. App. 21, 167 S.E. 2d 841 (1969). The record reveals no finding by the trial court that the evidence provided by the nurse was necessary to a proper administration of justice. Assuming, *arguendo,* that the court erred in admitting the nurse's evidence without the finding set out in the proviso to the statute,

we hold that the error was not prejudicial since the physician provided substantially the same evidence.

Next, we consider the question whether the evidence provided by the treating physician and the nurse resulted from an illegal search and seizure and was, therefore, inadmissible.

It is well settled, in both state and federal courts, that evidence obtained by unreasonable search and seizure is inadmissible. *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970). But, what is a *search* that comes within this principle of law? In *State v. Reams, supra,* the court, quoting from C.J.S. said:

> "The term 'search,' as applied to searches and seizures, is an examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. As used in this connection the term implies some exploratory investigation, or an invasion and quest, a looking for or seeking out. * * * "

In *Duffield v. Peyton,* 209 Va. 178, 162 S.E. 2d 915, the Supreme Court of Appeals from Virginia said: " '* * * A search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed.' *State v. Coolidge,* 106 N.H. 186, 191, 208 A. 2d 322, 326." In *State v. Colson,* 274 N.C. 295, 306, 163 S.E. 2d 376 (1968), the court said: "Evidence is not rendered incompetent under [G.S. 15-27] unless it was obtained (1) in the course of a search, (2) under conditions requiring a search warrant, and (3) without a legal search warrant."

[3] We hold that in the case at bar there was no "search" of defendant within the purview of G.S. 15-27 and Constitutional provisions forbidding unreasonable searches. Defendant was not undressed by, or at the direction of, a police officer. The purpose in undressing defendant was not to discover contraband or other illicit property or to obtain evidence to be used against her in the prosecution of a criminal action. On the contrary, she was undressed in order that a physician might determine the cause of her unconciousness and after determining the cause, administer treatment that would save her life. Finding heroin on her person was incidental to the examination.

We have carefully considered all assignments of error brought forward and argued in defendant's brief but finding them without merit, they are all overruled.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JENNIE CAROL ELLINGTON

No. 7318SC392

(Filed 23 May 1973)

1. **Searches and Seizures § 3— informer's tip plus corroborating evidence — probable cause to search**

An informant's tip plus corroborating evidence is sufficient to show probable cause to search where (1) the credibility of the informer is bolstered by a plethora of corroborating facts—names, times, descriptions—shown to be true, which in themselves are not of the type likely to circulate in rumor; and (2) the corroborating facts are of such detail as to support the reasonable inference that the informant gathered his information, not from rumor, but from firsthand observation himself.

2. **Searches and Seizures § 3— probable cause — sufficiency of affidavit**

There was probable cause to issue a warrant to search for marijuana where the affidavit alleged that a deputy sheriff in California telephoned Greensboro and informed officers there that, based on a tip from a reliable informer, he had information that two girls were flying into Greensboro at a specified hour with marijuana in their possession; the California officer described the girls' appearance in detail; and the informer's reliability was attested to.

APPEAL by defendant from *Crissman, Judge,* 1 January 1973 Session of GUILFORD Superior Court.

Defendant was convicted of possession of marijuana with intent to distribute and was sentenced to imprisonment for four years. The evidence for the State was to the effect that at 4:00 a.m. on 22 September 1972, the Greensboro police received a telephone call from a deputy sheriff in San Diego, California, telling them that he had been informed that two women, who were described, were flying on Eastern Airlines' Flight 203 from San Diego to Greensboro, and that they were carrying with them marijuana. The deputy described their four pieces of

luggage and the baggage ticket number for each piece. At 10:00 a.m. on 22 September Greensboro police were issued a search warrant. At 11:05 a.m. on 22 September officers saw two women, fitting the description, getting off Eastern Airlines' Flight 203 at Greensboro. These two women picked up four suitcases fitting the telephone description. The two women left the airport with the luggage in an airport limousine, the officers followed, and stopped the car, whereupon they read the warrant to the two women, who were the defendant Jennie Carol Ellington and Patrice Lee Walters. The officers opened the four suitcases after having been told the combination which opened the locks, and found a substance later determined to be marijuana, far in excess of 5 grams.

Since the affidavit upon which the search warrant was issued did not set forth facts upon which the informant based his conclusion that the defendant had marijuana, defendant contended that the warrant was illegally issued without probable cause, and moved to suppress the evidence, which motion was denied.

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

Booe, Mitchell, Goodson and Shugart by William S. Mitchell for defendant appellant.

CAMPBELL, Judge.

Since without the informant's tip the police officers would have had no knowledge of the crime, the reliability of the informer's tip is essential to the validity of the search warrant.

In *Draper v. United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959), corroborating evidence gained by police upon independent investigation was held to be sufficient evidence from which to infer the reliability of the informer's tip. In *Draper* an informer advised the police that a certain individual, whose dress, gait and luggage he described, would be arriving on one of two trains, carrying a quantity of heroin. When a man precisely fitting this description did appear, the police arrested him and found heroin. The Supreme Court held that there was probable cause for the arrest without a warrant.

In 1964, without mention of the *Draper* case, the United States Supreme Court formulated a standard for testing prob-

able cause to search based upon an informant's tip. *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), provided that an affidavit based on an informant's tip must set forth two things: (1) some of the underlying circumstances from which the police officers concluded that the informant is credible or his information reliable; and (2) some of the underlying circumstances from which the informant based his conclusions about the alleged criminal activity of the defendant.

The Court soon made clear, however, that *Aguilar* did not overrule *Draper.* In *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969), the court expressly reaffirmed *Draper* and formulated an alternative test to *Aguilar:*

> "The informer's report must first be measured against Aguilar's standards so that its probative value can be assessed. If the tip is found inadequate under Aguilar, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in Aguilar must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration?" 393 U.S. at 415, 21 L.Ed. 2d at 643, 89 S.Ct at 588.

Spinelli thus stands for the proposition that even if the two-pronged test of *Aguilar* is not met, the information before the magistrate may be sufficient if, as in *Draper,* it is sufficiently detailed, or sufficiently corroborated, to supply as much trustworthiness as does the *Aguilar* test.

In *Spinelli* an informant relayed information that the defendant was using a designated apartment as the headquarters of a gambling operation. The informant supplied information that defendant was using two telephones with different unlisted numbers, giving those numbers. The authorities confirmed the numbers given, and also included information that Spinelli had a reputation in police circles as a gambler. The court held that this information did not have the indicia of reliability that was present in the *Draper* case, and did not add up to probable cause.

> " . . . In the absence of a statement detailing the manner in which the information was gathered, it is es-

pecially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U.S. at 416, 21 L.Ed. 2d at 644, 89 S.Ct. at 589.

In *United States v. Harris,* 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075 (1971), the court used the tip plus corroboration test as an alternative to *Aguilar,* and the court found probable cause in a plurality opinion. The *Harris* affidavit alleged that defendant was dealing in non-taxpaid whiskey based upon information of a person who had himself purchased whiskey from the defendant within the last two weeks. The affidavit contained no underlying circumstances from which to infer the informant's credibility, but nevertheless the court affirmed the validity of the warrant, primarily because the informant claimed to have had firsthand observation, and because his statement was an admission against penal interest.

Two Federal Courts of Appeal, speaking nearly simultaneously on this issue, have concluded that *Harris* is a diminution of the requirement of the *Spinelli* case in finding suitable alternative to *Aguilar.* See *United States v. McNally,* 473 F. 2d 934 (3rd Cir. 1973) and *United States v. Marihart,* 472 F. 2d 809 (8th Cir. 1972).

[1] The tip plus corroborating evidence test satisfies the *Aguilar* requirements where (1) the credibility of the informer is bolstered by a plethora of corroborating facts—names, times, descriptions—shown to be true, which in themselves are not of the type likely to circulate in rumor; and (2) the corroborating facts are of such detail as to support the reasonable inference that the informant gathered his information, not from rumor, but from firsthand observation himself. The inference that the informer observed the facts he relates is permissible. See the concurring opinion of Justice White in *Spinelli v. United States, supra,* at 423, 21 L.Ed. 2d at 647, 89 S.Ct. at 592.

In applying *Spinelli's* alternative test to the facts of the present case, we first apply the *Aguilar* test—the sufficiency of the showing furnished the judicial officer of (1) the underlying circumstances showing the credibility of the informer, and (2) the underlying circumstances from which the informer

reached the conclusions he conveyed in the tip, which here was his statement that the defendant was carrying marijuana.

Here *Aguilar's* first prong is amply satisfied: The affidavit contains the statement that the "informer is 100% reliable, and that information obtained from this same informant recently led to the confiscation of 120,000 Barbiturates recently in New York City." Even in the absence of this statement the informant's reliability may reasonably be inferred from the very nature of his detailed report.

The second prong of the *Aguilar* test is not satisfied, however, because the officer revealed nothing to the issuing magistrate that would indicate the basis of the informer's conclusions. Under the alternative test the question now is whether the informant's tip was sufficiently detailed and corroborated to indicate its probable reliability. We think the test is clearly satisfied here. It is an inference reasonably arrived at from the report that the informant in all probability gathered the information from firsthand observation.

The affidavit presented in support of the search warrant reads:

> "C. D. Wade being duly sworn and examined under oath, says under oath that he has probable cause to believe that the above have in their possession certain property, to wit: 25 to 30 kilos of Marijuana, a controlled substance, a crime, to wit: Illegal Possession of Controlled Substance, Marijuana. The property described above is located Greensboro-High Point Regional Airport described as follows: Guilford County, N. C. (See Affidavit). The facts which establish probable cause for the issuance of a search warrant are as follows:
>
> "At 4:00 A.M., 9-22-72, Deputy Sheriff Robert Simmons of the San Diego, California Sheriff's Office, called the Communications Center of the Greensboro Police Department and talked to Operator Thomas. He gave the following information: He advised of the transportation of 25 to 30 kilos of Marijuana being transported by the following subjects: Two W/F's. (1) W/F, 20's, 5'6", 105-11 Lbs., has brown fuzzy hair & was wearing green and blue floor length flowered dress. Poss. traveling by the name of Miss J. Ellington or Miss P. Walters. (2) W/F, 20's, 5'6", 120-130 Lbs., has blonde hair and was wearing short white

rough type fabric dress. Also poss. traveling by one of names aforementioned. They will have a total of 4 suitcases with them, they will all be large 3-suiter type. Two of them will be Blue Sky-way, 1 will be a brown sky-way, and the other will be a brown Ventura. All of them will have combination locks. The baggage tickets will be as follows 17-33-13, 17-33-14, 17-33-15, 17-33-16. They are enroute to Greensboro from San Diego, their ultimate destination is here. They will be coming into Greensboro-High Point Airport on flight 203 Eastern Airlines.

"Deputy Simmons advises that his informer is 100% reliable, and that information obtained from this same informant recently led to the confiscation of 120,000 Barbiturates recently in New York City.

"Deputy Simmons also advised that he could be reached after 0900 hrs. their time (1200 Hrs.) our time, at the following number 714-297-2848 this would be the Metropolitan Enforcement Detail.

"This affiant, C. D. Wade, has confirmed through Eastern Airlines that subjects using the names above of the suspects, are in fact on Eastern Flight 203 and are expected to arrive at the Greensboro-High Point Regional Airport at 11:07 A.M. our time.

"This affiant also confirmed by telephone that Deputy Simmons is in fact a law enforcement officer with the San Diego, California Sheriff's Office."

[2] The facts in the instant case being so nearly those of the case of *Draper v. United States, supra,* that case is controlling; and we hold that there was probable cause for the issuance of the search warrant. While *Draper* involved the question of whether the police had probable cause to arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue. *Spinelli v. United States, supra,* note 5.

The affidavit did supply reasonable cause to believe that the luggage to be searched contained the contraband and met the

test of *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 753 (1972). See also *State v. Staley,* 7 N.C. App. 345, 172 S.E. 2d 293 (1970).

Affirmed.

Judges HEDRICK and VAUGHN concur.

EDWARD B. HOLLOWELL v. RAY HOLLOWELL AND WIFE, MAXINE B. HOLLOWELL

EVELYN H. TAPPAN v. RAY HOLLOWELL AND WIFE, MAXINE B. HOLLOWELL

No. 731SC168

(Filed 23 May 1973)

Wills § 29— devise of land with charge thereon — effect of codicil on charge

Where an item of testator's will devised real property to testator's son subject to a monetary charge in favor of two of the testator's other children, a codicil which canceled the devise to the son and in lieu thereof devised the property to the son and his wife as tenants by the entirety did not eliminate the charge upon the land in favor of the testator's other two children.

APPEAL by plaintiffs from *Blount, Judge,* 6 November 1972 Civil Session of CHOWAN Superior Court.

Plaintiffs filed similar complaints against the defendants alleging that under their father's will and codicil the defendants' devise of certain real property was subject to a monetary charge in favor of the plaintiffs which charge had not been paid. The Complaint further alleged that the testator died in March 1962 and that the defendants had accepted the realty devised and are now in possession of it. The defendants admitted all allegations of the complaint, except that they are indebted to the plaintiffs. Plaintiffs' motions for summary judgment (with the verified complaints as affidavits) or for judgment on the pleadings were denied, and plaintiffs appealed.

White, Hall & Mullen by Gerald F. White and Herbert T. Mullen, Jr., for plaintiffs appellant.

Pritchett, Cooke & Burch by Stephen R. Burch for defendants appellee.

CAMPBELL, Judge.

The two cases were consolidated for trial. There was also filed a petition for certiorari in the event it should be construed that the appeal was premature. All parties took the position that the cases presented only a question of law and that none of the facts were in dispute, and a final decision was desired rather than the case being remanded for any further factual determination.

There is presented the interpretation of the will and codicil thereto of R. H. Hollowell.

R. H. Hollowell died in March 1962 leaving surviving a widow, Leora, who has since died; a son, Edward, who lives in Mississippi; a daughter, Evelyn, who lives in Florida; a son, Norman, who lives in Chowan County, North Carolina; and a son, Ray, one of the defendants, who lives in Chowan County, North Carolina.

In Item Two of the Will which was executed 28 January 1957, the testator left all of his property to his wife for life. In Item Three, subject to the life estate of the wife, certain designated farm lands were devised to Norman subject to a charge in favor of Edward and Evelyn. In Item Four, subject to the life estate of the wife, certain farm lands were devised to Ray subject to certain charges in favor of Edward and Evelyn. In Item Five, subject to the life estate of the wife, another designated farm was devised to Ray subject to a charge in favor of Edward, Evelyn and Norman. In Item Seven, subject to the life estate of the wife, all of the residue was left to Edward, Norman, Ray and Evelyn in equal shares.

The codicil was dated 6 March 1959 and provides:

"ITEM ONE: Item Five in said Will is hereby cancelled in its entirety.

ITEM TWO: In Item Four of said Will certain real property is devised to my son, Ray Hollowell, subject to the life estate of my wife, Leora Hollowell. I hereby cancel such

devises to my son, Ray Hollowell, and in lieu and substitution thereof do hereby will and devise the properties devised in said item to my son, Ray Hollowell and his wife, Maxine B. Hollowell, as tenants by the entireties, subject, however, to the life estate of my wife, Leora Hollowell.

ITEM THREE: In Item Seven of my said will certain properties are devised and bequeathed to my son, Ray Hollowell, subject to the life estate of my wife, Leora Hollowell. Such devises and bequests are hereby cancelled and such properties as would otherwise be devised and bequeathed to Ray Hollowell, I hereby devise and bequeath to Maxine B. Hollowell.

And except as my said will is expressly or by necessary implication changed by this Codicil and is in conflict therewith, I do hereby ratify, republish and re-affirm my said Last Will and Testament and each and every part thereof."

The defendants assert that the effect of the codicil was to eliminate in Item Four of the Will the charges in favor of Edward and Evelyn; and that Ray and his wife, Maxine, took the farm lands devised in Item Four of the Will discharged of those charges. The plaintiffs assert otherwise. The trial judge ruled in favor of the defendants, Ray and Maxine. From this ruling each plaintiff appealed.

"A codicil does not import revocation but an addition, explanation, or alteration of a prior will. The courts are adverse to the revocation of a will by implication in a codicil. . . . A will and codicil are to be construed together so that the intention of the testator can be ascertained from both." *Toms v. Brown,* 213 N.C. 295, 195 S.E. 781 (1938). "In the absence of express words of revocation, it is a rule of construction that for a codicil to revoke any part of a will its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that the testator had changed his intentions." *Yount v. Yount,* 258 N.C. 236, 128 S.E. 2d 613 (1962).

The effect of this codicil was to place the testator's homesite devised in Item Five, in the residuary clause of his will; to include Ray Hollowell's wife, Maxine, as a beneficiary with Ray as a tenant by the entirety; and to substitute Maxine for Ray as residuary beneficiary.

The gist of the will was to give two sons land, and to give the other son and one daughter cash. The gist of the codicil was to include Ray Hollowell's wife as a beneficiary of the testator's estate. Neither the will nor codicil when read together show an intent on the part of the testator to revoke Item Four of the will in its entirety. The cash bequest, by way of a charge, to his other two children in Item Four remained valid.

Such holding is consistent with the ruling in *Baker v. Edge*, 174 N.C. 100, 93 S.E. 462 (1917), in which there was a codicil to the testator's will stating that "I hereby revoke and annul the devise or bequest . . . [to] John Baker . . . in item 12 of said will, and in lieu thereof. . . ." The court held that such codicil does not revoke the entire item 12 of the will, but only revokes the devise to John of the realty mentioned. Citing from another source the court said: " 'Thus a change of devisees to whom land is given, subject to a rent charge, will not revoke the rent charge, but the substituted devisee will take the land *cum onere*.' "

As the provision of the codicil and the provision for the charge on the land in Item Four of the will are not repugnant, they may both stand harmoniously together, and the plaintiff in each case is entitled to recover.

The cause is remanded to the Superior Court for disposition in accordance with this opinion.

Reversed and remanded.

Judges PARKER and VAUGHN concur.

WALTER ELBERT McKINNEY v. JOHN P. MORROW

No. 7329DC311

(Filed 23 May 1973)

Compromise and Settlement § 1; Torts § 7— insurer's settlement with defendant — ratification by plaintiff — plea in bar of counterclaim

Where the defendant in an action involving an automobile accident had accepted a settlement by plaintiff's insurance carrier and had given the carrier a release from liability, and defendant filed a counterclaim against plaintiff for damages sustained in the accident,

plaintiff's plea of the release from liability as a bar to defendant's counterclaim constituted a ratification of the settlement and barred plaintiff's claim against defendant.

APPEAL by plaintiff from *Gash, Judge,* 16 October 1972 Session of RUTHERFORD County District Court.

The plaintiff filed a complaint alleging that on 27 October 1970 he was injured in an automobile collision proximately caused by the negligence of the defendant. The defendant answered, and by counterclaim alleged that he was injured as a proximate result of the negligence of the plaintiff.

The plaintiff thereafter was allowed to file an amended reply to the counterclaim to the effect that his insurance carrier had obtained a release from liability from the defendant in exchange for payment of a compromise settlement totaling $310.00, paid to defendant by the insurance carrier.

The defendant thereafter was allowed to amend his answer to plead that release as an affirmative defense in bar of the plaintiff's action. The trial court sustained the plea in bar and dismissed plaintiff's claim for relief.

Hamrick & Hamrick by J. Nat Hamrick for plaintiff appellant.

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

CAMPBELL, Judge.

G.S. 20-279.21(f) (3) provides that every motor vehicle liability insurance policy shall include the right of the insurance carrier to settle in good faith any claim covered by the policy. The insurance carrier has the right to settle claims even if that provision is not written into the policy.

By a compromise settlement between parties to an automobile collision each party effectively "buys his peace" respecting any liability created by the collision. The settlement constitutes an acknowledgment, as between the parties, of the liability of the payor and the nonliability, or at least a waiver of the liability, of the payee. *Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805 (1952).

"[W]here an insurance carrier makes a settlement in good faith, such settlement is binding on the insured as between him

and the insurer, but . . . such settlement is not binding as between the insured and a third party where the settlement was made without the knowledge or consent of the insured or over his protest, unless the insured in the meantime has ratified such settlement." *Lampley v. Bell,* 250 N.C. 713, 714, 110 S.E. 2d 316, 317 (1959). Such consent or ratification constitutes an admission of his liability by the insured. *Snyder v. Oil Co., supra.*

In the situation where plaintiff and defendant were involved in an automobile collision, and plaintiff's insurance carrier pays for and obtains a release from liability from the defendant, and the plaintiff later sues defendant for damages, the defendant responding against the plaintiff by counterclaim for his own damages, the following results are possible:

(1) The plaintiff may plead the release to bar defendant's counterclaim, but such pleading constitutes a ratification of the compromise settlement which in turn bars the plaintiff's own claim.

(2) If the plaintiff does not plead the release, but moves to strike the counterclaim based on the release, such motion to strike is also a ratification of the compromise settlement.

(3) Whether the plaintiff does or does not ratify the compromise settlement, his insurance carrier is not liable to the defendant or the plaintiff for any judgment which the defendant might obtain in the counterclaim against the plaintiff. If the plaintiff does not ratify the settlement he preserves his right of action against the defendant, but he also assumes the risk of having to pay a judgment obtained against him in the defendant's counterclaim without benefit of the liability insurance.

(4) If the defendant does obtain a judgment against the plaintiff, the amount of liability must be diminished by the amount previously paid to the defendant by plaintiff's insurance carrier. *Bradford v. Kelly,* 260 N.C. 382, 132 S.E. 2d 886 (1963).

In the instant case plaintiff contends that this rule of law forces him to give up protection of his liability insurance policy which the State has forced him to buy. However, a similar contention was argued and rejected in *Keith v. Glenn,* 262 N.C. 284, 136 S.E. 2d 665 (1964).

"The Motor Vehicle Financial Responsibility Act obliges a motorist either to post security or to carry *liability* insurance, not accident insurance to indemnify all persons who might be injured by the insured's car. *Keith v. Glenn,* 262 N.C. 284, 286, 136 S.E. 2d 665, 667. When the Legislature passed the act it was not in the legislative contemplation that each driver in a two-car collision would recover from the other's insurance carrier." *Moore v. Young,* 263 N.C. 483, 485, 139 S.E. 2d 704, 706 (1965).

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHNNY FRANK HURLEY, JR.

No. 7319SC229

(Filed 23 May 1973)

1. **Automobiles § 3— violation of restrictive driving privilege — intent**

The operation of a vehicle on a public highway in violation of the conditions of a restrictive driving privlege constitutes a violation of G.S. 20-28 regardless of the intent of the operator.

2. **Automobiles § 3— driving while license is suspended — violation of limited driving privilege — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for driving while defendant's license was suspended where it tended to show that defendant had only a restricted driving privilege allowing him to drive a truck "while at work," that defendant was driving an automobile on the public highway at 1:15 a.m. when the service station at which he worked was closed, that the automobile was used as a substitute for the service station's truck which was inoperable, and that, contrary to defendant's contention, his employer had not directed him to drive the station automobile to help anyone start a car.

APPEAL by defendant from *McConnell, Judge,* 23 October 1972 Session of MONTGOMERY Superior Court.

On 26 October 1972 defendant was convicted after trial de novo in the superior court of violation of G.S. 20-28(a), driving while his operator's license was suspended or revoked. The facts are as follows:

On 19 August 1970, after having been convicted of driving a motor vehicle while under the influence of intoxicating beverage, defendant was granted a restrictive driving privilege, one of the restrictions of which was that he could operate a truck "while at work." This restrictive driving privilege was effective from 19 August 1970 to 19 August 1971.

At about 1:15 a.m. on 15 May 1971 a State Highway Patrol Officer observed defendant driving an automobile on the public highway. The officer was acquainted with the defendant, recognized him, and stopped his automobile, whereupon the defendant showed the officer his restrictive driving privilege. The defendant said that he was working for Mr. Carlie Batten, owner of a service station, that the car he was driving was owned by Mr. Batten and used in the business, and that the defendant had received a telephone call from Mr. Batten telling him to go to a designated place to help someone start an automobile.

The officer followed defendant to the place where defendant was to aid in starting a car, and upon learning that the defendant did not know which car he was to start or the owner, he took defendant back to the Montgomery County Courthouse. Mr. Batten was called, and he stated that he did not call the defendant and tell him to assist in starting an automobile.

Mr. Batten testified that he closed the service station on the night of 15 May at about 9:30 p.m., that he and the defendant, who was his employee, went to "catch a pony," and that they returned to the station at about midnight, whereupon defendant was left at the station and Mr. Batten went home. When he left for home, the station was unlocked but not open for business. The car defendant had been driving was used in the service station business since the station truck was then inoperable.

Attorney General Robert Morgan by Assistant Attorney General William F. Briley for the State.

Bell, Ogburn & Redding by Deane F. Bell for defendant appellant.

CAMPBELL, Judge.

Defendant's appeal is directed to the court's failure to grant judgment of nonsuit at the close of all the evidence. How-

ever, viewing the evidence in the light most favorable to the State, we feel that the evidence is sufficient to be submitted to the jury.

G.S. 20-179(b)(4) provides that "Any violation of the restrictive driving privileges . . . shall constitute the offense of driving while license has been revoked as set forth in G.S. 20-28." In order to convict a person of a violation of G.S. 20-28 such person must have: (1) operated a motor vehicle; (2) on a public highway; and (3) while his operator's license or operating privilege was lawfully suspended or revoked (or in violation of a restrictive driving privilege, G.S. 20-179(b)(4)). *State v. Newborn*, 11 N.C. App. 292, 181 S.E. 2d 214 (1971).

Knowledge or intent is not a part of the crime as set out in the statute. A person has no right to drive upon the highways after his driving privilege has been revoked, and it makes no difference what the person's intentions are in so doing. *State v. Teasley*, 9 N.C. App. 477, 176 S.E. 2d 838 (1970); *State v. Tharrington*, 1 N.C. App. 608, 162 S.E. 2d 140 (1968).

[1] Further, G.S. 20-179(b)(4) speaks of "any violation," not just knowing or wilful violations of the conditions of a restrictive driving privilege. Therefore, if the defendant was not "at work" when he drove the automobile on 15 May 1971 while his restrictive driving privilege was effective, then he is guilty of violation of G.S. 20-28 regardless of his intent, or whether he thought he was "at work." The doing of the act itself is the crime, not the intent with which it was done.

The restrictive driving privilege which defendant had was for a "truck" and the fact that the truck at the station was inoperable did not extend the privilege to the substitute automobile.

[2] According to the State's evidence the defendant's employer closed his business to the public at 9:30 p.m. and he did not reopen it. Further, the employer did not direct defendant to drive the station automobile that night to help anyone start an automobile. The evidence viewed in the light most favorabe to the State tends to show that at 1:15 a.m. on 15 May 1971 the defendant drove a motor vehicle on the public highway of North Carolina while not "at work," in the course of his employer's

business and not under any of the other restrictive provisions. The evidence of the violation was sufficient to go to the jury.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. GENE HERBERT CHAPPELL

No. 7314SC373

(Filed 23 May 1973)

Automobiles § 125; Criminal Law § 18— appeal to superior court — change in warrant — judgment of superior court arrested

Where defendant was arrested, tried and convicted in district court for permitting a person under the influence of intoxicating liquor to operate his automobile but the warrant was altered after trial in district court and before any evidence was heard in superior court so that defendant was tried and convicted in superior court on a warrant charging him with driving while under the influence, judgment of the superior court must be arrested since a defendant may be tried upon a warrant in superior court only after there has been a trial and appeal from a conviction by an inferior court having jurisdiction. G.S. 15-137; G.S. 15-140.

APPEAL by defendant from *Bailey, Judge,* 20 November 1972 Session of Superior Court held in DURHAM County.

Defendant, Gene Herbert Chappell, was charged in a warrant with operating a motor vehicle on a public highway of this State while under the influence of intoxicating liquor.

Defendant pleaded not guilty and was found guilty by the jury. From a judgment imposing a jail sentence of thirty days, defendant appealed.

Attorney General Robert Morgan and Associate Attorney General Howard A. Kramer for the State.

Stubbs, Biggs & Cole by Irvin P. Breedlove, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant first assigns as error the denial of his motion to quash the warrant.

The record discloses that after pleading not guilty and prior to the introduction of any evidence, defendant made the following motion:

> "I would like to move that the indictment which Mr. Gene Chappell is charged under is defective, in that the indictment shows that he was charged with permitting an intoxicated person to drive his car, and further, that he was never arraigned before a Magistrate under the charge of driving under the influence; that not being so arraigned under the language of driving under the influence that he was never really notified of what he was charged until the actual change of this warrant at the time of trial in the Lower Court."

The trial judge examined the affidavit and warrant and denied the motion.

Defendant is charged in an "Affidavit and Warrant" on a printed form containing twelve separate charges for motor vehicle vioations. A blank square appears before each printed charge. The following instruction appears on the form: "Charges Opposite Unmarked Squares Are To Be Disregarded As Surplusage." The printed form contains no charge for the offense of permitting a person under the influence of intoxicating liquor to operate a motor vehicle; however, the form in the present case contains the following hand printed charge: "20-138 Permitting An Intoxicated Person To Drive." An "x" appears in the square immediately preceding this handwritten charge which has been lined through. An "x" appears in the square opposite the charge of driving while under the influence of intoxicating liquor. The affidavit appears to have been signed by B. L. Walters on 19 October 1972 and the warrant issued by Audrey P. Merritt, Magistrate, that same day.

A motion to quash lies only for a defect appearing on the face of a warrant or indictment. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972).

Although there is evidence in the trial record tending to show that defendant was arrested for permitting a person under the influence of intoxicating liquor to drive his automobile, there was nothing in the record, when Judge Bailey denied the motion to quash, to show when, where or by whom the alteration, apparent on the face of the warrant, was made. In the

absence of a showing to the contrary, there is a presumption that such alteration was made before the warrant was issued. *State v. Bethea*, 9 N.C. App. 544, 176 S.E. 2d 904 (1970). However, the record on appeal shows to the contrary for the "Case on Appeal" contains the following pertinent statement:

> "The defendant was tried upon an Affidavit and Warrant charging him with permitting an intoxicated person to drive and said Affidavit and Warrant later being amended to the charge of driving while under the influence of intoxicating liquor on the 19th day of October, 1972."

Obviously the warrant was altered after trial in the district court and before any evidence was heard in the superior court. Therefore, the record indicates defendant was tried and convicted in the district court for permitting a person under the influence of intoxicating liquor to operate his automobile and appealed to the superior court where he was tried and convicted on a warrant charging him with driving while under the influence.

Only after there has been a trial and appeal from a conviction by an inferior court having jurisdiction may a defendant be tried upon a warrant in superior court. G.S. 15-137; G.S. 15-140. The jurisdiction of the superior court in a case involving the operation of a motor vehicle upon a pubic highway while under the influence of intoxicating liquor is derivative and the trial in superior court for that offense upon the original warrant is a nullity where the record fails to reveal that defendant was tried and convicted in district court for the same offense. *State v. Guffey*, 283 N.C. 94, 194 S.E. 2d 827 (1973).

If the State is so advised, it may proceed against defendant on a proper warrant charging him with operating a motor vehicle on a public highway while under the influence of intoxicating liquor.

Judgment arrested.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. RAY THOMAS TILLEY

No. 7317SC357

(Filed 23 May 1973)

Criminal Law § 113— inaccuracy in recitation of evidence — absence of prejudice

In this kidnapping prosecution, the trial court's statement in the charge that the victim testified defendant told her he had already killed two women "and that he wouldn't hesitate to kill another one," when in fact the victim testified defendant told her he had already killed two women "and he wouldn't hesitate to do otherwise," *is held* not to constitute prejudicial error.

APPEAL by defendant from *Wood, Judge,* 6 November 1972 Session of Superior Court held in SURRY County.

Indictment for kidnapping. Defendant pled not guilty. The State's evidence showed: Sometime after midnight on 6 July 1972 the prosecuting witness was alone in a laundromat in Mt. Airy, engaged in washing clothes. She did not know and had never previously seen the defendant. Defendant came in, drew a knife, and held it to her back or side. He seized her arm, and over her protest took her outside and placed her in a car. The car was not parked on the parking area provided for the laundromat but was on a nearby premises. Defendant also got in the car and attempted to force the prosecuting witness to become sexually intimate with him. While defendant was so engaged, a city police car drove up. Defendant started his car and drove rapidly away, taking the prosecuting witness with him. A high-speed chase ensued, joined in by cars of other officers. At times the defendant drove at speeds in excess of 90 miles per hour while traveling southward in the face of oncoming traffic in the northbound lanes of a divided dual-lane highway. Defendant's car finally stopped when its engine died after defendant had pulled off on a dirt road. He was immediately arrested by a pursuing officer.

Defendant did not introduce evidence. The jury found him guilty. From judgment imposing a prison sentence, defendant gave notice of appeal. To permit perfection of the appeal, this Court granted petition for certiorari.

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

Rodenbough & Price by Ronald M. Price; and Price, Osborne, Johnson & Blackwell by D. Floyd Osborne for defendant appellant.

PARKER, Judge.

The sole assignment of error relates to a portion of the court's charge to the jury. While referring to the testimony of the prosecuting witness which described events in the laundromat, the trial judge stated that she had testified "that he (the defendant) told her that he had already killed two women and that he wouldn't hesitate to kill another one." The record on appeal shows that what the witness actually testified was as follows:

> "As to what he said when he first put the knife to my back, when I told him I wasn't going with him, he said he had already killed two women, and he wouldn't hesitate to do otherwise."

While the meaning of the phrase, "wouldn't hesitate to do otherwise," is not entirely clear, defendant's statement that "he had already killed two women," made while he held a knife to the back of the prosecuting witness, was starkly clear. Defendant's actions and words, as testified to by the prosecuting witness, taken together could convey but one clear and terrifying message—that he was a dangerous and violent man and that her life was at stake.

In this State, kidnapping is "defined generally as the unlawful taking and carrying away of a human being against his will by force, threats, or fraud." *State v. Dix,* 282 N.C. 490, 193 S.E. 2d 897. The testimony of the prosecuting witness in this case abundantly demonstrated the use by defendant of force and threats to carry her away with him against her will. It is inconceivable that the slight inaccuracy in the trial judge's recitation of the evidence, which is the only matter complained of on this appeal, could have affected the jury's verdict. Moreover, "slight inaccuracies in the statement of the evidence must be called to the court's attention in time to afford opportunity for correction, in order for an exception thereto to be considered." 7 Strong, N. C. Index 2d, Trial, § 33, p. 333.

We have carefuly reviewed the entire record. Defendant has been given a fair trial free from prejudicial error. He was represented at the trial and on this appeal by competent counsel who were diligent on his behalf. The evidence amply supports the verdict. In the entire proceedings and in the judgment imposed we find

No error.

Judges CAMPBELL and VAUGHN concur.

WILLIAM CLINTON BRADY v. HAROLD P. SMITH

No. 7315DC63

(Filed 23 May 1973)

1. **Rules of Civil Procedure § 51; Trial § 33— failure to apply law to evidence**

In this action for personal injuries sustained in a collision between two automobiles, the trial court erred in failing to instruct the jury as to what facts if found by them to be true would constitute negligence on the part of defendant. G.S. 1A-1, Rule 51.

2. **Costs § 1— recovery of costs as matter of right**

In this action for personal injuries sustained in an automobile collision, the trial court erred in failing to tax the costs of the action against the defendant who lost at trial. G.S. 6-1.

3. **Costs § 3— allowance of counsel fees — discretion of court**

Allowance of counsel fees pursuant to G.S. 6-21.1 rests in the discretion of the court.

APPEAL by plaintiff and defendant from *Peele, District Judge,* 19 June 1972 Session of ORANGE County District Court.

Plaintiff instituted this action to recover for personal injuries arising out of an automobile collision allegedly due to the negligence of defendant Harold P. Smith who was operating a police vehicle owned by the Town of Chapel Hill, N. C. The Town of Chapel Hill was initially a defendant in this case but following the setting aside of an earlier judgment dismissing plaintiff's action, the action was reinstated only as to defendant Smith.

At trial plaintiff introduced evidence which tended to show the following:

On 18 July 1965 at approximately 4:00 to 4:30 p.m., plaintiff was operating his mother's Buick automobile on the U.S. 15-501 bypass around Chapel Hill, N. C., in a southerly direction. Plaintiff's mother, Jettie Brady Galligan, was a passenger in the Buick. A hard rain was falling at the time. As the vehicle operated by plaintiff approached a bridge, plaintiff observed a police vehicle driven by defendant Smith approximately 400 feet to 450 feet away coming around a curve in a northerly direction at approximately 45 to 50 miles per hour with its red light flashing. The posted speed limit was 45 miles per hour. Defendant's vehicle was out of control when first observed by plaintiff. It struck the bridge abutment and spun around, with its rear striking the front end of the vehicle driven by plaintiff. Plaintiff had pulled his mother's car as far to the right as he could prior to stopping just short of the bridge. Plaintiff's head hit the windshield on impact and he testified that he experienced soreness in his neck, arms, shoulders and back following the accident and that he received medical and chiropractic treatment for his neck.

Defendant offered no evidence at trial. The jury found for plaintiff, and awarded him $2,000 in damages. The trial court then denied plaintiff's motion for an award of attorney's fees and entered judgment from which both plaintiff and defendant appealed.

Ottway Burton for plaintiff appellant and appellee.

Perry C. Henson and Daniel W. Donahue for defendant appellant and appellee.

MORRIS, Judge.

[1] Defendant's assignments of error on appeal primarily relate to the judge's charge to the jury. Among those assignments of error is defendant's contention that the judge failed properly to explain the law arising upon the evidence as required by G.S. 1A-1, Rule 51. We feel that defendant's exception is well taken.

An examination of the record reveals that the trial judge defined burden of proof, negligence, and proximate cause in general terms and then recapitulated the evidence, the conten-

tions of the parties, and instructed as to measure of damages. He failed, however, to declare and explain the law arising on the evidence.

The record is void of any instruction to the jury as to what facts if found by them to be true would constitute negligence on the part of defendant. The defendant was entitled, among other things, to have the court instruct as to his duty to keep and maintain a proper lookout, his duty to keep his vehicle under control, and his duty to operate a motor vehicle at a speed that is reasonable and prudent under the conditions then existing.

> "[A] statement of the contentions of the parties together with a bare declaration of the law in general terms is not sufficient to meet the requirements of the provisions of G.S. 1-180." *Hawkins v. Simpson,* 237 N.C. 155, 157, 74 S.E. 2d 331 (1953).

For the failure of the trial judge properly to apply the law arising upon the evidence and for other errors in the charge, there must be a new trial. We deem it unnecessary to discuss his remaining assignments of error.

Plaintiff on appeal contends that the trial judge erred in failing to tax the costs of the action aganist the defendant who lost at trial and in refusing to allow plaintiff's attorney to be heard on motion for an allowance of counsel fees under G.S. 6-21.1.

[2] Plaintiff's exception as to the taxing of costs is well taken, and if plaintiff prevails upon retrial of this case, he will be entitled to have all items properly included as costs taxed against the defendant. G.S. 6-1 clearly provides that "[t]o the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter."

[3] Plaintiff's contention that the trial judge refused to hear his motion for counsel fees pursuant to G.S. 6-21.1 is totally without merit. The record clearly reveals that his motion was entertained and denied by the trial judge. Allowance of counsel fees pursuant to G.S. 6-21.1 is in the discretion of the trial judge and we find no abuse on his part.

New trial.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. RAY FAULKNER

No. 738SC300

(Filed 23 May 1973)

Forgery § 2— uttering forged check — sufficiency of evidence

In a prosecution charging defendant with uttering a forged check, evidence was sufficient to be submitted to the jury where it tended to show that defendant entered a furniture store after waiting for it to open, selected a $30 chair, gave the salesman a $60 counter check already made out to the furniture company and signed by "John H. Smith" with an address written under the signature, endorsed the name "John H. Smith" on the back of the check, received $30 and left the store, that no one named "John H. Smith" lived at the address written on the check, and that there was no bank account in the name of "John H. Smith."

ON *certiorari* to review judgment entered by *Tillery, Judge,* at the 31 August 1972 Session of LENOIR County Superior Court.

Defendant was tried upon the charge of uttering a forged check to which he pleaded not guilty. The jury found him guilty as charged, and he was given an active sentence of not less than eight nor more than ten years. This Court granted defendant's petition for writ of certiorari to review the trial.

Attorney General Morgan, by Deputy Attorney General Vanore, for the State.

Turner and Harrison, by Fred W. Harrison, for defendant appellant.

MORRIS, Judge.

Defendant was charged with uttering a forged check in violation of G.S. 14-120 which reads in relevant part:

> "If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged . . . check . . . , or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged . . .) the person so offending shall be punished by imprisonment . . . "

"Uttering a forged instrument consists in offering to another the forged instrument with the knowledge of the falsity of the

writing and with intent to defraud. 2 Wharton's Criminal Law and Procedure, Anderson Ed., Forgery and Counterfeiting § 648." *State v. Greenlee,* 272 N.C. 651, 657, 159 S.E. 2d 22 (1968).

The sole question presented for our determination is whether the evidence was sufficient to require submission of the case to the jury. Therefore, the evidence must be considered in the light most favorable to the State, and the State must be given the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. Only the evidence that is favorable to the State is considered and contradictions and discrepancies even in the State's evidence are for the jury and do not warrant nonsuit. *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971).

In brief summary, the evidence in the light most favorable to the State tended to show the following:

William Harold Lane, salesman for Pate's Furniture Company located at 113 West North Street, Kinston, N. C. observed defendant Ray Faulkner standing in front of the furniture store at approximately 8:30 a.m. on 13 March 1972. Lane had just arrived for work and went to the front door and unlocked the store. Defendant Faulkner entered and inquired about purchasing a chair and finally picked one out after examining several items. Defendant told Lane that he was John Smith and gave 1306 West Washington Avenue as his home address. The chair cost $30, and defendant gave Lane a $60 counter check already made out to Pate's Furniture Company and signed by "John H. Smith" with the address "1306 W. Washington, Kinston, N. C." written under the maker's signature. While in Lane's presence, defendant endorsed the name "John H. Smith" on the back of the check. Lane gave the defendant $30, and defendant left the store. Defendant was not asked to endorse the check by Lane or any other employee, it being unnecessary for him to do so since the check was made out to Pate's Furniture Company. An attempt was made to deliver the chair at 1306 West Washington Avenue, but no one by the name of "John H. Smith" resided there or anywhere else in that part of town. Lane then called the bank and found that there was no such account in the name of "John H. Smith."

The evidence was ample to sustain the conviction of defendant for uttering a forged instrument. All of the necessary elements of the crime were established by the evidence if believed by the jury. *State v. Greenlee, supra.*

No error.

Judges BROCK and VAUGHN concur.

CARTERET COUNTY GENERAL HOSPITAL CORPORATION, D/B/A CARTERET GENERAL HOSPITAL v. THESSALLY H. MANNING AND WIFE, EDITH MANNING

No. 733DC161

(Filed 23 May 1973)

Rules of Civil Procedure § 41— nonjury trial — dismissal of claim — failure to find facts

The trial court in a nonjury trial erred in dismissing plaintiff's claim at the close of its evidence on the basis of the statute of limitations without making findings of fact as required by G.S. 1A-1, Rule 41(b).

APPEAL by plaintiff from *Phillips, Judge,* 24 October 1972 Session of District Court held in CARTERET County.

This is a civil action instituted by plaintiff, Carteret County General Hospital Corporation, doing business as Carteret General Hospital, on 13 March 1972 to recover of defendants, Thessally H. Manning and wife, Edith Manning, $975.10 for expenses incurred by the feme defendant while a patient at plaintiff hospital during the period 26 October through 13 December 1968. Trial was before the judge without a jury.

The record reveals the following occurred at the close of plaintiff's evidence:

"MR. HAMILTON: Defendant moves for nonsuit, if it please the Court. Motion argued on the basis of the statute of limitations.

COURT: I think you are entitled to your motion. I am going to allow it and let you enter your exceptions."

Thereupon, the trial court entered the following judgment:

> "This matter came on for hearing before the undersigned Judge presiding, sitting without a Jury, and at the close of the Plaintiff's evidence motion having been duly made by the Defendant for nonsuit, and the Court being of the opinion that such motion should be allowed, IT IS THEREUPON
>
> ORDERED: That this action be dismissed and that the Plaintiff be taxed with the costs."

Plaintiff appealed.

Wheatly & Mason by L. Patten Mason for plaintiff appellant.

Hamilton, Hamilton & Phillips by Luther Hamilton, Jr., for defendant appellees.

HEDRICK, Judge.

This appeal presents for resolution the question of whether the trial court erred in granting defendants' "motion for nonsuit" at the close of plaintiff's evidence.

"When the new rules of Civil Procedure became effective on 1 January 1970, the word *nonsuit* was banished from our civil practice. In nonjury trials the motion for nonsuit has been replaced by the motion for a dismissal, G.S. 1A-1, Rule 41(b) . . . . " *Cutts v. Casey,* 278 N.C. 390, 411, 180 S.E. 2d 297, 307 (1971).

Rule 41(b) in pertinent part provides:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)."

Rule 52(a) (1) provides:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its concusions of law thereon and direct the entry of the appropriate judgment."

The requirement that findings of fact be made by the trial judge is " ' intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purpose of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts.' Wright, *Law of Federal Courts* § 96, at 428-29 (1970). *See also* 9 Wright & Miller, *Federal Practice and Procedure* § 2371, at 222 (1971)." *Helms v. Rea,* 282 N.C. 610, 619, 194 S.E. 2d 1, 7 (1973).

In their briefs both parties argue whether plaintiff's claim is barred by the statute of limitations. Obviously, we cannot resolve this question because the facts relative thereto have not yet been found by the trial court.

Since the order dismissing plaintiff's claim is not supported by findings of fact as required by G.S. 1A-1, Rule 41(b), the judgment appealed from is vacated and the cause is remanded to the district court for a

New trial.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. RAY THOMAS TILLEY

No. 7317SC212

(Filed 23 May 1973)

Homicide § 24— instructions — presumption of malice — no deadly weapon used

The trial court in a homicide prosecution erred in instructing the jury to presume the existence of malice if they found that the victim's death was intentionally caused where there was no evidence of the use of a deadly weapon, since malice is presumed only where death resulted from the intentional use of a deadly weapon.

State v. Tilley

APPEAL by defendant from *Gambill, Judge,* 14 August 1972 Session of ROCKINGHAM County Superior Court.

Defendant was indicted for murder in the first degree. At the beginning of trial the solicitor announced that the State would seek a conviction for murder in the second degree or manslaughter, as the evidence allowed. The jury found defendant guilty of murder in the second degree.

Attorney General Robert Morgan by Assistant Attorney General William F. O'Connell for the State.

Rodenbough & Price by Ronald M. Price; and Price, Osborne, Johnson & Blackwell by D. Floyd Osborne for defendant appellant.

CAMPBELL, Judge.

At about 8:40 a.m. on 14 September 1971 a neighbor observed Mrs. Onie Bullins Orander, age 74 years, walk to defendant's house. "She continued on to the Tilley house like she was on a mission." She was never seen alive again. A body was found beside a paved road in Virginia on 22 September 1971, some 20 miles from defendant's home. The body was subsequently identified as Mrs. Orander.

Sometime later defendant was arrested for the murder of Mrs. Orander and on 11 July 1972 he sent for the Sheriff and wanted to tell him about it. He was warned of his constitutional rights relative to interrogation. He told officers that on the morning of 14 September 1971 Mrs. Orander came to his home and "began fussing at him about his wife leaving him. . . . " They argued, and defendant had his right arm around her neck "and was trying to hold her hands with his other hand and she was fighting him and scratching him on his body. Well, she went limp and just fell to the floor and he examined her and thought that she was dead and of course then he became frightened and wanted to get her out of the house. . . . " Defendant described the route he had driven in his car with the body, which route was followed by the Sheriff and led to the place the body was found.

The defendant assigns as error the following charge of the trial judge to the jury:

> "Now where an intentional killing is admitted or established the law presumes malice and if the defendant

who has intentionally killed another would rebut the presumption arising from such a showing or admission, that is a killing under such circumstances that malice would be implied, he must establish to the satisfaction of the jury the legal provocation which would take from the crime the element of malice and thus reduce it to manslaughter."

The error in this instruction is that it told the jury to presume the existence of malice if they found that the death of Mrs. Orander was intentionally caused. However, an intentional killing may constitute murder or manslaughter. Malice is the element which distinguishes those two crimes. An unlawful killing with malice is murder in the second degree. *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969).

Malice is not only hatred, ill-will, or spite, as it is ordinarily understood, but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. It may be shown by evidence of hatred, ill-will, or dislike. *State v. Benson,* 183 N.C. 795, 111 S.E. 869 (1922). Malice is presumed only where death resulted from the intentional use of a deadly weapon. *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971). If a deadly weapon was not used, or if such weapon was not intentionally used (accident) the presumption does not arise. *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322 (1955); and it is error to instruct the jury as to that presumption. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963).

In the instant case there was no evidence of the use of a deadly weapon and no presumption of malice existed.

New trial.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JESSIE EARL FULLERTON

No. 7314SC339

(Filed 23 May 1973)

1. **Criminal Law § 76— admission of confession**

The trial court did not err in the admission of defendant's in-custody confession where the evidence on *voir dire* supports the court's determination that the confession was freely and voluntarily given.

2. **Burglary and Unlawful Breakings § 5; Larceny § 7— confession and corpus delicti — sufficiency of evidence for jury**

Evidence of defendant's confession coupled with evidence of the *corpus delicti* was sufficient to require submission of a felonious breaking and entering and felonious larceny case to the jury.

3. **Constitutional Law § 32; Criminal Law § 101— permitting defendant to offer evidence against advice of counsel**

The trial court did not err in permitting defendant, against the advice of his counsel, to call defendant's sister as a defense witness, the court having explained defendant's right to offer or not offer evidence and the procedural consequences of either choice and having advised defendant that defendant's counsel thought it would be in his best interest not to offer evidence.

APPEAL by defendant from *Bailey, Judge,* 2 October 1972 Session of Superior Court held in DURHAM County.

Defendant was charged and convicted of (1) felonious breaking and entering and (2) felonious larceny.

Two Durham city police officers went to New Orleans, Louisiana, in July 1971 to return defendant and his brother to North Carolina to stand trial on an armed robbery charge. After his return to North Carolina, defendant fully confessed to the armed robbery charge, and also confessed that he and his brother had committed the felonious breaking and entering and felonious larceny. He took the officers to the site of the break-in, the McPherson residence on Orange-Factory Road, a rural road in Durham County. Defendant showed the officers how the break-in in May 1971 was accomplished, and how they loaded a truck with miscellaneous items taken from the McPherson residence. The State's evidence further showed that on the weekend of 30 April—2 May 1971, the McPherson residence on Orange-Factory Road had been broken and entered, and over $4,000.00 worth of personal property had been taken.

Upon defendant's plea of not guilty he was tried by jury and found guilty as charged.

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

Arthur Vann for the defendant.

BROCK, Judge.

[1] Defendant assigns as error the admission of his in-custody confession into evidence. The trial judge conducted a full and fair evidentiary hearing, in the absence of the jury, upon the question of the voluntariness of defendant's confession. The evidence fully supports the finding and conclusion by the trial judge that defendant's confession was freely and voluntarily given. When supported by the evidence the trial court's findings will not be disturbed on appeal. This assignment of error is overruled.

[2] Defendant assigns as error the denial of his motion for nonsuit. The evidence of defendant's confession coupled with the evidence of the *corpus delicti* was sufficient to require submission of the case to the jury and to support its verdict. This assignment of error is overruled.

[3] Defendant assigns as error that the trial judge permitted defendant, against the advice of counsel, to call defendant's sister as a defense witness. The trial judge fully and fairly advised the defendant of his right to offer evidence or not offer evidence, and the procedural consequences of either choice. The trial judge further advised the defendant that defense counsel felt it would be for defendant's best interest that he not offer evidence. In spite of the judge's explanations, and in spite of the advice of counsel to the contrary, defendant called his sister to testify. Her testimony was sufficient to have convicted defendant. He now complains.

In our view, when a defendant proceeds against the advice of his attorney, he will just have to live with the results. This defendant has been accorded every protection to which he is entitled. In any event, the State's evidence in this case was so clear and overwhelming that the testimony of defendant's sister was merely cumulative. This assignment of error is overruled.

We find no merit in defendant's exceptions to the answers given by the trial judge to questions asked by the jurors. In our opinion, defendant had a fair trial, free from prejudicial error.

No error.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. DARYL E. GIBSON

No. 7312SC265

(Filed 23 May 1973)

1. **Narcotics § 4.5— stipulation that substance was heroin — no necessity for further proof on that issue**

Where an S.B.I. agent purchased a foil package from defendant which was turned over to an S.B.I. chemist for analysis and defendant stipulated that the substance in the package was heroin but did not stipulate that the chemist would have testified that the substance was heroin, the trial court did not err when, in its instruction, it recited the stipulation and charged that "no further proof is required for the facts stated in the agreement."

2. **Criminal Law §§ 97, 169— refusal to reopen case to enter excluded testimony into record — no error**

For the purpose of appellate review, the time to elicit testimony a witness would have given had he been permitted to answer questions objected to is immediately after the question or questions are objected to while that witness is still on the stand or else with the agreement of the trial court to provide for its later inclusion in the record; therefore, the trial court did not err in refusing to reopen the case and to allow defendant to enter excluded testimony of two witnesses into the record after the taking of evidence had been closed, particularly where the facts sought by each excluded question were clearly placed into evidence in other parts of the record.

3. **Criminal Law § 34— evidence of defendant's guilt of prior offenses — instruction to disregard testimony — harmless error beyond reasonable doubt**

Testimony by an S.B.I. agent that he had bought heroin from defendant on occasions prior to that for which defendant was on trial, even if error, did not justify reversal of the conviction and judgment since (1) any harmful effect of the admission of that testimony was corrected by the court's immediate instruction to the jury not to consider it and (2) any error in the admission of evidence of the prior crime was harmless beyond a reasonable doubt in view of the other competent and overwhelming evidence of defendant's guilt.

State v. Gibson

APPEAL by defendant from *James, Judge,* 7 November 1972 Criminal Session of CUMBERLAND County Superior Court.

Defendant was tried on a bill of indictment charging in the first count that on 1 June 1972 he did unlawfuly possess heroin, and in the second count that on 1 June 1972 he did distribute heroin. He was found guilty and was sentenced to imprisonment for three to four years for possession and four to five years for distribution, the sentences to run concurrently.

Frank Parker and Sammy Hayes worked together as undercover narcotic agents for the State Bureau of Investigation. On the night of 1 June 1972 they were given $40.00 by Agent Steven Woodall and instructed to make a purchase of narcotics from Daryl E. Gibson. Later that evening, while observed by Parker, Hayes received a foil package from defendant in exchange for $20.00. Parker wrote his initials and the date on the foil package, and gave it to Agent Woodall; Woodall wrote his initials on the foil, sealed the package inside a manila envelope, and delivered it to the S.B.I. chemical laboratory in Raleigh.

The defendant stipulated "that Agent McSwain [the S.B.I. chemist] received a manila envelope containing a tin foil packet with white powder in it on the 7th of June, 1972, from Agent Steve Woodall. That he conducted a chemical analysis of the white powder and found the presence of the scheduled one controlled substance of heroin, . . . "

Attorney General Robert Morgan by Assistant Attorney General James E. Magner, Jr. for the State.

Assistant Public Defender Kenneth Glusman for defendant appellant.

CAMPBELL, Judge.

[1] The defendant stipulated that the substance received from Agent Woodall and analyzed by Agent McSwain was heroin. He did not stipulate that Agent McSwain would have testified that it was heroin. The court did not err when, in its instruction, it recited the stipulation and charged that "no further proof is required for the facts stated in the agreement." Compare *State v. Thornton,* 17 N.C. App. 225, 193 S.E. 2d 373 (1972) (first syllabus).

[2] At the close of all the evidence and after the jury had been instructed and retired for deliberation, the defendant requested the court to recall Parker and Hayes as witnesses so that the answers to questions objected to and sustained could be made part of the record. The court declined to recall those witnesses.

Since the exclusion of testimony will not be held to be prejudicial if the record fails to show what the witness would have testified had he been permitted to answer questions objected to, *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970), it would be prejudicial error for the trial court to prevent a witness from giving his answer out of the hearing of the jury if requested by counsel.

Here, however, the refusal of the trial judge to allow the defendant to reopen the case and introduce further evidence after the taking of evidence had been closed is within the sound discretion of the trial judge, to be reviewed only in the case of manifest abuse. *State v. Rising,* 223 N.C. 747, 28 S.E. 2d 221 (1943). The time to elicit such excluded testimony, for purpose of appellate review, is immediately after the question or questions are objected to while that witness is still on the stand or else with the agreement of the trial court, to provide for its later inclusion in the record.

Further, we find no manifest abuse or discretion in the instant case, or prejudicial error in the exclusion of the testimony sought by the defendant. Each question was directed to the drug habit, criminal record, or manner of becoming an S.B.I. undercover agent of witness Hayes. All of these facts were clearly placed into evidence in other parts of the record.

During direct examination of witness Hayes by the State, as he was describing the purchase of heroin from defendant, he testified over objection and before the court ruled on the objection that he had bought heroin from the defendant on prior occasions. The court immediately cautioned the jury not to consider the statement. Defendant's motion for mistrial was denied, which denial is now the subject of an assignment of error properly noted.

[3] If it be assumed that admission of the prior crime of possession was error (compare *State v. Johnson,* 13 N.C. App. 323, 185 S.E. 2d 423 (1971), *appeal dismissed,* 281 N.C. 761, 191

S.E. 2d 364 (1972)), such error does not justify reversal of the conviction and judgment for two reasons: (1) any harmful effect of the admission of that testimony was corrected by the court's instruction to the jury not to consider it, *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541 (1970); and (2) error in the admission of evidence of the prior crime was harmless beyond a reasonable doubt in view of the other competent and overwhelming evidence of defendant's guilt. There is not a reasonable possibility that the evidence complained of might have contributed to the conviction, or that a different verdict might have resulted if the evidence had not gotten in. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963); *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972).

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. ALBERT NORFLEET SMITH, JR.

No. 7315SC352

(Filed 23 May 1973)

Parent and Child § 9— prosecution for wilful refusal to provide adequate child support — compliance with child support order — nonsuit required

In a prosecution against defendant for wilful neglect or refusal to provide adequate support for his children, the trial court erred in submitting the case to the jury where the evidence tended to show that defendant at all times was in compliance with a child support order of a court of competent jurisdiction, since it was presumed that, absent a reversal on appeal or a later modification upon appropriate application and showing in the trial court, the order provided for adequate support for defendant's children.

APPEAL by defendant from *Cooper, Judge,* 20 November 1972 Session of Superior Court held in CHATHAM County.

Defendant was charged in a warrant, issued 10 October 1972, with the wilful neglect or refusal to provide adequate support for his four children. Defendant was found guilty in District Court in Chatham County, and appealed to the Superior Court for trial *de novo.*

The State's evidence tended to show the following: Defendant and the prosecuting witness were married to each other in 1958 and that four children were born of the marriage. At some time prior to 14 December 1970, defendant and the prosecuting witness separated; and at some time since 14 December 1970, a decree of absolute divorce has been entered. On 14 December 1970 an order was entered by a district court judge in Randolph County requiring defendant, among other things, to pay to the clerk of court in Randolph County the sum of $200.00 per month for the support and maintenance of his four children. At the time of the issuance of the warrant in this case and at all times up to the trial, defendant was making payments under the district court order entered in Randolph County.

The State undertook to show a change in the circumstances of the prosecuting witness since the entry of the December 1970 district court order in Randolph County. Under the instructions of the trial court, the jury found defendant guilty of wilfully neglecting or refusing to provide adequate support for his four children. Defendant was sentenced to a term of six months in the county jail. The sentence was suspended for five years upon conditions which included the condition that he pay to the clerk of court of Chatham County the sum of $275.00 per month for the use and benefit of the prosecuting witness.

Defendant appealed.

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

Boyce, Mitchell, Burns & Smith, by Ben F. Clifton, Jr., for the defendant.

BROCK, Judge.

Defendant assigns as error that the trial court failed to allow his motion for nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. We think this assignment of error has merit.

"In a prosecution under G.S. 14-322 the failure by a defendant to provide adequate support for his child must be wilful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life, and this essential element of the offense must be alleged and proved." *State v. Hall,* 251 N.C.

211, 110 S.E. 2d 868. It has been perfectly clear for many years that evidence of *wilfulness* is necessary to support a conviction under G.S. 14-322. 6 Strong, N. C. Index 2d, Parent and Child, § 9, p. 172.

The evidence in the case under consideration shows that the defendant was ordered by the district court in Randolph County, in the civil action: (1) to pay $200.00 per month for the support of his children; (2) to carry hospitalization insurance for the benefit of the children; (3) to pay insurance premiums and property taxes on the residence occupied by the prosecuting witness and the children; (4) to allow exclusive possession by the prosecuting witness, for the benefit of the prosecuting witness and the children, of defendant's 1969 Ford LTD Station Wagon; (5) to allow exclusive possession by the prosecuting witness of the residence for the benefit of the prosecuting witness and the children; and to do other things solely for the benefit of the prosecuting witness. The Randolph County order was entered 14 December 1970, and its provisions with respect to the children remain unchanged. Absent a reversal on appeal, or a later modification upon appropriate application and showing in the trial court, it is presumed that the Randolph County order provides for adequate support for defendant's children. The State's evidence shows that defendant is complying with the Randolph County order, although there is some inconclusive evidence tending to show that defendant's payments were late on several occasions.

It seems unconscionable to us that a jury should be left free to find a father guilty of the criminal offense of wilfully failing to provide adequate support for his children when all of the evidence shows that he is complying in good faith with an order of a court of competent jurisdiction by making the payments which that court adjudged and decreed that he should make. *See* Annot., 73 ALR 2d 960 (1960).

Defendant's motion for judgment of nonsuit at the close of the State's evidence should have been allowed.

We note that his honor erred also in the provisions of the suspended sentence. The judgment appealed from provides that defendant shall pay $275.00 per month for the use and benefit of Priscilla Smith, defendant's wife. If defendant had been

properly convicted, the payments should have been directed to be made for the use and benefit of his children.

Reversed.

Judges BRITT and BALEY concur.

J. D. LITTLE, JR. v. JACQUELINE M. LITTLE

No. 7326DC32

(Filed 23 May 1973)

Divorce and Alimony § 18— alimony without divorce — findings as to dependent spouse — sufficiency

Evidence supported the trial court's finding that defendant was a dependent spouse where such evidence tended to show that plaintiff had one child by a previous marriage and defendant had three children by a previous marriage, that plaintiff was paying alimony and child support to his ex-wife in an amount very nearly equal to his income, that both plaintiff and defendant incurred obligations during their marriage greatly in excess of their income and that both plaintiff and defendant were employed and earned approximately the same wages.

APPEAL by plaintiff from *Belk, Judge,* 14 August 1972 Civil Nonjury Session of MECKLENBURG County District Court.

Plaintiff filed an action for divorce from bed and board on 21 June 1972, and left the home on 22 June 1972, taking his belongings. Defendant replied with a cross action alleging abandonment by the plaintiff, and seeking alimony without divorce, alimony pendente lite, and counsel fees. A hearing was held on 16 August 1972 on the alimony pendente lite application, at which hearing evidence was presented by affidavit and interrogatories of the parties.

The trial court found that the defendant-wife was a dependent spouse entitled to alimony pendente lite and counsel fees, and ordered the plaintiff-husband to pay her $140.00 per month alimony pendente lite, $300.00 counsel fees, and to pay indebtedness totaling $430.88.

James, Williams, McElroy & Diehl, P.A., by William K. Diehl, Jr., for plaintiff appellant.

Cecil M. Curtis for defendant appellee.

CAMPBELL, Judge.

The evidence in this case reveals a man who had been married before and had one child by his previous marriage and was under a court order to provide alimony and support for his former wife and child. The amount is nearly equal to the man's current income, and he is in arrears in excess of $8,000. The woman likewise had been previously married and had three children by that marriage and was receiving support for her children from her former husband in the amount of $50 a month, which was inadequate for their support.

Both the man and the woman are employed. At the time of the marriage in 1970, the man had an income in excess of $18,000 a year, but this sum was drastically reduced in 1971 due to the man going into a new business enterprise. The woman had an income at the time of the marriage and since of approximately the same amount as the man made after the drastic reduction in his income. During their marriage both parties incurred obligations greatly in excess of their income.

The trial court, on adequate and sufficient evidence, found "[t]hat the plaintiff left home on June 22, 1972, without the defendant's consent or permission and has since that time separated himself from the defendant and has failed and refused to offer or support the defendant since that date; that the separation was willful and without just cause and due to no provocation on the part of the defendant."

In order for a spouse to be entitled to alimony, alimony pendente lite, or counsel fees, that spouse must be a dependent spouse. *Sprinkle v. Sprinkle*, 17 N.C. App. 175, 193 S.E. 2d 468 (1972).

To find that one is a dependent spouse the trial court must make findings of fact sufficient to show (1) that a marital relationship between the parties exists; (2) either (a) that the spouse is actually substantially dependent upon the other spouse for his or her maintenance and support, or (b) that the spouse is substantially in need of maintenance and support from the other spouse, G.S. 50-16.1(3); and (3) that the supporting spouse is capable of making the payments required, G.S. 50-16.1 (4) and G.S. 50-16.5(a).

Only a dependent spouse may be entitled to alimony pendente lite, and then only after complying with the requirements

of G.S. 50-16.3(a). That section requires the dependent spouse who makes application for alimony pendente lite to present evidence showing (1) that it appears that he or she is entitled to the relief demanded in the action in which the application for alimony pendente lite is made; *and* (2) that it appears that he or she has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

Further, no spouse is entitled to an award of counsel fees unless he or she is (1) a dependent spouse, (2) who is entitled to alimony pendente lite. G.S. 50-16.4.

The trial court found facts conforming to every requirement of the foregoing statutes.

While the evidence is subject to different interpretations, nevertheless, the interpretation of the evidence is a prerogative of the trial court; and if that evidence is sufficient to support the findings of fact, then those findings are binding upon the appellate court. In the instant case we cannot say that the evidence does not support the findings made by the trial judge.

Affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. LARRY DONALD BAILEY

No. 736SC114

(Filed 23 May 1973)

Burglary and Unlawful Breakings § 5; Larceny § 7— unsupported accomplice testimony — sufficiency to sustain conviction

In an action charging defendant with breaking and entering and larceny where no stolen merchandise was ever found in defendant's possession and there was no physical evidence linking the defendant to the commission of the crime, the unsupported testimony of an accomplice as to the performance of the crime and the opening of a safe taken during the larceny was sufficient to sustain defendant's conviction.

APPEAL by defendant from *Cowper, Judge,* 17 July 1972 Regular Session of HERTFORD County Superior Court.

Defendant was tried on a three-count bill of indictment charging him with breaking and entering, larceny and receiving. He was convicted of breaking and entering and larceny, and sentenced to a term of imprisonment of ten years on each charge to run consecutively.

The State's evidence tended to show that defendant was employed by David Earl Brinkley as a carpenter, and that on 9 September 1971 Brinkley's home was broken into and a valuable gun and coin collection taken. Brinkley valued the collections at eight to ten thousand dollars. Additionally, a steel safe weighing about 350 to 500 pounds was taken from the home. The safe contained some of the coins in Brinkley's collection. Defendant was also a coin collector and had seen Brinkley's collection.

Lloyd Fletcher Crawford testified to having participated in the crime and explained in detail the manner of its performance and the opening of the safe. He testified he was paid $1,000 by defendant as a share of the spoils. Crawford's testimony not only implicated the defendant, but established him as the originator and guiding force behind the larceny plan.

Crawford testified that he and defendant took the safe to a cottage at Kitty Hawk, North Carolina, some few days after the theft, and that there they cut a hole in the safe using an electric grinder. Afterwards the safe was thrown from a bridge into Currituck Sound but was never found.

Mr. William E. Pierce, a forensic chemist with the State Bureau of Investigation, testified that he examined vacuum sweepings of the cottage in which Crawford said that he and defendant opened the safe. Pierce found the dust to contain particles of melted steel pellets and a small amount of corundum dust. The steel pellets, in his opinion, had been melted from a high-temperature grinding operation. Corundum, he explained, "is a very hard mineral used in grinding and cutting operations."

Attorney General Robert Morgan by Associate Attorney George W. Boylan for the State.

Jones, Jones & Jones by L. Herbin, Jr., for defendant appellant.

CAMPBELL, Judge.

Counsel is reminded that the rules of practice in this Court are not merely advisory, but are mandatory. Attention is directed to Rule 27½ of the Rules of Practice, which provides in part:

> "The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. . . .
>
> The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal."

Appellant's record contains 84 exceptions, grouped into 42 assignments of error. These exceptions and assignments of error were brought forward in appellant's brief in 45 questions, the statement of which requires 14 pages of the 156-page brief.

"It would much facilitate the argument and decision of causes if counsel would always thus carefully go over the exceptions, taken out of abundant caution during the trial, and eliminate all except those which on reflection are deemed vital, and thus concentrate their argument and our attention on pivotal points of the case." *Britt v. R. R.*, 148 N.C. 37, 61 S.E. 601 (1908).

No stolen merchandise was ever found in the defendant's possession, and there was no physical evidence linking the defendant to the commission of the crime. However, regardless of whether Crawford's confession testimony was corroborated, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant. *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473 (1954).

We find no error in the conduct of the trial and the defendant's conviction and judgment is

Affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. PRESTON LANE

No. 733SC193

(Filed 23 May 1973)

1. **Robbery § 5— failure to submit lesser included offense to jury — no error**

Though there may have been a conflict in the State's evidence as to how much, if any, money the victim had on his person, the evidence did not tend to show that anything other than a robbery took place, and the trial court properly failed to instruct the jury on the lesser included offense of an assault.

2. **Criminal Law § 118— failure to state contentions of defendant — new trial**

The trial judge is not required to state the contentions of both the State and the defendant; however, defendant in this robbery case is entitled to a new trial where the trial court undertook to state the contentions of the State but failed altogether to state those of defendant.

APPEAL by defendant from *Wells, Judge,* 25 September 1972 Session of PITT Superior Court.

Defendant was tried for common law robbery. The State's evidence tended to show that on 1 July 1972, Landis Webster, age 80 years, received a welfare check in the mail in the amount of $139.00. He cashed the check in the morning, bought about $25.00 worth of groceries, and gave James Redmond $90.00 to hold for him. Webster kept $20.00.

Sometime between sundown and dark Webster got the $90.00 from Redmond, giving him the $20.00 that Webster had previously retained. As he was walking home, the defendant, Preston Lane, put a knife to Webster's throat and took his billfold containing the $90.00. Webster was acquainted with defendant Lane, saw his face at the time of the robbery, and recognized his voice.

James Redmond's testimony as a witness for the State corroborated some of Webster's testimony, and contradicted portions of it. Redmond first testified that Webster exchanged his $20.00 for the $90.00 about midday; then on cross-examination he said the exchange took place about 9:00 p.m.; and on redirect examination, Redmond testified that Webster did not take the $90.00 until about 11:00 at night.

Defendant was found guilty by a jury, and sentenced to imprisonment for a term of ten years.

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

William E. Grantmyre for defendant appellant.

CAMPBELL, Judge.

[1] The defendant asserts that it was error for the trial court to fail to instruct the jury on the lesser included offense of an assault. This argument is based on the conflict in the State's evidence as to how much, if any, money the victim had on his person. This contention requires the jury to accept part of the State's evidence and reject a part of it. In the instant case the evidence for the defendant amounted to a denial of any participation in the crime. There was no controverting evidence that something other than a robbery took place. The defendant was not entitled to an instruction on a lesser offense.

> "Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. . . ." *State v. Cox,* 201 N.C. 357, 160 S.E. 358 (1931).

[2] The defendant also assigns as error the failure of the trial court in the instructions to the jury to give the contentions of the defendant. The trial judge reviewed the testimony both for the State and for the defendant in considerable detail. The court then stated the contentions of the State but did not state the contentions of the defendant.

G.S. 1-180 does not require the trial judge to state the contentions of either party. The statute does require, however, that the trial judge, "give equal stress to the State and defendant in a criminal action." Where the court gives the State's contentions but gives no contentions of the defendant, this mandate of G.S. 1-180 is not satisfied. For failure to state the contentions of the defendant after having undertaken to state the contentions of the State, a new trial must be ordered. *State v.*

Crawford, 261 N.C. 658, 135 S.E. 2d 652 (1964). *State v. Billinger*, 9 N.C. App. 573, 176 S.E. 2d 901 (1970).

New trial.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN KNOX DORSETT

No. 7326SC375

(Filed 23 May 1973)

Burglary and Unlawful Breakings § 5; Criminal Law § 60; Larceny § 7— sufficiency of fingerprint evidence

The State's evidence was sufficient for the jury in a prosecution for the breaking and entering of a home and the larceny of property therefrom, including a television set, where it tended to show that immediately after the theft defendant's fingerprint was found on a television rotor which had been on top of the set which was stolen, and that defendant was unknown to the victim and had no permission or lawful reason to enter the victim's residence.

APPEAL by defendant from *Friday, Judge*, 11 December 1972 Session of Superior Court of MECKLENBURG County.

Defendant was tried upon a bill of indictment which charged felonious breaking or entering and felonious larceny.

The State introduced evidence which tended to show the following: The locked home of Edward Farris Edwards on Island Point Road, Charlotte, North Carolina, was broken into on 17 December 1971 and a number of items with an approximate value of $2,500.00 were removed. Among the items taken was a table type television set. A roto-tenna which was used with this television was on top of the set when Mrs. Edwards left the home, but when she returned several hours later, the television was gone and the roto-tenna was on the floor of the living room where the television set had been located. Defendant was not known to Mrs. Edwards and he had never been given permission to enter the house. An officer secured a fingerprint from the roto-tenna immediately after the theft. This fingerprint was compared with known fingerprints of defendant, and an expert testified that they were identical.

Defendant offered no evidence.

The jury returned a verdict of guilty as charged. Defendant appeals from a judgment of imprisonment entered upon the verdict.

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

E. Clayton Selvey, Jr., for defendant appellant.

BALEY, Judge.

The sole contention of defendant concerns whether there was sufficient evidence to connect him with the breaking or entering and larceny, thereby requiring submission of the case to the jury.

Evidence of fingerprint identification when such fingerprints were secured from the roto-tenna in the Edwards home immediately after the commission of the crime combined with the fact that defendant was unknown to Mrs. Edwards and had no permission or lawful reason to enter her private residence was amply sufficient to take this case to the jury. *State v. Helms,* 218 N.C. 592, 12 S.E. 2d 243; *State v. Phillips,* 15 N.C. App. 74, 189 S.E. 2d 602, *cert. denied,* 281 N.C. 762; *State v. Pittman,* 10 N.C. App. 508, 179 S.E. 2d 198.

The circumstances under which defendant's fingerprints were found lead inescapably to the conclusion that they could have been impressed only at the time the crime was committed, and this is sufficient to support a conviction. *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472.

Defendant relies upon *State v. Smith,* 274 N.C. 159, 161 S.E. 2d 449, which is clearly distinguishable. In *Smith* there was no evidence that a crime was actually committed. In addition, there was ample opportunity for the fingerprint to have been impressed upon the wallet under circumstances not related to the loss of the money.

In this trial, we find

No error.

Judges BROCK and BRITT concur.

IN THE MATTER OF TRUMAN M. OATES: LICENSE No. 1866698, PETITIONER

No. 734SC351

(Filed 23 May 1973)

Automobiles § 2— three convictions of drunken driving — revocation of license — out-of-state conviction

An out-of-state conviction of operating a motor vehicle upon the public highway while under the influence of intoxicating liquor or an impairing drug is to be treated as a conviction for the purpose of mandatory permanent revocation of driver's license under G.S. 20-19(e).

APPEAL by respondent, North Carolina Department of Motor Vehicles, from *Peel, Judge,* 13 November 1972 Session of Superior Court held in SAMPSON County.

Petitioner instituted this proceeding to review the action of the North Carolina Department of Motor Vehicles in permanently revoking petitioner's driving privilege pursuant to G.S. 20-19(e) because of three convictions of operating a motor vehicle upon the highways while under the influence of intoxicating liquor.

The facts disclose that petitioner was convicted of operating a motor vehicle upon the highway while under the influence of intoxicating liquor on the following dates, at the following places:

8 December 1964 — Goldsboro, N. C.

17 July 1970 — Richmond, Va.

1 December 1971 — Sampson County, N. C.

Judge Peel found the facts to be as above, and additionally found that petitioner had failed to show that the proceedings in Virginia were irregular, invalid, or otherwise insufficient to support his conviction in Virginia.

Thereafter, Judge Peel concluded as follows:

"That the decision of the Department of Motor Vehicles mandatorily revoking the petitioner's driving privilege permanently, effective 1 December 1971, is erroneous and should be treated as a discretionary suspension or revocation."

It was thereafter ordered that the official notice and record of revocation be reversed, and the Department was ordered to grant petitioner a hearing to consider the restoration of petitioner's driving privilege in the discretion of the Department.

The North Carolina Department of Motor Vehicles appealed.

Attorney General Morgan, by Assistant Attorney General Ray, for the North Carolina Department of Motor Vehicles.

No counsel contra.

BROCK, Judge.

The question which is squarely presented by this appeal is whether an out-of-state conviction of operating a motor vehicle upon the public highway while under the influence of intoxicating liquor or an impairing drug is to be counted as a conviction for the purpose of the operation of the mandatory provision of G.S. 20-19(e). Judge Peel, in effect, ruled that the out-of-state conviction was not to be considered as a conviction for the purposes of the application of G.S. 20-19(e).

We disagree with his honor on this question. It seems to us that to eliminate an out-of-state conviction from consideration for the purpose of mandatory revocation under G.S. 20-19(e) would partially circumvent the clear intent of the legislature.

The judgment entered by Judge Peel is

Reversed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. RONALD LEE AVERY

No. 738SC141

(Filed 23 May 1973)

Criminal Law § 171— error relating to one charge — concurrent identical sentences — harmless error

Where defendant and another inmate attempted an escape, the other inmate succeeded in getting out of the jail, but defendant merely

took the gun of the deputy sheriff which he later gave back upon his surrender, instruction by the trial court that the jury could presume the lawful confinement of the other inmate from the fact of his presence in the jail cell was error; however, that error was rendered nonprejudicial since the two year sentence imposed in the escape case runs concurrently with the two year sentence imposed in the assault case in which the verdict was regular.

APPEAL by defendant from *Webb, Judge,* 18 September 1972 Session of Superior Court held in WAYNE County.

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

Sasser, Duke & Brown, by John E. Duke, for defendant.

BROCK, Judge.

Defendant was charged and convicted of (1) misdemeanor escape, and (2) felonious assault with a firearm upon a law-enforcement officer while such officer was in the performance of his duties.

Defendant and two others were locked in the jail in Wayne County. The jailer and a deputy sheriff went to the cellblock to carry one of the men back to court for trial. When the jailer opened the cell door, one of defendant's cellmates hit the jailer twice with his fist, and one threw salt in the deputy sheriff's eyes. One of the men than ran from the cell and the jailer pursued him, but the inmate succeeded in climbing out the kitchen window of the jail and getting away. The defendant jumped on the deputy sheriff and succeeded in taking his gun away from him. Later, he gave the gun back and surrendered without leaving the building.

The defendant seems to argue that the escape charge should have been nonsuited because there is no evidence that he actually escaped; and, that if he were convicted on the theory of aiding and abetting the other inmate to escape, that there was no showing that the other inmate was legally confined. The court instructed the jury that it could presume the lawful confinement of the other inmate from the fact of his presence in the jail cell. This, obviously, is error.

Nevertheless, there was sufficient evidence to justify submitting the case to the jury in the felony assault case. We hold that the court's instructions to the jury in the felony assault

case do not contain prejudicial error. The verdict in the assault case was regular, and the sentence imposed is well within the statutory limits.

Therefore, in accordance with the holding of our Supreme Court, error in the court's instructions to the jury in the escape case is rendered nonprejudicial because the two year sentence imposed in the escape case runs concurrently with the two year sentence imposed in the assault case. *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. RESPESS SPENCER

No. 732SC340

(Filed 23 May 1973)

Homicide § 28— failure to instruct on defense of others — prejudicial error

Where there was evidence that would permit the jury to find that defendant entered an affray and shot deceased only after deceased grabbed defendant's brother, hit him in the head with a pistol, shot the brother twice and then threatened to kill him, the trial court committed prejudicial error in failing to instruct as to the circumstances under which defendant could lawfully go to the aid of and act in defense of his brother.

APPEAL by defendant from *Tillery, Judge,* 27 November 1972 Session of Superior Court held in BEAUFORT County.

Defendant was convicted of murder in the second degree and sentenced to imprisonment for twenty years.

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

John A. Wilkinson for defendant appellant.

VAUGHN, Judge.

Defendant's assignments of error based on the denial of his motions for a directed verdict are overruled. Evidence introduced by the State was sufficient to go to the jury and sustain

the verdict rendered. Because there must be a new trial, however, we will not discuss the evidence except to the extent necessary to point out the prejudicial error on which we base our decision.

There was some evidence which would permit, but certainly not compel, the jury to find the following. Defendant was seated in the rear of a place called Moore's Snack Bar playing cards. Deceased came up to Lesley Spencer, brother of defendant, who was on the sidewalk in front of the snack bar. Deceased grabbed Lesley in the collar, hit in the head with a pistol and fired one shot in the ground. Deceased then shot Lesley twice and said that he would have to kill him. Defendant came out of the building. Defendant, deceased and Lesley struggled over the gun. Defendant got the gun and shot deceased. In the course of the charge, the judge instructed the jury as follows.

> "Now, in order to excuse the killing entirely on the ground of self-defense, the defendant Respess Spencer must satisfy you of three things:
>
> First, that he himself was not the aggressor. If he voluntarily entered into the fight he was the aggressor unless he thereafter attempted to abandon the fight and gave notice to Bill Ward that he was doing so. . . ."

Defendant contends, and we agree, that it was prejudicial error for the judge to fail to give any instructions as to the circumstances under which this defendant could lawfully go to the aid of and act in defense of his brother.

> "As the evidence favorable to the defendant tends to indicate that defendant acted in defense of his wife, instructions as to his right to defend himself are inapplicable and misleading. *S. v. Lee,* 193 N.C. 321, 136 S.E. 877. The court should have instructed the jury adequately on the law of self-defense *as it is applicable to the facts in the case.* 'The correctness of the instructions given is determined by the rules of law governing the right of self-defense as applied to the situation developed by the evidence.' " *State v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271.

We have reviewed only a portion of the evidence. There was other evidence from which the jury might find that defendant's brother was the aggressor or that indeed both defendant and his

brother were aggressors. There is other evidence from which the jury may conclude that deceased had abandoned the struggle, was attempting to run away and was killed after all danger to defendant or his brother had passed. The truth of the evidence, however, is for determination by the jury after the court properly declares and explains the law arising on the evidence given in the case then being tried.

New trial.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. DOUGLAS RAY BRADY

No. 7318SC355

(Filed 23 May 1973)

Criminal Law § 138— consolidated judgment — maximum punishment

Where cases have been consolidated for judgment, the punishment may not exceed that permitted for the crime carrying the greatest punishment; therefore, the trial court did not err in entering a consolidated judgment of not less than 25 nor more than 30 years for the crimes of safecracking, felonious breaking and entering and felonious larceny, since a sentence of from 10 years to life may be imposed for safecracking. G.S. 14-89.1.

APPEAL by defendant from *Crissman, Judge,* at the 9 October 1972 Session of GUILFORD Superior Court, Greensboro Division.

In three bills of indictment proper in form defendant was charged as follows: In No. 72-CR-56755 he was charged with feloniously breaking and entering a building in Greensboro occupied by North State Tractor Company. In No. 72-CR-56756 he was charged with safecracking. In No. 72-CR-56757, a three count bill, he was charged with (1) feloniously breaking and entering a building occupied by Security Mills of Greensboro, Inc., (2) felonious larceny of goods valued at $1,678.29 and (3) feloniously receiving stolen goods of the value of $1,678.29.

Defendant pleaded not guilty to all charges and the cases were consolidated for trial. A jury returned a verdict of guilty of all charges except felonious receiving. In case No. 72-CR-56755

the court entered judgment imposing prison sentence of not less than five nor more than seven years (to begin at expiration of sentence hereinafter referred to), suspended for five years on certain conditions. Cases Nos. 72-CR-56756 and 72-CR-56757 were consolidated for judgment and the court imposed prison sentence of not less than 25 nor more than 30 years. Defendant appealed.

Attorney General Robert Morgan by William W. Melvin, Assistant Attorney General, for the State.

Z. H. Howerton, Jr., for defendant appellant.

BRITT, Judge.

The only question presented on appeal relates to whether the court erred in imposing sentences.

Defendant contends that when cases are consolidated for judgment, a court is without authority to impose a sentence in excess of the maximum statutory penalty applicable to *any* of the offenses for which there has been a conviction or guilty plea. Therefore, defendant argues that since he was found guilty of (1) felonious breaking and entering and (2) felonious larceny, in violation of G.S. 14-54 and G.S. 14-70, each of said offenses being punishable by imprisonment for not more than ten years, the court erred in imposing a sentence of not less than twenty-five nor more than thirty years. We find no merit in defendant's contention.

Our Supreme Court has held that where cases have been consolidated for judgment, the punishment may not exceed that permitted on the count carrying the *greatest* punishment. *State v. McCrowe,* 272 N.C. 523, 158 S.E. 2d 337 (1968); *State v. Tolley,* 271 N.C. 459, 156 S.E. 2d 858 (1967). By virtue of G.S. 14-89.1, the judge in his discretion may impose a prison sentence of from ten years to life for safecracking.

The sentence imposed in the instant case does not exceed the greatest statutory penalty applicable to any of the charges upon which defendant was convicted, therefore, we find

No error.

Judges BROCK and BALEY concur.

STATE OF NORTH CAROLINA v. CLEMENTINE MURRELL

No. 738SC134

(Filed 23 May 1973)

Homicide § 31— involuntary manslaughter — maximum sentence

Involuntary manslaughter is a felony and punishable under G.S. 14-2 which permits a maximum prison sentence of ten years.

APPEAL by defendant from *Wood, Judge,* 3 October 1972 Criminal Session, LENOIR Superior Court.

The indictment against defendant charged her with the murder of James Cleveland Taylor on or about 1 August 1972. Defendant tendered a plea of guilty of involuntary manslaughter. After due inquiry, the court adjudged that the plea was freely, understandingly, and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, and accepted the plea. From judgment imposing prison sentence of not less than five nor more than seven years, defendant appealed.

Attorney General Robert Morgan by Diederich Heidgerd, Associate Attorney, for the State.

Gerrans & Spence by C. E. Gerrans for defendant appellant.

BRITT, Judge.

The only assignment of error brought forward and argued in defendant's brief relates to the judgment imposed. Defendant contends that the maximum prison sentence permissible for involuntary manslaughter is two years and cites *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970). There is no merit in this contention.

Defendant recognizes the court's holdings in *State v. Dunn,* 208 N.C. 333, 180 S.E. 708 (1935), *State v. Blackmon,* 260 N.C. 352, 132 S.E. 2d 880 (1963) and *State v. Adams,* 266 N.C. 406, 146 S.E. 2d 505 (1966) to the effect that involuntary manslaughter is a felony and punishable under G.S. 14-2 which permits a maximum prison sentence of 10 years. However, defendant argues that *State v. Spencer, supra,* overruled those cases. We reject this argument.

Spencer is clearly distinguishable. In that case defendants were charged with wilfully standing upon the traveled portion of a State highway in such a manner as to impede the regular flow of traffic, a violation of G.S. 20-174.1. By virtue of G.S. 20-176 a violation of 20-174.1 is a misdemeanor. In saying that "an offense punishable by fine or imprisonment, or both, in the discretion of the court is a general misdemeanor for which an offender may be imprisoned for two years in the discretion of the court," the court was discussing misdemeanors and not the entire area of criminal law.

Furthermore, in *State v. Stimpson,* 279 N.C. 716, 185 S.E. 2d 168 (1971), in an opinion by Chief Justice Bobbitt decided after *Spencer,* the court restated "that the maximum lawful term of imprisonment for involuntary manslaughter is 10 years."

The judgment appealed from is

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. MARY BURGES

No. 738SC306

(Filed 23 May 1973)

1. **Homicide § 21— death by shooting — sufficiency of evidence**

Evidence was sufficient to withstand motion for nonsuit in a murder case where it tended to show that the victim got into an argument with several customers in defendant's place of business and was ordered to leave, the victim left but shortly thereafter returned and got into an argument with defendant, the victim was ordered to leave the establishment for the second time and defendant shot him in the back as he was leaving.

2. **Criminal Law § 168— error in instructions — failure of defendant to show prejudice**

Even if the trial court in a murder case erred in instructing the jury that they could take into the jury room with them several pictures which were introduced into evidence during the course of the trial, defendant failed to show how such error was prejudicial to her.

State v. Burges

APPEAL by defendant from *Webb, Judge,* 25 September 1972 Session of LENOIR Superior Court.

By bill of indictment proper in form defendant was charged with the murder of Lawrence Richard Hicks, Jr., (Hicks). A jury found defendant guilty of voluntary manslaughter and from judgment imposing prison sentence of not less than two nor more than five years, defendant appealed.

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

Braswell, Strickland, Merritt & Rouse by David M. Rouse for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the court to grant her motions for nonsuit. The evidence, viewed in the light most favorable to the State, tended to show:

Defendant and her husband operated a tavern on South Queen Street in the City of Kinston. On the night of 12 November 1971 Hicks and several others were customers at the tavern. Hicks got into an argument with another customer, and defendant ordered him to leave. Hicks left but later returned, and he and defendant got into an argument. Defendant again ordered Hicks to leave and as he was leaving, defendant obtained a gun, went to the door and shot Hicks three times after he had gone out of the building. A postmortem examination revealed a hole in the back of Hicks' head and holes in his arm and side.

Defendant admitted the shooting but pleaded self-defense.

We hold that the evidence was sufficient to survive the motion for nonsuit.

[2] Next, defendant contends the court erred in instructing the jury that they could, if they wanted to, take into the jury room with them several pictures which were introduced into evidence during the course of the trial. Defendant concedes that the record does not disclose whether the jury actually took the pictures into the jury room. Assuming, but not deciding, that the court erred in this instruction, defendant has failed to show prejudice. It is well settled that the burden is on defendant not only to show error but also to show that the error was prej-

udicial to him. 3 Strong, N. C. Index 2d, Criminal Law, § 167, pp. 126, 127.

We have carefully considered the other assignments of error brought forward and 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 permitted by statute.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. CLAUDE GOODSON

No. 7315SC359

(Filed 23 May 1973)

1. **Criminal Law § 169— failure of record to show excluded testimony**

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

2. **Criminal Law § 99— admonishing defendant in absence of jury — absence of prejudice**

Defendant was not prejudiced when the trial court, in the absence of the jury, admonished defendant to answer questions of the solicitor, and to avoid getting "smart" and "bad mouthing" the solicitor.

APPEAL by defendant from *Cooper, Judge,* at the 16 October 1972 Session of ALAMANCE Superior Court.

By indictment proper in form defendant was charged with (1) feloniously breaking or entering the home of one Lewis and (2) felonious larceny of personal property of the value of $1,978 pursuant to the breaking or entering.

Principal testimony against defendant was provided by two alleged accomplices, Teresa Ellison (Ellison) and Billy Gene Phillips (Phillips). A jury found defendant guilty of the charges and from judgment imposing prison sentences aggregating sixteen years, defendant appealed.

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

John D. Xanthos for defendant appellant.

BRITT, Judge.

[1] By assignments of error Nos. 4, 5 and 8, defendant contends the court erred in sustaining the solicitor's objections to certain questions asked Ellison and Phillips by defense counsel on cross-examination and one question asked defendant on direct examination. The assignments have no merit.

The record does not show what the witnesses would have said had they been permitted to answer the questions, therefore, we cannot know whether the rulings were prejudicial. The burden is on an appellant not only to show error but to show prejudicial error. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972); *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1969). Furthermore, the information sought by several of the questions was provided in other parts of the testimony. The assignments of error are overruled.

[2] By his assignment of error No. 9, defendant contends that the trial court committed prejudicial error "in remonstrating with the defendant during the trial when there was no reason for such remonstration." The incident complained of occurred while defendant was on the witness stand and was being cross-examined. During the course of the cross-examination, the court sent the jury to their room and then admonished the solicitor and defense counsel as to how they should conduct themselves. The court then admonished the defendant to answer questions of the solicitor, avoid getting "smart" and "bad mouthing" the solicitor. This assignment has no merit.

It is well settled that it is the duty of the presiding judge to supervise and control the trial to prevent injustice to either party. 7 Strong, N. C. Index 2d, Trial, § 9, pp. 266, 267. The incident complained of occurred in the absence of the jury and we are unable to perceive any prejudice to defendant. The 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 without merit, they too are overruled.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES RANDELL GRISSOM

No. 732SC205

(Filed 23 May 1973)

Rape § 16— instructions — no expression of opinion

In its instructions to the jury in a rape case, the trial judge did not express an opinion or intimate that the defendant was guilty of some offense, or that he wanted to be found guilty of some lesser included offense.

APPEAL by defendant from *Tillery, Judge,* 6 November 1972 Session of Superior Court held in WASHINGTON County.

Defendant, James Randell Grissom, was charged in two bills of indictment, proper in form, with rape.

Upon defendant's pleas of not guilty, the State offered evidence tending to show that on 2 July 1972, the defendant forcibly and against her will had sexual intercourse with his 14 year old daughter and on 27 July 1972, the defendant forcibly and against her will had sexual intercourse with his 17 year old daughter.

Defendant denied ever having made any "improper advances" or an "overt attempt to molest" his children.

In each case, defendant was found guilty of assault with intent to commit rape and from judgments imposing consecutive action prison sentences of from 12 to 15 years, he appealed.

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

Franklin B. Johnston for defendant appellant.

HEDRICK, Judge.

Of the fifty-three exceptions and assignments of error noted in the record, only one is brought forward and argued on this appeal. The rest are deemed abandoned. Rule 28 of the Rules of Practice in the Court of Appeals.

Defendant argues in his brief that in stating defendant's contentions to the jury, the trial judge expressed an opinion that defendant was guilty of some offense and intimated that defendant wanted to be convicted of assault with intent to commit rape or assault on a female rather than rape. We do not agree.

While the instructions challenged by this exception might have been better stated, it is clear, when the charge is considered contextually, that the trial judge did not express an opinion or intimate that the defendant was guilty of some offense, or that he wanted to be found guilty of some lesser included offense.

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

No error.

Judges CAMPBELL and VAUGHN concur.

REBECCA NUNALEE REGISTER (EUBANKS) v. JAMES B. REGISTER

No. 735DC297

(Filed 23 May 1973)

Divorce and Alimony § 22— modification of custody and support order — finding of changed circumstances required

The trial court erred in amending a 1966 order giving the custody of two minor children to the mother by allowing the father more extensive visitation privileges and custody of the children during vacation months, increasing the amount of his support payments and relieving him of the burden of making support payments during the times he had temporary custody where the trial court did not first make findings of fact as to changed circumstances. G.S. 50-13.7.

APPEAL by defendant from *Walker, Judge,* 24 July 1972 Session of NEW HANOVER County District Court.

On 8 September 1966 Rebecca Nunalee Register filed complaint against her husband, James B. Register, seeking alimony without divorce, custody of their two minor children, and child support from her husband. On 7 March 1967 an order was entered awarding Rebecca Register custody of the two children, allowing James B. Register custody of the children on the first weekend of each month and the third Saturday of each month, and ordering him to pay $17.50 per child per week for support.

On 16 October 1967 James B. Register was awarded a divorce decree, Rebecca Register being granted custody of the two minor children of the marriage. Rebecca Register has since remarried and is now Rebecca Register Eubanks.

On 1 November 1971 James B. Register filed a motion in the cause, that cause being the original action by his wife against him for custody and support of the children, filed in 1966. His motion of November 1971, sought modifications of the prior custody order by granting him custody of the children.

A hearing on the motion was conducted on 28 July 1972, at which hearing both James Register and Rebecca Eubanks testified. On 29 November 1972 Judge Walker entered an order amending the custody order of March 1967 by allowing James Register more extensive visitation privileges and custody of the children during vacation months, increasing his support payments to $22.50 for each child per week, and relieving him of the burden of making support payments during the times he has temporary custody of the children. Rebecca Eubanks was still given custody of the children. From the entry of this order James B. Register appealed.

James L. Nelson and Harold E. Trask, Jr. for defendant appellant.

CAMPBELL, Judge.

Defendant has assigned as error the failure of the trial court to make findings of fact which support the modification of the prior support order. His assignment of error is well taken.

G.S. 50-13.7 now adds the force of statute to the requirement of showing changed conditions before a custody *or support* order may be modified.

It is error to modify or change a valid prior order with respect to support or custody absent findings of fact of changed circumstances. The order appealed from contains no such findings. *Rabon v. Ledbetter,* 9 N.C. App. 376, 176 S.E. 2d 372 (1970).

The order appealed from must be vacated, and the cause remanded for further proceedings.

Vacated and remanded.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. RONALD McILWAIN

No. 7326SC323

(Filed 23 May 1973)

Constitutional Law § 36; Robbery § 6— sentence for armed robbery — cruel and unusual punishment

There is no merit in defendant's contention that a sentence of twenty to twenty-five years imposed on him for armed robbery constitutes cruel and unusual punishment because the two eyewitnesses who testified for the State were doubtful about pretrial identification of defendant as one of the perpetrators of the crime.

APPEAL by defendant from *Friday, Judge,* 2 October 1972 Session of MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with armed robbery of Carrie Lynn Schrecengost on 25 December 1971. The evidence tended to show that about 9:00 p.m. on that date three Negro males entered the Horne's Motor Lodge in Charlotte, North Carolina, inquired about the price of lodging, and then one of them pulled a pistol from his pocket, shot Mrs. Schrecengost, and took over $200.00 from the cash register. Mrs. Schrecengost and Tony Prince were desk clerks in the Motor Lodge on that date.

Defendant was convicted and sentenced to imprisonment for not less than twenty years nor more than twenty-five years.

Attorney General Morgan by Assistant Attorney General Howard P. Satisky for the State.

Charles V. Bell for defendant appellant.

CAMPBELL, Judge.

Defendant's only exception in the record is to the judgment sentencing him to imprisonment for twenty to twenty-five years. The theory of defendant's assignment of error is that because the two eyewitnesses were doubtful about pretrial identification of the defendant as one of the perpetrators of the crime, the judge abused his discretion by imposing cruel and unusual punishment.

At the trial both witnesses to the armed robbery were positive that defendant was one of the three robbers. They recognized his facial appearance, particularly a scar over his left eye. Prior to trial at a lineup in which defendant stood number four out of five or six Negro males, witness Prince said he thought number four was one of the robbers, but that he was not certain. Witness Schrecengost did not identify anyone in the lineup. After the lineup each witness examined a group of photographs, and each independently of the other picked out defendant's photograph.

We find in this evidence absolutely no hint of suggestiveness in the pretrial identification of the defendant. Since defendant did not enter even a general objection to the in-court identification, he was not entitled to a voir dire hearing. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972).

A sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual in a constitutional sense. See *State v. Johnson,* No. 735SC369, filed in the Court of Appeals on 23 May 1973.

Affirmed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. LEWIS YELVERTON

No. 737SC319

(Filed 23 May 1973)

Narcotics § 5— possession and distribution of marijuana — two distinct crimes

The possession and distribution of a single quantity of marijuana taking place on one occasion constitute two crimes for each of which defendant may be convicted and punished.

APPEAL by defendant from *Webb, Judge,* 9 October 1972 Criminal Session of WILSON County Superior Court.

Defendant was charged in two bills of indictment with the crimes of possession of 2.4 grams of marijuana with intent to distribute on 19 July 1972, and with the distribution of 2.4 grams of marijuana on 19 July 1972. The evidence was to the effect that he made a sale to an undercover agent. He was convicted and sentenced for both crimes.

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

Farris, Thomas and Farris by Robert A. Farris for defendant appellant.

CAMPBELL, Judge.

Defendant has argued that the possession and distribution of a single quantity of marijuana taking place on one occasion constitutes but one crime for which he may be punished only once. This Court so held in *State v. Thornton,* 17 N.C. App. 225, 193 S.E. 2d 373 (1972), upon the premise that it is impossible to prove distribution of a narcotic without also proving at least constructive possession.

The *Thornton* case, however, has been specifically disapproved in *State v. Cameron,* filed in the Supreme Court of North Carolina on 18 April 1973. In the opinion by Justice Moore, it is observed that the General Assembly created two distinct crimes of equal degree, to be separately punished rather than providing that one should be a lesser included offense in the other. It is a matter of public policy, then, to punish equally the possession of a controlled substance and the distribution of a controlled substance.

It is also a rule of law that if a defendant's conduct violates two or more criminal statutes, he may be convicted and punished only one time if *each* crime does not require proof of additional facts not required by the other. *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838 (1962). In the *Cameron* ruling the Supreme Court met this test by holding that:

> " 'There are different elements present in the two crimes of selling and possessing the prohibited drugs. Proof of the illegal sale of the drugs would not prove the illegal possession of the drugs, since persons might legally possess the drugs who could not legally sell them. Proof of the illegal possession of the drugs would not prove the illegal sale of the drugs. Neither offense is a necessary element in, and constitutes an essential part of, the other offense. . . . ' " *Gee v. State,* 225 Ga. 669, 171 S.E. 2d 291 (1969).

As we find no error in the conduct of the trial, the judgment and conviction must be affirmed.

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. RUFUS H. JOHNSON

No. 735SC369

(Filed 23 May 1973)

Constitutional Law § 36; Burglary and Unlawful Breakings § 8; Larceny § 10— discretionary sentencing statute — constitutionality

The trial judge in a prosecution for breaking and entering and larceny did not abuse his discretion in sentencing defendant to a term of ten years for each offense with only two to run consecutively, and discretionary sentencing statutes with respect to imprisonment or fine are not unconstitutional.

APPEAL by defendant from *Wells, Judge,* 13 November 1972 Session of NEW HANOVER Superior Court.

Defendant pleaded guilty to charges of breaking and entering a building belonging to American Imports, Inc., of Wilming-

ton, North Carolina, on 23 July 1972, larceny of tools belonging to American Imports, Inc., on 23 July 1972, and larceny of an automobile belonging to Dr. R. M. Shah on 23 July 1972. The pleas were accepted by the court after finding that they were voluntarily and understandingly entered, without duress or promise of leniency. He was sentenced to a term of imprisonment of ten years for each offense, only two of which are to run consecutively.

Attorney General Robert Morgan by Associate Attorney C. Diederich Heidgerd for the State.

Jeffrey T. Myles for defendant appellant.

CAMPBELL, Judge.

The only question on appeal argued by defendant is that the punishment he received is excessive, since his only crime was against property. Defendant argued, relying upon *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), that because the trial court has wide discretion in determining the length of time of imprisonment it may order, such discretion is discriminatory, and thus unconstitutional.

Discretionary sentencing statutes with respect to imprisonment or fine are not unconstitutional. A sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual punishment. Where the trial judge has imposed a prison sentence within that allowed by statute, the judgment must be upheld. *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296, *cert. denied,* 409 U.S. 1047, 34 L.Ed. 2d 499, 93 S.Ct. 537 (1972).

Just as the trial judge in *Cradle* did not abuse his discretion in sentencing that defendant to imprisonment for seven to ten years for uttering a forged check in the sum of $50.00, so we find no abuse of discretion in the instant case.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. UTAH ELI BRYANT

No. 7326SC272

(Filed 23 May 1973)

Criminal Law §§ 154, 155.5— failure to docket record and serve case on on appeal in time

Appeal is subject to dismissal where the record on appeal was not docketed within 90 days after the date of the judgment appealed from and the case on appeal was not served within the time allowed by the trial court. Court of Appeals Rules 5 and 48.

APPEAL by defendant from *Friday, Judge,* 26 September 1972 Criminal Session of MECKLENBURG Superior Court.

Defendant entered a plea of guilty to the charge of assault with intent to commit rape, and was sentenced to imprisonment for a period of not less than five nor more than seven years.

Attorney General Robert Morgan by Associate Attorney C. Diederich Heidgerd for the State.

Gene H. Kendall for defendant appellant.

CAMPBELL, Judge.

Defendant's plea of guilty was accepted only after he had been carefully examined by the trial judge and had signed a written "transcript of plea," which examination showed that he entered his plea of guilty in conformance with the ruling in *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969).

The defendant did not protest his innocence at the time he tendered his guilty plea, but rather acknowledged that he was in fact guilty. The ruling of *North Carolina v. Alford,* 400 U.S. 25, 27 L.Ed. 2d 162, 91 S.Ct. 160 (1970), therefore does not apply.

Judgment was entered on defendant's plea on 26 September 1972. As there was no order by the trial tribunal granting an extension of time, this appeal should have been docketed with the Court of Appeals within 90 days after the date of judgment, or by 25 December 1972. Rule 5, Rules of Practice in the Court of Appeals. Defendant did not docket the appeal until 5 February 1973.

The appeal entry was dated 5 October 1972, at which time the trial judge allowed defendant 50 days to prepare and serve the case on appeal, which service should have been made by 24 November 1972. Defendant did not secure from the trial judge an order extending the time to serve the case on appeal, and did not in fact serve the case until 1 December 1972.

For failure to comply with these rules, defendant's appeal is subject to dismissal. Rule 48, Rules of Practice in the Court of Appeals. Nevertheless, the record shows no error.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. BARBARA TILLEY

No. 7322SC379

(Filed 23 May 1973)

Criminal Law § 155.5— failure to docket record in time

Appeal is dismissed where the record on appeal was docketed more than 90 days after the date of the judgment appealed from and the record contains no order of the trial tribunal extending the time for docketing. Court of Appeals Rules 5 and 48.

APPEAL by defendant from *Long, Judge,* October 1972 Session of Superior Court held in IREDELL County.

Defendant was convicted of willfully and unlawfully obstructing a public officer while he was attempting to discharge a duty of his office, a violation of G.S. 14-223. From judgment that defendant pay the cost of the action, defendant gave notice of appeal.

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

Gene H. Kendall for defendant appellant.

PARKER, Judge.

The judgment appealed from was dated 26 October 1972. The record on appeal was docketed in this Court on 22 March

1973, which was more than ninety days after the date of the judgment appealed from. The record contains no order of the trial tribunal extending the time for docketing. For failure of appellant to docket the record within apt time as prescribed by the rules of this Court, this appeal is subject to dismissal. Rules 5 and 48, Rules of Practice in the Court of Appeals. *James v. Greenway, Inc.*, 17 N.C. App. 156, 193 S.E. 2d 372; *Lambert v. Patterson*, 17 N.C. App. 148, 193 S.E. 2d 380; *State v. Squires*, 1 N.C. App. 199, 160 S.E. 2d 550.

Appeal dismissed.

Judges CAMPBELL and VAUGHN occur.

STATE OF NORTH CAROLINA v. SYLVIA LORRAINE HAIRSTON

No. 7321SC172

(Filed 23 May 1973)

Homicide § 23— instructions

The trial court in a homicide case properly declared and explained the law arising on the evidence in the case.

APPEAL by defendant from *Collier, Judge*, 25 September 1972 Session of Superior Court held in FORSYTH County.

Defendant was tried for murder and was convicted of voluntary manslaughter. Judgment imposing a prison sentence of from four to seven years was entered.

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

Drum and Liner by Renn Drum for defendant appellant.

VAUGHN, Judge.

Defendant brings forward only one assignment of error and that relates to the adequacy of the judge's charge to the jury.

We hold that the judge properly declared and explained the law arising on the evidence given in the case.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. HENRY NORMAN BARNETT

No. 736SC401

(Filed 23 May 1973)

Criminal Law § 23— voluntariness of guilty plea

Defendant's guilty plea was entered freely, understandingly and voluntarily.

APPEAL by defendant from *Lanier, Judge,* January 1973 Session of Superior Court held in HALIFAX County.

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

Josey & Vaughan by Charles J. Vaughan for defendant appellant.

HEDRICK, Judge.

The record affirmatively discloses that defendant, Henry Norman Barnett, freely, understandingly and voluntarily pleaded guilty to a two-count bill of indictment, proper in form, charging him with felonious breaking and entering and larceny. The judgment imposing a prison sentence of eight years is within the limits prescribed by statute for the offenses charged. The judgment is

Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. ELLA MAE RICE

No. 7318SC224

(Filed 23 May 1973)

Criminal Law § 23— guilty pleas — voluntariness

The record affirmatively discloses that defendant freely, understandingly and voluntarily pleaded guilty to charges of possession of taxpaid whiskey for the purpose of sale and sale of taxpaid whiskey.

APPEAL by defendant from *Exum, Judge,* 18 September 1972 Session of Superior Court held in GUILFORD County, High Point Division.

Attorney General Robert Morgan and Associate Attorney John M. Silverstein for the State.

Bob Scott for defendant appellant.

HEDRICK, Judge.

The record affirmatively discloses that defendant, Ella Mae Rice, represented by privately employed counsel, freely, understandingly and voluntarily pleaded guilty to a two-count warrant, proper in form, charging her with possession of tax paid whiskey for the purpose of sale and the sale of tax paid whiskey to John Robinson. The judgment imposing a prison sentence of six months is within the limits prescribed by statute for the offenses charged. The judgment is

Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. WILSON JUNIOR DOSS

No. 7322SC250

(Filed 23 May 1973)

Criminal Law § 23— voluntariness of guilty plea

Defendant's guilty plea was entered freely, voluntarily and understandingly.

State v. Doss

APPEAL by defendant from *Long, Judge,* 30 October 1972 Session of Superior Court held in DAVIDSON County.

Defendant entered pleas of guilty to (1) a felonious assault, (2) malicious damage to personal property, and (3) discharging a firearm into an occupied vehicle.

After hearing the evidence in each case, judgment was entered in the felonious assault case and the malicious damage to personal property case. The sentence in these two cases was suspended and defendant placed on probation. Thereafter, judgment of confinement for a period of two to four years was entered in the discharging a firearm into an occupied vehicle case.

Defendant appealed the judgment imposing the active sentence.

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

Michael D. Lea for the defendant.

BROCK, Judge.

Defendant's plea of guilty was found, upon plenary competent evidence, to have been freely, voluntarily and understandingly entered. The bill of indictment was proper in form, and the sentence imposed is within the statutory limits. Defendant has been represented by counsel appointed by the court, and the expense of trial and this appeal are to be paid by the State. We find no error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. TONY MINK

No. 7323SC280

(Filed 23 May 1973)

Arrest and Bail § 6; Assault and Battery § 11— assault on public officer — resisting arrest — warrant

Warrant is insufficient to charge the offense of assault on a public officer, G.S. 14-33(c)(4), or the offense of resisting an officer, G.S. 14-223, where it fails to allege the duty of his office that the public officer was discharging or attempting to discharge.

APPEAL by defendant from *Kivett, Judge,* 2 October 1972 Session of Superior Court held in WILKES County.

Defendant was charged in a warrant reading as follows:

"The undersigned, Bobby McCann, being duly sworn, complains and says that at and in the County named above and on or about the 4th day of August, 1972, the defendant named above did unlawfully, wilfully, and feloniously assault an officer of the law Bobby McCann while he was attempting to discharge a duty of his office.

"The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 14-33(c)(4)."

Defendant was convicted and sentenced to a term of ten days in the county jail.

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

Porter, Conner & Winslow, by Kurt B. Conner, for the defendant.

BROCK, Judge.

The warrant upon which defendant was tried in the District Court and upon which he was tried in the Superior Court is insufficient to charge an offense. It fails to allege the duty of his office that the public officer was discharging or attempting to discharge. For this reason it fails to allege an offense under either G.S. 14-33(c)(4) or G.S. 14-223. *See State v.*

Wiggs, 269 N.C. 507, 512, 153 S.E. 2d 84, 88; *State v. Smith*, 262 N.C. 472, 474, 137 S.E. 2d 819, 820.

Judgment arrested.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. RANDOLPH WIDEMAN

No. 7318SC225

(Filed 23 May 1973)

APPEAL by defendant from *Exum, Judge*, 23 October 1972 Session of Superior Court held in GUILFORD County.

Defendant was charged in a bill of indictment with the felony of armed robbery.

The State's evidence through the testimony of the victim and through the testimony of the alleged accomplice of defendant tended to show the following: On 24 April 1972, between 7:30 and 8:00 p.m., defendant and his accomplice went to the victim's service station as victim was preparing to close for the evening. When the victim stepped inside the men's bathroom to clean up, defendant followed him, threw one arm around the victim's neck, and held a gun on the victim with the other hand. Defendant then took the victim's pocketbook containing $36.00.

Defendant testified that he was elsewhere at the time of the robbery; that he knew nothing about the robbery; and that the alleged accomplice was trying to implicate him because he (the alleged accomplice) was angry with defendant.

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

Bob Scott, attorney for the defendant.

BROCK, Judge.

The bill of indictment is proper in form and sufficient to charge the defendant with the offense of armed robbery. The jury rendered in open court a verdict of guilty of the offense of

armed robbery and the sentence imposed is within the limits allowed by statute. In our opinion defendant received a fair trial, free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. ALBERT HENSLEY

No. 7328SC334

(Filed 23 May 1973)

APPEAL by defendant from *Thornburg, Judge,* 23 October 1972 Criminal Session of BUNCOMBE Superior Court.

Defendant was tried on a bill of indictment charging him with assault with a deadly weapon with intent to kill, which assault inflicted serious injury to James Cuy Robinson, on 5 August 1972. He entered a plea of not guilty, the jury found him guilty, and the court sentenced him to imprisonment for seven years.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

Robert S. Swain by Joel B. Stevenson for defendant appellant.

CAMPBELL, Judge.

Defendant having brought forward no assignments of error, the appeal requires review of the record proper only. Defendant was charged and tried on a valid bill of indictment, the jury verdict is proper, and supports the judgment of the court. Defendant was sentenced to a term of imprisonment within that allowed by statute.

Defendant has had a fair trial free from prejudicial error.

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. LACY CRAWFORD

No. 7318SC356

(Filed 23 May 1973)

APPEAL by defendant from *Exum, Judge,* 23 October 1972 Regular Criminal Session of GUILFORD Superior Court, High Point Division.

Defendant was tried on a bill of indictment charging him with armed robbery of $122.00 from Ernest J. O'Bannon, Jr., and Francis O'Bannon on 13 June 1972. He entered a plea of not guilty; the jury found him to be guilty; and the court sentenced him to imprisonment for six to twelve years.

Attorney General Robert Morgan by Deputy Attorney General Jean A. Benoy for the State.

Assistant Public Defender Richard S. Towers for defendant appellant.

CAMPBELL, Judge.

Defendant having brought forward no assignments of error, the appeal requires review of the record proper only. Defendant was charged and tried on a valid bill of indictment, the jury verdict is proper, and supports the judgment of the court. Defendant was sentenced to a term of imprisonment within that allowed by statute for armed robbery.

Defendant has had a fair trial free from prejudicial error.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. GARY L. BROOKS

No. 7312SC338

(Filed 23 May 1973)

APPEAL by defendant from *Clark, Judge,* from judgment entered on 8 December 1972 after trial at the 30 October 1972 Session of Superior Court held in CUMBERLAND County.

Defendant was convicted on two counts of felonious possession of controlled substances. The counts were consolidated for judgment and a prison sentence of from four to five years was imposed. At trial, defendant was represented by private counsel. After judgment and upon his affidavit of indigency, Judge Clark appointed the assistant public defender to represent defendant.

Attorney General Robert Morgan by R. Bruce White, Jr., Deputy Attorney General, and Alfred N. Salley, Assistant Attorney General, for the State.

Neill H. Fleishman, Assistant Public Defender, for defendant appellant.

VAUGHN, Judge.

We have considered all of the assignments of error brought forward by the public defender. We hold that defendant had a fair trial which was free of prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN RICHARD NEWSOM

No. 7318SC256

(Filed 23 May 1973)

Appeal by defendant from *Crissman, Judge,* 23 October 1972 Session of Superior Court held in GUILFORD County.

Defendant was convicted of armed robbery. Judgment imposing a prison sentence of from twenty to twenty-five years was entered.

Attorney General Robert Morgan by R. Bruce White, Jr., Deputy Attorney General, and Jones P. Byrd, Associate Attorney General, for the State.

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

VAUGHN, Judge.

The public defender ably represented defendant at trial and on appeal. We have considered each of the numerous assignments of error that were brought forward. In the trial, however, we find no prejudicial error.

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. RANDOLPH L. BRIGGS

No. 7328SC367

(Filed 23 May 1973)

APPEAL by defendant from *Thornburg, Judge,* 16 October 1972 Session of Superior Court held in BUNCOMBE County.

Defendant was convicted on two charges of uttering forged checks. Judgment imposing a prison sentence of not less than eight nor more than ten years was entered.

Attorney General Robert Morgan by William W. Melvin and William B. Ray, Assistant Attorneys General, for the State.

Bruce A. Elmore and George W. Moore by George W. Moore for defendant appellant.

VAUGHN, Judge.

This indigent defendant was ably represented at trial and on this appeal by his counsel. We have considered all of the exceptions brought forward. We hold that defendant's trial was free of prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

ROBERT C. LIVENGOOD, PLAINTIFF v. PIEDMONT AND NORTHERN RAILWAY COMPANY, DEFENDANT, AND THIRD-PARTY PLAINTIFF v. TRANSCONTINENTAL GAS PIPE LINE CORPORATION, THIRD-PARTY DEFENDANT

No. 7326SC47

(Filed 13 June 1973)

Carriers § 8— injury to person unloading freight — alleged defective hand brakes — inspection — insufficiency of evidence of negligence

In this action against a railroad to recover for injuries received by plaintiff, who was unloading pipe from freight cars for the consignee, when a car plaintiff was attempting to position for unloading by controlling its movement down an incline with the hand brakes collided with an empty car on the track, the evidence was insufficient to support findings that the brakes were insufficient to control and stop the car under the existing conditions and that defendant failed to make a reasonable inspection of the brakes where the evidence showed that as the car picked up speed plaintiff and another kept tightening down on the brakes until "they wouldn't tighten down anymore," that after the loaded car became part of defendant's train the hand braking system was twice visually inspected for defects before the accident and that the hand brake was working properly after the accident.

APPEAL by defendant, Piedmont and Northern Railway Company, from *McLean, Judge,* 18 June 1972 Session of Superior Court, MECKLENBURG County.

Plaintiff, an employee of Parkhill Truck Company (hereinafter called Parkhill), was injured on 9 July 1966, while engaged in the operation of unloading freight cars in the Town of Ranlo, Gaston County. Parkhill had a contract with Transcontinental Gas Pipe Line Corporation (hereinafter called Transcontinental) to unload pipe consigned to Transcontinental at Ranlo and move the pipe to Transcontinental's storage site near Ranlo. Both these companies are based in Tulsa, Oklahoma. The pipe which was being unloaded was shipped from Houston, Texas. It arrived at Piedmont and Northern Railway Company's (hereinafter called Piedmont) Pinoca Yard at Charlotte via Seaboard Air Line Railroad Company on 4 July 1966. Piedmont then moved the cars over its rails to Ranlo. Plaintiff was injured in the unloading operation. He alleged that the site for unloading was selected by Piedmont and it failed to provide plaintiff a safe place to work, that the brakes on the car in which plaintiff was injured were defective, that Piedmont failed to provide a switch engine when it knew that to attempt to move the cars

by hand would or could cause injury to those working on the freight cars.

Piedmont denied the material allegations and pleaded plaintiff's contributory negligence. Subsequently Piedmont, after motion granted, served summons and third-party complaint on Transcontinental alleging alternative claims for indemnity or contribution. Transcontinental moved for judgment on the pleadings and for dismissal of the complaint for failure to state a claim. Both were denied. Transcontinental answered denying liability. On its own motion, the court entered an order peremptorily setting the matter for hearing, fixing a deadline within which discovery must be completed, and severing the issues raised by the third-party complaint and ordering a separate trial at a later time.

The matter was heard by the court without a jury, all parties having waived jury trial.

Upon completion of plaintiff's evidence, Piedmont moved for dismissal and involuntary nonsuit pursuant to Rule 41(b) and asked to be heard. The court at that point said: "First, before I hear you, now, what are your allegations of negligence?" Plaintiff's counsel replied: "Your honor, my allegations of negligence is the defective braking mechanism which the defendant knew or should have known was present." After Piedmont's counsel completed his argument, the court denied the motion. During the course of defendant's evidence the court ruled that site selection and control of the loading operations were not applicable and said "[N]ow, the question is as to whether or not the brakes on this particular car were defective at this time." Plaintiff's counsel then said: "Or brakes sufficient to hold this car loaded like it was on the grade that the engineer testified about. I think that enters into it." Court: "Well, I wouldn't think so. I think you are down to the question of whether or not these particular brakes were defective." Plaintiff's counsel insisted that in addition to alleging defective brakes he alleged "that they knew or should have known that it would not hold this car coming off a steep grade." Our study of plaintiff's complaint reveals no such allegation. The complaint does not refer to a steep grade. It does allege that the cars had been parked on an incline and that the plaintiff was directed to release the brake and permit the car to roll down the incline toward the position for unloading.

At the close of all the evidence, Piedmont renewed its motion for involuntary dismissal. The court did not rule on the motion, but continued the matter for arguments of counsel and submission of proposed findings of fact. On 1 July 1972, the court entered judgment finding actionable negligence as to Piedmont and awarding plaintiff $85,060. On the same day, the court entered an order granting Transcontinental's motion for summary judgment. Piedmont excepted and appealed from the entry of the judgment and the order.

Hedrick, McKnight, Parham, Helms, Warley and Kellam, by Philip R. Hedrick, for plaintiff appellee.

Cansler, Lockhart and Eller, P.A., by Thomas R. Eller, Jr., and Richard D. Stephens, for Piedmont and Northern Railway Company, defendant and third-party plaintiff appellant.

Kennedy, Covington, Lobdell and Hickman, by Edgar Love, III, for third-party defendant appellee Transcontinental Gas Pipe Line Corporation.

MORRIS, Judge.

Appellant brings forward and argues 53 assignments of error based on 52 exceptions. Twenty-five of the assignments of error are addressed to the question of whether the court erred in finding negligence on the part of Piedmont, proximately causing plaintiff's injuries, and entering judgment in favor of plaintiff based on those findings.

The record reveals that at the close of all the evidence, Piedmont renewed its motion for involuntary dismissal under Rule 41(b) and tendered findings of fact and conclusions of law. We are of the opinion that the motion should have been granted.

There is no question but that plaintiff sustained serious injuries, some of them permanent in nature. Negligence, however, is never presumed from the mere fact that an accident occurred. Piedmont's liability, therefore, does not arise unless plaintiff has established by competent evidence that Piedmont was negligent and that its negligence was a proximate cause of plaintiff's injuries.

Plaintiff was not an employee of the railroad, and the court properly ordered stricken the allegations with respect to Piedmont's failure to provide a safe place to work.

The evidence, briefly summarized, tended to show that plaintiff, an employee of Parkhill, had worked as a pipe liner for some 18 years, that he had some familiarity with railroad cars and had had some experience in the very type of unloading operation being performed at the time of his injury. Parkhill, under a contract with Transcontinental, unloaded pipe consigned to Transcontinental and moved it by motor carrier to Transcontinental's storage site. The pipe being unloaded originated as a shipment of eight cars on Southern Pacific at Houston, Texas. After interchange with four other railroads, it arrived at Piedmont's Pinoca Yard at Charlotte on 4 July 1966. The car was received by Piedmont as part of its train No. 89. This train No. 89 was visually inspected and no defects were observed. On 5 July 1966, the car was a part of train No. 71 and left for Gastonia and points between Charlotte and Gastonia. Ranlo, the point at which the unloading was done, is a point between Pinoca and Gastonia. The eight cars were again inspected by a different car inspector on 5 July 1966, and no defects were found. Uncontradicted evidence was that the cars were inspected with respect to safety mechanisms including hand wheel, brake shoes, brake chains, and brake platforms. When the cars arrived at Ranlo, seven were "spotted above Central Avenue" and one down below. Those above Central Avenue were on a slight grade. They were tied down, chocks put down, and the brake put on. A brakeman for Seaboard tested the car. "Everything was working perfect on it." The car was moved back to Pinoca on 9 July 1966 and placed on what is referred to as the "scale" track. This is a track on which cars are placed which are in need of repair. It remained there until 12 July 1966, when a full mechanical inspection was made, including testing the brakes. No defects were found.

Plaintiff arrived at the unloading site on 8 July 1966. At least two of the cars were "floated down" on the 8th. Plaintiff was uncertain as to whether he participated in the operation on the 8th but was certain that he had "let several of them down that morning," referring to the morning of the 9th. He testified, "And as to prior to July 9, 1966, oh, yes, I had floated cars down by means of gravity, using the hand brake before, and as to how long it had been, it hadn't been too long before then." The plaintiff testified, with respect to the grade, on direct examination as follows:

> "As to the grade from back at the extreme end of the siding down to the unloading place, well, it was steep enough

> grade that the cars would pick up right smart speed. From back in this end of it where we would have to start from the North end of it, it came down and then there is another little incline here which gives it a dip and after we come over it, then you had more downgrade which give you more speed into the unloading site."

The procedure was first to be sure that the car from which a car was being uncoupled had sufficient scotches, then break the lead car loose, bleed the air down, get on the car and release the brakes and let it start rolling down but not let it roll too fast, and start braking back as soon as the car started rolling. If one stood in the car facing the direction in which the car was to go, the braking mechanism was on the right hand side. Plaintiff testified that the car in which he was injured had the old lever type brake. Every other witness who testified with respect to the type of brake testified that it was the wheel and lever type generally referred to as the Ajax hand brake. All exhibits indicate that the brake was the Ajax brake. Plaintiff testified that he had moved cars before with this type brake on them and knew how to operate this type brake. Expert testimony on the operation of the brake was to the effect that the operator positions himself with one foot on the brake step and one foot on a rung of the ladder, holding on with the left hand to the hand hold or ladder rung and operating the lever and wheel of the brake with the right hand. Plaintiff testified that he was inside the car because there was no platform on which to stand. The man assisting him, Burchfield, was on the outside of the car on the left side. When plaintiff got up on the car, "the hand brakes, emergency brakes, were holding the car. The hand brakes on the car were working at that time and they were holding it." Plaintiff testified that it was not customary to operate the hand brakes on a railroad car from inside the car. When he got inside the car, he "let off on the brakes" so it would start rolling. He "flipped the on mechanism back in position." When he released the brake to let it move, he "released it just a little bit" and it started rolling. He didn't release it any more. Then Burchfield "flipped it back over on on position to hold the brakes" when plaintiff started tightening them down. "We started tightening down on them and it taken effect for a little bit, then they just wouldn't hold no more, just kept getting faster and we kept tightening down on them and they wouldn't tighten down any more. They went so tight and that was it." Jay Burchfield, plaintiff's co-worker, testified (by

deposition) for Piedmont and stated that plaintiff started off standing on the brake platform but got inside the car when it started rolling. The car hit another car and plaintiff was injured. Immediately after the accident, the car was moved back by winch and crane. When it started rolling, an employee of defendant "mounted the brake platform and tightened the brake just tight enough to tighten the chain." When they got the car up under the boom, he "tied a good hand brake." While the brakes were tied down Piedmont's brakeman and superintendent pulled it with a locomative without the air brakes connected. In this test, the wheels slid on the rails. This evidence was uncontradicted.

Evidence with respect to the grade, in addition to plaintiff's description, was that the average grade of the track was 2.5%—the grade falling an average of 2.5 feet for each 100 feet of track. The car in which plaintiff was riding traveled approximately 500 feet before it collided with an empty car on the track. Piedmont's superintendent testified that he would consider the grade 1.5% "looking at it in railroad language," and would characterized it as a slight grade. He further testified that a grade of 3.7% would be "steep considerable, but not out of line, I wouldn't say."

The last witness for plaintiff (by deposition) before plaintiff rested was an employee of Transcontinental whose duties were to handle all freight shipments for the company. It was his responsibilities to determine the most feasible location for shipment of pipe in North Carolina. He testified:

> "There was nothing unusual or hazardous out of the ordinary about the Ranlo site when I looked at it on April 6, 1966. It looked rather normal as a piece of railroad track. It wasn't much used, and I didn't see anything hazardous about it. It looked like as level as this table almost to me. I would say that it wouldn't really make any difference to Mr. Owens if it was level or graded as long as he got the cars put in there. If Mr. Owens on April 6, 1966, had said this site was unacceptable, I don't think I would have directed the pipe be shipped to Ranlo."

Plaintiff, in his complaint and throughout plaintiff's evidence, relied on allegations of defective brakes. During defendant's evidence, he stated that in addition he was contending that Piedmont failed to furnish a car with "brakes sufficient to hold

this car loaded like it was on the grade that the engineer testified about." Whether this variance between the complaint and proof is cured under the new rules by the application of the "litigation by consent" doctrine arising under G.S. 1A-1, Rule 15, (see 1 McIntosh, N. C. Practice 2d, 1970 Supp., § 970.80) we do not decide. Suffice it to say we do not think the evidence sufficient under either theory. In *Yandell v. Fireproofing Corp.*, 239 N.C. 1, 6, 79 S.E. 2d 223 (1953), Justice Ervin, speaking for a unanimous Court said:

> "A delivering carrier by rail, which delivers to the consignee for unloading a car received by it from a connecting carrier, owes to the employees of the consignee, who are required to unload the car, the legal duty to make a reasonable inspection of the car to ascertain whether it is reasonably safe for unloading, and to repair or give warning of any dangerous condition in the car discoverable by such an inspection."

Piedmont owed no higher duty to plaintiff here. We think that logic requires that the reasonable inspection required by *Yandell, supra,* was met when Piedmont's inspection disclosed no visible defects—patent defects. See *Butler v. Central of Georgia Ry. Co.*, 87 Ga. App. 492, 74 S.E. 2d 395 (1953). In our view Piedmont was not held to the duty of discovering by its inspection latent defects. The evidence is uncontradicted that Piedmont inspected the car when it got to Pinoca, again before it left for Ranlo, and again after the accident. The testimony of the inspectors was clearly sufficient to disclose reasonable inspections. The question of duty to inspect most generally arises when there is evidence of a defect. *Yandell v. Fireproofing Corp., supra.* Here, however, plaintiff's evidence contained not a scintilla of evidence as to what was defective about the braking system. The only evidence was the brakes "wouldn't tighten down any more." Whether the alleged defect was such a defect as should have been discovered by the inspection we cannot say, for the record before us is silent as to what the alleged defect was.

Plaintiff introduced no evidence with respect to the weight or capacity of the car loaded or unloaded. The uncontradicted evidence from defendant was that the capacity of the car was 154,000 pounds and the load limit of the car was 165,000 pounds. The pipe was 36 inches in diameter and 40 feet long. The car contained seven joints of pipe. The weight of the joints will

vary, but the load on this car weighed "a little better than 85,000 pounds." There is no evidence of what effect, if any, this load—considerably less than the maximum—had on the operation of the braking system.

The court found as a fact "[t]hat the car on which the plaintiff was injured was not equipped with brakes sufficient to control and stop it under the conditions and circumstances then and there existing." We are of the opinion that there was not sufficient evidence to justify this finding of fact nor the conclusion of law worded exactly the same.

Nor, as indicated above, do we find sufficient evidence to support the finding of fact "[t]hat the defendant failed to make a reasonable inspection and determination of the condition of the brakes of the car on which the plaintiff was injured," or the conclusion of law in the same language.

Having concluded, as we do, that plaintiff has failed to carry his burden of proof, we do not discuss the question of plaintiff's contributory negligence nor the court's granting summary judgment in favor of the third-party defendant, Transcontinental.

Reversed.

Judges CAMPBELL and BRITT concur.

W. L. SAMPLES v. MAXSON-BETTS COMPANY

No. 7326SC275

(Filed 13 June 1973)

1. **Brokers and Factors § 4— kickbacks received by employees — employer's right to employee's earnings — sufficiency of evidence**

Where the evidence tended to show that plaintiff, as a salesman for defendant, procured two contracts with a steel company for defendant for which he received a commission, but that, without defendant's knowledge, plaintiff assisted in doing part of the work on the two jobs subcontracted to the steel company for which plaintiff received payment from the steel company, which payment was included in the cost of the contract to defendant, the evidence was sufficient to present questions for the jury as to whether the earnings of plaintiff were undisclosed and gained in the course of, or in connection with, the services of the plaintiff which were owed to the defendant,

and whether those earnings were achieved as a result of the plaintiff's breach of his fiduciary relationship with the defendant; therefore, it was error for the trial court to direct a verdict for plaintiff on defendant's counterclaim for "kickbacks" received by plaintiff on sales made by him on behalf of defendant.

2. **Brokers and Factors § 6— action by employee to recover commissions — sufficiency of evidence**

In an action to recover commissions allegedly due plaintiff by virtue of his employment contract with defendant, evidence was sufficient to carry issues to the jury as to whether there was a contract between plaintiff and defendant, whether the job in question was covered by that contract and the amount of recovery due the plaintiff under the contract.

3. **Appeal and Error § 53— instruction on quantum meruit — no error**

Even if there was insufficient evidence to raise an issue as to *quantum meruit* recovery, the charge of the court as to that issue did not amount to prejudicial error, since the jury found for plaintiff on the basis of an express contract and not on the basis of *quantum meruit.*

APPEAL by defendant from *Froneberger, Emergency Judge,* 25 September 1972 Session of Superior Court held in MECKLENBURG County.

This is a civil action to recover commissions allegedly due plaintiff by virtue of his employment contract with defendant. Plaintiff alleges that he was employed by defendant as a sales engineer from July 1967 until December 1970 when he terminated his employment; that pursuant to the contract, plaintiff was to receive 45 per cent of the gross profit made by defendant as a result of the sale of materials used on construction jobs where the sales were obtained for the defendant and the installation of the materials supervised to completion by plaintiff; that plaintiff had a monthly "draw" from defendant of $1600; that the gross profit on the sale and installation of windows on the "Piedmont Courts" project which plaintiff sold and supervised to completion was $37,879; that gross profits for the sale and installation of other materials and other projects not yet completed amounted to some $7300; and that defendant had refused to account for the share of the profits due to plaintiff under the contract.

Defendant answered, denying the material allegations, and averring that no sums were due plaintiff at the time of the termination of plaintiff's employment contract. By way of counterclaim, defendant asserted that plaintiff received "kickbacks" on certain sales made by him without the knowledge or

consent of defendant, and that defendant was entitled to recover any such secret profits from plaintiff.

Plaintiff's evidence tended to show that his duties required him to call on architects and general contractors, bidding for work orders on construction projects and supervising the shipping and, if necessary, installation of the materials sold. Plaintiff worked pursuant to an oral contract by the terms of which plaintiff was to receive 45 per cent of the gross profit on "each job sold," or share 45 per cent of any loss. As an advancement against his commission, plaintiff received $1600 each month. Defendant was a "manufacturers agent," representing material manufacturers with whom defendant held contracts. Normally, the relationship of defendant on a construction job was that of subcontractor. On the "Piedmont Courts" job, plaintiff "handled the job, sold it and looked after the complete installation of it." The gross profit on that project was stipulated to have been $37,879. Of that sum, plaintiff received from the defendant $9,470 toward his share of the gross profits, but the defendant company failed and refused to pay the plaintiff the full 45 per cent of the $37,879 gross profit (which would have amounted to $17,045.55). Plaintiff testified that he and Bruce Betts and Max Maxson attempted to reach a settlement agreement concerning the amount of commission owed to plaintiff for the Piedmont Courts project and that Betts and Maxson, on behalf of the defendant, offered to pay plaintiff an additional $4,000 in full settlement of plaintiff's commission, but that thereafter plaintiff received only one check for $1,000 and that the settlement agreement was never carried out. On cross-examination, plaintiff testified that, although on the Piedmont Courts job the defendant company acted in the capacity of a general contractor, rather than in their normal capacity of subcontractor, ". . . I had an agreement with Maxson-Betts Company that I would receive 45% of the profit on any job that I handled. This was a verbal agreement. . . ." At the close of the plaintiff's evidence the defendant moved for a directed verdict: Motion denied.

During the presentation of defendant's evidence, the following stipulation was read into evidence:

"STIPULATION: It is agreed and stipulated that, while Mr. Samples was employed by Maxson-Betts Company, that he was to be paid 45% of any gross profits on any jobs, and

that on any jobs on which there was a loss his account would be debited with 45% of such losses."

Defendant introduced evidence tending to show that at the time the contract for the Piedmont Courts project was executed, the defendant and plaintiff had an understanding that the defendant would be acting as a general contractor on the Piedmont Courts job, and that there was no understanding or agreement that plaintiff would receive 45 per cent of the gross profits on that job. On cross-examination Bruce Betts testified that, "[t]he City was who we contracted with. The job went smoothly and was finished. It was not only after that that there came up with regard to a discussion of the division of the profits, and I decided that he would get 25 per cent. . . . There were discussions about what per cent he would get that came up during the time of the job. There never was any agreement about it. What happened was that I, as Secretary and Treasurer, determined what amount I would credit his account with. . . ."

At the close of the defendant's evidence, the motion for a directed verdict was renewed: Motion denied. The jury returned a verdict on issues submitted to it that the Piedmont Courts project was included in the contract between the plaintiff and defendant stipulated to at the trial, and that plaintiff was due under that contract the sum of $7,575.55. An issue submitted regarding recovery by the plaintiff on a *quantum meruit* basis, and issues submitted with respect to recovery by plaintiff of commissions on jobs other than the Piedmont Courts project were returned answered in the negative. The defendant's motion for judgment n.o.v. was denied. Judgment was rendered on the verdict that the plaintiff recover of the defendant the sum of $7,575.55. Defendant appealed to the Court of Appeals, assigning error.

Sanders, Walker and London, by Alvin A. London and Richard A. Lucey, for plaintiff appellee.

Weinstein, Sturges, Odom & Bigger, P.A., by T. LaFontine Odom, for defendant appellant.

MORRIS, Judge.

By assignment of error No. 3 defendant raises the question whether the court erred in granting the motion of the plaintiff for a directed verdict, G.S. 1A-1, Rule 50(a), as to defendant's counterclaim. In its counterclaim, the defendant alleged that

prior to 1 December 1970, the plaintiff was a full-time employee of the defendant and by the terms of his employment was to devote his full time and energies to the defendant's business; that plaintiff caused defendant additional expenses on certain "jobs" by taking secret "kickbacks"; that the "kickbacks" amounted to some $2,950, plus other indeterminate amounts, received during 1969 and 1970. The defendant prayed that it have and recover of the plaintiff the full amount of any funds so obtained.

The evidence elicited at the trial of the cause on this issue tended to show that during 1969 and 1970, the plaintiff received two payments totaling $2,940 from the B and H Steel Erecting Company which were not disclosed or reported to the defendant. As to the first payment of $940, the evidence concerning its origin was that the plaintiff earned the money for managing the installation of certain equipment at Jacksonville, North Carolina, on a weekend and that plaintiff used some of the money to pay expenses for the men and the equipment that were hired by him for the job.

The plaintiff testified that the equipment installation was performed under his direction as a part of "the Helicopter Group Training job," and that Maxson-Betts Company was a subcontractor on that job. Plaintiff testified that "the Helicopter Group Training job, I did on the weekend at my own expense, to help the erector out because he didn't have any men to send down there, and the material that was on the job had to be erected that weekend. So, I took men and equipment, went to the job and worked the entire weekend and installed the equipment for him. He in turn paid me the $940 that was in the job for erection, and I in turn paid the men and all their expenses for the weekend." The plaintiff further testified that he received a second $2,000 payment as a result of work performed by him in construction of a conveyor system for the B and H Steel Erecting Company on "the Allied Chemical job in Irmo, S. C.," on which job Maxson-Betts Company was a subcontractor. Plaintiff testified that "[w]e could not find a manufacturer who could make this particular item. So I worked with Mr. Tom Brown, of B and H Steel Company, and Mr. Larry Lupo, of the Coleman Company, and we spent many hours engineering this system and building it. Now, this money [the $2000] was in payment for my services doing this. Maxson-Betts Company paid B and H Steel Company for the erection of an overhead

crane system and the conveyor systems. They also paid B and H Steel Company for the manufacture of the conveyors and the installation of the conveyors. . . ."

The general rule in regard to secret profits garnered by employees, not disclosed to their employers, in breach of their fiduciary relationship with their employer, is that the earnings of the employee in the course of, or in connection with, his services belong to the employer, so that the employer in a proper action may recover the profits of the agent's transaction and the employee is accountable therefor. *Cotton Mills v. Manufacturing Co.*, 221 N.C. 500, 20 S.E. 2d 818 (1942); 56 C.J.S., Master and Servant, § 71; 53 Am. Jur. 2d, Master and Servant, § 101; Lee, North Carolina Law of Agency and Partnership, §§ 31, 37; Annot., 102 A.L.R. 1115; Restatement of Agency 2d, § 388.

[1] The evidence in this case viewed in the light most favorable to defendant and giving defendant the benefit of every reasonable inference therefrom, tends to show that plaintiff, as a salesman for defendant, procured two contracts for defendant for which he received a commission, but that, without defendant's knowledge, plaintiff assisted in doing part of the work on the two jobs subcontracted to the B and H Steel Company for which plaintiff received payment from the B and H Steel Company, which payment was included in the cost of the contract to defendant. Viewed in this light, plaintiff's position and interests were adverse to those of defendant, plaintiff's employer: plaintiff had an interest in contracting with the B and H Steel Erecting Company in order to recover additional compensation for services they would permit him to perform, whereas defendant's interests were in contracting for the lowest possible cost. We are of the opinion that the evidence on this issue was sufficient to present questions for the jury whether the earnings of the plaintiff were undisclosed and gained in the course of, or in connection with, the services of the plaintiff which were owed to the defendant, and whether those earnings were achieved as a result of the plaintiff's breach of his fiduciary relationship with the defendant. Therefore, it was error for the trial court to direct a verdict, dismissing the counterclaim of the defendant.

[2] By assignments of error Nos. 1 and 2, defendant raises the question whether the trial court erred in denying the motions of the defendant for a directed verdict and for judgment not-

withstanding the verdict, G.S. 1A-1, Rule 50(a) and (b). We are of the opinion that the evidence was sufficient to carry issues to the jury regarding the existence of a contract between plaintiff and defendant, whether the Piedmont Courts job was covered by that contract, and the amount of recovery by the plaintiff under the contract.

[3] By assignments of error Nos. 4 and 5 defendant raises the question whether the trial judge committed error in the charge to the jury. Assignment of error No. 4 is to the court's summation of the contentions of the parties in regard to the evidence pertinent to the second issue submitted to the jury. We are of the opinion that the question raised by assignment of error No. 4 is without merit, and that assignment of error is overruled. Assignment of error No. 5 is to the portion of the court's charge on *quantum meruit* recovery. Defendant argues that there was insufficient evidence to raise any issue as to *quantum meruit* recovery and that, therefore, the charge of the court on that issue was erroneous. However, assuming *arguendo* that there was insufficient evidence to raise an issue as to *quantum meruit* recovery, which we do not concede, even so the charge of the court as to that issue would not amount to prejudicial error, since the jury found the facts to be that there was an express contract and gave recovery to the plaintiff, not on a *quantum meruit* basis, but on the basis of the difference between the amount due to the plaintiff under the contract and the amount paid to the plaintiff at the time of trial.

The result of the foregoing is this: As to the directed verdict on defendant's counterclaim, reversed; as to the judgment in favor of the plaintiff, affirmed.

Affirmed in part and reversed in part.

Judges BRITT and VAUGHN concur.

FLOYD B. FAGGART, BY HIS GUARDIAN AD LITEM JOHNSON B. FAGGART, PLAINTIFF v. JOHN THOMAS BIGGERS AND HARRY SHOAF, DEFENDANTS AND JOHN THOMAS BIGGERS, JR., THIRD PARTY DEFENDANT

No. 7319SC465

(Filed 13 June 1973)

1. **Rules of Civil Procedure § 13— compulsory counterclaim — effect of time of filing of action**

The words "at the time the *action* was commenced" as used in Rule 13(a)(1) with respect to compulsory counterclaims refer to the action against which the pleader is required to counterclaim, and not necessarily the primary action originally commencing the lawsuit; thus, where, as here, the defendant institutes a cross claim and a third party action, the court should look to the times of filing such cross claim and third party action to determine whether, at those times, there was pending an action whose claim involved the same subject matter as that of the proposed counterclaims.

2. **Rules of Civil Procedure § 13— counterclaims permissive — denial of motion to amend answer proper**

Where, on the date defendant Shoaf filed a cross claim against defendant Biggers and a third party action against defendant Biggers, Jr., in this action, there was pending in superior court an action instituted by Biggers involving the same claims as set forth in the proposed counterclaims of Biggers and Biggers, Jr., the proposed counterclaims were permissive, not compulsory, and the trial court properly denied the motions of Biggers and Biggers, Jr., to amend their answers to the third party claim and cross claim in order to assert counterclaims.

APPEAL by defendant John Thomas Biggers and third party defendant John Thomas Biggers, Jr., from *Armstrong, Judge,* 26 February 1973 Session of Superior Court held in CABARRUS County.

This appeal is from the denial of a motion by the defendant John Thomas Biggers (Biggers) and the third party defendant John Thomas Biggers, Jr. (Biggers, Jr.) to amend their answers to defendant Shoaf's cross claim against Biggers for contribution and Shoaf's third party claim against Biggers, Jr., for contribution, in order to assert counterclaims against the defendant Shoaf. The appeal arises out of a civil action bearing File No. 70CVS775 brought by the minor plaintiff Floyd Faggart by his father as guardian ad litem to recover damages for personal injuries suffered in an automobile accident on 24 May 1969.

Pleadings of the parties and a stipulation by the attorneys for Biggers, Biggers, Jr., and Shoaf tend to show that on 24 May 1969 Biggers, Jr., was driving a Volkswagen owned by his father, Biggers, in a southerly direction on Highway 29 in Mecklenburg County. Plaintiff Floyd Faggart was a passenger in the Biggers vehicle. At the point of the accident here involved, Highway 29 is a four-lane highway, with two lanes going south and two lanes going north. On the west side of the highway, some two-tenths of a mile south of the Cabarrus County line, is a drive-in restaurant. Across from the drive-in restaurant, in the traffic divider between the two lanes headed south and the two lanes headed north, is a crossover. At about 6:50 p.m., the vehicle operated by Shoaf entered the highway from the premises of the drive-in restaurant, crossed the two southbound lanes into the crossover area, and prepared to turn in a northerly direction on Highway 29. Plaintiff alleged that Shoaf was negligent in entering the highway from a private drive without yielding the right-of-way and in driving into the path of the approaching Biggers vehicle. The two vehicles did not collide, but the Biggers vehicle, driven by Biggers, Jr., veered to the right, overturned, and went down an embankment, causing injuries to both Floyd Faggart and Biggers, Jr., and resulting in damage to the Volkswagen automobile. Plaintiff Faggart alleged that his injuries were a result of the joint and concurring negligence of Biggers, Jr., and Shoaf, and that Biggers was responsible for any injuries caused by Biggers, Jr., by virtue of the family purpose doctrine. The minor plaintiff instituted this action, No. 70CVS775, in the Superior Court for Cabarrus County on 23 November 1970 against Biggers and Shoaf. Simultaneously, the minor plaintiff's father, J. B. Faggart, filed a separate action, No. 70CVS776, in Cabarrus County, arising out of the same automobile accident, against Biggers and Shoaf, to recover damages for loss of earnings and medical expenses incurred for his son. Answers to the complaints in both cases were duly filed.

On 27 January 1971, Biggers, Jr., filed a separate action, No. 71CVS119, in Superior Court in Cabarrus County against Shoaf to recover for personal injuries arising out of the automobile accident, alleging therein that Shoaf's negligence was the sole cause of the accident. On 16 November 1971 Biggers was joined in No. 71CVS119 as an additional party plaintiff and filed a complaint against Shoaf to recover damages for medical expenses he incurred on behalf of Biggers, Jr., loss

of wages resulting from time spent while caring for his son, loss of services of his son, travel expenses, and property damage to his Volkswagen. Answers to the complaints in No. 71CVS119 were duly filed.

On 31 January 1972, in action No. 70CVS775, Shoaf filed a cross claim against Biggers for contribution in the event Shoaf should be found to be negligent, and on 7 February 1972, pursuant to an order entered on Shoaf's motion, Biggers, Jr., was joined as a third party defendant in Case No. 70CVS775. In his third party complaint against Biggers, Jr., which was served 8 February 1972, Shoaf alleged that if he should be found to have been negligent in the accident of 24 May 1969, then he was entitled to contribution from Biggers, Jr.

On 10 February 1972, Biggers filed a pleading, entitled a Reply, in response to Shoaf's cross claim, denying the material allegations of the cross claim and denying Shoaf's right to contribution. On 8 March 1972, Biggers, Jr., filed an answer to Shoaf's third party complaint, denying the material allegations thereof and denying Shoaf's right to contribution for that Shoaf's negligence was the sole proximate cause of the accident.

Thereafter, at the 6 March 1972 session of Superior Court in Cabarrus County, action No. 71CVS119 came on for trial, but ended in a mistrial. Case No. 71CVS119 was again calendared for trial at the 29 January 1973 session of Superior Court in Cabarrus County, but was continued.

On 8 February 1973 Biggers and Biggers, Jr., filed a motion in the present action, Case No. 70CVS775, to be allowed to amend their answers to set forth counterclaims against the defendant Shoaf. In this motion, the movants stated that their motion was made "under the provisions of Rules 13, 14 and 15 of the North Carolina Rules of Civil Procedure," and that "the ends of justice require that the third-party defendant John Thomas Biggers, Jr., and the defendant John Thomas Biggers, Sr., be permitted to establish their counterclaim and cross action against the defendant Harry Shoaf. . . . " The proposed counterclaims set forth claims which are substantially the same as those which were previously set forth in the complaints filed in Case No. 71CVS119, i.e., claims for recovery of damages by Biggers, Jr., for personal injuries, and recovery of damages by Biggers, Sr., for medical expenses and loss of earnings, and for property damage to the Volkswagen, loss of wages while caring for his son, and travel expenses.

The motion to amend came on for hearing at 10:00 a.m. on 26 February 1973 before Judge Armstrong. During the argument, the attorney for the movants advised Judge Armstrong that they intended voluntarily to dismiss their pending action, Case No. 71CVS119, and prior to the signing of the order denying the motion, Case No. 71CVS119 was voluntarily dismissed and Judge Armstrong was so notified.

Notwithstanding the voluntary dismissal of Case No. 71CVS119, Judge Armstrong entered an order finding the facts to be substantially as hereinabove set forth and concluding that:

> "And it appearing to the Court that the granting of the present Motion would result in a consolidation of a case in which one of the drivers is plaintiff with a case in which a passenger is plaintiff and that this would be cumbersome and undesirable from the standpoint of judicial economy and administration in the trial of these cases;
>
> "IT IS THEREFORE, IN THE COURT'S DISCRETION, ORDERED that the Motion of defendant John Thomas Biggers, Sr., and third-party defendant John Thomas Biggers, Jr., to amend Answer and set up Cross-claim and Counterclaim in Case No. 70-CVS-775 against the defendant Harry Shoaf be, and it is hereby DENIED."

The defendant Biggers and the third party defendant Biggers, Jr., appealed to the Court of Appeals, assigning error.

Hartsell, Hartsell & Mills by W. Erwin Spainhour for defendant appellant John Thomas Biggers and third party defendant appellant John Thomas Biggers, Jr.

Kluttz & Hamlin by Lewis P. Hamlin, Jr., and Richard R. Reamer for defendant appellee Harry Shoaf.

PARKER, Judge.

G.S. 1A-1, Rule 13(f), provides that:

> "(f) *Omitted counterclaim.*—When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

In their motion to amend and in their brief before this Court, appellants contend that justice requires that they be

allowed to amend their pleadings. They contend that their counterclaims appear to be compulsory, and from this argue that the denial of their motion will be severely prejudicial, and, implicitly, that the refusal by the trial judge to grant the motion amounted to an abuse of discretion, reviewable on appeal.

Under G.S. 1A-1, Rule 13(a), a counterclaim is compulsory only when (1) it is in existence at the time of serving the pleading against the opposing party, (2) it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and (3) does not require the presence of third parties of whom the court cannot acquire jurisdiction. However, a counterclaim is not compulsory, even if it meets the three tests stated above, if "at the time the action was commenced the claim was the subject of another pending action. . . . " G.S. 1A-1, Rule 13(a)(1).

[1] We are of the opinion that the term "at the time the *action* was commenced" as used in Rule 13(a)(1) refers to the action against which the pleader is required to counterclaim, and not necessarily the primary action originally commencing the lawsuit. Thus, where, as here, the defendant institutes a cross claim and a third party action, the court should look to the times of filing such cross claim and third party action to determine whether, at those times, there was pending an action whose claim involved the same subject matter as that of the proposed counterclaims.

[2] By the stipulated facts and filing dates of the pleadings appearing in the record, it appears that on 31 January 1972, the date defendant Shoaf in this Case No. 70CVS775 filed his cross claim against the appellant Biggers, and on 8 February 1972, the date defendant Shoaf commenced his third party action against appellant Biggers, Jr., there was pending in the Superior Court in Cabarrus County Case No. 71CVS119, an action involving the same claims as set forth in the proposed counterclaims of the appellants. Therefore, the proposed counterclaims were in this case permissive and not compulsory.

Further, we agree with Judge Armstrong's conclusion that the allowance of appellants' motion to amend their responsive pleadings would result in this case in a consolidation of actions which "would be cumbersome and undesirable from the standpoint of judicial economy and administration in the trial of these cases."

The appellants have failed to show any abuse of discretion in the denial of their motion to amend their responsive pleadings, and the order denying their motion is

Affirmed.

Judges BRITT and MORRIS concur.

J. E. FRANZLE, AMELIA FRANZLE, R. C. PENNINGTON, MARY PENNINGTON, M. A. LYONS, LIBBY LYONS, F. H. TRETHEWAY, JEWEL TRETHEWAY, MICHAEL P. MULLINS AND HELEN G. MULLINS v. WILLIAM W. WATERS, WATERS CONSTRUCTION COMPANY, INC., GEORGE S. GOODYEAR, GEO. GOODYEAR COMPANY AND MURRY-HILL DEVELOPMENT COMPANY

No. 7326SC121

(Filed 13 June 1973)

1. **Deeds § 20— restrictive covenant — residential use — construction of road on subdivision lot**

A restrictive covenant limiting subdivision lots to residential use precludes a construction company from building a roadway across a lot in the subdivision that would connect a street in the subdivision with a street in an adjoining subdivision.

2. **Injunctions § 2— enjoining violation of restrictive covenant — inadequate remedy — irreparable injury**

In an action to enjoin the construction of a roadway in violation of a subdivision restrictive covenant, the court's conclusion that plaintiffs' remedy at law was inadequate and that irreparable injury would be sustained by plaintiffs was supported by findings that defendant intended to construct the roadway as soon as possible and had in fact begun construction of the roadway.

APPEAL by defendants from *Grist, Judge,* 7 September 1972 Schedule "A" Civil Jury Session of MECKLENBURG County Superior Court.

Defendants appeal from summary judgment entered 22 September 1972 permanently enjoining them from constructing a roadway from Mountainbrook Subdivision No. 7 across Lot No. 59 in Mountainbrook Subdivision No. 1. The essential and undisputed facts disclosed by the pleadings, stipulations, affidavits and exhibits are as follows:

Plaintiffs are owners of lots located in Mountainbrook No. 1, a subdivision in Mecklenburg County, a plat of which is duly recorded in the office of the Register of Deeds for Mecklenburg County. In 1957 all the then owners of lots in Mountainbrook No. 1 entered into a "Joint Venture" by which they bound all the lots therein to certain restrictive covenants, and the restrictive covenants were embodied in an instrument also duly recorded in the office of the Register of Deeds for Mecklenburg County. The pertinent provisions of that instrument designated as "Exhibit B" are as follows:

> "[I]t is agreed by and between said parties that the following restrictions be and they are hereby imposed upon the above real estate. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them until January 1, 1982, at which time said covenants shall be automatically extended for successive periods of ten years unless by vote of a majority of the then owners of the lots it is agreed to change said restrictions in whole or in part.
>
> (1) *All of the above lots shall be known and designated as residential lots* and no re-subdivision thereof shall be effected resulting in residential lots having an area of less than 15,000 square feet.
>
> No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one single family dwelling not to exceed two and one-half stories in height and a private garage for not more than three cars; and other outbuildings incidental to residential use of the plot.
>
> * * *
>
> (3) No residence or dwelling shall be located on any residential plot nearer than the building line shown on recorded map. No building shall be located on any residential plot nearer than ten feet to the side lot lines. The ten feet restriction shall not be so construed as to result in a violation of the side line restriction in the event a building is located within ten feet of the side lines of the lots shown on the aforesaid map, if, by re-subdivision, new side lines fall outside the restricted area. There is reserved along all streets except Mountainbrook Road a five foot easement to the State Highway Department.

* * *

(4) No noxious or offensive trade or activity shall be carried on upon any residential plot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.

* * *

(6) No trailer, basement, tent, shack, garage, barn or outbuilding erected on any residential plot shall at any time be used as a residence, temporarily or permanently, nor shall any structure of a temporary character be used as a residence.

(7) No dwelling costing less than $12,000.00 or whose ground floor area of the main structure, exclusive of one story open porches and garages, shall be less than 1500 square feet. In the case of split levels, one and one-half stories and two stories, the area of the ground floor shall not be less than 1200 square feet heated area and the entire heated area, shall not be less than 1750 square feet.

(8) No animals or poultry of any kind shall be kept or maintained on any part of said property except house pets such as dogs and cats.

(9) No signboards of any description shall be displayed on any of said residential plots except signs 'For Rent' and 'For Sale,' which signs shall not exceed 15 inches by 20 inches." (Emphasis added.)

Defendant Geo. S. Goodyear Company is the owner of Lot No. 59 in Mountainbrook No. 1. Defendant Waters Construction Company is the owner of approximately 39.85 acres lying adjacent to Mountainbrook No. 1 and abutting Lot No. 59. This 39.85-acre tract has been subdivided and is known as Mountainbrook No. 7. The defendant Goodyear Company and defendant Waters Construction Company entered into an agreement by which Goodyear Company granted a 60-foot right-of-way to Waters Construction Company across Lot No. 59 in Mountainbrook No. 1 for the purpose of constructing a 28-foot roadway which would connect a street in Mountainbrook No. 7 with Mountainbrook Road which runs through Mountainbrook No. 1. Defendant Waters Construction Company, developer of Mountainbrook No. 7, had no connection with the development of Mountainbrook No. 1.

Defendants secured the approval of the Charlotte-Mecklenburg Planning Commission for the construction of the roadway and were engaged in the initial stages of construction when plaintiffs sought and obtained a temporary restraining order enjoining any further construction. The restraining order was subsequently continued, and the matter was finally heard upon plaintiffs' motion for summary judgment. After making findings of fact in basic accord with those set out above, the trial judge made the following conclusions of law:

"1. That the construction of a roadway across Lot No. 59 in Mountainbrook No. 1 by Defendant Waters Construction Co., Inc., pursuant to an agreement between said Defendant and Defendant Geo. S. Goodyear Company, constitutes a violation of the restrictive covenants, referred to above as Exhibit 'B.'

2. That the Plaintiffs have no adequate remedy at law, or otherwise, to prevent the harm and damage which would occur if the construction of said roadway across Lot No. 59 in Mountainbrook No. 1 is allowed to proceed.

3. That irreparable harm, damage and injury will be sustained to the plaintiffs, as a matter of law and as inferred and implied from the above and foregoing findings of fact, unless the Defendants Waters Construction Co., Inc. and Geo. S. Goodyear Company are permanently restrained and enjoined from constructing a roadway across any portion of Lot No. 59 in Mountainbrook No. 1.

4. That there exists no genuine issue as to any material fact, and that the Plaintiffs are entitled to a Judgment as a matter of law."

Judgment was then entered permanently restraining defendants from constructing a roadway over Lot No. 59 and ordering defendant, Waters Construction Company, to restore the property to its condition prior to the commencement of construction. From this judgment defendants appealed.

Palmer, Jonas and Mullins, P.A., by Michael P. Mullins, for plaintiff appellees.

Levine, Goodman and Murchison, by Sol Levine, for defendant appellants.

MORRIS, Judge.

[1] The primary question for our determination is whether the construction of the proposed roadway over Lot No. 59 is violative of the restrictive covenants governing lots in Mountainbrook Subdivision No. 1.

The general principles governing construction of restrictive covenants in this State were well summarized by Sharp, Justice, in *Long v. Branham,* 271 N.C. 264, 268, 156 S.E. 2d 235 (1967), as follows:

> "In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions. *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619. The rules of construction are fully set out in Annot., Construction and application of covenant restricting use of property to 'residential' or 'residential purposes,' 175 A.L.R. 1191, 1193 (1948), and they are succinctly stated in 20 Am. Jur., *Id.* § 187 as follows:
>
> > 'Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.
> >
> > *Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.'* " (Emphasis supplied.)

Defendants contend that the restrictive covenants cannot be interpreted as legally sufficient to prevent construction of the proposed roadway. We do not agree.

While each case involving the construction of proposed roadways over property restricted solely to residential use must be determined on its own facts, *Long v. Branham, supra,* the facts in the case *sub judice* are so strikingly similar to those in *Long* that we are of the opinion that decision there is controlling here. In *Long,* it was held that restrictive covenants limiting the lots in a subdivision to residential use only, precluded a lot owner in that subdivision from constructing a roadway across his lot that would connect the only street in that subdivision with a street in an adjoining subdivision. Examining the intent of the parties the Court in *Long* stated, at page 275:

> "It is quite obvious that its developer and those who purchased lots therein did not contemplate that Timberly Drive should ever become a thoroughfare which would carry traffic from another subdivision. Their objective was a quiet, residential area in which the noise and hazards of vehicular traffic would be kept at a minimum and in which children could play with relative safety."

Similarly, it appears that the original owners and subsequent purchasers of lots in Mountainbrook No. 1, so designated as residential lots, did not contemplate that a road 28 feet wide with a 60-foot right-of-way would carry traffic from another subdivision through Mountainbrook No. 1 thereby increasing the traffic flow on Mountainbrook Road. It is obvious from the provisions set forth in Exhibit B that a quiet residential area was planned and we feel that the trial judge was correct in concluding that the proposed roadway constituted a violation of the restrictive covenants.

[2] Defendants also attack the propriety of the remedy of injunction in this case. They contend that there were insufficient findings of fact to support the conclusions of law that plaintiffs' remedy at law was inadequate and that irreparable harm, damage and injury would be sustained. Again, we do not agree.

It is well settled in North Carolina that injunctive relief is available as a remedy to enforce restrictive covenants. *Realty Company v. Barnes,* 197 N.C. 6, 147 S.E. 617 (1929).

The trial court found as a fact, in accordance with facts stipulated by Waters, that defendant Waters Construction Company intended to construct the roadway as soon as possible. The court also found as a fact, to which there was no exception, "upon representations to the Court by counsel for the parties" that defendant Waters Construction Company had in fact begun construction of the roadway. Clearly the danger was real and immediate that the roadway would be constructed in derogation of plaintiffs' rights under the restrictive covenants.

Defendants do not except to the findings of fact, but do except to the conclusions of law. We are of the opinion that the court properly concluded there was no genuine issue as to any material fact. We are also of the opinion that the court correctly applied the law to the facts.

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAKE HORN

No. 735SC364

(Filed 13 June 1973)

1. **Constitutional Law § 18— obscenity statute — constitutionality**

G.S. 14-190.1 proscribing dissemination of obscenity in a public place is constitutional.

2. **Obscenity— dissemination of obscenity — refusal to instruct as to proctected activity — no error**

Trial court in a prosecution for disseminating obscenity in a public place properly refused to instruct the jury that if they found defendant provided notice to the public of the nature of the magazines involved in the case and if they found defendant provided reasonable protection against the exposure of the magazines to juveniles, then the jury would have to find that defendant's conduct was protected under the First and Fourteenth Amendments to the U. S. Constitution.

3. **Obscenity— obscene magazines — dissemination of obscenity — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution under G.S. 14-190.1 where such evidence tended to show that defendant operated a book store in Wilmington, that a police detective purchased three magazines in the store and that the magazines appealed to the prurient interest in sex, affronted contemporary

national standards relating to the description or representation of sexual matters and were utterly without redeeming social value.

4. **Obscenity — dissemination of obscenity — instructions proper**

Trial court's instruction in a prosecution for disseminating obscenity in a public place that the jury could convict defendant if it found that one or more of the magazines involved in the case met the tests for obscenity was proper.

5. **Criminal Law § 122— denial of jury request for instructions — no error**

Where the trial court finished its instructions in late afternoon, the jury separated for the night and deliberations began the following morning, the trial court did not err in refusing to "quickly review the law" and in refusing a juror's request for a written copy of the instructions, particularly since the court told the jurors that if, after they began their deliberations they needed further instructions, he would give them.

APPEAL by defendant from *Rouse, Judge,* 20 November 1972, Criminal Session, Superior Court, NEW HANOVER County.

Defendant was tried under a warrant the affidavit portion of which reads in pertinent part as follows:

> " . . . in the county named above and on or about the 11th day of May, 1972, the defendant named above did unlawfully, wilfully, intentionally, and knowingly while working for Glenn's Book Store, a firm doing business at 107 Market St., Wilmington, N. C., a public place, disseminate obscene literature to the public by exhibiting, offering for sale, and selling to a member of the public, D. A. Hollifield, certain magazines, entitled Seizure, Vol. II, No. 1, French Luv (Europ. Ser. 104), Swingers (NO. 3), and having a retail price of $3.50, $10.00 and $4.00 respectively. Said magazines and pictures are obscene in that their dominant theme taken as a whole appeals to the prurient interest in sex, the material is patently offensive in that it affronts contemporary national community standards relating to the description or representation of sexual matters, the material is utterly without redeeming social value, and the material as used is not protected or privileged under the Constitution of the U.S. or N.C., in that the magazines display both male and female private parts (sexual organs), nude males and nude females engaged in both bisexual and homosexual sex play, nude males and nude females shown in various positions of copulation or staged copulation, and nude males and nude females engaging in cunnilingus and fellatio.

The offense charged here was committed against the peace and dignity of the State and in violation of law N.C. G.S. 14-190.1.

D. A. HOLLIFIELD
Complainant
Det. W.P.D."

Defendant was convicted in the district court and appealed for a de novo trial in the superior court. There the jury returned a verdict of guilty as charged and from judgment entered on the verdict defendant appealed.

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

Smith, Patterson, Follin and Curtis, by Norman B. Smith, Michael K. Curtis, and J. David James, for defendant appellant.

MORRIS, Judge.

[1] Prior to plea, defendant moved to quash the warrant. His motion was grounded on the alleged unconstitutionality of G.S. 14-190.1. In his brief, defendant concedes that this Court has previously spoken to this and in *State v. Bryant* and *State v. Floyd,* 16 N.C. App. 456, 192 S.E. 2d 693 (1972), cert. denied and appeal dismissed 282 N.C. 583, 193 S.E. 2d 747 (1973), held that the statute is constitutional. Defendant, nevertheless, in order to preserve his rights, set out in his brief his arguments in support of his contention that the statute is unconstitutional. We reject these arguments and follow *State v. Bryant, supra.*

[2] Defendant also assigns as error the court's denial of his request for an instruction to the jury that if the jury found the defendant provided notice to the public of the nature of the magazines involved in the case and if they found the defendant provided reasonable protection against the exposure of the magazines to juveniles, then the jury would have to find that the defendant's conduct was protected under the First and Fourteenth Amendments to the Constitution of the United States and that it would be the duty of the jury to return a verdict of not guilty. This contention was also advanced in *State v. Bryant, supra.* It was rejected there, and we reject it here.

[3] Defendant strenuously urges that the court erred in overruling his motions for nonsuit. We disagree. The evidence for

the State tended to show that on 11 May 1973, Police Detective Hollifield and Lt. Lewis of the Wilmington Police Department went to Glenn's Book Store at 107 Market Street in Wilmington. Defendant was in the store working behind the counter. Detective Hollifield purchased from defendant several magazines. One was entitled Seizure, Volume No. 2, and cost $3.50. Another was Swingers, Volume No. 3, and cost $4.00. A third was French Luv and cost $10.00. These magazines were introduced into evidence as State's Exhibits One, Two and Three, respectively. State license was in the store back of the counter and the name J & J Development of Wilmington appeared on the State revenue signs. The store had a large plate glass front with a recessed door. All windows and doors were painted.

Evidence for the State further tended to show that the materials in State's Exhibits One, Two and Three, when taken as a whole, appeal to the prurient interest in sex; that the three magazines are patently offensive because they affront contemporary national standards relating to the description or representation of sexual matters; and that the magazines and material are utterly without redeeming social value.

Defendant's evidence tended to show that the book store not only had painted windows and doors, but had an outside sign which proclaimed: "Adult Book Store. No one under eighteen admitted. If nudity offends do not enter." Defendant's evidence further tended to show that the magazines do not appeal to the prurient interest in sex; that they are not patently offensive since they do not affront contemporary national standards relating to the description or representation of sexual matters; and that they are not without redeeming social value and have true educational value as well as entertainment value. Defendant also introduced exhibits which he contends are acceptable but which also have pictures of various obscene acts.

Judge Mallard's description of the exhibits in *State v. Bryant, supra,* is completely appropriate for the State's exhibits in the case *sub judice.* We do not quote it here. Suffice it to say that the exhibits introduced in this case have no emphasis other than the revealing of one scene after another of sexual activity. There is no real motive other than to appeal to the prurient interest in sex. In *United States v. Wild,* 422 F. 2d 34 (2d Cir. 1969), cert. denied, 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed. 2d 152 (1971), reh. denied, 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed. 2d 720 (1971), the exhibits were color slides

sent through the mail. They depicted the same sexual activities as are depicted by the exhibits in the case before us. The Court, through Chief Judge Lumbard, said that in cases such as that, the trier of facts really needed no expert advice and that "[s]imply stated, hard core pornography such as this can and does speak for itself." Id., at 36. In *Womack v. United States,* 294 F. 2d 204, 205 (D.C. Cir. 1961), cert. denied 365 U.S. 859, 81 S.Ct. 826, 5 L.Ed. 2d 822 (1961), the Court noted that "[a] fact is said to be evidence Autoptically when it is offered for direct perception by the senses of the tribunal without depending on any conscious inference from some other testimonial or circumstantial fact." The exhibits in this case, as in that case, are conclusive autoptical proof of obscenity and filth. We think another statement of that Court appropriate here: "We think that photographs can be so obscene—it is conceivably possible that they be so obscene—that the fact is incontrovertible." Id., at 206. The exhibits in the case at bar are such.

Though the evidence of defendant's knowledge of the contents of the magazines was wholly circumstantial, we hold it was sufficient. Also, the fact that some other material and publications have vivid written descriptions and pictures of various obscene acts does not save the magazines in this case.

The case was properly submitted to the jury. This assignment of error is overruled.

[4] By his assignment of error No. 2 defendant takes the position that the court committed reversible error in charging the jury that it could convict the defendant if it found that one or more of the magazines involved in this case met the tests for obscenity. Defendant urges that this was error in this case because one of the magazines, Seizure, was no more explicit in its scenes portraying lesbian activity than the magazine My-Oh-My, involved in the case of *Wiener v. California,* 404 U.S. 988, 92 S.Ct. 534, 30 L.Ed. 2d 539 (1971). This case came from the Appellate Department of the Superior Court of California, County of San Diego. The petition for certiorari was granted and the judgment reversed in a memorandum decision by the Supreme Court. The grounds for reversal are stated. Our research fails to reveal *People v. Wiener* as a case reported in the California Appellate Reports, California Supplement—Report of Cases determined—the Appellate Departments of the Superior Court of the State of California. The magazine My-Oh-My is not before us. Its similarity or dissimilarity to the magazines

before us is totally irrelevant. This contention, while novel, is certainly not convincing. The assignment of error is overruled.

[5] Finally, defendant contends that the court committed reversible error in failing to accede to a juror's request for a review of the court's instructions given the day before. It appears that the court finished his instructions to the jury in the late afternoon. The jury was allowed to leave and begin their deliberations the next morning. When the jury reassembled one juror asked if the jury could have "a written copy of the laws." The court advised the jury that they would follow the law given them by the court the day before. The same juror then asked for a written copy of the instructions. This request was refused. Another juror asked the court if he would "quickly review the law." The court advised the jury that he would not do that but if after the jurors began their deliberations, if they felt that they needed instructions, they could let the court know. The jury did not ask for further instructions. The defendant cites as authority *Burns v. Laundry,* 204 N.C. 145, 167 S.E. 573 (1933). There the court charged the jury on Thursday and then discharged them until the following Monday and subsequently until Tuesday. One of the jurors asked the sheriff if he would ask the court to read his charge again. The court did not get the message, but, at the request of defendant's counsel and in the absence of counsel for plaintiff, gave the jury additional instructions. The Supreme Court granted a new trial on two grounds: that the jury had been separated for a period of four days and needed to have their memories refreshed on the evidence as well as the law and that in the absence of plaintiff's counsel defendant had requested and obtained instructions which presumably were favorable to the defense. The factual difference in that case and the case before us are obvious. Here the court clearly told the jurors, who had only been separated overnight that if, after they began their deliberations, they needed further instructions he would give them. In this we perceive no error.

Defendant has had a fair and impartial trial, free from prejudicial error. The jury of twelve, after hearing the evidence and viewing the magazines, and under proper instructions from the court, found that the magazines met all the tests for obscenity.

No error.

Judges BRITT and VAUGHN concur.

ANNIE GENEVA ALLEN, ADMINISTRATRIX OF HAYWOOD L. ALLEN, JR., DECEASED v. CLAY BERTRAND FOREMAN, JR., AND FOREMAN'S, INC.

No. 731SC333

(Filed 13 June 1973)

Automobiles § 63— striking child who ran from behind bridge — absence of negligence

Plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendant's negligence in striking a three-year-old child where it tended to show that the child had been standing with his father on ground four or five feet lower than the roadway, that the child suddenly ran into the roadway from behind the end of a 33-foot bridge farthest from defendant's approaching vehicle, that defendant was approximately 100 feet from the child when he first saw him and defendant immediately applied his brakes, that defendant was traveling 50 to 55 mph in a 60 mph zone, and that defendant never left his appropriate lane of travel.

APPEAL by plaintiff from *Cowper, Judge,* 11 December 1972 Session of Superior Court held in CAMDEN County.

Action to recover damages for the wrongful death of plaintiff's intestate, a boy three years and five months old, who died as a result of injuries sustained when he came into contact with a 1967 model automobile driven by defendant Clay Foreman on 18 June 1969 at about 5:30 p.m.

Defendants' motion for a directed verdict, made at the close of plaintiff's evidence, was allowed.

John T. Chaffin for plaintiff appellant.

Leroy, Wells, Shaw, Hornthal & Riley by L. P. Hornthal, Jr., for defendant appellees.

VAUGHN, Judge.

The only question is the sufficiency of plaintiff's evidence to withstand defendants' motion.

The parties made the following pertinent stipulation. The accident occurred at about 5:30 p.m., during daylight hours, on 18 June 1969 at a point approximately 1.9 miles east of Belcross in Camden County, a few feet west of the west end of a low bridge on U.S. Highway #158. At the location in question, U.S. Highway #158 has an asphalt surface with two lanes of

travel which run generally in an east-west line. There are white lines painted at the north and south traveled edges of the highway and the width of the traveled portion of the highway between these lines is approximately nineteen feet. There is a painted broken center line on the highway at this locale. Highway #158 is straight and generally level for a mile in each direction from the bridge in question. There is a canal on each side of the roadway "for a considerable distance" and the surrounding countryside is generally swampy, wooded and uninhabited, with the nearest house located approximately one-half mile away. The shoulders of the road vary in width from ten to fifteen feet and slope downward from the paved portion of the highway to the edge of the canal on the south a distance of from "about four to five feet" and a distance of approximately six feet to the canal on the north. Deceased was approximately three feet tall. The bridge at the location in question is approximately thirty-three feet long and there is a paved shoulder or margin on each side of the highway measuring five feet in width between the bridge railings and the painted white line at the edge of the traveled portion of the highway. The bridge railings are approximately two feet four inches high. Abutting the eastern and western ends of each bridge railing is a sign painted with black and white diagonal stripes and measuring approximately four feet in height and twelve inches in width. The speed limit in the accident locale was 60 miles per hour on the date in question and there were no other traffic signs or signals in the area. The weather was fair and clear and the road was dry. Defendant Foreman was operating an automobile in the westbound lane of U. S. Highway # 158 traveling in a westerly direction. The automobile was owned by defendant Foreman's, Inc. and Foreman was acting as an agent for the corporation and within scope of such agency at the time in question.

In addition to these stipulations, plaintiff introduced evidence which tended, in pertinent part, to show the following. Deceased, Haywood L. Allen, Jr., accompanied his father, his uncle and his six-year-old stepbrother to a fishing area at the bridge on U. S. Highway # 158. When they first arrived, all four went down an embankment to the edge of the canal on the north side of the road and began to fish. After dividing the bait, deceased's father and deceased crossed the highway and descended the embankment on the south side of the road, leaving their two companions on the north side. The father testified

that from their new location on the south side of the highway and approximately four or five feet below the roadway, he could get a clear view of automobiles on the highway only if they were at least four or five hundred feet from his location. Father and son fished with the son catching three catfish. Deceased's father testified that as he removed the third catch from his son's hook, he heard brakes and "tires squall" and "when I looked up I saw my son running on the road away from me." Defendant's automobile was estimated to be eight feet away from the child when the father first saw it. At the time of impact, the child was approximately five feet west of the west end of the bridge and two or three feet south of the north edge of the traveled portion of the roadway. The boy's uncle testified that defendant's automobile "was going West and Haywood Allen, Jr., was crossing from South going to the North side of the road." The deposition of defendant Clay Foreman was introduced into evidence by plaintiff and it contained the only estimate of the speed of defendant's vehicle. Defendant estimated his speed as approximately 50 or 55 miles per hour when he first saw "something that darted out from behind that post along there." The physical evidence at the scene tended to corroborate this estimate and to show that defendant never left his appropriate lane of travel. Defendant stated he was approximately 100 feet from the child when he first saw him and he immediately grabbed the steering wheel and applied the brakes.

The case of *Jones v. Johnson,* 267 N.C. 656, 148 S.E. 2d 583, an action to recover for the wrongful death of plaintiff's intestate, a six-year-old boy who was struck and killed by an automobile while crossing the highway, was characterized by the North Carolina Supreme Court as "a borderline case." In reversing a judgment of nonsuit, the Court noted that the defendant motorist saw the child to her left side of the road as she approached the scene and that there was no evidence that defendant decreased her speed or blew her horn at that time. There was evidence that defendant did not apply her brakes until the child ran into the highway. Defendant's automobile then skidded 150 feet to the point of impact and continued to skid for an additional 45 feet before coming to rest in a ditch on the right side of the road. The Court appears to have relied on the settled principle of law that the presence of a child on or near the traveled portion of a highway whom a driver sees, or should see, places that driver under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant

lookout to avoid injury. A similar result was reached in *Capps v. Dillard,* 11 N.C. App. 570, 181 S.E. 2d 739, where there was sufficient evidence to permit the jury to find that a three-year-old child was standing in the street in such a position and for such a length of time as to put a reasonably careful motorist on notice of his presence, and, with such notice, the motorist has a duty to exercise reasonable care to avoid injury to that child.

It is equally settled that ". . . when a child, without warning, darts from behind another vehicle into the path of a motorist who is observing the rules of the road with respect to speed, control, and traffic lanes, and who is maintaining a proper lookout, the resulting injury is not actionable." *Brinson v. Mabry,* 251 N.C. 435, 438-439, 111 S.E. 2d 540. In that case, two children were standing on the west side of a highway at an unmarked crossing known by defendant to be a crossing place. Defendant was traveling north and two vehicles, traveling south, passed the children and obstructed defendant's view of them. As the two cars passed, one child ran into the street to pick up an object, was warned of the approaching vehicle by the other child, ran on across towards the east side of the street and was struck by defendant's vehicle. All the evidence indicated that defendant was not traveling at an excessive speed and did not depart from his lane of travel. The Court stated that under these circumstances the cause should not be submitted to the jury.

In *Rountree v. Fountain,* 203 N.C. 381, 166 S.E. 329, the evidence was to the effect that defendant backed his truck into an alley and ran over a four-year-old child. The absence of a showing of the length of time that the child was in the alley, or that the defendant could or should have seen him in time to avoid the injury, led only to conjecture as to whether the child was there long enough to be seen or whether he dashed suddenly into the path of the truck. A judgment of nonsuit was affirmed.

The present case is distinguishable from the situation presented in *Exum v. Boyles,* 272 N.C. 567, 158 S.E. 2d 845, in which it was held that defendant motorist could have used "a mere flick of the wrist" in order to avoid inflicting fatal injuries upon plaintiff's intestate. Evidence in the Exum case indicated that defendant saw, or should have seen, a clearly lighted, disabled vehicle parked on the shoulder close to the edge of the roadway while still 200 yards away, yet defendant took no precaution to avoid injury to anyone who might be in the area.

Defendant struck plaintiff's intestate who was attempting to change the left rear tire of his vehicle while it was parked so close to the edge of the pavement that deceased's body projected over a portion of the roadway. A new trial was ordered for, among other reasons, the failure of the trial judge to submit the issue of "last clear chance" to the jury. In the present case, the deceased, a child three feet tall, was standing in a place of safety with his father on ground four or five feet lower than the level of the roadway and there was a thirty-three feet long bridge with railings two feet four inches high between the original location of the child and the approaching motorist. All of the evidence is consistent in indicating that the child suddenly ran into the roadway from behind the end of the bridge farthest from the approaching vehicle.

One who acts in an emergency not of his own making is held liable only for failure to take the measures which a reasonably prudent man, faced with a like emergency, would have taken. *Sink v. Moore* and *Hall v. Moore,* 267 N.C. 344, 148 S.E. 2d 265. In that case, defendant motorist was approaching a "T" intersection, proceeding along the top of the "T," when he observed a young boy, riding a bicycle and followed by a running dog, approaching the same intersection from the motorist's left. The cyclist failed to obey a stop sign and ran through the intersection. In an effort to avoid a collision, the defendant drove to his right, off of the paved roadway, but the cyclist struck the left door of the automobile near the windshield. The defendant was held to have been acting in an emergency not created by his own conduct, there being no evidence of speed in excess of that warranted by conditions and no reason for him to believe the dog was chasing the bicycle or that the cyclist would neither stop nor turn at the intersection. "In such a situation [defendant] is not required to exercise precautions which calm, detached hindsight suggests might have been taken. He may not be held liable for failure to take those measures unless it can be said that a reasonable man faced with a like emergency would have done so." *Sink v. Moore* and *Hall v. Moore, supra,* page 352.

We hold that the evidence, when evaluated in the light most favorable to plaintiff and when plaintiff is given the benefit of every reasonable inference which may be drawn therefrom and with all contradictions, conflicts and inconsistencies resolved in plaintiff's favor, is insufficient to support a finding of action-

able negligence on the part of defendant and is insufficient to survive defendant's motion for a directed verdict.

Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES C. ROBERTS

No. 7314SC133

(Filed 13 June 1973)

1. **Constitutional Law § 30— speedy trial — motion to dismiss — failure to hold evidentiary hearing — remand for hearing**

Where the record shows a delay of 13 months between indictment and trial, the trial court erred in the dismissal of defendant's written motion to dismiss the indictment for failure to grant a speedy trial without holding an evidentiary hearing and making findings of fact as to whether the State caused the delay and, if so, whether the delay was justified, whether defendant's conduct caused the delay, and whether defendant was prejudiced by the delay; however, since such error did not infect the guilt finding process of the trial, a new trial will not be granted but the case will be remanded for an evidentiary hearing on the motion to dismiss the indictment.

2. **Witnesses § 1— competency of child — failure to hear testimony of others**

The trial court did not abuse its discretion in permitting an eight-year-old assault and kidnapping victim to testify without hearing testimony of others as to the child's competency, since an accurate determination of the child's moral and religious sensitivity can be made by the trial judge through his personal observation while the child is being questioned.

3. **Kidnapping § 1— dragging child 75 to 100 feet — asportation**

The State's evidence was sufficient for the jury in a kidnapping prosecution where it tended to show that defendant, an adult, grabbed the eight-year-old victim in a nursery playground and dragged her 75 to 100 feet to the foot of the steps of the nursery building.

APPEAL by defendant from *Bailey, Judge,* at the 18 September 1972 Session of Superior Court held in DURHAM County.

Defendant was charged in a bill of indictment with (1) assault on a minor child under the age of 12 with intent to rape, and (2) kidnapping.

The indictment was returned on 17 August 1971, at which time defendant was already in police custody. On 25 August 1972, defendant moved that his case be dismissed with prejudice for failure of the State to grant defendant a speedy trial. This case came to trial on 21 September 1972, approximately thirteen months after return of the bill of indictment. At that time, and before defendant's plea, the following discourse occurred between defendant's counsel and Judge Bailey in the absence of the jury:

"MR. LOFLIN: The first motion I would like to make, it has been filed with the court, is a motion to dismiss for lack of a speedy trial in this case.

COURT: Motion denied.

MR. LOFLIN: Without being disrespectful to the court, I would like some findings of fact.

COURT: You filed a motion, it has never been heard until right now, and you are getting a speedy trial. You are going to get it in ten minutes.

MR. LOFLIN: The motion is to dismiss for lack of a speedy trial.

COURT: I have denied it and that is the end of that."

Defendant's motion for a preliminary hearing was also denied.

The State's evidence tended to show the following: That on 18 July 1971 Kathy Sue Cates was seven years old and lived on Hyde Park Street in Durham, N. C.; that 18 July 1971 was a Sunday, and that Kathy Cates was at home with her family; that Sunday afternoon Kathy and two friends went to a nursery two doors away from her home on Hyde Park and played there on the playground equipment; that while they were playing there defendant approached them and they ran from him; that when they could no longer see defendant, they continued to play on the playground equipment; that defendant appeared again and began to chase the children; that defendant grabbed Kathy by the arm and pulled her towards the building in which the nursery was operated; that he pulled her 75 to 100 feet to the foot of the steps that go into the nursery building; that during this time she was struggling, resisting, and screaming "let go," and he said "Shut up and come on"; that Walter Cates,

Kathy's father, had been in his backyard cutting watermelon; that he heard children screaming and immediately ran down toward the nursery; that the father was met by the other two children who were screaming and hysterical; that he could not make sense out of what they said and did not see his daughter; that he went to the nursery and saw defendant pulling his daughter toward the nursery door; that the father still had the butcher knife with which he was cutting watermelon in his hand; that he rushed up and grabbed defendant, put the knife against his throat, and said "What are you doing to my daughter?"; that Kathy got loose from defendant; that the locks on the door near the point where Kathy and defendant were stopped had been forcibly removed and that the door to the nursery building could be opened simply by turning the knob.

Defendant offered no evidence.

Defendant's motion for judgment of nonsuit on the charge of assault with intent to commit rape was allowed. A verdict of guilty on the charge of kidnapping and assault on a female under 12 years of age was returned by the jury. Defendant was sentenced to 60 years for kidnapping and 6 months for assault. From the verdict and judgment, defendant appealed.

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

Loflin, Anderson, Loflin & Goldsmith, by Thomas F. Loflin, III, for defendant.

BROCK, Judge.

Defendant's motion for a preliminary hearing was properly denied.

[1] Defendant excepts to the court's denial of his motion to dismiss the indictment for lack of a speedy trial. Before entering a plea on the bill of indictment, defendant moved to dismiss the indictment on the grounds that defendant was not afforded a speedy trial in derogation of his Sixth Amendment rights under the United States Constitution. Prior to the case being placed on the calendar, defendant had made this motion in written form and filed it with the court. The court denied the motion without affording defendant an opportunity to make an evidentiary showing. Defendant's counsel then specifically requested

the court to make findings of fact. The court refused to make any findings of fact in regard to the motion.

Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in light of the circumstances of each case. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779. A claim that a defendant has been denied his right to a speedy trial is subject to a balancing test, in which the conduct of both the prosecutor and defendant are weighed. Some of the factors which should be assessed in determining whether a particular defendant has been deprived of his right to a speedy trial are (1) length of the delay, (2) the reason for the delay, (3) the defendant's assertion or nonassertion of his right, and (4) prejudice to the defendant. *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).

From the record before us, it is impossible to tell whether the State caused the delay of a year in getting defendant's case to trial; and, if so, whether such delay was justified. It is likewise impossible to tell whether the delay was caused by defendant's conduct. Also, it is impossible to determine whether prejudice has resulted to defendant from the delay.

We do not propose that the trial judge must hold an evidentiary hearing each time a defendant contends that he has been denied a speedy trial. Nor are we suggesting that defendant was denied a speedy trial in this case. However, where the record shows a substantial delay and does not show the cause therefor, the trial judge should hold a sufficient hearing to allow him to determine the facts and balance the equities in accordance with *Barker v. Wingo, supra.*

[2] Defendant assigns as error that the trial judge permitted Kathy Sue Cates, the eight-year-old victim of the alleged assault and kidnapping, to testify. Defendant argues that the court should have heard testimony of others with relation to the child's competency. There are, no doubt, situations in which the testimony of parents, teachers, and others might prove helpful to the trial judge in making his determination. However, the competency of a child to testify as a witness in a case is a matter resting in the sound discretion of the trial judge. *State v. Bowden,* 272 N.C. 481, 158 S.E. 2d 493. An accurate determination of the moral and religious sensitivity of the child can be made by the trial judge through his personal observation while the child is being questioned. Absent a showing of abuse of dis-

cretion, the ruling of the trial judge will not ordinarily be disturbed. This assignment of error is overruled.

[3] Defendant assigns as error that the trial judge denied his motion for nonsuit on the kidnapping charge. Defendant relies heavily upon *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897. In *Dix* the "asportation" of the jailer from one section of the jail to another was only incidental to defendant's purpose of aiding the escape of prisoners. As pointed out in the opinion in *Dix:* "It had no other significance and created no risks to Crowder which were not inherent in the escape defendant engineered."

In the case before us now the child was being dragged by an adult from the playground to a building. The inference is strong that if defendant had not been stopped by the child's father, defendant would have dragged the child into the building and out of the sight and sound of her friends and family. The mere fact that defendant was frustrated by an alert and outraged father does not change the nature of the offense he was committing. It surely cannot reasonably be said that the dragging of the child from the playground was an incident of some lesser crime. The decision in *Dix* must be read in the light of the facts of that case.

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

We find the trial to be free from prejudicial error.

[1] Although we feel that the trial judge committed error in failing to hear evidence and find facts upon defendant's motion to dismiss the indictment for failure to grant a speedy trial, this error did not infect the guilt finding process of the trial. Therefore, we do not order a new trial but remand the case to the Superior Court with directions as follows:

The presiding judge at the 9 July 1973 Session of Superior Court to be held in Durham County shall cause the defendant and his counsel to be brought before him at that Session or as soon thereafter as possible, and shall permit defendant and the State to offer evidence upon the question of the delay between defendant's indictment and trial. If the presiding judge determines that defendant's constitutional right to a speedy trial has been denied, he shall find the facts and enter an order vacating judgment, setting aside the verdict, and dismissing the indictment. If the presiding judge determines that defendant's con-

stitutional right to a speedy trial has not been denied, he shall find the facts and enter an order denying the defendant's motion to dismiss, and order commitment to issue in accordance with the judgment entered at the 18 September 1972 Session of Superior Court held in Durham County. *See State v. Tart,* 199 N. C. 699, 155 S.E. 609.

No error in the trial.

Remanded with instructions.

Judges MORRIS and PARKER concur.

CLYDE C. RANDOLPH, JR. v. ELVA J. SCHUYLER

No. 7321DC422

(Filed 13 June 1973)

1. **Evidence §§ 29, 34— contingent fee contract — assignment of portion of proceeds — admissibility**

In an action to recover upon a contingent fee contract for services rendered by plaintiff attorney in connection with a claim of defendant and her hubsand for insurance benefits, written assignment by defendant and her husband to plaintiff of one-third of the proceeds of a policy on the life of the husband in consideration of the services plaintiff had rendered as their attorney was competent to show performance by plaintiff and as an admission of defendant.

2. **Attorney and Client § 7— action on contingent fee contract — summary judgment for plaintiff**

Summary judgment was properly entered in favor of plaintiff attorney in an action to recover upon a contingent fee contract for services rendered in connection with a claim of defendant and her husband for insurance benefits where defendant admitted execution of the contingent fee contract and of an assignment of one-third of the proceeds from insurance coverage on the husband's life, defendant admitted the receipt of $13,000 as payment due under the insurance policy and that neither she nor her husband paid plaintiff anything for his services, and there was no dispute that plaintiff's efforts resulted in the reinstatement of the insurance policy from which defendant eventually secured her recovery.

APPEAL by defendant from *Clifford, Judge,* 19 February 1973 Session of District Court held in FORSYTH County.

By complaint filed 19 July 1972, plaintiff seeks to recover from defendant upon a contingent fee contract the sum of $4,333.33 for services rendered by plaintiff as an attorney at law in connection with a claim of defendant and defendant's husband for insurance benefits. Defendant in her answer does not deny the execution of the contract but differs with plaintiff in her interpretation of its legal effect with respect to performance by plaintiff of his obligations thereunder.

The facts disclosed by answers of the plaintiff to interrogatories and the deposition, affidavit, and admissions of the defendant are substantially as follows:

On 3 September 1959 defendant (Mrs. Elva Schuyler) and her husband (R. Lloyd Schuyler) came to plaintiff's law office to confer with him about the possible collection of insurance benefits from a group policy carried by Reynolds Tobacco Company for its employees. Defendant's husband had previously been employed by Reynolds but his employment had been discontinued and his insurance thereby terminated on 17 April 1959. Plaintiff agreed to represent defendant and her husband in pursuance of their claim. The fee for services rendered was to be one-third of any recovery obtained. This agreement was reduced to writing and signed by all parties on 11 September 1959.

The contract provides, in pertinent part:

> "That parties of the first part [Schuylers], being advised that they have a cause of action against the EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES by reason of a claim under a policy issued by The Equitable Life Assurance Society of the United States on account of total and permanent disability, do hereby retain and employ party of the second part [Randolph] as their attorney at law and as such on their behalf;
>
> (a) To make all reasonable efforts to obtain compromise settlement of said matter in an amount satisfactory to parties of the first part.
>
> * * *
>
> And it is agreed that in full compensation for his services, said party of the second part shall receive a contingent fee in the event of a recovery based upon the amount of recovery according to the following schedule:

(a) Upon compromise settlement without litigation, or upon settlement after institution of court action or upon final judgment in the Superior Court from which there is no appeal, 33⅓%;

* * *

. . . In the event that there is no recovery under the claim above referred to, it is expressly understood and agreed that party of the second part shall be entitled to no fee whatsoever."

After communicating with Equitable Life Assurance Society, plaintiff was informed that Mr. Schuyler was not entitled to periodic disability benefits under the group policy. Plaintiff then suggested that he attempt to establish that Mr. Schuyler's permanent disability existed prior to his separation from his employment. The establishment of this fact would permit reinstatement of his life insurance benefits under the policy. Plaintiff assembled and submitted medical proof of disability to Equitable Life, and eventually on 28 March 1960 obtained the reinstatement of life insurance coverage in the amount of $13,000.00 on Mr. Schuyler's life. As long as he remained permanently disabled, the insurance coverage would continue without the payment of any premiums.

Following the reinstatement of the coverage on the life of Mr. Schuyler, defendant and her husband executed a second writing dated 22 April 1960 assigning to plaintiff one-third of the net proceeds of the life insurance policy in consideration of the professional services already rendered by the plaintiff.

This instrument dated 22 April 1960 recites in part:

"AND WHEREAS the parties have heretofore entered into a contract on the 11th day of September, 1959, with respect to the professional services of party of the second part on behalf of parties of the first part;

AND WHEREAS party of the second part has rendered unto parties of the first part valuable professional services as their attorney at law with respect to a claim for life insurance benefits against the Equitable Life Assurance Society of the United States by reason of a certificate of group insurance issued to R. Lloyd Schuyler October 3, 1958, Certificate # 3255N-08931;

* * *

NOW, THEREFORE, for and in consideration of professional services rendered to parties of the first part by party of the second part . . .

1. Parties of the first part do hereby convey and assign to party of the second part . . . one-third (1/3) of the net proceeds of certificate of group insurance issued to R. Lloyd Schuyler October 3, 1958, Certificate # 3255N-08931. . . ."

After the death of Mr. Schuyler on 5 March 1972, a check for $13,000.00 representing the proceeds of the insurance policy was sent to the plaintiff and forwarded by him to the defendant with a copy of the 22 April 1960 instrument and an invoice for $4,333.33 which defendant has refused to pay.

On 1 March 1973 the court found that there was no genuine issue of material fact, granted the motion of plaintiff for summary judgment, and allowed recovery from the defendant of the amount claimed under the contingent fee contract.

Womble, Carlyle, Sandridge & Rice, by Charles F. Vance, Jr., and W. Andrew Copenhaver, for plaintiff appellee.

Allen A. Bailey, by Thomas D. Windsor, for defendant appellant.

BALEY, Judge.

[1] Defendant takes the position that the instrument dated 22 April 1960, which assigned to plaintiff one-third of the proceeds of the insurance policy on the life of her husband in consideration of the services plaintiff had rendered as their attorney, should be excluded from evidence because it was not within the issues raised by the pleadings. We cannot agree.

Under the notice theory of pleading as set out in Rule 8(a), Rules of Civil Procedure, a statement of claim is adequate if it gives sufficient notice of the claim " '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. . . .' " *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E. 2d 161, 165.

In our view the complaint comes within these guidelines and the issues raised are sufficient to permit the introduction of evidence concerning the 22 April 1960 assignment.

The complaint was based upon a contingent fee contract executed on 11 September 1959 and asserted that plaintiff had fulfilled his obligations under such contract. Performance by the plaintiff or lack of it is an issue raised by the pleadings. The 22 April 1960 assignment was evidence of compliance with the September contract and is competent upon this issue. In fact, the April assignment refers to and approves the services rendered by the plaintiff and confirms the understanding of the parties concerning the attorney fee. It would be difficult to show more complete satisfaction on the part of defendant and her husband with the arrangement for the attorney fee than their written assignment of the proportionate part of the proceeds of the life insurance coverage to which they agreed at the time that plaintiff was entitled. If for no other reason, the 22 April 1960 document should be admitted in evidence as an admission of defendants. 2 Stansbury, N. C. Evidence, § 167, § 178 (Brandis Revision 1973).

[2] Defendant also assigns as error the entry of summary judgment awarding recovery to the plaintiff.

Rule 56(c) of the Rules of Civil Procedure provides a standard for summary judgment:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

In *McNair v. Boyette,* 282 N.C. 230, 234-35, 192 S.E. 2d 457, 460, this purpose for summary judgment is set out:

> "The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. Two types of cases are involved: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial."

In this case the defendant admits the execution of the 11 September 1959 contingent fee contract and the execution of the

22 April 1960 assignment of one-third of the proceeds from the insurance recovery. She admits the receipt of $13,000.00 as payment due under the insurance contract and that neither she nor her husband had paid the plaintiff anything for his services in this matter. There is no dispute about the fact that the efforts of the plaintiff resulted in the reinstatement of the insurance policy from which defendant eventually secured her recovery. Defendant contends in her affidavit that the 11 September 1959 contract should be interpreted to apply only to a claim for periodic income payments arising from her husband's disability and that the plaintiff did not secure any such payments and is not entitled to his fee. This contention is refuted by the express provisions of the contract and by the later assignment of one-third interest in the life insurance proceeds.

We hold that summary judgment was properly granted, and judgment is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. LYNN EARL MARTIN, ALIAS LYNN JOSEPH PRIMMER, AND ROBERT WILLIAM PADGETT, ALIAS MARTY FORD

No. 7326SC222

(Filed 13 June 1973)

1. **Constitutional Law § 36; Criminal Law §§ 138, 140— consecutive sentences — different sentences for like offenses — no cruel and unusual punishment**

Where one defendant pleaded guilty to eight and another defendant to four two-count indictments charging felonious breaking and entering and felonious larceny, active sentences of varying length to run consecutively did not constitute cruel and unusual punishment, though consecutive sentences will make it more difficult for defendants to obtain parole and though the various sentences were given for like offenses.

2. **Criminal Law § 23— guilty plea — evidence of plea bargaining not considered — error**

Where the record raised an issue as to the solicitor's promise to continue prayer for judgment in defendant's case, the trial court erred in failing to determine whether a plea bargain was made and whether the solicitor reneged on his promise.

Judge VAUGHN dissents as to defendant Martin.

State v. Martin

ON *certiorari* to review judgments of *Hasty, Judge,* entered at the 20 March 1972 Schedule "D" Criminal Session of MECKLENBURG County Superior Court.

Defendant Martin, alias Primmer, was charged in eight two-count indictments with felonious breaking or entering and felonious larceny. Defendant Padgett, alias Ford, was charged in four two-count indictments also with felonious breaking or entering and felonious larceny. Both defendants pleaded guilty to each charge.

Before their guilty pleas were accepted, both defendants were examined by the trial judge. Defendant Martin stated that he understood that he could be imprisoned as much as 160 years as a result of his plea of guilty and defendant Padgett stated that he understood that his guilty plea could result in imprisonment for as much as 80 years.

Upon acceptance of the pleas and reception of the evidence, the two counts in each indictment were consolidated for judgment. Defendant Martin was given active sentences of four to ten years in 71CR77951, three to ten years in 71CR77952, eight to ten years in 71CR77953, four to ten years in 71CR77954, three to five years in 71CR77955, two to five years in 71CR77956, two to five years in 72CR2241, and two to five years in 72CR2242. Defendant Padgett was given active sentences of three to five years in 71CR77708, one to five years in 71CR77709, three to five years in 71CR77710, and four to ten years in 71CR77711. All sentences as to both defendants were to run consecutively.

From judgments entered both defendants appealed. Their appeals were not perfected in accordance with the rules of this Court and their petition for writ of certiorari was allowed by this Court on 20 December 1972.

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

Gene H. Kendall and Francis O. Clarkson, Jr., for defendant appellants.

MORRIS, Judge.

[1] In their first assignment of error defendants contend that the trial court sentenced them in such a fashion as to constitute "cruel and unusual punishment," prohibited by the Constitu-

tions of North Carolina and the United States. They argue that because the sentences run consecutively, it will be more difficult for defendants to obtain parole. They further contend that because these sentences vary from one to five years to eight to ten years for like offenses, the punishment was not meted out in consideration of the crime committed. We find defendants' argument without merit.

The punishment imposed upon defendants does not exceed the limits fixed by statute, and the court's authority to provide that such sentences shall run consecutively is well established. *State v. Dawson,* 268 N.C. 603, 151 S.E. 2d 203 (1966). Such punishment is not cruel and unusual in a constitutional sense. *State v. Cleaves,* 4 N.C. App. 506, 166 S.E. 2d 861 (1969).

[2] Also, defendants contend that the trial judge erred in failing to recognize and enforce the solicitor's "plea bargain" to continue prayer for judgment in their cases. Defendants' pleas of guilty were accepted on 21 March 1972 and at proceedings held 24 March 1972 defense counsel addressed the following remarks to the court on the issue of punishment:

> "Mr. Kendall (to the Court)—Well about the Solicitor's office, I do want to say this. Two months ago Tom Moore told me that he would continue Prayer for Judgment in Mr. Primmer's cases. Tuesday morning when this case was called, Tom Moore in his office down the hall on this floor of this building told me, 'All right, go on down there and continue Judgment in these cases.' Now he did that somewhat reluctantly, but that is what he said. He said, 'All right, go on down there and continue Judgment on those cases.'
>
> COURT: Well, he has changed that.
>
> MR. KENDALL: That's right, he has, your Honor. Right now Tom Moore doesn't want to do this. I agree with it, but I'm saying to you Tom Moore, as recently as Tuesday, said 'yes,' and Tom Moore is doing what is proper."

"The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello v. New York,* 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed. 2d 427, 432 (1971). In *Santobello,* the United States Supreme Court held that when a plea of guilty rests in

any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello involved a defendant who was indicted by the State of New York on two felony counts relating to illegal gambling. Defendant first pled not guilty as to both charges, but after negotiations with the assistant district attorney in charge of the case, he changed his plea to guilty to a lesser-included offense that would carry a maximum prison sentence of one year. The prosecution agreed to make no recommendation as to the sentence. Defendant represented to the court that his plea was voluntary. The plea was accepted, and a date for sentencing was set.

After a series of delays, defendant finally appeared for sentencing before a different trial judge. At this appearance another prosecutor replaced the former prosecutor who had negotiated the plea, and the new prosecutor recommended the maximum one-year sentence based on defendant's criminal record and alleged links with organized crime.

Defendant Santobello's counsel objected on the grounds that the State had previously promised defendant before his guilty plea was entered that no sentence recommendation would be made. The presiding trial judge overruled defense counsel's objection and stated that he was not at all influenced by what the prosecutor said and that the maximum one-year sentence was justified by evidence from other sources. The Supreme Court of New York, Appellate Division, First Department, affirmed the conviction, 35 App. Div. 2d 1084, 316 N.Y.S. 2d 194 (1970), and the defendant was denied leave to appeal to the New York Court of Appeals. On certiorari to the United States Supreme Court, the judgment was vacated and the case remanded, leaving defendant's ultimate relief in the discretion of the state court to decide whether the circumstances required that there be specific performance of the agreement on the plea, in which case defendant should be resentenced by a different judge or whether the circumstances required granting the relief sought by defendant, i.e., the chance to withdraw his guilty plea.

It was stated in *State v. Jones,* 278 N.C. 259, 264, 179 S.E. 2d 433 (1971), that "[w]here the evidence supports the findings that defendant entered a plea of guilty voluntarily and with full knowledge of his rights, the acceptance of the plea will not

be disturbed. (Citations omitted.)" The signed transcript of pleas of both defendants were adequately set out in the record in compliance with *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969), and it was adjudicated as to each defendant that his respective plea was voluntarily made without undue influence, duress or without promise of leniency. Nevertheless, we are of the opinion that the statements by defense counsel and the trial court on 24 March 1972, set out above, raise the question as to whether defendant Martin (alias Primmer) was promised some sort of leniency by the State.

In *Santobello* it was conceded that the promise to abstain from a sentence recommendation was made by the prosecutor, while in the case *sub judice* the only indication of the State's acknowledgment of the existence of such a bargain is the court's statement, "Well, he has changed that." The State argues that from the record there is no way of knowing what the bargain was, i.e., whether the solicitor had promised to continue prayer for judgment indefinitely nor is there any evidence that defense counsel thought the solicitor had authority to continue prayer for judgment which the State contends he does not have.

In light of *Santobello,* we must remand as to defendant Martin (alias Primmer) for a determination as to whether he was promised anything by the solicitor and whether the solicitor reneged on that promise. As to defendant Padgett, there is nothing in the remarks set out above or in the rest of the record from which we can surmise that the alleged "plea bargain" encompassed his cases as well.

We, therefore, remand the case of Martin (alias Primmer) to the Superior Court. The presiding judge at the 9 July 1973 Session of Superior Court to be held in Mecklenburg County shall cause defendant and his counsel to be brought before him at that session, or as soon thereafter as possible, and shall hear evidence from the defendant and the State upon the question of whether a plea bargain was made. If the trial court finds from the evidence presented that there was a plea bargain made, then and in that event, the court shall strike the plea and vacate the judgment of 24 March 1972, and defendant shall be entitled to replead. If, however, the trial court shall find that there was no plea bargain, the court shall proceed to issue commitment in accordance with the judgment of 24 March 1972.

Judgment vacated and remanded as to defendant Martin.

No error as to defendant Padgett.

Judge BRITT concurs.

Judge VAUGHN concurs in the opinion as to defendant Padgett. As to defendant Martin, Judge Vaughn dissents and would affirm the judgment of 24 March 1972.

OSCAR JOE PEARSON AND WIFE, NORMA JEAN PEARSON v. ROBERT A. CHAMBERS AND WIFE, BETTY LANEY CHAMBERS; AND HARRY L. CHAMBERS AND WIFE, PHYLLIS COOK CHAMBERS

No. 7319SC266

(Filed 13 June 1973)

Deeds § 12; Easements § 2— conveyance of right-of-way — easement or fee

Where, immediately after the metes and bounds description of 37 acres conveyed by a deed, the deed stated, "Second Tract consisting of a right-of-way to the above tract, said right-of-way more specifically described as follows," and then followed a metes and bounds description of a strip of land 40 feet wide and 1358 feet long which runs across an adjoining tract thereafter conveyed by the grantor, it was *held* that the grantees acquired merely an easement over the 40-foot-wide strip and not fee title thereto.

APPEAL by defendants from *McConnell, Judge,* 4 December 1972 Session of Superior Court held in CABARRUS County.

Civil action involving interpretation of a deed, submitted on agreed statement of facts. Plaintiffs and defendants are owners of adjoining tracts of land which were conveyed to them by a common grantor. By deed dated and recorded 13 August 1969 in Deed Book 397, page 252, W. R. Mullis, widower, being then the owner of all of the lands involved in this controversy, conveyed to defendants, their heirs and assigns, certain real property in Cabarrus County described by metes and bounds and containing thirty-seven acres more or less. Immediately after the description of this property, the deed contained the following:

> "Second Tract consisting of a right-of-way to the above tract, said right-of-way more specifically described as follows:"

There then follows a metes and bounds description of a strip of land forty-feet wide and thirteen hundred fifty-eight feet long, which extends from along and adjoining the southern boundary of the thirty-seven-acre tract in a western direction to the west side of Hileman Mill Road.

By deed dated and recorded 8 January 1970 in Deed Book 400, page 645, W. R. Mullis conveyed to plaintiffs and their heirs a tract described by metes and bounds containing thirty acres, which tract adjoins the southern boundary of the thirty-seven-acre tract previously conveyed to defendants and includes within its boundary property over which Hileman Mill Road passes and the forty-foot-wide strip of land which extends from the southern boundary of defendants' property to Hileman Mill Road which was described in the earlier deed to defendants. This deed to plaintiffs is expressed to be "subject to the right-of-way of Hileman Mill Road, and also subject to a 30-foot (sic) right-of-way along the northern line of the above described property to provide access to the property lying in the rear."

Defendants erected a gate at Hileman Mill Road across the forty-foot-wide strip of land. Plaintiffs, contending they own the underlying fee title to said strip of land subject to defendants' right-of-way over the same, brought this action to require defendants to remove the gate and to enjoin defendants from interfering with the plaintiffs in the use of the forty-foot-wide strip.

Upon the agreed facts, the court entered judgment that plaintiffs are the owners in fee of the property described in Deed Book 400, page 645, and that defendants have a forty-foot-wide right-of-way over the same as described in Deed Book 397, page 252. The court ordered defendants to remove the gate which they had erected and to refrain from blocking the forty-foot-wide strip, or in the alternative to provide plaintiffs with a key to the gate. From this judgment, defendants appeal.

Irvin & Irvin by Howard S. Irvin for plaintiff appellees.

Johnson & Jenkins by Cecil R. Jenkins, Jr., for defendant appellants.

PARKER, Judge.

The question presented is whether defendants acquired fee title to the forty-foot-wide strip or acquired merely an easement over the same. Defendants contend they acquired fee title, that

the use of the term "right-of-way" as employed in the deed to them did not have the effect of limiting their estate to an easement but was merely descriptive of the use or purpose to which the forty-foot-wide strip of land was to be put, and that their deed having been first executed and recorded, the plaintiffs acquired no estate or interest whatsoever in the forty-foot-wide strip since the common grantor of the parties had already conveyed fee title in the same to the defendants. In support of their position defendants cite and rely upon the decision in *McCotter v. Barnes*, 247 N.C. 480, 101 S.E. 2d 330. That case, however, is distinguishable. The grantee in the deed involved in that case was a corporation engaged in construction of a railroad. The deed conveyed to the grantee,

> "its successors and assigns, a tract or parcel of land 100 feet in width to be cut out of the following described tract of land situated, lying and being in the county and State aforesaid and in No. 3 township adjoining the lands of C. A. Flowers, S. H. Muse and others, A right of way 100 feet wide (To be located by said party of the second part and when so located to become a part of this description) across the homestead tract. The said location to be through the southwest corner of said tract of land. There shall be no building other than for railroad use. The said tract hereby conveyed is to be 100 feet in width and to extend through the entire tract above described."

In discussing the language employed in that deed, the court pointed out that the term "right-of-way" has a two-fold meaning: "it may be used to designate an easement, and, apart from that, it may be used as descriptive of the use or purpose to which a strip of land is put." In holding that the grantee railroad obtained title in fee simple to the 100-foot-wide strip involved in that case, the Court laid stress on the fact that the grantee was a railroad company, pointing out that "[i]t is a matter of common knowledge that the strip of land over which railroad tracks run is often referred to as the 'right of way,' with the term being employed as merely descriptive of the purpose for which the property is used, without reference to the quality of the estate or interest the railroad company may have in the strip of land." In the present case no railroad or railroad "right-of-way" is involved. More importantly, it should be noted that the deed involved in *McCotter v. Barnes* described the property conveyed, in words appearing immediately after the granting clause, as "a tract or parcel of land 100 feet in

width," and later in the description referred to "[t]he said tract hereby conveyed." Applying the rule of construction that the granting clause will prevail in case of repugnancy, the Court held that the term "right-of-way" as used in the description in the deed involved in that case must yield to the granting clause which conveyed in fee. In the deed involved in the present case we find no such repugnancy.

In the deed with which we are here concerned, immediately after the granting clause appears a metes and bounds description of a tract of land containing thirty-seven acres. Clearly, fee title to this thirty-seven-acre tract was conveyed by the deed, and the granting clause can thereby be given full effect. Only following the description of the thirty-seven-acre tract does the language appear: "Second Tract consisting of a right-of-way to the above tract, said right-of-way more specifically described as follows: . . ." It is entirely consistent with the granting clause, which clearly conveyed the thirty-seven-acre tract in fee, to interpret the additional language following the description of the thirty-seven-acre tract as conveying merely an easement appurtenant to said tract. Such an interpretation gives effect to the more usual connotation of the term "right-of-way" as denoting an easement for passage over a described strip of land rather than as describing fee title to the strip. Certainly such an interpretation cannot be said to be irreconcilable with other portions of the deed which, by this interpretation, are still given full effect.

"In the interpretation of the provisions of a deed, the intention of the grantor must be gathered from the whole instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable, or a provision which is contrary to public policy or runs counter to some rule of law." *Ellis v. Barnes,* 231 N.C. 543, 57 S.E. 2d 772. Applying this rule of construction in the present case, we agree with the trial court's interpretation that the grantor in the deed to defendants, by using the term "right-of-way" in connection with the forty-foot-wide strip of land, intended to convey and did convey merely an easement over said strip to provide defendants, their heirs and assigns, access to and from the public road as an appurtenance to and for the benefit of the thirty-seven-acre tract which was conveyed to them in fee.

Judgment affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. JOHN JUNIOR McDOUGALD

No. 7312SC405

(Filed 13 June 1973)

1. **Criminal Law § 84— failure to furnish copy of search warrant to defendant — no effect on search**

Failure to furnish defendant with a copy of the warrant under which his home was searched did not invalidate the search or his arrest. G.S. 15-21.

2. **Constitutional Law § 31— identity of informer**

Defendant in this prosecution for possession of marijuana with intent to distribute was not entitled to disclosure of the name of the confidential informer whose information led police to defendant, since there was no showing that disclosure would aid defendant in any way and since there was ample independent evidence of defendant's guilt.

3. **Constitutional Law § 32— duty of court to defendant appearing pro se**

A defendant appearing *pro se* by his own choice does so at his own peril and does not automatically become a ward of the court.

4. **Criminal Law § 32; Narcotics § 3— possession and distribution statute — no presumption of guilt**

The statute relating to the possession and distribution of controlled substances upon which the bill of indictment in this case is based is constitutional, and it does not create a presumption of guilt.

APPEAL by defendant from *Braswell, Judge,* 3 January 1973 Criminal Session of Superior Court held in CUMBERLAND County.

Defendant was charged in a bill of indictment with the felony of possession with intent to distribute 276 grams of marijuana.

The evidence for the State tends to show that on 3 June 1972 about 9:15 p.m. an agent of the State Bureau of Investigation assigned to narcotics investigations in company with other officers executed a search warrant at the residence of John Junior McDougald located at 110 Quincy Street in Fayetteville and found approximately 276 grams of marijuana in the right rear bedroom of the house. The marijuana was contained in 20 separate plastic bags placed in a Busch Bavarian Beer cardboard box on the floor next to a couch with a red, white and blue cloth covering it. An officer testified that the plastic bags are called "lids" which sell locally at $20.00 each.

When the officers arrived at the house the defendant was present and the search warrant was read to him. Upon discovery

of the marijuana the defendant was arrested and advised of his constitutional rights and later taken to the police station.

Defendant had lived at 110 Quincy Street for several years and items of correspondence addressed to the defendant were found in the bedroom.

The defendant offered evidence tending to show that the marijuana belonged to his son, Mark McDougald, and one Larry Roseboro and had been placed in his home without his knowledge or consent.

Prior to the introduction of any evidence defendant objected to the admission of the materials seized at his home pursuant to the search warrant and moved to dismiss the action because he had not been furnished a copy of the search warrant. After a *voir dire* hearing the court found that the search warrant had been lawfully obtained upon information furnished by a confidential informer who had provided reliable information within the past three months which had led to the arrest of ten persons in the Fayetteville area and that the marijuana and other materials seized were admissible in evidence. The court further held: ". . . I rule as a matter of law, that although you did not receive a copy of the search warrant at the time of its being read to you, or at any time to this moment, that that does not invalidate your arrest nor the search."

In the trial in the lower court defendant did not choose to employ counsel and represented himself.

The jury found the defendant guilty as charged, and he appeals from the prison sentence imposed.

Attorney General Morgan by Associate Attorney Henry E. Poole for the State.

Barrington, Smith & Jones by William S. Geimer for defendant appellant.

BALEY, Judge.

[1] The defendant contends that it was error for him not to be given a copy of the search warrant, that entry into his premises was illegal, and that evidence obtained by the search should be suppressed. We find no merit in these contentions.

G.S. 15-21 specifically provides that a failure to furnish copy of warrant ". . . shall not invalidate the arrest." The offi-

cers read the search warrant to the defendant before any search was made, and he was advised of its contents. There was no indication in the record that defendant made any contention that he had suffered any improper invasion of his privacy.

[2] Defendant further contends that if he had been furnished a copy of the warrant he would have had an opportunity to show that the identity of the informant was essential to his defense.

Disclosure of the identity of a confidential informer will not be allowed unless such disclosure would be relevant or helpful to the defense. *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405; *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53; *State v. Hendrickson,* 17 N.C. App. 356, 194 S.E. 2d 208; *State v. Cameron,* 17 N.C. App. 229, 193 S.E. 2d 485.

In this case 276 grams of marijuana were found in a bedroom of defendant's home. It was separated into 20 plastic bags known as "lids" which, according to the testimony of the officer, sell locally at $20.00 per lid. Correspondence addressed to defendant was in the room. It is abundantly clear that the defendant was in possession of this marijuana. It was in his custody and control and subject to his disposition. *State v. Romes,* 14 N.C. App. 602, 188 S.E. 2d 591, *cert. denied,* 281 N.C. 627.

The disclosure of the informant whose information led the police to the defendant would not be relevant or helpful to this defendant as there is ample independent evidence of his guilt. The activities of the confidential informant are only collaterally connected with the offense for which defendant was on trial, and there is no showing that disclosure of his identity could aid the defendant in any way. *State v. Johnson,* 13 N.C. App. 323, 185 S.E. 2d 423.

Defendant assigns as error the failure of the court to declare a mistrial or give a precautionary instruction to the jury in connection with the testimony of Officer Samuel White on cross-examination by the defendant.

The statement of Officer White must be taken in context. The defendant by cross-examination was attempting to establish that the officer did not believe that the defendant had anything to do with the marijuana being in his house, and asked what the officer told him. Officer White then testified ". . . as I stated to you, even I had information in reference to you and your son dealing in narcotics." In reply to defendant's question,

ill-advised as that question may have been, the answer of Officer White cannot be held as error.

Defendant asserts that the court owes him an additional duty because he was not represented by counsel. The court is not required to represent a defendant who chooses to be his own counsel, but, rather, a trial judge sits as an impartial arbiter to see that justice is done between the accused on the one hand and society on the other. *State v. Morris,* 2 N.C. App. 262, 163 S.E. 2d 108, *reversed on other grounds,* 275 N.C. 50, 165 S.E. 2d 245.

[3] A defendant appearing *pro se* by his own choice does so at his peril and does not automatically become a ward of the court. *See* Note, "Criminal Procedure—Right to Defend *Pro Se*," 48 N.C.L. Rev. 678, 683-84 (1970). We have, however, considered all assignments of error urged by defendant and find them without merit.

[4] Finally, defendant insists that the statute relating to the possession and distribution of controlled substances upon which the bill of indictment is based is unconstitutional as it creates a presumption of guilt. This same statute has already been before this Court upon a similar contention in *State v. Garcia,* 16 N.C. App. 344, 192 S.E. 2d 2, *cert. denied,* 282 N.C. 427, where it was held to be constitutional.

The evidence here of possession of 276 grams of marijuana is reinforced by other evidence showing concealment and that the marijuana was separated into smaller containers, indicating that it was being broken up for more ready distribution. This would support a jury finding that the defendant actually had the intent to distribute. *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535.

In our opinion, the defendant has been accorded a fair trial free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. ARTHUR B. McCOTTER

No. 733SC116

(Filed 13 June 1973)

1. **Automobiles § 3— driving after revocation of license**

There was no error in a prosecution charging defendant with driving while his driver's license was revoked where defendant entered a plea of *nolo contendere*, the trial court determined that the plea was made voluntarily and understandingly and an active prison sentence was imposed.

2. **Criminal Law § 154— invalid order extending time to serve case on appeal**

Extension of time granted defendant for serving the statement of case on appeal was invalid where it was entered by a judge other than the judge who tried the case; however, the record proper will be considered to determine whether errors of law appear on the face of the record.

3. **Bills and Notes § 22; Criminal Law § 140— issuing worthless check — excessive sentence**

Where defendant was charged with unlawfully making a check to another in the amount of $23.60 and was found guilty as charged, entry of a 90-day sentence was in excess of the permissible statutory limit, and since sentences imposed against defendant in other cases were to run consecutively with that 90-day sentence, defendant was prejudiced. G.S. 14-107.

APPEAL by defendant from *Blount, Judge,* 9 October 1972 Session of Superior Court held in CRAVEN County.

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

Beaman, Kellum and Mills, by James C. Mills, for defendant appellant.

MORRIS, Judge.

Defendant by his court-appointed counsel has filed with this Court two separate appeals. Both are included in the record on appeal and both are argued in one brief. The appeals bear one docket number.

[1] In case No. 71CR8631 defendant was charged in a uniform traffic ticket, proper in form, with the offense of driving while his driver's license was in a revoked status. Upon a finding of guilt in the district court, defendant appealed to the superior

court where he tendered a plea of nolo contendere. The plea was accepted after a determination by the court that it was freely, voluntarily, and understandingly made. Judgment was entered imposing an active prison sentence of 18 to 24 months, and defendant appealed. In his brief defendant's counsel states that he is unable to find error in the proceedings. We have reviewed the record proper and find no error appearing on the face thereof.

In cases No. 71CR4245, 71CR4246, 71CR4247, 71CR4248, 71CR4249, and 71CR4250, defendant was charged in warrants, proper in form, with the misdemeanors of making and uttering to other persons checks on a bank for the payment of sums of money, none greater than $50, knowing at the time that the defendant had insufficient funds on deposit in the bank with which to pay the same upon presentation, all charges being violations of G.S. 14-107. In the district court, defendant was found guilty of the violations charged in the warrants, and sentence was rendered as follows: 71CR4245—90 days in the county jail; 71CR4246 through 71CR4250—30 days in the county jail in each case. All sentences were suspended for three years and defendant placed on probation on certain named general and special conditions, one of which reads as follows: "(k) Violate no penal law of any state or the Federal Government and be of general good behavior."

On 17 January 1972, the defendant was convicted in the district court of the offenses of disorderly conduct and resisting arrest. Both cases were consolidated with case No. 71CR8631, driving while license revoked, for judgment, and defendant was sentenced to six months in prison, suspended for one year and defendant placed on probation under named conditions. Defendant appealed to the superior court from the judgments entered in the resisting arrest and disorderly conduct cases, but in the superior court defendant entered pleas of guilty as charged to both offenses, and a probation judgment was entered placing defendant on probation for a term of one year subject to certain named conditions.

Thereafter, on 14 June 1972, defendant's probation officer in cases No. 71CR4245 through 71CR4250 filed a bill of particulars and a report, relating the foregoing convictions for resisting arrest and disorderly conduct, notifying defendant that these constituted violations of his probation judgment, and that the alleged violations were to be brought to the attention of

the appropriate trial tribunal. On 14 September 1972, defendant's probation was revoked in cases No. 71CR4245 through 71CR4250, and the sentences activated. Defendant appealed to the superior court which took similar action and issued judgments and commitments in each case.

Defendant gave notice of appeal on 19 October 1972, and on that same date Judge Cohoon, presiding judge of the superior court for the term following that in which defendant's probation was revoked, entered an order appointing attorney J. C. Mills to perfect defendant's appeals, and granting defendant an extension of time to serve the statement of case on appeal.

[2] Questions presented by the assignments of error in this case are not properly before us. Judge Cohoon was not the "trial judge" within the meaning of G.S. 1-282. "By the terms of the statute, only the judge who tried the case can extend the time for serving the statement of the case on appeal. . . ." *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Lewis,* 9 N.C. App. 323, 176 S.E. 2d 1 (1970). 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 of the record. *State v. Lewis, supra; Roberts v. Stewart* and *Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58 (1968), cert. denied 275 N.C. 137.

[3] The record proper in a criminal case consists of the bill of indictment or warrant, the plea on which the case is tried, the verdict, and the judgment from which the appeal is taken. *State v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262 (1965). We note that the judgment in case No. 71CR4245 contains error. The warrant in 71CR4245 charged defendant with unlawfully making a check to another in the amount of $23.60. Defendant was found to be guilty as charged in the district court, but judgment was entered sentencing defendant to 90 days in the county jail. G.S. 14-107 provides that if the amount of the check made in violation of that statute is not over $50, punishment shall not be for more than 30 days, provided that on the fourth conviction of a violation of G.S. 14-107, and thereafter, the defendant may be punished as a general misdemeanant. There is no allegation in the warrant in case No. 71CR4245 that defendant had been convicted three prior times of that offense, nor is there

any other evidence in the record of that circumstance. The 90-day sentence in case No. 71CR4245 exceeded the permissible statutory limit.

The sentences imposed in cases No. 71CR4246 through 71CR4250 were made to run consecutively with that in case No. 71CR4245, and the sentence imposed in case No. 71CR8631 was made to run at the expiration of the sentences imposed in cases No. 71CR4245 through 71CR4250. See *State v. Fields*, 11 N.C. App. 708, 182 S.E. 2d 213 (1971). The imposition of a 90-day sentence in case No. 71CR4245, where only a 30-day sentence was authorized by statute, resulted in prejudice to defendant.

For the reasons set forth, the judgment in case No. 71CR4245 is vacated and the case is remanded for a proper sentence with credit for time already served, and the second sentence will commence as provided in the judgment therein at the expiration of the proper sentence on the judgment in case No. 71CR4245. The revised commitment will, of course, be dated and be effective as of the date of the original commitment in order that defendant have credit for the time served. *State v. Smith*, 267 N.C. 755, 148 S.E. 2d 844 (1966).

Case No. 71CR4245: Vacated and remanded for resentencing.

Cases No. 71CR8631, 71CR4246, 71CR4247, 71CR4248, 71-CR4249 and 71CR4250: Affirmed.

Judges BROCK and PARKER concur.

JOHN G. WILSON AND WIFE, PEGGY S. WILSON v. CORA EDITH CAVIN SMITH, CLYDE CHRISTY AND WIFE, ADDIE CHRISTY, AND CLAUDE B. CHRISTY AND WIFE, SUE CHRISTY

No. 7319SC208

(Filed 13 June 1973)

1. Appeal and Error § 6; Easements § 3— grant of way of necessity — failure to perfect appeal — appeal from location of way — exceptions to interim judgment granting way

Since defendants had an option whether to appeal from the interim judgment granting plaintiffs an easement by way of necessity across defendants' lands or from the judgment locating the easement, their

failure to perfect an appeal from the interim judgment did not vitiate their exceptions thereto and such exceptions could be considered upon appeal from the judgment locating the easement.

2. Easements § 3— way of necessity

A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over the land retained by the grantor or land owned by a stranger.

3. Easements § 3— way of necessity — sufficiency of findings

The trial court's conclusion that plaintiffs are entitled to an easement by way of necessity across defendants' lands to a public road is supported by the court's findings that plaintiffs acquired title to their land by warranty deed from defendant grantor, that the other defendants acquired their land by subsequent *mesne* conveyances from defendant grantor, that the tract of land retained from defendant grantor abuts a public highway, that the other defendants' lands lie between that of plaintiffs and defendant grantor, and that although plaintiffs have permissive use of a dirt road across the lands of strangers to their title to a public highway, plaintiffs have been unable to obtain a right-of-way to use such road.

Judge VAUGHN dissents.

APPEAL by defendants from *Collier, Judge,* 16 October 1972 Session of Superior Court held in ROWAN County.

Plaintiffs, John G. Wilson and wife, Peggy S. Wilson, instituted this action to establish an easement by way of necessity across defendants' land to a public highway. In March, 1972, the matter was heard before Judge Johnston, sitting without a jury. Judge Johnston made findings of fact which are summarized as follows:

Plaintiffs acquired title to their land by warranty deed from defendant Cora Edith Cavin Smith dated 30 August 1965. On or about 26 September 1965, defendant Smith purported to grant plaintiffs a right-of-way, but this conveyance was improperly executed and was void. Plaintiffs' tract was carved from the rear portion of a tract of land owned by defendant Smith. The tract of land retained by defendant Smith abuts a paved public highway, the Enochville School Road. On 23 February 1968, defendant Smith deeded a tract to one Tilley and wife, who on 6 March 1968 conveyed the same tract to defendants Clyde Christy and Claude B. Christy. Although a dirt road which leads to paved public roads passes through the tract of land owned by plaintiffs, the owners of the other land through which said road passes have refused to grant plaintiffs a right-

of-way to use such road across their lands. Plaintiffs are left with no legally enforceable access to a public road. Plaintiffs have constructed a dwelling upon their property but are unable to procure a deed of trust with which to finance the construction of their home until they procure a legally enforceable right-of-way to an existing public road.

In an "interim judgment" filed 27 March 1972, Judge Johnston concluded that at the time of the conveyance from defendant Cora Edith Cavin Smith to plaintiffs:

> "[T]here was impliedly granted to them by said Cora Edith Cavin Smith an easement by way of necessity from the tract of land owned by plaintiffs across the tract owned by the defendant, Cora Edith Cavin Smith, to the said Enochville School Highway so as to provide the plaintiffs their only means of egress and ingress and that the tract of land . . . which has come to the defendants, Clyde Christy and Claude B. Christy through *mesne* conveyances from the defendant, Cora Edith Cavin Smith, remains burdened with said easement by way of necessity in favor of the plaintiffs."

Thereupon, Judge Johnston ordered that a jury of view of three disinterested freeholders be appointed to "lay off an easement across the tracts owned by defendants of not less than eighteen feet in width providing plaintiffs with a reasonable means of access to the Enochville School Highway." Defendants excepted to the conclusions and judgment of Judge Johnston and gave notice of appeal on 31 March 1972. On 21 April 1972, counsel for plaintiffs filed a motion to dismiss defendants' appeal for failure to serve a case on appeal within the time prescribed by statute. Plaintiffs' motion was allowed by order of Judge Johnston filed 4 May 1972. On 27 September 1972, the jury of view filed its report; whereupon, counsel for plaintiffs filed a "Motion for Final Judgment," which motion was allowed by order of Judge Collier filed 16 October 1972, granting plaintiffs a permanent easement by way of necessity, according to the description reported by the jury of view. Defendants appealed.

Woodson, Hudson, Busby & Sayers by Donald B. Sayers for plaintiff appellees.

Childers and Fowler by Henry L. Fowler, Jr., for defendant appellants.

HEDRICK, Judge.

The exception to the "interim judgment" presents the question of whether the facts found by Judge Johnston support the conclusion that plaintiffs are entitled to an easement by way of necessity across the land of defendants.

[1] Since defendants had an option whether to appeal from the interim judgment or from the judgment locating the easement across their property, *Pritchard v. Scott,* 254 N.C. 277, 118 S.E. 2d 890 (1961), we do not think their failure to perfect the appeal noted vitiated their exceptions to the interim judgment.

[2] A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over the land retained by the grantor or land owned by a stranger. *Oliver v. Ernul,* 277 N.C. 591, 178 S.E. 2d 393 (1971). An implied easement of necessity arises only by implication in favor of a grantee and his privies as against a grantor and his privies. *Lumber Co. v. Cedar Works,* 158 N.C. 161, 73 S.E. 902 (1912).

> "[T]o establish the right to use the way of necessity, it is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that the grantor intended the grantee should have the right of access." *Oliver v. Ernul, supra* at 599.

In *Pritchard v. Scott, supra* at 282, the North Carolina Supreme Court quoting from 17A Am. Jur., Easements § 58, stated:

> "A way of necessity is an easement arising from an implied grant or implied reservation; it is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. Such a way is the result of the application of the presumption that whenever a party conveys property, he conveys whatever is necessity *(sic)* for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. Thus, the legal basis of a way of necessity is the presumption of a grant arising from the circumstances of the case. This presumption of a grant, however, is one of fact, and

whether a grant should be implied depends upon the terms of the deed and the facts in each particular case."

[3] The facts found by Judge Johnston clearly show that plaintiffs acquired their land from defendant Smith, that defendants Christy acquired their land by *mesne* conveyance from defendant Smith, and that the land retained by defendant Smith abuts a public highway. The Christys' land lies between that of plaintiffs and Smith. Plaintiffs have no legally enforceable right-of-way to the public highway. While the facts indicate that plaintiffs have a permissive right-of-way to the public highway across the lands of strangers to their title, they are unable to obtain a loan to secure a deed of trust upon their land to finance their home built thereon and, therefore, do not have full beneficial use of their property.

We think the facts found support the conclusion that plaintiffs are entitled to an easement by way of necessity across the lands of defendants to the public road. The exceptions to the interim judgment are not sustained. The judgment appealed from is

Affirmed.

Judge BROCK concurs.

Judge VAUGHN dissents.

DENITA FLOYD, A MINOR, AND ANITA FLOYD, A MINOR, BY THEIR GUARDIAN AD LITEM, ROSA LEE FLOYD, AND ALVESTER FLOYD v. CHARLES R. JARRELL

No. 7318SC386

(Filed 13 June 1973)

Landlord and Tenant § 8— violation of municipal housing code — liability of lessor for injury to lessee

Violation of a city ordinance requiring defendant to keep his apartment building in sound condition and good repair did not constitute negligence *per se;* therefore, in an action for injuries and medical expenses resulting when plaintiffs were bitten by rats in an apartment rented from defendant, the trial court properly entered a directed verdict for defendant since plaintiffs failed to show actionable negligence on the part of defendant in not keeping his apartments substantially rodent-proof.

Floyd v. Jarrell

APPEAL by plaintiffs from *Crissman, Judge,* 27 November 1972 Regular Civil Session, High Point Division of GUILFORD Superior Court.

The allegations of plaintiffs' complaint, as amended, are summarized in pertinent part as follows:

Plaintiffs Denita and Anita Floyd are the twin daughters of plaintiff Alvester Floyd and his wife, having been born in High Point, N. C., on 23 April 1969. At all times pertinent to this action, defendant was the "owner and landlord" of a two-story, four-apartment frame dwelling located at 1307 West Avenue in High Point. Prior to the birth of Denita and Anita, defendant rented one of the apartments to their parents who continued to reside there following their birth. At approximately 4:00 a.m. on 11 June 1969, while they slept in their crib in the apartment rented by their parents from defendant, plaintiffs Denita and Anita were bitten about their legs and feet by a rat or rats, necessitating hospitalization and extensive medical treatment for their injuries.

Injuries to the infant plaintiffs were proximately caused by the negligence of defendant in that: (a) Defendant let the dwelling unit occupied by said infants to their parents when the exterior walls, foundation, interior floors, interior walls, ceilings, windows and exterior doors were not substantially rodent-proof, and defendant failed to maintain said structures in sound condition and good repair, and did negligently maintain the same in violation of ordinances of the City of High Point and statutes of the State of North Carolina; (b) Defendant failed to adequately screen openings in the crawl area or basement area of said dwelling unit, or to otherwise prevent the entrance of insects and rodents, all of which allowed said unit to become rat infested, in violation of ordinances of the City of High Point and the general law of the State of North Carolina; (c) Defendant was negligent in attempting to exterminate, and failed to exterminate, rats which infested said apartment house and premises, in violation of ordinances of the City of High Point and the general law of the State of North Carolina.

The infant plaintiffs demanded judgment in amounts of $100,000 and $12,500 to compensate for their injuries and the male plaintiff demanded judgment for medical expenses incurred and to be incurred by him on behalf of said infants.

At trial plaintiffs presented evidence in support of their allegations and, among other witnesses, called defendant. The undisputed evidence tended to show that the male plaintiff rented the apartment in question from defendant on 20 October 1967 and that plaintiffs occupied one of the first floor apartments, there being two apartments on the first floor and two on the second floor. The male plaintiff had seen rats in the apartment for some time prior to 11 June 1969.

At the conclusion of plaintiffs' evidence, defendant moved for directed verdict pursuant to G.S. 1A-1, Rule 50, on grounds that (1) plaintiffs had failed to show actionable negligence on the part of defendant and (2) the evidence showed contributory negligence on the part of the male plaintiff.

The court allowed the motion for directed verdict and from judgment denying them any recovery, plaintiffs appealed.

Schoch, Schoch, Schoch and Schoch by Arch Schoch, Jr., for plaintiff appellants.

Henson, Donahue & Elrod by Perry C. Henson and Joseph E. Elrod, III, for defendant appellee.

BRITT, Judge.

Did the trial court err in allowing defendant's motion for directed verdict? We answer in the negative.

In 5 Strong, N. C. Index 2d, Landlord and Tenant, § 8, pp. 162-163, we find:

> "The lessor is not ordinarily liable to a tenant, or the tenant's sublessee, family, servants, or guests, for personal injuries resulting from disrepair, or patent defects, even when the lessor is under a contractual obligation in his lease to keep the premises in repair, or even if the dangerous condition had been brought to the lessor's attention and he had agreed to repair the same, or the lessor had assumed the duty of making repairs. The doctrine of caveat emptor ordinarily applies, and the lessor is not liable unless the lessee shows that there was a latent defect known to the lessor, or of which he should have known, and that the lessee was unaware of, or could not by the exercise of ordinary diligence discover, the defect, the concealment of which would be an act of bad faith on the part of the lessor."

In their brief plaintiffs concede that the general rule in this jurisdiction is accurately stated by Strong. However, they contend that the instant case falls within the exception to the rule "that failure to comply with a duty imposed by statute or code dealing with the care of premises constitutes actionable negligence on the part of a landlord, rendering him liable for personable injuries resulting to a tenant thereby." Plaintiffs contend that in the care and maintenance of the premises rented to the male plaintiff and the adjoining premises owned by defendant, defendant did not comply with certain ordinances enacted by the City of High Point.

While the facts in *Clarke v. Kerchner*, 11 N.C. App. 454, 181 S.E. 2d 787 (1971), cert. den. 279 N.C. 393, 183 S.E. 2d 241 (1971), were different from those in the instant case, we think the principles of law are sufficiently similar for our decision in that case to control here. In *Clarke,* plaintiff was a guest of the lessee of a house owned by defendants Kerchner and fell and received injuries when a horizontal rail on the back porch gave way; plaintiff contended that a violation of the Greensboro Housing Code was negligence *per se,* and that a showing of violation entitled plaintiff to go to the jury on the question of proximate cause. In a well reasoned opinion by Judge Vaughn, concurred in by Chief Judge Mallard and Judge Parker, this court rejected plaintiff Clarke's contention, holding that although the violation of a city ordinance is a misdemeanor, the ordinance in question was remedial rather than penal in nature. Plaintiffs' argument in the case at bar that there are sufficient differences between the High Point ordinances and the Greensboro Housing Code to justify a different ruling is unconvincing.

We hold that the trial court, for failure of plaintiffs to show actionable negligence on the part of defendant, did not err in allowing defendant's motion for directed verdict.

The judgment appealed from is

Affirmed.

Judges CAMPBELL and BALEY concur.

MARTHA DAVIS FEARING v. GEORGE T. WESTCOTT, JR. T/A: CASINO QUIZO NAGS HEAD, N. C.

No. 731SC219

(Filed 13 June 1973)

1. **Negligence § 57— fall from stool in business establishment — sufficiency of evidence of negligence**

Trial judge's conclusion that plaintiff was not injured by the negligence of defendant was supported by the judge's findings that the plaintiff was a business invitee sitting on a stool on defendant's premises from which she fell and suffered injury, that defendant maintained the stools in a reasonably safe condition and that there was no defect in the stools; therefore, the trial court properly granted defendant's motion to dismiss made at the close of all the evidence in plaintiff's action to recover damages for injuries sustained when she fell.

2. **Negligence § 31— fall from stool in business establishment — res ipsa loquitur not applicable**

In this action for damages for injuries sustained by plaintiff when she fell off a stool, the doctrine of *res ipsa loquitur* was not applicable where more than one inference could be drawn from the evidence as to the cause of injury and where the judge sat as trier of the facts.

APPEAL by plaintiff from *Cowper, Judge,* 18 September 1972 Session of Superior Court held in PASQUOTANK County.

Action by plaintiff to recover damages for injuries sustained when she fell from a stool provided for patrons of defendant's "Quizo Stand." The case was tried by the judge without a jury.

Plaintiff's evidence tended to show the following. On 2 August 1968 plaintiff, an 82-year-old woman, and others went to defendant's establishment to play "Quizo," a game similar to Bingo which plaintiff has played "for 20 years or more, since it first opened." Plaintiff changed her seat several times and as she took the seat in question, she placed her pocketbook in her lap. As she was removing her change purse, she "turned the least bit in [her] seat" and the seat "slipped over." Plaintiff fell to the floor and sustained injuries to her right hip and leg. The seat in question was described as a swivel top stool about twelve inches in diameter. A four-inch long iron post was mounted, by the use of screws, to the underside of the seat head. When the seat is in position to be used, the four-inch long post fits inside a two-feet high iron post which is attached

to a one-inch by six-inch board resting on the floor. Plaintiff's daughter, who had accompanied plaintiff on the occasion in question, testified that, "[a]fter the seat tilted, . . . it went back to its natural position except that it was leaning to the right, a little." The seat head did not fall from its mounting, but was removed by an employee after plaintiff's fall. Plaintiff's daughter testified that she returned to defendant's establishment after the accident to examine the seats and stated that, "[n]othing that I saw attached to or connected with the seat on which Mother was sitting came apart or broke."

Defendant's evidence tended to show the following. Seating arrangements for customers in Bingo establishments in the Southeast in August of 1968, and prior thereto, followed the same general pattern and used stools. Defendant has never had any trouble with the seats. The bottom boards were renewed in the Spring of 1968, but no repairs had been made from that time until August of 1968. The seats were described as being in good condition on the date in question. During the 21 years prior to plaintiff's fall, an intoxicated man had fallen and another man stumbled on the board when going to his seat.

At the close of plaintiff's evidence the defendant moved for an involuntary dismissal under Rule 41(b) of the Rules of Civil Procedure, G.S. 1A-1. The court declined to render judgment until the close of all the evidence, at which time the judge granted defendant's renewed motion for dismissal and made findings of fact pursuant to Rule 52(a)(1).

Twiford, Abbott & Seawell by Russell E. Twiford and Christopher L. Seawell for plaintiff appellant.

Leroy, Wells, Shaw, Hornthal & Riley by Dewey W. Wells for defendant appellee.

VAUGHN, Judge.

The only question presented is whether the court erred in granting defendant's motion to dismiss.

[1] Plaintiff first argues that there was evidence to support a finding that defendant breached a duty owed to plaintiff. A patron at a Bingo parlor is an invitee to whom the proprietor owes a duty to exercise ordinary care to keep his premises in a reasonably safe condition and the proprietor is not an insurer

of the safety of his patrons. *Graves v. Order of Elks,* 268 N.C. 356, 150 S.E. 2d 522. It is a question of law for the court whether there is sufficient evidence to support a finding that this duty was violated and the question of whether the evidence does show a breach of the applicable duty is for the trier of the facts. In the present case, the judge was trier of the facts.

Rule 41(b) provides procedures whereby a judge sitting in a nonjury case can render judgment against a plaintiff "not only because his proof failed in some essential aspect to make out a case but also on the basis of facts as he may then determine them to be from the evidence before him." *Helms v. Rea,* 282 N.C. 610, 618, 194 S.E. 2d 1. When a Rule 41(b) motion is made at the close of plaintiff's evidence, the judge may decline to render any judgment until the close of all of the evidence, as was done in the present case. "As trier of the facts, the judge may weigh the evidence, find the facts against plaintiff and sustain defendant's motion at the conclusion of his evidence even though plaintiff has made out a *prima facie* case which would have precluded a directed verdict for defendant in a jury case." *Helms v. Rea, supra,* at pages 618-619. The judge's evaluation of the evidence pursuant to a Rule 41(b) motion is to be conducted free of any limitations as to the inferences which a court must indulge in favor of plaintiff's evidence on a motion for a directed verdict in a jury case. *Bryant v. Kelly,* 10 N.C. App. 208, 178 S.E. 2d 113, reversed on other grounds, 279 N.C. 123, 181 S.E. 2d 438. In the present case, Judge Cowper made the following findings of fact pursuant to Rule 52(a)(1) as required by Rule 41(b).

> "(a) On the evening of 2 August 1968 the plaintiff was on the defendant's premises as a business invitee, seated on a stool playing a game in the nature of Bingo.
>
> (b) While so seated the plaintiff fell to the floor and sustained injury.
>
> (c) On the occasion in suit the seating arrangements for customers on the defendant's business premises were being maintained in a reasonably safe condition; there was no defect in the stool on which plaintiff was seated which might have caused her fall or which could have been discovered by defendant in the exercise of reasonable care.
>
> (d) The plaintiff's fall was not caused by any negligent act or omission of the defendant."

The court then proceeded to the conclusions that plaintiff was not injured by the negligence of defendant and that plaintiff had shown no right to relief. "Where, as in the present case, the trial court as the trier of the facts has found the facts specially, such findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence which might sustain findings to the contrary." *Bryant v. Kelly, supra,* at page 213. Judge Cowper's findings are supported by the evidence and we hold that the facts found support the conclusions of law and judgment.

[2] Plaintiff's second argument, to the effect that the doctrine of *res ipsa loquitur* is applicable to the facts of this case and, if applicable, is sufficient to defeat defendant's motion for involuntary dismissal and carry the case to the trier of fact, is without merit. The doctrine of *res ipsa loquitur* is not applicable in situations where, as in the present case, " '. . . more than one inference can be drawn from the evidence as to the cause of the injury. . . .' " *Lane v. Dorney,* 250 N.C. 15, 108 S.E. 2d 55. Even where applicable, that doctrine merely takes the case to the trier of the facts and permits, but does not compel a finding of negligence. Here the judge sat as trier of the facts. He passed upon the credibility of the witnesses, weighed the evidence, considered what inference might be drawn therefrom and made his findings thereon.

Affirmed.

Judges CAMPBELL and PARKER concur.

IN THE MATTER OF: THE WILL OF FLETA YORK, DECEASED

No. 7318SC284

(Filed 13 June 1973)

Trial § 10; Wills § 23— caveat proceeding — expression of opinion by court

In a caveat proceeding wherein the court submitted to the jury issues of (1) proper execution, (2) mental capacity, (3) undue influence, and (4) *devisavit vel non,* it had been stipulated that the clerk could take the verdict in the absence of the judge, the jury returned to the courtroom on Friday afternoon while the judge was absent and the clerk read the jury's answers to the first two issues in favor of

the propounders, a member of the jury stated that they hadn't finished yet and wished to ask the judge a question, the jury was dismissed and returned the following Monday when the judge, upon the jury's request, again charged on the third issue, and the jury resumed its deliberations, the trial judge expressed an opinion on the evidence in violation of G.S. 1A-1, Rule 51(a), when he thereafter instructed the jury that they still had the right to change their answers to the first issues, the jury subsequently returning a verdict changing their answer to the second issue from yes to no.

APPEAL by propounder from *Crissman, Judge,* 4 September 1972 Civil Session of GUILFORD Superior Court.

This caveat proceeding, contesting the purported last will and testament of Fleta York, was instituted by her brother and a niece and nephew. The purported will bequeathed $300 to a church, devised and bequeathed all other property of decedent to her nephew, Albert Y. Riddle, and designated his wife to serve as executrix.

Following the presentation of evidence by propounders and caveators, the following issues were submitted to the jury:

"I. Was the paper writing propounded, dated the 21st day of September, 1970 executed by Fleta York according to the formalities of the law required to make a valid last will and testament?

II. At the time of the execution of this paper writing did Fleta York have the mental capacity to make a valid last will and testament?

III. Was the execution of this paper writing propounded in this case procured by the undue influence of either Helen Riddle or Albert Riddle?

IV. Is the paper writing propounded, dated the 21st day of September, 1970, and each and every part thereof the last will and testament of Fleta York, deceased?"

The court accepted a verdict answering the first issue yes and the second issue no and entered judgment in favor of caveators. Propounder appealed.

Henson, Donahue & Elrod by Perry C. Henson and Daniel W. Donahue for caveators appellees.

Dees, Johnson, Tart, Giles & Tedder by J. Sam Johnson, Jr., for propounders appellants.

BRITT, Judge.

Propounders assign as error certain instructions of the court to the jury. A review of the proceedings leading up to the instruction challenged by Exception No. 30 is necessary for a proper understanding of the exception.

The record reveals the following: At 4:00 p.m. on Friday, the jury in this case had been deliberating for some time and at that time the trial judge announced that he had a commitment which made it absolutely necessary that he leave. The parties agreed that the judge could absent himself from the court while the jury was deliberating and if the jury returned with a verdict, the verdict could be taken by the Clerk in the absence of the judge with the same legal effect as if taken by the judge. The parties further agreed that in the event the jury returned to the courtroom and asked for further instructions that the Clerk would tell the jury that the judge had to leave and that the jury would return on the following Monday at 9:45 a.m. for further proceedings in the case. It was further agreed that if the jury did not return with a verdict by 7:00 p.m., they would be recalled to the courtroom and dismissed by the Clerk to return on Monday at 9:45 a.m.

After the judge left on Friday afternoon, the jury knocked on the door and advised the bailiff that they wanted to come out. The jury returned to the courtroom and the bailiff relayed the issues from the jury to the Clerk. The Clerk inquired if the jury had agreed upon their verdict, hesitated a moment and nothing was said; the Clerk then, after observing the issues, said: "You answer the first issue yes and the second issue yes." A member of the jury then stated: "We haven't finished yet. We want to ask the judge a question." Thereupon the Clerk dismissed the jury and instructed them to return at 9:45 a.m. on Monday.

On the following Monday morning, the jury returned and the judge stated that he understood they had a question to ask the court. A juror replied that they would like for the court to charge them again on the third issue. The court proceeded to do so and the jury retired for further deliberations. Counsel for the caveators then made a motion that the court, in its discretion, declare a mistrial "for the reason that the verdict was purportedly taken and was announced to all the parties and that if the jury deliberates further, the jury would not know

that it would still have the right to change its answers to issues No. 1 or No. 2, and that it is a partial verdict."

Counsel for caveators then stated that if the court would call the jury back and instruct them to the effect that they still had the right to change their answers to issues one and two, the caveators "would have no more complaints." Thereupon the jury was recalled to the courtroom and the court gave additional instructions as follows:

> "COURT: Members of the jury: in stating to you a few minutes ago, I just answered your question. Of course, the issues had been brought in, and the issues, as far as they went, had been read, but the court now charges you that you have not arrived at a verdict and you are not bound by what you have already done. You have a right to consider the whole case from start to finish, and if you should want to make any changes or feel that upon consideration that you ought to change what you have done up to now, you have a perfect right to do so, because you are considering the whole case as to what the outcome will be, and so you will consider all of the issues as you go into your further deliberation and come out with a complete verdict, with all issues answered or answered in accordance with the court's instructions.
>
> You will remember that the burden is upon the propounders on the first issue to satisfy you by the greater weight of the evidence and that the burden is upon the caveators on the second and third issues to satisfy you by the greater weight of the evidence."

Thereafter, the jury returned to their room for further deliberations and eventually returned with a verdict answering the first issue yes and changing their answer to the second issue from yes to no.

We think the court in providing the instructions quoted above inadvertently expressed an opinion on the evidence in contravention of G.S. 1A-1, Rule 51(a), and that the error was prejudicial to propounders. Certainly this was true absent an instruction to the effect that it was not permissible for the court to express an opinion about the case and that nothing said or done by the court should be construed as an opinion.

Much has been written about Rule 51(a), the substance of which was enacted in 1796. Still pertinent today is the observa-

tion expressed by Justice Nash in *Nash v. Morton,* 48 N.C. 3, 6 (1855), as follows: "We all know how earnestly, in general, juries seek to ascertain the opinion of the judge trying the cause, upon the controverted facts, and how willing they are to shift their responsibility from themselves to the court." (Quoted with approval by Justice Walker in *Withers v. Lane,* 144 N.C. 184, 188, 56 S.E. 855 [1907].)

The trial judge occupies an exalted station, causing jurors to entertain great respect for his opinion and to be influenced easily by a suggestion coming from him. *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481 (1966). The probable effect upon the jury, and not the motive of the judge, determines whether a party's right to a fair trial has been impaired. *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263 (1954).

For the reasons stated, there must be a

New trial.

Judges HEDRICK and BALEY concur.

BYRON C. CALHOUN v. MARGARET L. CALHOUN

No. 7318DC456

(Filed 13 June 1973)

1. **Limitation of Actions § 7— action grounded on fraud — three-year statute of limitations applicable**

In an action grounded on fraud, the three-year statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. G.S. 1-52.

2. **Limitation of Actions § 7— alleged fraud in execution of deed of separation — claim barred by three-year statute of limitations**

Where the deed of separation which defendant challenges on the ground of fraud was prepared by her attorney and executed by her and plaintiff in March 1962, defendant instituted an action on 27 June 1969 to have modified portions of the separation agreement including the amount of monthly payments for her support, judgment was entered sustaining a demurrer and dismissing the action on 7 November 1969, said judgment was affirmed by the Court of Appeals on 1 April 1970 and defendant filed no amended pleadings in that action, any fraud in connection with the execution of the

deed of separation was discovered by defendant or should have been discovered by her more than three years prior to the institution of this action.

APPEAL by defendant from *Haworth, Judge,* 19 March 1973 Civil Session of GUILFORD District Court, High Point Division.

On 30 March 1972 plaintiff instituted this action for absolute divorce on ground of one-year separation. He alleged marriage of the parties on 3 October 1936, separation on or about 15 December 1959, residence of both parties in North Carolina for more than six months next prior to the institution of the action, that the two children born to the marriage are more than 21 years of age and emancipated, and that a deed of separation was entered into between the parties in March 1962.

In her answer, defendant admitted all allegations of the complaint but alleged that plaintiff "left" her and that she did not execute the deed of separation freely and voluntarily; she asked that plaintiff's prayer for absolute divorce be denied. By way of further answer, affirmative defense and cross claim, defendant alleged that her signature to the deed of separation was fraudulently obtained by plaintiff and that the deed of separation was grossly unfair and injurious to her. She prayed (1) that the deed of separation be declared null and void and (2) that she be awarded temporary and permanent alimony and counsel fees.

In his reply and answer to the cross action, plaintiff pleaded numerous defenses including:

(1) Defendant's answer and cross claim fails to state a defense to the complaint and fails to state a claim upon which relief can be granted in that it fails to allege with particularity any facts or grounds constituting fraud by plaintiff or the court with respect to the deed of separation sought to be declared null and void.

(2) In February 1962, defendant instituted an action against plaintiff in the Superior Court of Guilford County alleging a separation of the parties on 15 December 1959 and asking for alimony and child support. On 27 March 1962, following negotiations, defendant's attorney prepared the deed of separation in question, defendant executed the same before an assistant clerk of the superior court after which the deed was forwarded to plaintiff and executed by him. On 10 December 1962

a judgment was entered in said action by Judge Donald Phillips reciting "the matters and things in controversy have been settled and . . . the parties hereto have entered into a voluntary separation agreement which adequately provides for the support and maintenance of the Plaintiff and her minor child." The action was nonsuited by said judgment with costs taxed against plaintiff (defendant herein); costs in said action have not been paid. Plaintiff pleads the judgment of Judge Phillips (copy being attached to the reply) as an estoppel to the relief sought by defendant herein.

(3) On or about 27 June 1969, defendant instituted an action against plaintiff in the District Court of Guilford County, asking the court to modify the deed of separation to require plaintiff to increase his support payments from $300 to $400 per month and requiring plaintiff to reimburse defendant for funds spent by her in support of the minor son of the parties. Said action was dismissed by the district court and on appeal to the Court of Appeals the dismissal was affirmed by decision rendered on 1 April 1970 and reported in 7 N.C. App. 509. (A copy of the Court of Appeals opinion is attached to the reply.) Plaintiff pleads the acknowledgment and validity of the deed of separation indicated by defendant in said action as an estoppel to deny the validity of the deed of separation in this action.

(4) The three-year statute of limitations provided by G.S. 1-52.

On 15 December 1972 plaintiff served "Requests for Admissions" on defendant pursuant to which defendant made certain admissions with respect to the February 1962 action, the deed of separation, the judgment of Judge Phillips, the June 1969 action, and plaintiff's compliance with the terms of the deed of separation.

On 12 March 1973 plaintiff filed motion for summary judgment as to defendant's further defenses and cross claim on the grounds set forth in his reply. Following a hearing, the court allowed plaintiff's motion for summary judgment on the several grounds asserted. Defendant appealed.

Block, Meyland & Lloyd by A. L. Meyland for plaintiff appellee.

Stern, Rendleman, Isaacson & Klepfer by Robert O. Klepfer, Jr., for defendant appellant.

BRITT, Judge.

If either of the grounds asserted by plaintiff is valid, he is entitled to have the judgment affirmed. We hold that summary judgment was proper on plaintiff's plea of the three-years statute of limitations.

Summary judgment may be granted in two types of cases, those where a claim or defense is utterly baseless in fact and those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial. *McNair v. Boyette,* 282 N.C. 230, 192 S.E. 2d 457 (1972).

[1] G.S. 1-52 provides that an action for relief on the ground of fraud or mistake must be brought within three years after "the discovery by the aggrieved party of the facts constituting the fraud or mistake." The Supreme Court of our State has held in numerous cases that in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. *Wimberly v. Washington Furniture Stores, Inc.,* 216 N.C. 732, 6 S.E. 2d 512 (1940); *Brooks v. Ervin Constr. Co.,* 253 N.C. 214, 116 S.E. 2d 454 (1960); *B-W Acceptance Corp. v. Spencer,* 268 N.C. 1, 149 S.E. 2d 570 (1966).

[2] In the case at bar, the materials presented at the hearing showed conclusively that the deed of separation which defendant challenges on the ground of fraud was prepared by her attorney and was executed by her and plaintiff in March 1962; that she instituted an action on 27 June 1969 to have modified portions of the separation agreement including the amount of monthly payments for her support; that judgment was entered sustaining a demurrer and dismissing the action on 7 November 1969; that said judgment was affirmed by the Court of Appeals on 1 April 1970; and that defendant has not filed any amended pleadings in said action. We think that any fraud in connection with the execution of the deed of separation was discovered by defendant, or in the exercise of reasonable diligence should have been discovered by her, more than three years prior to the institution of this action.

The summary judgment is valid on other grounds but no worthwhile purpose would be served in discussing them.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. COLEY JAMES MASON AND BELVIA JEAN MASON

No. 7321SC384

(Filed 13 June 1973)

Homicide § 6— involuntary manslaughter — death of child by starvation — sufficiency of evidence

Evidence was sufficient to submit the issue of involuntary manslaughter to the jury where it tended to show that defendants' child died of starvation, that the house in which she was found was unheated and filthy, that a large quantity of molded and rotten food was found in the refrigerator in the house, that the male defendant was gainfully employed and that the femme defendant's father had, sometime prior to the day the child was found, advised his daughter to take the child to a doctor.

ON *certiorari* to review judgment of *Armstrong, Judge,* 3 August 1972 Session of FORSYTH Superior Court.

In separate indictments defendants, husband and wife, were charged with the murder of their two-year-old daughter, Antonia Elaine Mason (Antonia). The cases were consolidated for trial and defendants pleaded not guilty. At the close of the State's evidence, the court reduced the charge to involuntary manslaughter. For their verdict the jury found both defendants guilty of involuntary manslaughter and from judgments imposing prison sentences, they gave notice of appeal. Defendants were unable to perfect their appeal within the time allowed by our rules and we granted certiorari.

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

R. Lewis Ray for defendant appellants.

BRITT, Judge.

Defendants assign as error the failure of the court to grant their motions for nonsuit.

This appears to be a case of first impression in this jurisdiction. The theory of the State's case is that defendants (1) intentionally failed to feed the child, or (2) culpably neglected to provide the child with food, care and medical attention, and that the child's death resulted therefrom.

In 4 Strong, N. C. Index 2d, Homicide, § 6, p. 198, we find:

> "Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, *or resulting from the culpably negligent omission to perform a legal duty.*" (Emphasis added.)

G.S. 14-316.1(a) provides in pertinent part: "Any parent . . . to a child under 16 years of age who fails to exercise reasonable diligence in the care, protection, or control of such child, . . . shall be guilty of a misdemeanor."

In 40 Am. Jur. 2d, Homicide, §§ 89 and 90, pp. 382-384, we find:

> "Neglect on the part of one charged with the duty of supporting another to provide the necessary food, clothing, and shelter to the dependent, resulting in the latter's illness and death, renders the person upon whom the duty rests guilty of culpable homicide, the grade of which depends upon the nature and character of the act or acts causing death. The crime is murder when the neglect is wilful or malicious, as where a parent intentionally withholds the food necessary to sustain an infant's life, or abandons an infant in a remote place where it is not likely to be found so that it dies of exposure, or where a husband criminally neglects to shelter his wife when he is able to do so and knowingly leaves her to perish. On the other hand, the crime is manslaughter when the omission is not malicious but arises out of negligence, as where a parent, having the means at his command, negligently fails to provide his child with food, clothing, or shelter, and the child dies in consequence. . . ."
>
> * * *
>
> ". . . [I]t is quite generally recognized that a parent owes a legal duty to provide medical care to a minor un-

emancipated child, and that his violation of such duty may render him guilty of homicide."

Evidence for the State in the instant case tended to show:

In April of 1970, through action of the Social Services Department, Antonia was placed in a foster home. In August of 1971, at the request of defendants, she was returned to her parents to live in their home. At that time Antonia was toilet trained and in good physical condition. Some time later and prior to 8 January 1972, the feme defendant's father visited in defendants' home, noticed that Antonia was very thin and sickly looking; he advised his daughter to take the child to a doctor, she promised that she would but apparently never did.

Around 9:30 a.m. on 8 January 1972, pursuant to a telephone call from the feme defendant, two Winston-Salem police officers went to the apartment home of defendants. They found Antonia's dead body lying on a bed; there were no sheets on the bed but there was a bedspread thrown over her body. The child's body was in a doubled-up position with her pants pulled down around her knees. There was no heat in the house and the feme defendant stated she found the child dead at 9:00 a.m. Sores were found on the arm and rectum of the child. The house was fairly new but little or no heating equipment was present. The apartment was littered with trash and boxes; the bedroom was in a poor state of cleanliness with clothes scattered on the floor. In the closet there were children's clothes, wet with an odor of urine. In the kitchen police observed cockroaches on the walls and running over the floors; milk cartons were on the floor with bottoms eaten out of them. Police opened the door to the refrigerator and found it to contain a large quantity of molded and rotten food.

Dr. J. B. Dudley, a pathologist, testified: He performed an autopsy on the body of Antonia on 8 January 1972, beginning at 12:15 p.m. He found the body extremely emaciated, the cheeks sunken and drawn in. He found the neck, arms and legs to be quite thin and ribs protruding. He found blood about the genital portions and anus. The body generally was dirty and foul smelling with multiple scratch marks on the skin. His conclusion was stated as follows: "The findings are consistent with starvation. The stomach and proximal intestine contained no food. There is no evidence of any other significant disease." On cross-examination he testified that the body weighed 14 to

15 pounds and his conclusion was that the child died from starvation.

Testimony by defendants disclosed: The male defendant was gainfully employed; they purchased adequate food for the family but Antonia would not eat. They reported the fact that Antonia would not eat to a Social Service worker who said she would arrange for a psychiatrist to see Antonia but the worker never did call back. Defendants were planning to move to another housing unit and that accounted for the condition of the apartment; they were trying to get by with heat from electrical appliances including a small stove, a hot plate and a toaster until they moved.

We hold that the evidence was sufficient to show that the child's death resulted from the culpably negligent omission of defendants to perform their legal duty with respect to the child; therefore, the trial court did not err in overruling defendants' motions for nonsuit as to involuntary manslaughter and the assignment of error is overruled.

We have carefully considered the other assignments of error brought forward and argued in defendants' brief but finding them without merit, they too are overruled.

No error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. ODELL DAVIS

No. 7318SC433

(Filed 13 June 1973)

1. **Homicide § 28— instruction on self-defense proper**

Trial court's instruction on self-defense in a homicide case properly left it to the jury to determine the reasonableness of the belief of the defendant that he was in danger of death or great bodily harm under all the circumstances as they appeared to him.

2. **Homicide § 21— voluntary manslaughter — sufficiency of evidence**

Where the evidence tended to show that defendant and deceased were arguing, that defendant had a gun and that deceased was killed by the use of a deadly weapon, evidence was sufficient to support the verdict of guilty of voluntary manslaughter.

State v. Davis

APPEAL by defendant from *Crissman, Judge,* 13 November 1972 Regular Criminal Session of Superior Court held in GUILFORD County.

Defendant was brought to trial upon an indictment, proper in form, for the first degree murder on 2 September 1972 of Thomas Williams. At the conclusion of the State's evidence the court allowed defendant's motion for nonsuit on the capital charge and submitted to the jury the possible verdicts of guilty of second degree murder, guilty of voluntary manslaughter, guilty of involuntary manslaughter, or not guilty. The jury returned a verdict of guilty of voluntary manslaughter. Defendant appeals from a judgment imposing a prison sentence of not less than ten nor more than fifteen years.

The evidence offered by the State tends to show that the defendant, Odell Davis, went to the residence of deceased, Thomas Williams, at 5212 Summit Avenue, Greensboro, on 2 September 1972. According to the testimony of the witness, Thomasine Anderson, defendant and Williams were in the backyard having an argument when Williams told defendant he was telling a damn lie and ". . . not to go in his pocket." Shortly thereafter a shot was heard and then later on another shot or two. She looked out the bathroom window and saw Williams and the defendant close together almost in an embrace. There was blood on Williams' shirt and his arm was bleeding. She immediately called to others who were in the house, and when she reached the outside, deceased was staggering backwards and he fell without saying anything. After the others had come out of the house she saw defendant running down the driveway.

Medical testimony indicated that a bullet had gone through the left forearm of deceased and that there was an entry wound beneath the left breast which ranged downward through the abdomen and liver causing massive hemorrhaging and death. All the wounds could have been caused by one bullet, but because of the lower line of entry into the breast, the doctor testified there were in all probability two bullets.

Additional testimony tended to show that defendant had been at the Williams home for some period of time, that the deceased sold home brew, and that other persons at the home were drinking.

Ruby Troxler, a next door neighbor, testified that she visited the Williams home and prior to entering the home, she

saw defendant and Tommy Williams ". . . by that car out there fussing. . . ." Other witnesses testified they saw defendant running down the road and that he admitted he had ". . . got in a fight . . ." and ". . . just shot a man."

C. E. Pegram, at defendant's request, called the Sheriff's Department and defendant turned himself in to the authorities. When the officers arrived, they searched the area surrounding the site where the shooting occurred but did not find any weapons or anything else of significance.

All of the defendant's evidence consisted of his own testimony. He testified in substance that he went to the Williams residence to purchase some home brew, and deceased delayed bringing it out; that he started to leave when deceased said ". . . wait a damn minute" and he heard something behind him and when he turned, deceased was close to him and came on him with a knife. Defendant reached in his back pocket and got his gun and ". . . me and him went together . . ." and the gun went off. " . . . I was trying to keep him from cutting me, and I reckon he was trying to keep me from shooting him." Defendant stated that he did not have any intention of shooting the deceased; that he does not know what happened to his gun; and he turned himself in because ". . . I didn't want to be caught while I was on the run."

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

Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, for the defendant appellant.

BALEY, Judge.

The only assignments of error brought forward by defendant concern the charge of the court. In our view the charge was comprehensive and fair and fully presented the contentions of the defendant and the law as it applied to the facts in this case.

Defendant relied upon his plea of self-defense. The plea of self-defense rests upon necessity, real or *apparent*. One may kill in defense of himself if he believes it to be necessary and has a reasonable ground for such belief. The reasonableness of the belief must be judged by the facts and circumstances as they appear to the defendant, and it is a question for the jury to

determine the reasonableness of defendant's belief. *State v. Robinson,* 213 N.C. 273, 195 S.E. 824.

[1] Upon the plea of self-defense, the court properly left it to the jury to determine the reasonableness of the belief of the defendant that he was in danger of death or great bodily harm under all the circumstances as they appeared to him.

[2] This was a case in which the evidence was clear that the defendant and deceased were engaged in an altercation, and deceased was killed by the use of a deadly weapon. The court submitted all permissible verdicts to the jury, and defendant was convicted of voluntary manslaughter. Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Wrenn,* 279 N.C. 676, 185 S.E. 2d 129; *State v. Benge,* 272 N.C. 261, 158 S.E. 2d 70. The State's evidence fully supports the verdict of the jury.

We have carefully examined all assignments of error and find them to be without merit. Defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

J. M. FORBES T/A FORBES' FLORIST-ALUMINUM PRODUCTS-REALTOR v. SAM PILLMON T/A CHOWAN BEACH

No. 736DC61

(Filed 13 June 1973)

1. **Pleadings § 33— action on contract — amendment to allege quantum meruit**

Where plaintiff's original cause of action was gounded in contract, the trial court did not err in permitting plaintiff to amend his complaint to seek recovery on *quantum meruit.* G.S. 1A-1, Rule 15.

2. **Quasi Contracts § 2— labor and material — judgment unsupported by findings**

Judgment awarding plaintiff an amount allegedly remaining due for labor and materials furnished defendant was not supported by the court's findings where there was no finding that plaintiff ever furnished labor and materials to defendant in any amount, that defendant

had accepted labor and materials in any amount, or that defendant had paid plaintiff any amount to be credited to the total value of labor and materials furnished by plaintiff and accepted by defendant.

APPEAL by defendant from *Gay, Judge,* 24 August 1972 Session, District Court, HERTFORD County.

This action was brought to recover $4,729.50 allegedly due for the furnishing of materials and labor under a written contract. Plaintiff moved to amend and, over defendant's objection, was allowed to amend his complaint to allege that defendant entered into a written contract with plaintiff whereby plaintiff was to furnish labor and materials and an itemized account; that defendant failed and refused "to pay for said labor and materials as set out in the written contract"; that notice of lien had been filed and was filed within six months from the last day on which the labor and materials were furnished; that defendant owes plaintiff $4,984.83 for labor and materials furnished. An itemized account was attached to the complaint as Exhibit A. Defendant denied all material allegations and by way of further defense averred that the agreement signed did not set forth the specifications in detail and plaintiff had not complied with the agreement; that defendant had paid plaintiff $7,000 which was more than the value of labor done and materials furnished.

Counsel for both parties waived trial by jury and agreed that the matter would be heard by the court who would find facts, make conclusions of law, and render judgment thereon. After hearing the evidence, the court did find facts and entered judgment in favor of plaintiff in the amount of $4,984.83, the exact amount prayed for in plaintiff's amended complaint. Defendant appealed.

No counsel for plaintiff.

Cherry, Cherry and Flythe, by Ernest L. Evans, for defendant appellant.

MORRIS, Judge.

[1] Defendant urges as error the court's allowing plaintiff to amend his complaint. He concedes that G.S. 1A-1, Rule 15, provides for broad discretion on the part of the court in allowing motions to amend complaint after answer is filed. His basis for argument is that, even so, the court cannot allow plaintiff to

amend his complaint to set up a wholly different cause of action. The original cause of action was grounded on contract. The amendment sought recovery on *quantum meruit.* There is a difference in the measure of damages in a claim on an express contract and a claim on *quantum meruit.* Nevertheless, this Court has said that "[i]t is permissible under our practice, in an action to recover for personal services, for the one rendering the services to abandon his allegations of special contract and proceed on the principle of *quantum meruit.*" *Stout v. Smith,* 4 N.C. App. 81, 84, 165 S.E. 2d 789 (1969). This assignment of error is overruled.

[2] Finally defendant urges that the facts found by the court do not support the judgment. We agree. The judgment recited the following: That plaintiff and defendant entered into a written contract wherein plaintiff was to furnish labor and material and construct a building on defendant's property for the sum of $11,729.50; that "plaintiff did extra work outside of said contract which (sic) an itemized account and contract both were introduced into evidence by the plaintiff"; that defendant paid $7,000 on the contract and "extra work"; that an itemized account of the work under the contract and "extra work" was furnished defendant and there is now a balance due of $4,984.83; "from plaintiff's testimony" defendant would not allow him to complete the contract and that plaintiff filed a laborer's and materialman's lien in the amount of $4,729.50, the amount owed under the contract and not the extra work done; that "defendant testified in his own behalf and stated that he signed the contract with the plaintiff. That the plaintiff had failed to complete the contract and the material and workmanship were inferior quality"; that "it further appearing to the Court that from defendant's testimony that he never authorized the plaintiff to do extra work beyond the contract."

The court then found "the facts as follows:

1. That plaintiff and defendant entered into a written contract with an itemized account of all work and material furnished.

2. That the defendant kept plaintiff from finishing the written contract and has not paid for the extra work.

3. That the defendant paid the sum of $7,000.00 on said contract."

The court then ordered (A) That plaintiff have and recover of defendant the sum of $4,984.83 with interest from 13 August 1971, and (B) That the judgment be a lien against defendant's property in the amount of $4,729.50, the lien dating from 13 August 1971, and (C) "For the costs of this action."

Clearly there is no finding of fact that plaintiff ever furnished labor and materials to defendant in any amount, or that defendant accepted labor and materials in any amount, or that defendant had paid plaintiff any amount to be credited to the value of the labor and materials furnished by plaintiff and accepted by defendant. Although the award is in the exact amount prayed for by plaintiff in his action on *quantum meruit*, the facts found do not support the judgment. Defendant is, therefore, entitled to a new trial.

The record states that at the close of plaintiff's evidence defendant moved for "a directed verdict" and renewed the motion for "a directed verdict" at the close of all the evidence. We assume that defendant intended to move under G.S. 1A-1, Rule 41, for involuntary dismissal, since this was a case tried by the court without a jury. Treating the motions as properly made under G.S. 1A-1, Rule 41, we think it obvious that the disposition of the case presupposes that in our opinion the motions were correctly overruled.

New trial.

Judges BRITT and PARKER concur.

WEEKS MOTOR COMPANY OF KINSTON, INC. v. HENRY B. DANIELS AND WIFE, ANNIE RUTH DANIELS

No. 738DC343

(Filed 13 June 1973)

Chattel Mortgages § 19— deficiency judgment — directed verdict for plaintiff — error

The trial court erred in directing a verdict for plaintiff at the close of the evidence in an action to recover a deficiency judgment for the balance allegedly due on a purchase money security agreement on an automobile where defendants denied the alleged default, denied that plaintiff repossessed the automobile under rights contained in the

security agreement, denied legal advertisement of the sale, denied sale to the highest bidder, and denied that a balance was owed under the agreement.

APPEAL by defendants from *Wooten, Judge,* 11 December 1972 Session of LENOIR District Court.

Plaintiff brought this action on 1 June 1972 to recover a deficiency judgment for balance allegedly due on a purchase money security agreement.

Pertinent allegations of the complaint are summarized as follows: On 21 August 1971 plaintiff sold to defendants a 1971 Plymouth automobile, the unpaid balance of said sale being evidenced by a note and purchase money security agreement. The agreement provided for 36 monthly installments in the amount of $104.64 each beginning on 1 October 1971. Defendants having defaulted in payments, plaintiff repossessed the automobile and on 29 May 1972 after due advertisement offered the vehicle for sale. The automobile was sold at a public sale to the highest bidder for $1,730.00, leaving a balance on the purchase price of $829.10 for which sum plaintiff made demand upon defendants and they refused to pay. Plaintiff prays judgment against defendants for $829.10 with interest, attorney fees and costs.

The allegations of defendants' answer are summarized as follows: Defendants admit the purchase of the automobile and the execution of the security agreement but deny defaulting in payments, deny the legal sale of the automobile and that the car was sold to the highest bidder for the sum of $1,730.00, and deny that there is a balance of $829.10 due on the security agreement. In their further answer to the complaint, defendants allege as a second defense and counterclaim that some time during the month of March or first of April 1972, with the payments required under the security agreement being fully paid, plaintiff took possession of the automobile to make repairs and the vehicle remained in plaintiff's shop for over a month before plaintiff began making the repairs. Defendants told plaintiff that they would not make further payments while plaintiff retained possession of the automobile. Plaintiff then sold the automobile for an inadequate price and the sale amounted to a conversion of the car to plaintiff's use. On the date of the conversion, the automobile was worth the sum of $2,600.00 for which amount defendants pray judgment against plaintiff and request that plaintiff's cause of action be dismissed.

At trial, evidence favorable to plaintiff tended to show: Plaintiff sold the automobile to defendants on 21 August 1971. The unpaid balance was financed through Wachovia Bank and Trust Company (Bank), and payments were to be made by defendants to the Bank; but if a default occurred, plaintiff was obligated to pay all unpaid payments. Defendants became past due in payments, and the Bank repossessed the car and subsequently sold it at public auction on 29 May 1972. Plaintiff attended the sale and was the only bidder, buying the car for $1,730.00. At the time of repossession, the amount owed the Bank was $2,338.28. Plaintiff paid the deficiency owed to the Bank. At the time of repossession, the automobile had been wrecked and was in plaintiff's body shop for repairs. The car was in plaintiff's body shop from 4 March 1972 until 10 May 1972 because defendants' insurance company failed to arrange for the repair work to be done. The car was sold in a wrecked condition.

Defendants' evidence tended to show: Defendants purchased the automobile from plaintiff. The car was involved in a collision, and at defendants' request, plaintiff's wrecker towed the car to plaintiff's body shop for repairs. The car remained in the body shop for three months, and defendants refused to make further payments until plaintiff began the repair work. Defendants reported the collision to their insurance company, but the company made payment for the damage incurred to the car to a representative of the Bank.

At the close of all the evidence, upon plaintiff's motion the court directed a verdict in favor of plaintiff and dismissed defendants' counterclaim. Defendants appealed.

Wallace, Langley, Barwick & Llewellyn by James D. Llewellyn for plaintiff appellee.

Turner and Harrison by Fred W. Harrison for defendant appellants.

BRITT, Judge.

Defendants' only assignment of error relates to whether the trial court erred in granting plaintiff's motion for a directed verdict at the close of all the evidence. The assignment is well taken.

In *Cutts v. Casey*, 278 N.C. 390, 417-418, 180 S.E. 2d 297, 311-312 (1971), Justice Sharp in discussing whether under G.S.

1A-1, Rule 50, the trial judge can direct a verdict in favor of the party having the burden of proof, said:

> "As a consequence of our constitutional and statutory provisions this Court has consistently held that the judge cannot direct a verdict upon any controverted issue in favor of the party having the burden of proof 'even though the evidence is uncontradicted.' (Citations.) Justice Rodman stated the rule succinctly in *Chisholm v. Hall,* 255 N.C. 374, 376-77, 121 S.E. 2d 726, 728: 'When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. *Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff.* (Emphasis ours.)
>
> 'A peremptory instruction does not deprive the jury of its right to reject the evidence because of lack of faith in its credibility. Such an instruction differs from a directed verdict as that term is used by us. A verdict may never be directed when the facts are in dispute. *The judge may direct a verdict only when the issue submitted* presents a question of law based on admitted facts.' (Italics ours; citations omitted.)"

In the instant case defendants denied material allegations of plaintiff. They denied the alleged default, denied that plaintiff repossessed the automobile under rights contained in the security agreement, denied due advertisement of the sale in compliance with state law, denied sale of the automobile to the highest bidder and denied that a balance was owing under the agreement. Having denied these alleged facts, defendants raised an issue as to their existence. The facts being in dispute the case became one for jury determination and the court erred in directing a verdict in plaintiff's favor.

The trial court properly dismissed defendants' counterclaim but the judgment in favor of plaintiff on its claim is

Reversed.

Judges CAMPBELL and MORRIS concur.

LAWRENCE E. KACZALA v. GEORGE GRADY RICHARDSON
v. CITY OF WILMINGTON

No. 725SC842

(Filed 13 June 1973)

Automobiles § 46; Evidence § 41— testimony invading province of jury

In an action to recover for personal injuries sustained in a collision between a fire truck and an automobile, testimony by a police officer that his investigation revealed that the fire truck ran through a red light invaded the province of the jury and constituted prejudicial error.

APPEAL by plaintiff and third party defendant from *Wells, Judge,* 12 June 1972 Session of NEW HANOVER Superior Court.

Plaintiff instituted this action seeking to recover for personal injuries sustained by him in a collision between a fire truck and an automobile on 26 December 1970 at the intersection of North Fourth Street and Chestnut Street in the City of Wilmington.

In his pleadings, plaintiff alleged in pertinent part as follows: On said date he was employed as a fireman by the City of Wilmington. Around 5:25 p.m., he was operating a fire truck belonging to said city in a northerly direction on North Fourth Street. As the fire truck approached the intersection with Chestnut Street, its flashing or revolving red light was burning and its siren was emitting a loud wailing sound. As plaintiff attempted to drive the fire truck through said intersection on a green light, defendant Richardson, who was operating an automobile west on Chestnut Street, negligently drove into the intersection on a light that was red to traffic on Chestnut Street, crashed into the fire truck and caused it to overturn, resulting in serious personal injuries to plaintiff.

In his answer, defendant Richardson denied any negligence on his part, alleged that he had the green light and pleaded contributory negligence on the part of plaintiff. He further pleaded a third party action against the City of Wilmington, asking for recovery for damages to his property and injury to his person.

Defendant city filed answer to the third party action and alleged a cross action against defendant Richardson for damages to the fire truck.

At trial the parties presented evidence in support of their respective allegations. Eight issues covering the three claims were submitted to the jury who answered the issues of defendant Richardson's negligence and plaintiff's contributory negligence in the affirmative. From judgment allowing no recovery by any party and dismissing the actions, plaintiff and defendant city appealed.

Smith & Spivey by Jerry L. Spivey for plaintiff appellant.

Yow & Yow by Cicero P. Yow for third party defendant appellant.

Carlton S. Prickett, Jr., and Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellee.

BRITT, Judge.

Appellants assign as errors the court's allowing a police officer to testify over objection that his investigation revealed that the fire truck ran through a red light, and the court's recapitulation of that evidence in its charge to the jury. The assignments of error are sustained.

The officer in question was presented as a witness by plaintiff. The record pertaining to his cross-examination reveals:

> "Q. As a result of your conversation or your investigation, did your investigation reveal that the fire truck had run through the red light?
>
> OBJECTION. OVERRULED. EXCEPTION.
>
> EXCEPTION No. 11.
>
> A. Yes, sir. At this time it did."

The record further reveals that the court in its jury charge in recapitulating the evidence of Officer Brown stated "and on cross-examination he said on the report he stated that the fire truck had run a red light."

While appellants do not cite, and our research does not disclose, authorities that are directly in point with the instant case, we think proper analogy can be drawn from numerous opinions of our State Supreme Court.

In *Jones v. Bailey,* 246 N.C. 599, 99 S.E. 2d 768 (1957), a case involving a collision between two automobiles at a street intersection, testimony of a witness to a declaration made by an officer in a conversation with defendant at the hospital some time after the accident to the effect that the officer said de-

fendant did not have the right of way at the intersection was held to be incompetent, entitling defendant to a new trial. The court declared that the evidence was inadmissible on two grounds: "In the first place, it was hearsay evidence to the extent that its value or truthfulness depended in part upon the veracity and competency of some other person. * * * In the second place, the purported statement of the officer was inadmissible because it was a declaration of an opinion or conclusion which he would not have been permitted to state as a witness. (Citation.) We think this evidence clearly invaded the province of the jury."

In *McGinnis v. Robinson,* 258 N.C. 264, 128 S.E. 2d 608 (1962), the court declared inadmissible in evidence the opinion of an officer as to which occupant of the vehicle was driving at the time of the accident, the opinion being based upon the officer's investigation following the accident.

In several cases the Supreme Court has held that while it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident, his testimony as to his conclusions from these facts is incompetent. See *Farrow v. Baugham,* 266 N.C. 739, 147 S.E. 2d 167 (1966); *Shaw v. Sylvester,* 253 N.C. 176, 116 S.E. 2d 351 (1960); 1 Strong, N. C. Index 2d, Automobiles, § 46, pp. 469-472.

We find unconvincing appellee's argument that even if the testimony was incompetent, it was not prejudicial. Evidence as to who had the green light at the intersection was in sharp conflict. In all probability the most crucial question for the jury in determining who was at fault was a determination as to who had the green light and it is conceded generally that the testimony of a police officer has considerable weight. By stating that his investigation revealed that the fire truck ran through the red light, the officer stated an opinion or conclusion which invaded the province of the jury.

We deem it unnecessary to discuss the other assignments of error brought forward in appellants' brief as the points raised may not occur upon a retrial of this action.

For the reasons stated, appellants are awarded a

New trial.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. EDDIE McGEE

No. 7318SC348

(Filed 13 June 1973)

1. **Criminal Law § 32; Narcotics § 3— possession and distribution statute — constitutionality**

G.S. 90-95(f)(3) providing that possession of more than five grams of marijuana raises a presumption of possession with intent to distribute is constitutional.

2. **Narcotics §§ 1, 4.5— possession of more than five grams of marijuana — nonexistent offense — prejudicial instructions**

Trial court's instruction that defendant could be found guilty of the illegal possession of marijuana with intent to distribute, guilty of the illegal possession of more than five grams of marijuana, or guilty of the illegal possession of less than five grams of marijuana was error since possession of more than five grams of marijuana does not constitute a separate offense, and that instruction, together with the failure of the court to instruct clearly on the effect of G.S. 90-95(f)(3), was so prejudicial as to entitle defendant to a new trial.

Judge BROCK dissents.

APPEAL by defendant from *Seay, Judge,* at the 13 November 1972 Criminal Session of GUILFORD Superior Court (High Point Division).

By indictment proper in form defendant was charged with felonious possession of marijuana with intent to distribute on 23 June 1972. He pleaded not guilty, a jury returned a verdict of guilty as charged, and from judgment imposing 24 months prison sentence as a youthful offender, defendant appealed.

Attorney General Robert Morgan by John M. Silverstein, Associate Attorney, for the State.

Schoch, Schoch, Schoch and Schoch by Arch K. Schoch for defendant appellant.

BRITT, Judge.

All assignments of error brought forward and argued in defendant's brief relate to the court's instructions to the jury.

[1] Defendant assigns as error the jury instruction applying the presumption created by G.S. 90-95(f)(3) which provides that the possession of more than five grams of marijuana from which the resin has not been extracted raises a presumption of

possession with intent to distribute. Defendant contends that said statute is unconstitutional. A similar contention was raised in *State v. Garcia,* 16 N.C. App. 344, 192 S.E. 2d 2 (1972), cert. den. 282 N.C. 427, 192 S.E. 2d 840, where we upheld the constitutionality of the statute and we deem it unnecessary to restate the reasoning set out in that opinion. The assignment of error is overruled.

[2] By proper assignments of error, defendant contends the court erred in instructing the jury that he could be found guilty of a "non-existent" crime and in failing to provide instructions as to the effect of G.S. 90-95(f)(3). The challenged instructions include the following:

> "As to the defendant McGee, you may find him guilty of the illegal possession of the controlled substance marijuana with the intent to distribute it, or you may find him not guilty of that and find him guilty of the illegal possession of more than five grams of marijuana, or you may find him not guilty of that and find him guilty of the illegal possession of less than five grams of marijuana, or you may find him not guilty, just as you find the facts to warrant from all the evidence in the case, applying thereto the law as given to you by the court."

Defendant argues that "possession of more than five grams of marijuana" does not constitute a separate offense. The point is well taken and we hold that the court erred in giving the quoted instruction as well as other instructions of like effect. While stated in a different context, the following words of Judge Brock in *Garcia* are applicable here: "The statutory provisions of which defendants complain merely constitute a rule of evidence for the establishment of a prima facie case; . . . ." In all fairness to the able trial judge in the instant case, we point out that our opinion in *Garcia* had not been published in the Advance Sheets at the time of the trial of this case.

The Attorney General argues, however, that if there was error in the instructions, the error was not prejudicial as defendant was found guilty of possession of marijuana with intent to distribute. Ordinarily this argument would be valid but in the case at hand there are strong indications that defendant was prejudiced by the instructions.

The chief purpose of a charge is to aid the jury to understand clearly the case and to arrive at a correct verdict. *Glenn v. City of Raleigh,* 246 N.C. 469, 98 S.E. 2d 913 (1957).

Defendant was tried jointly with another defendant charged with the same offense. Early in the charge, the court instructed the jury as follows:

> "Now, I charge you, members of the jury, that for you to find the defendants or either of them guilty of possessing the controlled substance marijuana with intent to distribute it, the State must prove these things beyond a reasonable doubt: First, that the defendant; that is, either the defendant Burton or the defendant McGee; that is, either of the defendants; specifically, as to that defendant, knowingly possessed the controlled substance marijuana—and a person possesses a controlled substance marijuana when he has either by himself or together with others both the power and intent to control the disposition or use of that substance; and, second, that the defendant or either of them intended to distribute the controlled substance; that is, to deliver or transfer it, the marijuana, to another or to others. And if you find beyond a reasonable doubt that the defendant McGee or the defendant Burton knowingly possessed the 15 grams of marijuana, you may infer that the defendant possessed it for the purpose of distribution. However, you are not compelled to do so. You will consider this evidence together with all the other evidence in the case in determining whether the State has proved beyond a reasonable doubt that the defendant McGee or the defendant Burton knowingly possessed the controlled substance marijuana with the intent to distribute it."

At no other place in the charge did the court instruct the jury with respect to the effect of the statutory presumption.

After the jury had deliberated for some period of time, they returned to the courtroom and requested further instructions. The foreman inquired as to which is the greater charge, "possession of less than five ounces, or grams?" The court replied: "They are charged in the bill of indictment with the offense of possession of a controlled substance marijuana with the intent to distribute, just simple possession of more than five grams or simple possession of less than five grams." The foreman then inquired: "If they have a simple possession of more than five grams, is that a misdemeanor or a felony?" The court refused to answer the question but advised the jury that they were not to concern themselves with the question of punishment as that was a matter for the court.

After further deliberation, the jury returned to the courtroom and advised that they had agreed upon a verdict. The record discloses the following:

"CLERK: What say you as to the defendant McGee; do you find the defendant guilty of illegal possession of controlled substance marijuana with intent to distribute the same; guilty of possession of controlled substance marijuana in excess of five grams; guilty of simple possession of marijuana in an amount less than five grams; or, not guilty?

FOREMAN: We find him guilty of possession in excess, with intent to distribute.

CLERK: You say you find the defendant guilty of possession of the controlled substance marijuana, with intent to distribute the same?

FOREMAN: Yes."

We think the erroneous instructions, together with the failure of the court to instruct clearly on the effect of G.S. 90-95(f)(3), were prejudicial to defendant, entitling him to a new trial.

New trial.

Judge BALEY concurs.

Judge BROCK dissents.

DON EAST v. RESERVE INSURANCE COMPANY

No. 7321SC182

(Filed 13 June 1973)

Insurance § 69— hit-and-run accident — no physical contact established — summary judgment for insurer proper

Trial court properly entered summary judgment for insurer in plaintiff's action to recover under the "hit-and-run automobile" provision of his policy where plaintiff's evidence failed to show that his accident and resulting injuries occurred through actual physical contact with an alleged hit-and-run automobile.

APPEAL by plaintiff from *Gambill, Judge,* 9 October 1972 Session of FORSYTH Superior Court.

This is a civil action instituted by plaintiff on 30 June 1972 in which he seeks to recover from defendant, his insurer, under uninsured motorists coverage applicable to the motorcycle upon which plaintiff was riding at the time of his injuries. Defendant denies liability, contending (1) that there was no contact between plaintiff's motorcycle and any other vehicle, and (2) that there is no evidence of actionable negligence on the part of the operator of any other vehicle.

On 4 August 1972 defendant caused plaintiff's deposition to be taken and thereafter moved for summary judgment for the reason that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

A hearing was held on the motion at which time the court had before it the complaint, answer, deposition of plaintiff, affidavit of one Bob Archer, and the insurance policy. Following the hearing summary judgment was entered in favor of defendant from which plaintiff appealed.

Laurel O. Boyles for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by J. Robert Elster for defendant appellee.

BRITT, Judge.

Plaintiff seeks to recover under the "HIT-AND-RUN AUTOMOBILE" provision of his policy which provides in pertinent part as follows: "The term 'hit-and-run automobile' means an automobile, other than one in which an insured is a passenger, which causes an accident resulting in bodily injury to an insured, arising out of *physical contact* of such vehicle with the insured or with a vehicle which the insured is occupying at the time of the accident, * * *." (Emphasis added.) Plaintiff does not deny that it is incumbent on him to show that there was physical contact between the motorcycle he was riding and the alleged hit and run automobile.

In *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971), we find: "The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. * * * Evidence which may be considered under Rule 56 includes admissions in the pleadings, depositions

on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken."

On the question of summary judgment, this court in *Pridgen v. Hughes,* 9 N.C. App. 635, 639-640, 177 S.E. 2d 425, 428 (1970), said:

> "The burden is on the moving party to establish the lack of a triable issue of fact. The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counter-affidavits or other materials. *Griffith v. William Penn Broadcasting Co.* (E.D. Pa. 1945) 4 F.R.D. 475. 'But if the moving party by affidavit or otherwise presents materials which would require a directed verdict in his favor, if presented at trial, then he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials, by affidavit or otherwise, that show there is a triable issue of material fact. He need not, of course, show that the issue would be decided in his favor. *But he may not hold back his evidence until trial; he must present sufficient materials to show that there is a triable issue.*' Moore's Federal Practice, 2d Ed., Vol. 6, § 56.11(3), p. 2171." (Emphasis added.)

In his deposition, plaintiff stated: "I'm right much at a loss as to what happened. I was riding down the highway, and I woke up in the hospital some days later." He further stated that he was on the right side of the road, going around a curve to his left, but he does not remember anything else until he woke up "a time or two" in the ambulance. He did not remember a car approaching him from the opposite direction.

In his affidavit, Archer stated he and plaintiff and two other persons were riding motorcycles on the day in question. Plaintiff was first in line, Archer was behind him and the other two men were considerably behind Archer. Archer observed plaintiff enter the curve *but lost sight of plaintiff as he rounded the curve.* When Archer got into the curve, he observed a red Chevrolet sliding broadside, completely in Archer's lane of travel. Archer drove his motorcycle off the side of the road

to avoid a collision and thereafter saw plaintiff lying unconscious in the ditch on the right-hand side of the road; plaintiff's motorcycle, totally demolished, was in the ditch on the left side of the road.

We hold that the materials produced at the hearing were not sufficient to show that there was a triable issue on the question of physical contact between plaintiff's motorcycle and the alleged hit and run automobile. Consequently, the judgment appealed from is

Affirmed.

Judges CAMPBELL and BALEY concur.

MARLENE INGLE, PETITIONER v. GARRIE McDEAN INGLE, RESPONDENT

No. 7319DC443

(Filed 13 June 1973)

1. **Contempt of Court § 5— indirect contempt — sufficiency of notice**

Where defendant allegedly failed to comply with a prior court order directing him to make child support payments, his contempt, if any, would be indirect and G.S. 5-7 required that an order issue directing defendant to appear within a reasonable time and show cause why he should not be attached for contempt; therefore, defendant was not given sufficient notice of the purpose of the hearing which resulted in his incarceration for failure to make support payments where he was served only with a subpoena which ordered him to appear "to testify in the above entitled action."

2. **Contempt of Court § 6; Divorce and Alimony § 23— failure to comply with support order — findings required**

An order committing defendant to prison until he complied with a child support order is vacated where the trial court failed to make findings that defendant's failure to comply was willful and that defendant possessed the means to comply.

ON *certiorari* from order of *Warren, Judge,* 28 September 1972 Civil Nonjury Session of CABARRUS District Court.

On 24 January 1973 this court granted respondent's petition for certiorari to review an order committing respondent to prison for wilful failure to make support payments under a previous court order.

This is an action under the Uniform Reciprocal Enforcement of Support Act (G.S. 52A-1, et seq.) to require respondent to contribute to the support of his wife and minor children. The action was initiated in Wisconsin, where the wife and children reside, and North Carolina, as the state in which respondent resides, is the responding state.

On 17 June 1970, pursuant to a petition from a Wisconsin Court, due notice to respondent, and a hearing, the Domestic Relations Court of Cabarrus County ordered respondent to pay $25.00 per week toward the support of his wife and children, payments to begin on 26 June 1970. On 19 September 1972 respondent was served with a subpoena commanding him to appear before the District Court of Cabarrus County (successor to the Domestic Relations Court of Cabarrus County) on 28 September 1972 "to testify" in this action.

In obedience to the subpoena, defendant appeared (without counsel) at a hearing in the district court at which time the court inquired why respondent had failed to make support payments in compliance with the prior court order. Respondent stated that he had had "child visitation problems." The court asked respondent if he owned a car to which respondent replied that he did. The court then asked what value the car had and respondent answered "$4,800.00." Making no further inquiry and hearing no sworn testimony from either respondent or petitioner, the court found as facts that defendant "willfully failed to pay support payments ordered" and that "he is more than $2,800.00 in arrears with the support payments." From an order that respondent "be confined in the common jail of Cabarrus County to be held until such time as his arrearage is current," respondent gave notice of appeal.

Attorney General Robert Morgan by Miss Ann Reed, Associate Attorney, for the State.

Davis, Koontz & Horton by Clarence E. Horton, Jr., for respondent appellant.

BRITT, Judge.

[1] The first question for our consideration is whether respondent was given sufficient notice of the purpose of the 28 September 1972 hearing. We hold that he was not. Prior to the hearing, respondent was served only with a subpoena which

ordered him to appear "to testify in the above entitled action." At the hearing, the court made an informal inquiry as to why respondent had failed to make support payments in compliance with a prior court order and then, in effect, adjudged him in contempt.

Failure to comply with a prior court order would amount to an act committed outside the presence of the court, at a distance from it, which tends to degrade the court or interrupts, prevents or impedes the administration of justice and would be classified an indirect contempt. *In re Edison,* 15 N.C. App. 354, 190 S.E. 2d 235 (1972). When the contempt is indirect, the procedure prescribed by G.S. 5-7 providing that an order issue directing an offender to appear within a reasonable time and show cause *why he should not be attached for contempt* must be followed. In the instant case respondent received no such notice.

[2] Respondent next assigns as error the court's failure to make findings of fact as to his present ability to comply with the previous court order and his ability to pay during the period of the alleged default. This assignment also has merit. An order, entered pursuant to a contempt hearing, which confines a person to jail until he complies with a support order must find not only that his failure to comply with the support order was willful but also that he presently possesses the means to comply with the order. *Mauney v. Mauney,* 268 N.C. 254, 150 S.E. 2d 391 (1966); *Upton v. Upton,* 14 N.C. App. 107, 187 S.E. 2d 387 (1972); *Cox v. Cox,* 10 N.C. App. 476, 179 S.E. 2d 194 (1971). In the case at bar the court made no such findings of fact.

For the reasons stated, the order appealed from is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

Remanded.

Judges MORRIS and PARKER concur.

WANDA TODD v. JAMES KYLE TODD

No. 7321DC309

(Filed 13 June 1973)

Divorce and Alimony § 24; Infants § 9— custody by mother — overnight visits by male friend — no substantial change in circumstances

The trial court did not make sufficient findings of a substantial change of circumstances to support modification of a child custody order transferring custody from the mother to the father where the court found the mother had allowed a male friend to spend numerous nights and weekends in her home and in the presence of the child, the court found the mother had permitted such visitations prior to the former order, and the court failed to find there was any adulterous relationship between the mother and her male friend or that the mother had become an unfit person to have custody of the child.

APPEAL by plaintiff from *Sherk, Judge,* 9 November 1972 Session of FORSYTH District Court.

Plaintiff instituted this action on 20 December 1971 to have the court determine custody of Tammy Victoria Todd, a child born to the marriage of the parties on 9 February 1967, and specify the amount of child support defendant should pay. The parties were married to each other on 12 June 1966 and separated in July of 1971.

On 31 January 1972, following a hearing, Judge Sherk entered an order finding that both plaintiff and defendant were fit and proper persons to have custody of the child but at that time the best interest of the child required that her custody be awarded to plaintiff. Custody was awarded to plaintiff, with visitation rights given to defendant who was ordered to pay $30.00 per week child support. There was no appeal from that order.

On 13 June 1972 defendant filed a motion in the cause alleging that since the above mentioned order was entered, plaintiff had been living in adultery with one Ralph Brunett and that plaintiff was no longer a fit and proper person to have custody of the child; defendant asked that he be awarded custody.

On 30 November 1972, following a hearing by the court and an investigation by a family counselor of the Domestic Di-

vision of the District Court, Judge Sherk entered an order summarized in pertinent part as follows:

(1) Finding that "prior to said (31 January 1972) order and since said order the plaintiff has allowed one Ralph Brunett to spend numerous nights and weekends in the home of plaintiff and in the presence of the said minor child."

(2) Finding that it would be in the best interest of said child that the order previously entered be changed whereby defendant would be awarded the exclusive custody, care and control of said child with plaintiff given certain visitation rights.

(3) Ordering that exclusive custody, care and control of the child be awarded to defendant, with specified visitation privileges in plaintiff.

Plaintiff appealed from the order.

White and Crumpler by Fred G. Crumpler, Jr., and Michael J. Lewis for plaintiff appellant.

Wilson and Morrow by Harold R. Wilson and John F. Morrow for defendant appellee.

BRITT, Judge.

Plaintiff contends that the trial court erred in entering the order modifying a previous custody order without a finding of substantial change in circumstances affecting the welfare of the child. The contention has merit.

G.S. 50-13.7(a) provides: "An order of a court of this State for custody or support, or both, of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." Our courts have held that before a custody order may be altered a *substantial* change of circumstances must be shown. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967); *Rothman v. Rothman,* 6 N.C. App. 401, 170 S.E. 2d 140 (1969).

We do not think the trial court made sufficient findings of substantial change of circumstances to support the order transferring custody of the child from plaintiff to defendant. While the court found that plaintiff had allowed a male friend to spend numerous nights and weekends in her home and "in the presence of" the child, the court found that plaintiff had

permitted visitations by her male friend prior to the former order and failed to find that there was any adulterous relationship between plaintiff and said friend. In its previous order the court found that both plaintiff and defendant were fit and proper persons to have custody of the child; in the order appealed from the court made no finding that plaintiff had become an unfit person to have custody of the child.

For the reasons stated, the order appealed from is vacated and this cause is remanded for further proceedings not inconsistent with this opinion.

Remanded.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. CHARLES EDGAR ALEXANDER

No. 7317SC238

(Filed 13 June 1973)

1. **Burglary and Unlawful Breakings § 1— elements of burglary**

Burglary consists of five elements: (1) a breaking, (2) an entry, (3) of a dwelling house, (4) in the nighttime, and (5) with the intent to commit a felony therein.

2. **Burglary and Unlawful Breakings § 5— burglary — opening of door as breaking**

In a prosecution for second-degree burglary, there was sufficient evidence of a breaking where defendant testified that he "just opened the door and went in."

3. **Burglary and Unlawful Breakings § 5— intent to steal inferred from evidence**

In a second degree burglary prosecution, the jury could find that defendant intended to commit the felony of larceny where the evidence tended to show that defendant entered a home with a "For Sale" sign in the yard in the middle of the night when the home was unoccupied but full of household goods.

ON *certiorari* to review a trial before *James, Judge,* 4 September 1972 Session of ROCKINGHAM Superior Court.

Defendant was tried on a bill of indictment charging him with second-degree burglary of an uninhabited dwelling house

on 18 March 1972. He was found guilty by a jury and sentenced to imprisonment for four to six years.

The State's evidence tended to show that the house was uninhabited, placed on the market for sale, but that the owner's household goods were still in the house. A neighbor saw, in the nighttime, a man go into the house through a window; the neighbor did not know whether that window had been open or closed prior to the entry.

The neighbor called the police, who arrived within only a few minutes of the call. One officer saw the front door begin to open and then suddenly slam shut. He entered the house and saw the defendant sitting in a chair, at which time he arrested the defendant.

Attorney General Robert Morgan by Associate Attorney Howard A. Kramer for the State.

Bethea, Robinson and Moore by D. Leon Moore for defendant appellant.

CAMPBELL, Judge.

Under G.S. 14-51 second-degree burglary is the crime as defined at the common law, except that the dwelling house must not be occupied by anyone at the time of the commission of the crime.

[1] Burglary consists of five elements: (1) a breaking, (2) an entry, (3) of a dwelling house (mansion-house), (4) in the nighttime, and (5) with the intent to commit a felony therein. *State v. Whit*, 49 N.C. 349 (1857).

Breaking is an essential element of the crime. More is required than merely the crossing of an imaginary line.

> "[T]here must be a breaking, removing, or putting aside of something material, which constitutes a part of the dwelling-house and is relied on as a security against intrusion. Leaving a door or window open shows such negligence and want of proper care as to forfeit all claim to the peculiar protection extended to dwelling-houses. But if the door or window be shut, it is not necessary to resort to locks, bolts, or nails; because a latch to the door and the weight of the window may well be relied on as a sufficient security. . . ." *State v. Boon*, 35 N.C. 244, 246 (1852).

The State must present evidence that a breaking occurred, or from which it may reasonably be inferred that the defendant broke into the dwelling. Such proof is usually accomplished by testimony showing that prior to the entry all doors and windows were closed. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967); *State v. McAfee,* 247 N.C. 98, 100 S.E. 2d 249 (1957); *State v. Feyd,* 213 N.C. 617, 197 S.E. 171 (1938); *State v. Walls,* 211 N.C. 487, 191 S.E. 232 (1937); *State v. Ratcliff,* 199 N.C. 9, 153 S.E. 605 (1930); *State v. Allen,* 186 N.C. 302, 119 S.E. 504 (1923); *State v. Johnston,* 119 N.C. 883, 26 S.E. 163 (1896).

In *State v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278 (1940), the windows were open, but screens covering the windows were attached in place. In *State v. Fleming,* 107 N.C. 905, 12 S.E. 131 (1890), the windows were open, but blinds inside the house covered them.

[2] In the instant case, while the evidence for the State fails to reveal whether the window was open or not, nevertheless, the defendant, by his own statement, shows there was a breaking. The defendant testified, "I did not go in the window of the house. I went through the door. I just opened the door and went in." Thus, the defendant's own evidence supplies this element of the commission of the crime.

[3] The fifth element of burglary—the intent to commit a felony—must exist at the time of the breaking and entering. Intent, being a state of mind, is difficult to prove and ordinarily is a question for the jury to decide. In the instant case the defendant contended that he went into the house only for the purpose of looking it over to determine whether or not he would like to purchase it, since there was a "For Sale" sign in the yard. On the other hand, the State contended that a person does not usually go into a home in the middle of the night when the home was unoccupied but full of household goods unless such person had an intent to steal.

As stated in *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970):

> "'. . . Numerous cases, however, hold that an unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. The fundamental theory, in the absence of evidence of other intent or explana-

tion for breaking and entering, is that the usual object or purpose of burglarizing a dwelling house at night is theft.' "

We hold that in the instant case the evidence presented a question for the jury.

The charge of the trial court was adequate and sufficient to present the contentions of the defendant to the jury and no exception was assigned to this charge by the defendant.

We think the evidence, when considered in the light strongest for the State, presented a jury question; and the defendant has had a trial free from any prejudicial error.

No error.

Judges BRITT and BALEY concur.

JAMES B. HENRY, SR., AND ERNEST L. RIDENHOUR v. L. G. SHORE, JR. AND WIFE, BARBARA D. SHORE; RICHARD C. TALBERT, JR. AND WIFE, ELIZABETH C. TALBERT; RICHARD C. TALBERT, SR., AND WIFE, MARGARET C. TALBERT; C. B. MILLER; NORTH CAROLINA SAVINGS AND LOAN ASSOCIATION OF STANLY COUNTY, NORTH CAROLINA

No. 7320SC262

(Filed 13 June 1973)

1. **Frauds, Statute of § 7— oral contract to convey — voidness**

Summary judgment was properly entered in favor of defendant in an action for specific performance of an oral contract to convey land or for damages for breach thereof since such a contract is void. G.S. 22-2.

2. **Contracts § 32; Registration § 1; Vendor and Purchaser § 10— interference with contract to convey — failure to record contract**

Summary judgment was properly entered in favor of defendants in an action in which plaintiff sought damages resulting from an alleged conspiracy to deprive plaintiff of his rights under a contract to purchase land where it was stipulated that no such contract had been recorded as required by G.S. 47-18.

APPEAL by plaintiffs from a judgment entered by *Godwin, Special Judge,* 9 October 1972 Session of STANLY County Superior Court.

The plaintiffs filed a complaint in an action against Shore on 20 March 1972. In this action the plaintiffs asserted that on 13 March 1972, they entered into a contract to purchase certain real estate from Shore for a price of $34,000.00; that plaintiffs tendered the purchase price to Shore, and he refused to accept same and refused to convey the lands involved to plaintiffs but advised that he had another buyer. Plaintiffs sought specific performance of the contract or, in lieu thereof, $8,000.00 in damages. Shore filed an answer denying the material allegations of the complaint and further asserted that any agreement was entirely oral and in violation of the Statute of Frauds, G.S. 22-2, and was therefore void. Thereafter on 28 June 1972, plaintiffs filed a motion to make Talbert, Jr., Talbert, Sr., Miller, and Savings and Loan Association parties to the action and alleged that on 27 March 1972, Shore conveyed the land in question to Talbert, Jr., and on the same date Talbert, Jr., and Talbert, Sr., executed a deed of trust to Miller and the Savings and Loan Association; that all of the additional defendants knew of the contract between the plaintiffs and Shore and that they conspired and agreed to interfere with the contract and that as a result thereof a cloud has been created on the aforesaid property, and the plaintiffs have been damaged in the amount of $8,000.00.

The additional defendants filed pleadings denying any wrongdoing on their respective parts but admitting the conveyance from Shore to Talbert, Jr., and the execution of the deed of trust to Miller as trustee for the Savings and Loan Association.

Thereafter, the parties entered into certain stipulations including one to the effect that no contract between the plaintiffs and Shore had ever been recorded in the Stanly County Public Registry.

A motion for summary judgment was filed by the Shores; and upon hearing thereon, the plaintiffs stated in open court that the contract between the plaintiffs and Shore was an oral one. Judgment was duly entered dismissing the action as to Shore, and no appeal was taken.

Likewise motions for summary judgment were made on behalf of Talbert, Jr., Talbert, Sr., Miller, and the Savings and Loan Association. These motions were also allowed. Pursuant to the judgments allowing the motions for summary judgment, the

action was dismissed with prejudice as to Talbert, Jr., Talbert, Sr., Miller, and the Savings and Loan Association.

Jones and Drake by Henry T. Drake for plaintiff appellants.

D. D. Smith for defendant appellees, Richard C. Talbert, Jr., and wife, Elizabeth C. Talbert; and Richard C. Talbert, Sr., and wife, Margaret C. Talbert.

Coble, Morton and Grigg by David L. Grigg for defendant appellees, C. B. Miller and North Carolina Savings and Loan Association.

CAMPBELL, Judge.

[1] There was no error in dismissing this action as to all defendants. The summary judgment in favor of Shore was correct for that there was no contract in writing pertaining to the conveyance of the realty as required by North Carolina General Statutes 22-2. "A wholly unexecuted parol contract to sell land is void." *Riggs v. Anderson,* 260 N.C. 221, 132 S.E. 2d 312 (1963).

[2] With regard to the Talberts, Miller, and the Savings and Loan Association, the North Carolina registration statute, G.S. 47-18, is controlling. *Bruton v. Smith,* 225 N.C. 584, 36 S.E. 2d 9 (1945); *Eller v. Arnold,* 230 N.C. 418, 53 S.E. 2d 266 (1949).

Affirmed.

Judges MORRIS and PARKER concur.

EDITH SINK PENNELL v. SECURITY INSURANCE COMPANY AND NEW AMSTERDAM CASUALTY COMPANY

No. 7321SC310

(Filed 13 June 1973)

1. Insurance §§ 130, 137— fire policy — proof of loss — time limitations — waiver

An insurer, by the conduct and acts of its agents and adjusters, may waive the requirements in a fire insurance policy relating to the rendering of formal proofs of loss and the institution of an action within twelve months of the inception of the loss.

2. **Insurance §§ 130, 137— fire policy — proof of loss — time limitations — genuine issue as to waiver**

In an action on a fire policy, there was a genuine triable issue as to whether defendant insurers waived requirements of the policy relating to filing formal proof of loss and institution of an action within twelve months where plaintiff filed affidavits and exhibits tending to show that defendants offered to pay for the loss and continually negotiated with plaintiff as to the amount, that defendants repeatedly assured plaintiff her claim would be paid, and that defendants' adjuster wrote plaintiff more than twelve months after the fire that plaintiff or her representative should contact him immediately if she wished to pursue the matter.

APPEAL by plaintiff from *Armstrong, Judge,* 30 October 1972 Session of Superior Court held in FORSYTH County.

This is a civil action instituted by plaintiff on a standard fire insurance policy issued by defendants to recover $10,000.00 for damages to her home and personal property located therein allegedly caused by fire on 8 October 1968.

Defendants filed a motion for summary judgment, supported by an affidavit, on the grounds that plaintiff had failed to comply with the requirements of the policy relating to the filing of a signed proof of loss and the institution of the action within twelve months.

Plaintiff filed affidavits and exhibits in opposition to the motion.

The trial court, after making detailed findings of fact and conclusions of law, entered a judgment dismissing plaintiff's claim. Plaintiff appealed.

White & Crumpler by Michael J. Lewis for plaintiff appellant.

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

HEDRICK, Judge.

The trial judge in substance, if not in form, allowed the defendants' motion for summary judgment.

The affidavit of defendants' Claims Manager, filed in support of their motion for summary judgment, tended to show that plaintiff had failed to comply with the requirements of the policy relating to filing a signed and sworn proof of loss,

"and further, that the defendants have never waived the one-year limitation of action clause in the policy." Plaintiff does not contend that she rendered defendants a signed and sworn formal proof of loss within sixty days of the loss, and it is obvious her action was not commenced within twelve months of the inception of the loss. Therefore, unless the record contains evidence that defendants waived the requirements of the policy relating to the filing of formal proof of loss and the institution of the action within twelve months, summary judgment for defendants was appropriate.

[1] It appears to be well settled in this jurisdiction that an insurer, by the conduct and acts of its agents and adjusters, may waive the requirements in an insurance policy relating to the rendering of formal proofs of loss and the institution of an action within twelve months of the inception of a loss. *Meekins v. Insurance Co.*, 231 N.C. 452, 57 S.E. 2d 777 (1950); *Strause v. Ins. Co.*, 128 N.C. 64, 38 S.E. 256 (1901); *Vail v. Insurance Co.*, 14 N.C. App. 726, 189 S.E. 2d 527 (1972); *Horton v. Insurance Co.*, 9 N.C. App. 140, 175 S.E. 2d 725 (1970), cert. denied 277 N.C. 251 (1970).

The affidavits and exhibits filed by plaintiff in opposition to the motion for summary judgment, except where quoted, are summarized as follows:

After the fire on 8 October 1968, plaintiff notified defendants within sixty days and visited the site of the fire with two of defendants' agents. Plaintiff gave the defendants an itemized list and value of the property destroyed in the fire. The defendants offered to pay the plaintiff, and she and her sons "continuously" negotiated with the defendants as to the amount of the loss. She and her sons "repeatedly" called the defendants and were assured her claim would be paid. Defendants never furnished plaintiff with proof of loss forms.

Plaintiff received the following letter:

"GENERAL
ADJUSTMENT
BUREAU, INC. 611 Peters Creek Parkway

P. O. Box 448—Winston-Salem, North Carolina 27102

October 24, 1969

Mrs. Edith Sink Pennell
P. O. Box 1358
Winston-Salem, N. C.

Dear Mrs. Pennell:

Fire 10-8-68
Our File 23447-30339
Security Insurance Company
Policy #H 93 2004

It is imperative that you or your representative contact me immediately concerning the above if you wish to pursue the matter. Otherwise, I am going to close my file. The policy contract has already been violated by you by not submitting Proof of Loss within ninety days of the date of the loss.

Yours very truly,

W. O. Andrews, Jr.
Adjuster

WOAjr.:ajm"

[2] We hold that the evidence tending to show that the defendants offered to pay for the loss and continually negotiated with the plaintiff as to the amount, that the defendants repeatedly assured plaintiff that her claim would be paid, and that more than twelve months after the fire, the adjuster wrote the letter dated 24 October 1969, is sufficient to show that there is a genuine triable issue as to whether defendants waived the requirements of the policy relating to filing formal proof of loss and institution of the action within twelve months. The judgment appealed from is

Reversed.

Judges BRITT and BALEY concur.

IN THE MATTER OF WALTER DENNIS EDWARDS, A MINOR, AGED 15

No. 7322DC416

(Filed 13 June 1973)

1. **Infants § 10— juvenile proceeding — request for court reporter denied — failure of trial court to make findings — new hearing**

Where the trial judge refused the juvenile's request for a court reporter to transcribe the proceedings, the electronic device for recording the proceedings failed to function and the trial judge did not summarize the evidence and make findings of fact within ten days, the Court of Appeals cannot give the minor an effective appellate review; however, the Court in its discretion does order a new hearing.

2. **Infants § 10— unrealistic condition of probation — order vacated**

An order requiring that an indigent fifteen-year-old regularly attending school and without a steady job pay the complainant $1500 within 30 days or face confinement was unrealistic and is vacated.

APPEAL by the minor from *Hughes, District Court Judge,* 15 January 1973 Session of District Court held in DAVIDSON County.

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

Stoner, Stoner & Bowers, by P. G. Stoner, for respondent appellant.

BROCK, Judge.

This matter was heard upon four juvenile petitions, each signed by the same complainant. Two were signed on 5 January 1973 complaining of alleged conduct of the minor on 5 January 1973. The two other petitions were not signed until 9 January 1973 but they also complained of alleged conduct of the minor on 5 January 1973. The testimony of the complainant indicates that he was an eyewitness to the alleged conduct on 5 January 1973. There is no explanation why one petition on the 5th of January would not have been sufficient; nor is there an explanation why complainant waited until 9 January 1973 to complete his allegations concerning conduct occurring on 5 January 1973.

When the petitions were called for hearing, the minor, through counsel, requested the trial judge to cause a court re-

porter to record the proceedings. The trial judge declined to do so and advised that the proceedings would be recorded by electronic recorder, and that the record thereof would be available for transcribing. After the proceedings were terminated and a Juvenile Disposition Order was entered, counsel for the minor was advised that the recording device had failed to function properly and the proceedings could not be transcribed.

[1] We have held that, in the absence of a showing of prejudice, it is not error to deny a motion for a court reporter to record the proceedings in District Court. *McAlister v. McAlister*, 14 N.C. App. 159, 187 S.E. 2d 449. In juvenile cases, in the absence of a showing of prejudice, it is not error to deny the use of a court reporter or a recording device to record the proceedings. However, in such situation our appellate rules require the trial judge to summarize the evidence and make findings of fact. Rule 19(g), as amended on 19 May 1970 provides:

> "In all appeals from the district courts in cases involving juveniles, pursuant to G.S. 7A-277 through G.S. 7A-289, these rules shall apply, with the exception that when the evidence is not recorded and transcribed, and notice of appeal is given in such case, the district court judge shall, within ten days after the notice of appeal is given, summarize the evidence and make findings of fact as required by the statute."

In this case the trial judge has failed to summarize the evidence and make findings of fact. Because of the paucity of the record of the proceedings, we are unable to give the minor an effective appellate review. However, in our discretion we will order a new hearing.

[2] It is noted that the trial judge found this minor to be indigent and allowed him to appeal as a pauper, but imposed as a condition of probation that this fifteen-year-old boy pay to the complainant the sum of $1,500.00 within 30 days. We see no basic harm in requiring a minor to compensate for damages if he has maliciously caused them. However, a realistic approach must be taken. In this case a fifteen year old, regularly attending school, without a steady job, is required to pay $1,500.00 within 30 days or face confinement.

The Juvenile Disposition Order, dated 29 January 1973, is vacated, the Juvenile Adjudication Order, dated 29 January 1973, is vacated; and the Detention Order, dated 9 January

1973, is vacated. The cause is remanded to the District Court for a

New hearing.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. SHERMAN W. MESSER

No. 7318SC396

(Filed 13 June 1973)

1. **Criminal Law § 75— volunteered in-custody statement — admissibility**

In a prosecution for assault on a police officer, there was no error in the admission of defendant's volunteered statement while in custody, "I'm sorry the gun wasn't loaded, I'd have blowed your damn head off."

2. **Assault and Battery § 14— assault on officer — pulling trigger of unloaded gun**

The State's evidence was sufficient for the jury in a prosecution for assault on a police officer where it tended to show that the officer had returned to his car after answering a call to go to defendant's home, that defendant came out of his house, pointed a shotgun directly at the officer and pulled the trigger but the gun did not fire, and that defendant later told the officer he was sorry the gun wasn't loaded or he would have blown the officer's head off.

APPEAL by defendant from *Crissman, Judge,* 13 November 1972, Criminal Session of Superior Court held in GUILFORD County, Greensboro Division.

Defendant was tried on an indictment charging him with the felony of committing an assault with a firearm upon a police officer while such officer was in the performance of his duties. G.S. 14-34.2.

Evidence for the State tended to show the following. A police officer was dispatched to defendant's residence. When defendant came to the door, the officer asked if there had been any trouble. Defendant replied, "No." The officer apologized for disturbing defendant, told him that he had been dispatched because of a call and that since there was no trouble he would be on his way. Defendant appeared to have been drinking but was not drunk. He repeatedly demanded that the officer tell

him who placed the call. The officer explained that he had no way of knowing who placed the call. The officer started to leave and reached the driveway when defendant began to curse the officer and called him obscene names. The officer advised defendant to watch his language. Defendant turned and went inside the house. The officer got into his automobile, which was parked on the street, filled out his activity sheet and radioed communications to the effect that the call had been completed. The officer then observed defendant in the yard with a shotgun. Defendant raised the shotgun to his shoulder, pointed it directly at the officer and pulled the trigger. The officer heard the click of the hammer falling but the gun did not fire. Defendant opened the breech of the gun and then turned and started away. The officer, who had previously drawn his revolver, pursued defendant and caught him at the steps of the house. Defendant began to bring the shotgun to bear on the officer who then shoved the barrel away and jabbed defendant with his revolver. Defendant was then handcuffed and taken to the police station. He was not questioned by the police but, while at the station, was very boisterous and was making a lot of noise. Among other things, he spontaneously told the officer, "I'm sorry the gun wasn't loaded, I'd have blowed your damn head off."

Defendant's version of the events that took place after the initial conversation at the door is that he went inside and got his shotgun; that he got the gun to let the officer know that he meant business when he told him to leave; he unloaded the gun in the house and then went out in the yard wondering if there was trouble he did not know about. He thought the officer had gone and didn't see him again until the officer came up from behind and took the shotgun away.

The verdict was guilty as charged. Judgment imposing a thirty-months prison sentence was entered.

Attorney General Robert Morgan by James E. Magner, Jr., Assistant Attorney for the State.

Wallace C. Harrelson, Public Defender, for defendant appellant.

VAUGHN, Judge.

The Public Defender brings forward numerous assignments of error on behalf of the defendant. We hold as follows.

[1] Defendant's objections to the officer's testimony as to defendant's statement, "I'm sorry the gun wasn't loaded, I'd have blowed your damn head off," were properly overruled. "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.

[2] The State's evidence made the case one for the jury. Defendant's assignments of error which relate to his motions for nonsuit, motion to set aside the verdict and the entry of judgment are overruled as are those directed to the charge of the court.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. PAUL CLARK

No. 732SC57

(Filed 13 June 1973)

Narcotics §§ 3, 4— analysis of portion of vegetable matter — testimony that matter was marijuana — presumption of possession for distribution

A chemist was properly allowed to give opinion testimony that all the vegetable matter contained in four plastic bags was marijuana where he testified that the contents of the bags were emptied into one pile and microscopically examined for cross visual characteristics of marijuana and that a sample was then taken from the pile and chemically tested for marijuana; and where the chemist also testified that the contents of the four bags weighed 30.3 grams and that each bag contained more than 5 grams, such evidence raised the presumption of possession for distribution under G.S. 90-95(f)(3).

APPEAL from *Tillery, Judge,* 14 August 1972 Session, Superior Court, BEAUFORT County.

Defendant was convicted of possession of marijuana with intent to distribute. From judgment entered on the verdict of guilty, defendant appealed. He was represented at trial and is represented on appeal by counsel furnished by the State.

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

W. B. Carter for defendant appellant.

MORRIS, Judge.

Evidence for the State tended to show the following: Agent Boyd found three plastic bags containing vegetable substance hidden in some bushes at the base of a gum tree with three sticks lying across the bags. This was just off Honey Pod Farm Road near Washington, N. C. He notified Officers Davis and Hales by radio and took a position across the road to watch. No one approached the scene until a car driven by one Haddock approached. It pulled off the road and defendant got out from the front center seat. Defendant went to the gum tree and when he came back, the plastic bags were sticking out his shirt. He returned to the car and got on the right front seat. The car drove off. As soon as the car left, Agent Boyd went to the tree and found that the bags were gone. He got a ride with a passing motorist, and some 400 or 500 yards down the road he found the car driven by Haddock had been stopped by Officers Davis and Hales. When told to get out of the car, Clark did so and threw three bags down. A fourth was voluntarily given to the officers. A small set of scales and a match box containing cigarette butts were taken from defendant at the time of his arrest. Two bags were found in the car.

S.B.I. Chemist Evans testified that he received the four bags in one envelope and the two in another and analyzed each envelope separately. He poured the contents of the four bags into a pile and analyzed the substance as marijuana. The same was true of the two bags in one envelope. The contents of the four bags weighed 30.3 grams and the contents of the two bags weighed 18.1 grams.

Defendant objected to question to the chemist "Would you state your opinion?", after the chemist had stated that he had an opinion as to what the green vegetable substance was which was contained in the two envelopes. The objection was overruled. Defendant objected to the introduction into evidence of Exhibits 1 and 2—the scales and a match box containing cigarette butts, and assigns as error the court's admitting into evidence Exhibits 1 and 2. In his brief he does not refer to these exhibits. They were, however, properly admitted into evidence.

On appeal, defendant contends that the opinion evidence of the chemist was inadmissible. He argues that because the contents of the four bags were placed in a pile and a sample from that pile analyzed, the evidence was inadmissible. The

chemist testified that after he weighed the material, he looked at all of it under the microscope closely, moving it around and stirring it up, to get "an overall view." He was looking for gross visual characteristics of marijuana. At that point he had an opinion, but made further tests, all of which confirmed marijuana. He further testified that each bag contained more than five grams. Defendant urges that this evidence is not sufficient to carry the case to the jury nor to raise the presumption of possession for distribution created by G.S. 90-95(f)(3). We are of the opinion that *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535 (1970), is adequate authority for the admission of the results of the tests conducted. G.S. 90-95(f)(3) was held to be constitutional in *State v. Garcia,* 16 N.C. App. 344, 347-348, 192 S.E. 2d 2 (1972), cert. denied 282 N.C. 427, 192 S.E. 2d 837 (1972), where Judge Brock noted:

> "The statutory provisions of which defendants complain merely constitutes a rule of evidence for the establishment of a prima facie case; it does not deprive defendants of the presumption of their innocence nor relieve the State of its burden to prove their guilt beyond a reasonable doubt. The establishment of such a prima facie case will support, but it does not compel, a finding of guilty. Clearly there is a rational connection between the fact proved (possession of more than five grams of marijuana) and the ultimate fact to be established (possession of marijuana with the intent to distribute). We hold the challenged provisions of the statute to be constitutional."

See also *State v. John Junior McDougald,* 18 N.C. App. 407, 197 S.E. 2d 11 (1973).

Defendant had a fair and impartial trial free from prejudicial error.

No error.

Judges BROCK and PARKER concur.

STATE OF NORTH CAROLINA v. ARTHUR RAWLINGS

No. 738SC82

(Filed 13 June 1973)

1. **Constitutional Law § 30— two month delay — right to speedy trial**

Trial court properly refused to grant defendant's motion to dismiss for lack of a speedy trial where defendant did not show that a delay of two months between the offense and the issuance of a warrant for his arrest was prejudicial to him or was purposeful and due to the neglect or willfulness of the State.

2. **Constitutional Law § 31— witnesses not produced by State — no error**

Assignments of error to the State's failure to make available to defendant a witness to the alleged offense and to the State's failure to produce at trial a witness to the alleged offense are without merit.

3. **Intoxicating Liquor § 14— sale of non-tax-paid whiskey — sufficiency of evidence**

Evidence was sufficient to submit to the jury the question of defendant's guilt of selling non-tax-paid whiskey.

APPEAL by defendant from *Cowper, Judge,* 24 July 1972 Session, Superior Court, WAYNE County.

Defendant was charged with possession and with sale of non-tax-paid whiskey. He entered a plea of not guilty to both charges. The jury found him guilty of the sale of non-tax-paid whiskey. From the judgment entered on the verdict, defendant appealed.

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

Herbert B. Hulse for defendant appellant.

MORRIS, Judge.

[1] Defendant's first assignment of error is directed to the failure of the court to grant his motion to dismiss for lack of a speedy trial. It appears from the record that the offenses charged occurred on 15 February 1972, and the warrant for defendant's arrest was not issued until 12 April 1972. Without question, a *purposeful* delay in issuing a warrant can place a defendant at a special disadvantage. Without knowledge of impending service of a warrant, an innocent person would have no reason to fix dates and time and places in his memory. Memories dim with the passage of time. Frequently witnesses are

not available. "The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution." *State v. Johnson,* 275 N.C. 264, 269, 167 S.E. 2d 274 (1969). Here defendant has not shown that the delay of slightly less than two months was prejudicial. He has not shown that the delay was purposeful and due to the neglect or willfulness of the State. This passage of time standing alone shows no prejudice. See *State v. Wrenn,* 12 N.C. App. 146, 182 S.E. 2d 600 (1971), appeal dismissed, 279 N.C. 620, 184 S.E. 2d 113 (1971), cert. denied, 405 U.S. 1064, 92 S.Ct. 1492, 31 L.Ed. 2d 794 (1972).

[2] Also included in assignment of error No. 1, albeit erroneously, is defendant's contention that the court erred in denying his motion to require the State to furnish and make available to him a witness to the alleged offense. Defendant cites no authority for this position. Suffice to say that the record clearly discloses that defendant was aware of the witness's participation in the matter very shortly after defendant was arrested—at his trial in District Court. The power of subpoena was available to defendant but, as to this witness, not used. This assignment of error is overruled in its entirety.

Akin to the foregoing contention is the contention contained in assignment of error No. 4—that the court should have granted defendant's motion for dismissal based on the State's failure to produce John (T-Bone) Kornegay as a witness. Mr. Kornegay was witness to the transaction. Again, defendant cites no authority. The assignment of error is totally without merit and is overruled.

Assignment of error No. 2 groups seven exceptions to the allowing of evidence defendant deems incompetent. Assuming arguendo that error occurred in one or more of the rulings, the error was not sufficiently prejudicial to require a new trial.

[3] Finally defendant contends that nonsuit should have been granted as to the charge of the sale of non-tax-paid whiskey. Our review of the record discloses plenary evidence for submission of this charge to the jury.

Defendant has had a fair and impartial trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. STEVE ODOM

No. 7320SC423

(Filed 13 June 1973)

Criminal Law § 66— illegal pretrial show-up — in-court identification — independent origin

The evidence on *voir dire* supported the trial court's determination that a robbery victim's in-court identification of defendant as the perpetrator of the crime was based on her observations of defendant during the robbery and was not tainted by a previous illegal show-up at the county jail.

APPEAL by defendant from *Martin, Harry C., Judge,* 17 November 1972 Session of Superior Court held in RICHMOND County.

Defendant, Steve Odom, was charged in an indictment, proper in form, with the armed robbery of Mrs. C. L. Cole. Upon his plea of not guilty, the State offered evidence tending to show that at about 6:00 p.m., 25 August 1972, defendant entered the store in which Mrs. C. L. Cole is employed, walked to the "ice cream box" and "stood there with his back to me for about five minutes." Mrs. Cole was seated on a cot behind a glass counter and detected a pistol in defendant's left front pocket. She testified: "Sudden-like he whirled around with a gun and a freeze pop and I could see about four inches of the barrel of the gun. He said this is a robbery and for me not to try anything." As defendant reached behind the counter to remove the $100.00 from the "cash box," Mrs. Cole observed the name "Steve" tattooed on his right arm. Defendant then fled from the store.

Defendant offered evidence tending to establish an alibi and denied that he was the perpetrator of the robbery.

The jury found defendant guilty as charged and from a judgment imposing a prison sentence from twelve to sixteen years, he appealed.

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

Leath, Bynum & Kitchin by Henry L. Kitchin for defendant appellant.

HEDRICK, Judge.

Defendant contends the trial court erred in admitting into evidence witness Cole's in-court identification of him as the perpetrator of the robbery.

Before allowing Mrs. Cole's in-court identification of defendant as the person who committed the robbery, the trial judge conducted a *voir dire* examination in the absence of the jury; and, after hearing testimony of Mrs. Cole, defendant, Deputy Sheriff Joe Warner of Richmond County, and Jesse Goodwin, Jailer of Richmond County, the court made findings and conclusions "[t]hat the identification or show-up of the defendant in the Richmound County Jail was unconstitutional and impermissible." However, the judge made further findings that the in-court identification of defendant by Mrs. Cole was based "upon her independent memory in her viewing of him in her presence on August 25, 1972" and "was not tainted or rendered incompetent as evidence by the subsequent unconstitutional show-up at the Richmond County Jail." 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. Sneed*, 14 N.C. App. 468, 188 S.E. 2d 537 (1972). There is plenary, competent evidence in the record to support these positive findings. This assignment of error is overruled.

Defendant assigns as error the denial of his motions for judgment as of nonsuit. There is plenary, competent evidence in the record 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 had a fair trial free from prejudicial error.

No error.

Judges BROCK and VAUGHN concur.

MARSHALL BRYAN SUTTON v. CLAUDE S. SUTTON, JR.

No. 7318DC290

(Filed 13 June 1973)

Rules of Civil Procedure § 41; Trial § 30— dismissal with prejudice — subsequent motion in the cause

Where the trial court dismissed with prejudice plaintiff's action for alimony and child custody and support because the parties had settled the case by execution of a deed of separation, the action was terminated and the court had no authority to consider a motion in the cause thereafter filed by plaintiff.

APPEAL by plaintiff from *Washington, Judge,* 18 December 1972 Session of District Court held in GUILFORD County, Greensboro Division.

Facts pertinent to a resolution of this appeal are summarized as follows:

On 19 January 1971, plaintiff, Marshall Bryan Sutton, instituted this action against her husband, defendant Claude S. Sutton, Jr., for child custody and support, alimony *pendente lite,* permanent alimony, possession of the homeplace and its furnishings and a reasonable attorney's fee. On 26 February 1971, Judge Herman E. Enochs entered an order awarding plaintiff child custody and support and temporary alimony. Defendant excepted to and appealed from the order of Judge Enochs. On 21 May 1971, before the appeal was heard, counsel for plaintiff and defendant consented to the following order of Judge Enochs:

> "THIS CAUSE coming on to be heard, and being heard, before the undersigned judge presiding, and it appearing that the parties have compromised and settled all matters at issue in this cause, and have entered into a deed of separation which sets forth the terms of their settlement, and that, therefore, this case is rendered moot and should be dismissed;
>
> Now, therefore, it is ORDERED, ADJUDGED AND DECREED that this cause be, and the same hereby is, including all claims asserted by both parties, dismissed with prejudice. Plaintiff shall pay the costs."

On 6 November 1972, plaintiff filed a motion in the cause "for an order incorporating certain unperformed provisions of

a deed of separation relating to alimony and child support into an order of this Court, and for an increase in the payments required by defendant by said agreement for child support and alimony." On 20 December 1972, defendant filed a responsive motion to dismiss plaintiff's motion, alleging, *inter alia*, that "this civil action was dismissed and completely terminated by consent judgment entered by this Court on May 21, 1971."

From an order dated 22 December 1972 denying her motion, plaintiff appealed.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd for plaintiff appellant.

Cahoon & Swisher by Robert S. Cahoon for defendant appellee.

HEDRICK, Judge.

The correctness of the order appealed from depends on the effect given the judgment of voluntary dismissal with prejudice dated 21 May 1971.

In *Collins v. Collins*, 18 N.C. App. 45, 50, 196 S.E. 2d 282, 286 (1973), Judge Britt, writing for this court, stated:

> "Under the former practice a judgment of voluntary nonsuit terminated the action and no suit was pending thereafter in which the court could make a valid order. 7 Strong, N. C. Index 2d, Trial, § 30, p. 317. We think the same rule applies to an action in which a plaintiff takes a voluntary dismissal under G.S. 1A-1, Rule 41(a)(1)."

Regardless of what name we apply to the order dated 21 May 1971, the effect thereof was to terminate the action and when plaintiff's motion in the cause was made, no action was pending wherein the court could enter a valid order. The order denying the motion is

Affirmed.

Judges BRITT and BALEY concur.

Watch Co. v. Brand Distributors and Watch Co. v. Motor Market

BULOVA WATCH COMPANY, INC., A CORPORATION, PLAINTIFF APPELLEE v. BRAND DISTRIBUTORS OF NORTH WILKESBORO, INC., A CORPORATION, AND ROBERT YALE, DEFENDANT APPELLANTS

BULOVA WATCH COMPANY, INC., A CORPORATION, PLAINTIFF APPELLEE v. MOTOR MARKET, INC., A CORPORATION, D/B/A BOB'S JEWELRY & LOAN, AND ROBERT YALE, DEFENDANT APPELLANTS

No. 7323SC261

(Filed 13 June 1973)

Constitutional Law § 4; Injunctions § 12— preliminary injunction — constitutionality of Fair Trade Act

The constitutionality of the North Carolina Fair Trade Act, G.S. Ch. 66, Art. 10, could not be decided by the court in a hearing upon plaintiff's application for a preliminary injunction restraining defendants from violating fair trade agreements.

Certiorari to review an order by *Kivett, Judge,* 30 October 1972 Session of Superior Court held in WILKES County.

This is a civil action arising under Article 10 of Chapter 66 of the General Statutes, known as the "Fair Trade Act." Plaintiff, alleging that defendants were in violation of the statute, sought preliminary injunction, permanent injunctive relief and damages.

The cases came on for hearing upon plaintiff's application for preliminary injunction. On 3 November 1972, after a hearing, Judge Kivett signed an order enjoining defendants from selling plaintiff's products at less than the minimum retail prices established by plaintiff's fair trade agreements in North Carolina, until final determination of the action on the merits. Plaintiff posted bond to indemnify defendants from damages arising out of the issuance of the preliminary injunction in the event plaintiff fails to prevail. Defendants gave notice of appeal from the entry of the order granting the preliminary injunction.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Mark R. Bernstein and W. Samuel Woodard for plaintiff appellee.

W. G. Mitchell and McElwee & Hall by John E. Hall, attorneys for defendant appellants.

VAUGHN, Judge.

We are of the opinion that defendants' attempt to appeal from the order allowing the preliminary injunction is premature and we will treat the same as a petition for *certiorari* which we allow.

Defendants' sole assignment of error is as follows:

> "The Court erred in issuing a preliminary injunction in each of these cases for the reason that the Fair Trade Act is in violation of the Constitution of the State of North Carolina and the Act has probably been repealed by subsequent legislation."

The constitutionality of the act was not before Judge Kivett when he heard the application for preliminary injunction. The Supreme Court so held in *Carbide Corp. v. Davis,* 253 N.C. 324, 116 S.E. 2d 792. The cited case also involves the "Fair Trade Act." The trial judge had declined to continue a temporary restraining order until trial on the grounds that the act was unconstitutional. The Supreme Court quoted with approval from other writings which were to the effect that the constitutionality of an act will not be determined on the question being raised on preliminary motions or interlocutory orders.

Moreover, the act in question was expressly held to be constitutional in *Lilly & Co. v. Saunders,* 216 N.C. 163, 4 S.E. 2d 528. Though decided by the Supreme Court in 1939, the case continues to be binding on the Court of Appeals and the trial courts of this State.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES KENNETH BRANDON

No. 7323SC479

(Filed 13 June 1973)

1. **Criminal Law § 84; Searches and Seizures § 2— search with defendant's consent — admissibility of amphetamine capsules**

Where defendant who was in prison on another charge asked the jailer to bring him his coat from his locked car, the jailer fetched the

coat and examined the pockets before giving it to defendant and the examination yielded five capsules containing amphetamine, there was no unlawful search, and evidence obtained from the search was admissible in this prosecution for the unlawful possession of amphetamine.

2. Narcotics § 4— possession of amphetamine — sufficiency of evidence

Evidence was sufficient to withstand defendant's motion for nonsuit in a prosecution for the unlawful prossession of amphetamine where it tended to show that defendant had had actual possession of the amphetamine capsules found in the pocket of his coat taken from his locked car.

APPEAL by defendant from *Winner, Judge,* January 1973 Session of Superior Court held in YADKIN County.

Defendant pled not guilty to the charge of unlawful possession of amphetamine. The State's evidence showed: While defendant was in the Yadkin County jail as result of another charge, he asked the jailer to bring him his coat from his car, stating he wanted to use it for a pillow. The jailer got the keys, unlocked defendant's car which was parked on the jail property, and got defendant's coat from the front seat. Before giving the coat to defendant, the jailer searched the pockets and found five capsules, which, on being tested by an SBI chemist, were found to contain amphetamine.

Defendant offered no evidence. He was found guilty as charged. From judgment imposing a suspended sentence, defendant appealed.

Attorney General Robert Morgan by Associate Attorney General Ralf F. Haskell and Wade E. Brown, Consultant, for the State.

James Lee Graham for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to denial of his motion to suppress the State's evidence made on the grounds it was obtained as result of an unlawful search. At the hearing on the motion the State presented testimony to show that the jailer got defendant's coat from his locked car only after defendant had requested him to do so and had given him the car keys for that purpose. Thus no unlawful search of the car was involved. Before giving defendant his coat, the jailer took the sensible precaution of examining its pockets. This, in our opinion, he had every right to do, else he ran the obvious risk of unknowingly

delivering to his prisoner some weapon which might be employed against him or some instrument which might be used to effect an escape. The Fourth Amendment does not forbid all searches and seizures but only those that are unreasonable. Under the circumstances here disclosed, no unreasonable search has been shown and the trial judge correctly so held.

[2] Defendant's motion for nonsuit was also properly denied. When the evidence is viewed in the light most favorable to the State, it was a legitimate inference for the jury to draw that defendant had had actual possession of the amphetamine capsules found in the pocket of his coat taken from his locked car. *State v. Chavis,* 270 N.C. 306, 154 S.E. 2d 340, relied on by appellant, is factually distinguishable.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. DENNIS RAY LOWERY

No. 7313SC395

(Filed 13 June 1973)

1. **Criminal Law § 91— motion for continuance — no supporting affidavits — denial proper**

   Trial court did not abuse its discretion in denying defendant's motion for a continuance where defendant sought the continuance in order to obtain the presence of a witness but did not support his motion with affidavits setting forth the reasons for the motion or indicating what he had done to secure the presence of the witness.

2. **Automobiles § 3; Criminal Law § 75— driving after revocation of license — voluntary statements of defendant to police officer — admissibility**

   Trial court in a prosecution charging defendant with driving after revocation of his license did not err in allowing an officer to testify as to voluntary statements made to him by defendant at the time the officer issued defendant a citation.

APPEAL by defendant from *Clark, Judge,* 15 January 1973 Session of Superior Court held in BRUNSWICK County.

Defendant, Dennis Ray Lowery, was charged in a warrant, proper in form, with driving a motor vehicle on a public high-

way while his operator's license was revoked. The defendant pleaded not guilty.

On 24 November 1971 at about 1:45 p.m., Highway Patrolman Canipe saw defendant driving an automobile northeast on Rural Paved Road 1143. Having served a revocation notice on defendant, effective 1 August 1971, the officer knew that defendant's driving privileges had been revoked. When defendant drove the automobile into Burris Inman's yard, the officer, who was not on duty, stopped and told the defendant that he would see him on Friday when he returned to work. On Saturday, 27 November 1971, the officer went to defendant's residence and issued him a citation for driving an automobile while his operator's license was revoked.

Defendant denied that he was driving the automobile.

Defendant was found guilty as charged and from a judgment imposing a prison sentence of six months to one year, he appealed.

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

Frink, Foy and Gainey by Henry G. Foy for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of his motion for a continuance.

[1] Ostensibly, defendant sought a continuance in order to obtain the presence of Billy Inman as a witness; however, the motion to continue was not supported by affidavits setting forth the reasons for the motion or detailing what steps had been taken to secure his presence as a witness. Indeed, in response to questioning by the solicitor, defendant stated:

> "I did not tell Billy Inman that I was going to be tried this week and I have not subpoenaed him. I thought he would come on his own."

A motion for a continuance is addressed to the sound discretion of the trial judge and his ruling thereon will not be disturbed on appeal absent a showing of such abuse of discretion as would deprive a defendant of a fair trial. *State v. Holloway*

and *State v. Jones*, 16 N.C. App. 266, 192 S.E. 2d 75 (1972). Defendant has failed to show an abuse of discretion by the trial judge in the denial of his motion for a continuance.

[2] Defendant contends the trial court erred in allowing Officer Canipe to testify, over defense objection, "as to the contents of a conversation had with the defendant at the time of his arrest without any evidence that the defendant was warned of his Constitutional Rights. . . ."

Suffice it to say, the challenged testimony concerned voluntary statements allegedly made by defendant when the officer issued him a citation and did not result from custodial *interrogation*. Therefore, it was not incumbent upon the officer to administer the "Miranda warnings," *State v. Hayes*, 273 N.C. 712, 161 S.E. 2d 185 (1968); *State v. Tessenar*, 15 N.C. App. 424, 190 S.E. 2d 313 (1972); and the court did not err in admitting this testimony into evidence.

Defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD MILLER

No. 735SC368

(Filed 13 June 1973)

Robbery § 4— armed robbery — no error in trial

Defendant who was charged with armed robbery was given a fair and impartial trial free from prejudicial error.

ON *certiorari* to review the order of *Wells, Judge*, entered at 24 April 1972 Session, Superior Court, NEW HANOVER County.

Defendant was charged in a bill of indictment with armed robbery. He entered a plea of not guilty and the jury returned a verdict of guilty as charged. The evidence for the State, briefly summarized, was as follows: On 8 July 1971, at approximately 7:15 to 7:30 Mrs. Cromartie was walking from her mother's house to her own home. Suddenly a right arm was

around her neck. The person came up from her rear and put his right arm around her neck. He held a sharp object in his left hand which he placed at her throat, telling her not to move and not to scream but to go with him. Mrs. Cromartie, in an effort to avert his attention, said "There is my husband." As defendant looked both ways, Mrs. Cromartie managed to turn and face defendant. There was a scuffle during which time the knife moved from her neck and hit her hand knicking it slightly. She threw up her arms, knocked his arms away, and ran. In the course of the scuffle, she had dropped her pocketbook and umbrella. Defendant started running behind her but stopped and ran back to the scene, picked up her pocketbook and continued running. The pocketbook contained approximately $8.00, various credit cards, her glasses and other items of personal property. The police found at the scene pointed out by Mrs. Cromartie a yellow umbrella, a stainless steel knife, and scuffle marks. Subsequent to this occurrence and prior to defendant's arrest, Mrs. Cromartie saw the defendant on three occasions and each time notified the police. On each occasion, he had left the scene when the police arrived. In late October or November she identified defendant from a series of photographs furnished by the Police Department.

Defendant testified that he had no recollection of what took place on 8 July 1971, had never seen Mrs. Cromartie, and knew nothing about the purported armed robbery on 8 July 1971.

Defendant was represented at trial and is represented on this appeal by counsel furnished by the State.

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

Mathias P. Hunoval for defendant appellant.

MORRIS, Judge.

The trial court was properly organized and had jurisdiction of the defendant and the subject matter. The bill of indictment is proper in form. Defendant was duly arraigned upon a charge of armed robbery, entered a plea of not guilty, and was found guilty by the jury upon evidence sufficient to support the verdict. The jury verdict was proper in form and the judgment entered thereon correctly entered. The sentence imposed is within the statutory limit.

Defendant has had a fair and impartial trial, free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. DAVID EARL MILLER

No. 732SC366

(Filed 13 June 1973)

Receiving Stolen Goods § 5— insufficiency of evidence — failure to charge proper

Though there was evidence of defendant's possession of recently stolen goods, this evidence was insufficient to submit an issue to the jury as to defendant's having received stolen goods with knowledge that they were stolen by another, and failure of the trial court to charge on that issue did not constitute error.

APPEAL by defendant from *Cowper, Judge,* 15 January 1973, Criminal Session, Superior Court, BEAUFORT County.

Defendant was charged with felonious breaking and entering, felonious larceny, and receiving. The court submitted the case to the jury on breaking and entering and larceny and did not charge on receiving. The jury found defendant guilty of both offenses, and defendant appeals from the judgment entered on the verdict, represented by counsel furnished by the State.

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

Franklin B. Johnston for defendant appellant.

MORRIS, Judge.

Defendant's only exceptions and assignments of error are to portions of the court's charge. By these assignments of error, defendant contends that the court erred in failing to submit to the jury the charge of receiving. He concedes, and properly so, that receiving is not a lesser included offense of breaking and entering but a separate and distinct offense. On oral argument,

defendant took the position that the jury could have found the defendant not guilty of breaking and entering and larceny and guilty only of the misdemeanor of receiving had they been given that opportunity. The record, however, does not support a charge on receiving. The State failed to prove all the elements. There is no evidence that defendant received stolen goods with knowledge that they were stolen by another. There was evidence of defendant's possession of recently stolen goods. This is not sufficient. *State v. Neill,* 244 N.C. 252, 93 S.E. 2d 155 (1956).

Since the evidence as to the count of receiving was insufficient to submit that issue to the jury, the court properly submitted only the counts of breaking and entering and larceny. This amounted to granting a motion of nonsuit on the receiving charge. In the trial of this case, we perceive no prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES VERNON RIDDLE

No. 7329SC388

(Filed 13 June 1973)

Criminal Law § 143— appeal from revocation of suspended sentence — jurisdiction of court on appeal

Where defendant appealed to superior court from judgments revoking suspended sentences, jurisdiction of the superior court was derivative and the court was without authority to try defendant anew; therefore, judgments of superior court sentencing defendant to prison terms upon his guilty pleas are vacated.

ON *certiorari* to review judgment of *Falls, Judge,* 5 June 1972 Session of Superior Court held in MCDOWELL County.

Defendant entered pleas of guilty in the District Court of McDowell County on two charges of issuing worthless checks. Judgments were entered imposing two consecutive four-months jail sentences. The sentences were suspended for one year on certain conditions, including one that restitution be made. Subsequently, after notice and hearing, an order revoking the suspended sentences and placing the active sentences into effect

was entered in the district court. Defendant appealed to the superior court.

The cases came on for hearing in the superior court on 7 June 1972. Instead of proceeding on the issue of whether there had been violations of the suspended sentences as provided by G.S. 15-200.1, the court placed defendant on trial anew. Pleas of guilty were entered and defendant was sentenced to jail for six months in each case. The sentences were to run consecutively. On 12 September we issued an order allowing defendant's petition for certiorari. After a hearing conducted pursuant to our order, counsel was appointed to represent defendant.

Attorney General Robert Morgan by Eugene Hafer, Assistant Attorney General, for the State.

Dameron & Burgin by Charles E. Burgin for defendant appellant.

VAUGHN, Judge.

Defendant appealed to the superior court from judgments of the district court placing two suspended sentences into effect. Such appeals are heard in the superior court only upon the issue of whether there has been a violation of the terms of the suspended sentence. Upon finding that the conditions have been violated, the superior court shall enforce the judgment of the district court, unless the judge finds that the circumstances and conditions surrounding the terms of probation and the violation thereof have substantially changed so that enforcement of the judgment would not accord justice to the defendant, in which case the terms of the suspended sentence may be modified or revoked. G.S. 15-200.1.

The jurisdiction of the superior court was derivative and the court was without authority to try defendant anew. In fairness to the trial judge, we must observe that it does not appear that the solicitor advised the court that the cases were on appeal from judgments revoking suspended sentences instead of appeals from convictions for which trials *de novo* would be proper. The judgments are vacated and the case is remanded.

Vacated and remanded.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. GARRY DWAIN MABRY

No. 7320SC446

(Filed 13 June 1973)

1. **Automobiles § 126— Motor Vehicle Department records — admissibility in driving under the influence, second offense, case**

In a prosecution for driving under the influence, second offense, the trial court erred in allowing the State to introduce records of the Department of Motor Vehicles in an attempt to prove defendant's first conviction for driving under the influence.

2. **Automobiles § 129— driving under the influence, second offense — failure to submit lesser offense — error**

When it is alleged and there is evidence tending to show that defendant is guilty of a second offense of operating under the influence, the court should submit the question of defendant's guilt or innocence of operating under the influence and operating under the influence, second offense; failure to submit an issue as to guilt of the lesser offense constituted error requiring a new trial.

APPEAL by defendant from *Seay, Judge,* 20 November 1972 Session of Superior Court held in STANLY County.

Defendant was tried upon a warrant alleging that on 7 June 1972 he operated a vehicle upon the public highways while under the influence of intoxicating liquor. The warrant alleged that it was his second offense. Defendant was found guilty as charged.

Attorney General Robert Morgan by William W. Melvin and William B. Ray, Assistant Attorneys General, for the State.

Gerald R. Chandler for defendant appellant.

VAUGHN, Judge.

Defendant brings forward numerous assignments of error. We will refer to those which require a new trial.

[1] Where a statute provides more severe punishment in case of repeated convictions for similar offenses the State must allege and prove, by competent evidence, the earlier convictions. Whether there was an earlier conviction is for the jury and not the court. *State v. Cole,* 241 N.C. 576, 86 S.E. 2d 203. A duly certified transcript of the record of the earlier conviction, upon proof of the identity of the offender, is sufficient evidence of the first conviction. G.S. 15-147. In the present case the State

did not utilize the relatively simple statutory method of proving the first conviction but attempted to do so by introducing, over defendant's objection, a record of the Department of Motor Vehicles prepared under the provisions of G.S. 20-42. Records of the Department of Motor Vehicles are not competent to prove the contents of the records of a court of law. The effect of G.S. 20-42(b) is to provide merely that properly certified copies of the Department's records are admissible in like manner as the original thereof. Such records of the Department are competent to prove, among other things, the status of an individual's license with the Department and actions previously taken by the Department. The admission of the Department records as evidence in this case constituted prejudicial error.

[2] It was also error for the court to instruct the jury so as to permit them to return only two possible verdicts: a verdict of guilty as charged (second offense) or not guilty. "A warrant charging defendant with a second or subsequent offense of driving under the influence would support a verdict of driving under the influence." *State v. Guffey,* 283 N.C. 94, 194 S.E. 2d 827. When it is alleged and there is evidence tending to show that defendant is guilty of a second offense of operating under the influence, the court should submit the question of defendant's guilt or innocence of operating under the influence and operating under the influence, second offense. *State v. Stone,* 245 N.C. 42, 95 S.E. 2d 77.

For the reasons stated there must be a new trial.

New trial.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. THOMAS LOGAN TEAL

No. 7320SC237

(Filed 13 June 1973)

Embezzlement § 6— embezzlement of knitted material — sufficiency of evidence

In a prosecution charging defendant with embezzlement, evidence was sufficient to take the case to the jury where it tended to show that it was defendant's job to take material after it had been removed

from knitting machines to an examining room and prepare it for shipment, defendant had no authority to sell any of his employer's goods and defendant transported some of his employer's material to South Carolina where he sold it to the operator of a fabric shop.

APPEAL by defendant from *Chess, Judge,* 23 October 1972 Session of Superior Court held in UNION County.

Defendant was convicted upon a bill of indictment alleging that he embezzled certain polyester materials belonging to his employer, Monroe Combining Corp. Judgment imposing a prison sentence of five to seven years was entered.

Attorney General Robert Morgan by Charles R. Hassell, Jr., Associate Attorney, for the State.

Griffin and Humphries by Charles D. Humphries and James E. Griffin for defendant appellant.

VAUGHN, Judge.

Defendant argues that the court erred in denying his motion for nonsuit, contending mainly that the State failed to establish that he was entrusted with the possession of the goods. The State's evidence tends to show the following.

Defendant's employer produces a knitted polyester fabric. After the material is taken from the knitting machines it was defendant's job to take the material to an examining room, remove the material from the examining machines, weigh it, place it in plastic bags and prepare it for shipment. He had no authority to sell any of the goods. The knitted goods were supposed to be shipped to another plant for additional processing. Defendant took some of his employer's knitted material to Florence, South Carolina, and sold it to the operator of a fabric shop for $130.00. He transported the material in the trunk of a car.

We hold that the State's evidence was sufficient to permit the case to be submitted to the jury. We have considered defendant's exceptions to the charge and the same are overruled.

No error.

Judges BROCK and MORRIS concur.

ARNOLD R. TINGEN AND WIFE, MARTHA M. TINGEN v. INSURANCE COMPANY OF NORTH AMERICA

No. 738SC179

(Filed 13 June 1973)

Appeal and Error § 26— exception to entry of judgment— insufficiency to attack validity of prior order by trial court

Where plaintiffs consented to an order providing for the appointment of appraisers to determine the amount of loss occasioned by fire and providing that the report of appraisers be filed with the court, plaintiffs could not subsequently attack the validity of the order merely by excepting to the entry of a judgment for plaintiffs based on the report of the appraisers.

APPEAL by plaintiffs from *Jackson, Judge,* 2 October 1972 Session of Superior Court held in GREENE County.

On 17 June 1970 plaintiffs instituted this suit to recover for a fire loss insured by defendant. On 2 October 1972, judgment was entered in favor of plaintiffs for $5,420.74.

Turner and Harrison by F. W. Harrison for plaintiff appellants.

Young, Moore & Henderson by B. T. Henderson II, Joseph C. Moore, Jr., and J. Clark Brewer for defendant appellee.

VAUGHN, Judge.

The only assignment of error is to the entry of the judgment and presents, at most, the face of the record for review.

In their brief plaintiffs state that the judgment signed by Judge Jackson has to stand or fall on the validity of an order signed by Judge May on 25 February 1971. It appears of record that Judge May's order was entered by *agreement* and *consent* of the plaintiffs and defendant. Plaintiffs do not argue to the contrary. The effect of the order was to appoint appraisers (agreed upon by all parties) and to order that the report of their appraisal be filed with the court. The parties had previously designated appraisers who, for one reason or another, did not serve.

Plaintiffs, having expressly consented to Judge May's order of 25 February 1971, cannot now attack its validity by merely

excepting to the entry of a judgment of Judge Jackson on 2 October 1972.

The judgment from which plaintiffs appealed is affirmed.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. IRIS THOMAS LASH

No. 7321SC321

(Filed 13 June 1973)

Homicide §§ 23, 30— second degree murder — instruction on involuntary manslaughter proper

Trial court's charge in a second degree murder case included an adequate declaration and explanation of the law arising on the evidence, and an instruction with respect to involuntary manslaughter did not constitute prejudicial error.

APPEAL by defendant from *Wood, Judge*, 16 October 1972 Criminal Session of Superior Court held in FORSYTH County.

Defendant was placed on trial for murder in the second degree. Upon a verdict of voluntary manslaughter, judgment was entered imposing a prison sentence of eight to twelve years.

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

William G. Pfefferkorn for defendant appellant.

VAUGHN, Judge.

The court submitted possible verdicts of murder in the second degree, voluntary manslaughter, involuntary manslaughter or not guilty. Defendant complains that the jury was instructed that it might return a verdict of guilty of involuntary manslaughter. We hold that the instruction did not constitute prejudicial error.

All the remaining assignments of error are directed to the charge of the court. We hold that the charge, when considered in its entirety, includes an adequate declaration and explana-

tion of the law arising on the evidence in the case and no error so prejudicial as to require a new trial has been shown.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROY DAVID ORR

No. 7318SC207

(Filed 13 June 1973)

Criminal Law § 23— guilty plea

Defendant's guilty plea was accepted by the State only after due inquiry and proper adjudication by the court that it was freely and voluntarily made.

APPEAL by defendant from *Crissman, Judge,* 9 October 1972, Regular Criminal Session, Superior Court, GUILFORD County, Greensboro Division.

Defendant was tried on two bills of indictment, each charging him with one count of forgery and one count of uttering a forged instrument. He tendered a plea of guilty in each case to the misdemeanor of attempted forgery. The plea was accepted by the State. Judgment was entered sentencing defendant to a term of 18 months in each case, the sentence in the second case to begin at the expiration of the sentence in the first case. Defendant appealed. He was represented at trial and is represented here by counsel furnished him by the State of North Carolina through the Public Defense program.

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

Public Defender Harrelson for defendant appellant.

MORRIS, Judge.

This is another appeal at State's expense by an indigent defendant after a plea of guilty. His plea was accepted by the State only after due inquiry and proper adjudication by the court that it was freely and voluntarily made. The transcript

of his plea and the court's adjudication appear of record. The sentences imposed were within the statutory limit.

Affirmed.

Judges CAMPBELL and BRITT concur.

State v. Spencer

STATE OF NORTH CAROLINA v. LESLIE SPENCER

No. 732SC317

(Filed 21 June 1973)

Criminal Law § 9— new trial for principal — new trial required for aider and abettor

Where defendant was convicted of second degree murder as an aider and abettor, and the conviction of the principal has been vacated by an order for a new trial, a new trial must also be ordered for defendant since he cannot be convicted of aiding and abetting unless the principal is also convicted.

APPEAL by defendant from *Tillery, Judge,* 27 November 1972 Session of Superior Court held in BEAUFORT County.

Defendant was convicted, along with his brother, of murder in the second degree. The case against this defendant was submitted to the jury upon the theory of aiding and abetting his brother, Respess Spencer, in committing the homicide.

The evidence tended to show that Respess Spencer shot the deceased and that Leslie Spencer aided and abetted Respess Spencer. Leslie Spencer and Respess Spencer were tried jointly, but filed separate appeals. Error was found in the trial on Respess Spencer's appeal (No. 732SC340, Court of Appeals, Opinion filed 23 May 1973) and he was awarded a new trial.

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

McMullan, Knott & Carter, by W. B. Carter, Jr., for the defendant.

BROCK, Judge.

We find no merit in defendant's argument that the evidence shows he was a mere bystander and did not aid and abet in the commission of the homicide. In our view, the trial judge properly submitted the case against defendant to the jury upon the theory of aiding and abetting.

However, the conviction of the principal has been vacated by an order for a new trial. Therefore, a new trial as to this defendant must also be ordered. The defense asserted by Respess Spencer was that in killing the deceased he was acting in self-defense and in defense of his brother Leslie Spencer. Leslie

Spencer was found guilty solely upon the grounds that he aided and abetted Respess Spencer. Therefore, if Respess Spencer is not convicted upon his new trial, Leslie Spencer should not stand convicted. *State v. Gainey,* 273 N.C. 620, 160 S.E. 2d 685. It follows that the prejudicial error in the trial of Respess Spencer constituted error prejudicial to this defendant.

New trial.

Judges BRITT and PARKER concur.

MARGARET BLUE PARKER v. RAYMOND L. PITTMAN, JR., AND WIFE, SARA L. PITTMAN

No. 7312SC431

(Filed 27 June 1973)

1. **Reformation of Instruments § 1— reformation of a deed**

If a deed fails to express the true intention of the parties it may be reformed to express such intent only when the failure is due to the mutual mistake of the parties, to the mistake of one party induced by fraud of the other, or to the mistake of the draftsman.

2. **Reformation of Instruments § 7— reformation of deed — insufficiency of evidence**

In an action to reform a deed wherein it was established that the grantor owned a life estate in the property conveyed for the life of another and a one-half undivided interest in the remainder, that the grantor's son owned the other one-half undivided interest in the remainder, and that the grantor's deed conveyed to his son and to his stepdaughter a one-half undivided interest each in the property, plaintiff stepdaughter's evidence was insufficient to support reformation of the deed on the ground of mistake of the draftsman so as to vest in the stepdaughter a one-half interest in the entire property.

3. **Deeds § 12— construction of deed — estates created**

Where the grantor owned a life estate in the property conveyed for the life of another and a one-half undivided interest in the remainder, and the grantor's son owned the other one-half undivided interest in the remainder, grantor's deed conveying to his stepdaughter and son a one-half undivided interest each in the property as tenants in common did not convey the life estate in equal shares to each of the two grantees and the grantor's one-half interest in the remainder only to his stepdaughter to the exclusion of the son since the deed throughout treats the two grantees equally.

APPEAL by defendants from *Clark, Judge,* 20 November 1972 Session of Superior Court held in CUMBERLAND County.

This is a civil action in which plaintiff seeks judgment declaring her to be the owner of record of a one-half undivided interest in a certain tract of real property or, in the alternative and if the court should declare plaintiff owner of record of less than a one-half interest, to correct and reform a deed dated 5 April 1962 recorded in Book 995, page 25, of the Cumberland County Registry so as to vest in plaintiff a one-half interest. Jury trial was waived and the court found the facts. Certain of these, as to which there is no dispute, may be summarized as follows: By recorded deed dated 5 September 1945 the property in question, being a lot and building located in the City of Fayetteville, was conveyed to Dr. R. L. Pittman and wife, Grace S. Pittman, and to Raymond L. Pittman, Jr., subject to the outstanding right of one Maggie Williford Williamson to receive the rents therefrom during her natural life. It is admitted that this deed conveyed an undivided one-half interest in the property to Dr. and Mrs. Pittman as tenants by the entirety and an undivided one-half interest to Raymond L. Pittman, Jr., both interests being subject to the outstanding life estate. By recorded deed dated 6 November 1947 Maggie Williford Williamson conveyed her life estate to Pittman Realty Company. As part of the consideration for this deed the grantee corporation covenanted to pay to Maggie Williford Williamson from the rents from the property the sum of $250.00 monthly throughout her life, during which time she shall have a lien on the property as security for such monthly payments. By deed dated 10 January 1948 and recorded in Book 512, page 91, of the Cumberland County Registry, Pittman Realty Company conveyed all of its right, title and interest in the land, being the identical interest which had been conveyed to it by Maggie Williford Williamson by her deed dated 6 November 1947, to Dr. R. L. Pittman and wife, Grace Sykes Pittman, the grantees in this deed covenanting to make the $250.00 monthly payments from the rents to Maggie Williford Williamson throughout her lifetime as set forth in her deed to Pittman Realty Company. Grace S. Pittman died testate on 8 September 1961, her will dated 18 June 1958 containing a provision devising her interest in the subject property to her daughter, Margaret Blue Parker, the plaintiff herein.

By deed dated 5 April 1962 recorded in Book 995, page 25, Cumberland County Registry, Dr. R. L. Pittman executed and recorded a deed to Raymond L. Pittman, Jr., (defendant herein), and Margaret Blue Parker (plaintiff herein), conveying the

subject property, in which the words of conveyance are as follows:

> "WITNESSETH, That said party of the first part in consideration of other good and valuable consideration and the sum of Ten Dollars, to him paid by parties of the second part the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do grant, bargain, sell and convey to said parties of the second part, their heirs and assigns, to each a ½ undivided interest as tenants in common in and to a certain tract or parcel of land in Cross Creek Township, Cumberland County, State of North Carolina, adjoining the lands of ..... and others and bounded as follows, viz:"

There then appears a metes and bounds description of the property, after which the following reference is made:

> "And being the same property conveyed to R. L. Pittman and Grace Sykes Pittman (Grace Sykes Pittman is now deceased) by deed from Pittman Realty Company, duly recorded in the Cumberland County Registry in Book 512, page 91."

The habendum and warranty clauses in this deed are as follows:

> "TO HAVE AND TO HOLD to each a one-half undivided interest as tenants in common the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging to the said parties of the second part, their heirs and assigns, to their only use and behoof forever.
>
> "And the said party of the first part for himself and his heirs, executors and administrators, covenants with said parties of the second part, their heirs and assigns, that he is seized of said premises in fee and has right to convey in fee simple; that the same are free and clear from all encumbrances and that he does hereby forever warrant and will forever defend the said title to the same against the claims of all persons whomsoever."

This deed also contains a recital to the effect that the grantees covenanted to pay Maggie Williford Williamson $250.00 monthly from the rents on the property throughout her life. Dr. R. L. Pittman died testate on 1 August 1963, his will and a codicil thereto, both dated in 1958, making no specific mention of the

subject property, but making provision for a testamentary trust of the residue of the testator's estate.

In addition to the foregoing findings of fact, as to which there is no dispute, the trial court made the following finding of fact to which defendants excepted:

> "8. That in the execution of the said deed, at the time Dr. R. L. Pittman made the aforesaid deed to the plaintiff and defendant dated April 5, 1962, he intended to make such conveyance as would vest an equal interest in fee simple in plaintiff and defendant in and to the subject property as tenants in common."

Based upon the foregoing findings of fact the trial court made conclusions of law in substance as follows: Prior to the death of Grace S. Pittman, she and her husband, Dr. R. L. Pittman, were owners as tenants by the entirety of (1) a life estate in the property for the life of Maggie Williford Williamson, subject to the latter's right to receive $250.00 monthly from the rents, and (2) an undivided one-half interest in the remainder; that Raymond L. Pittman, Jr., at that time owned the other one-half undivided interest in the remainder; that on the death of Grace S. Pittman, her husband, Dr. R. L. Pittman, as surviving tenant by the entirety, became owner of the same interests as had previously been owned by the two of them as tenants by the entirety, and no interest in the property passed by the will of Grace S. Pittman; that by his deed dated 5 April 1962 recorded in Book 995, page 25, Dr. R. L. Pittman "clearly intended for the plaintiff and defendant each to be vested with an equal undivided one-half interest in fee simple in said property as tenants in common, with the provision that the payment of the monthly rental to Maggie Williford Williamson be continued"; and that said deed, "as intended by the grantor, Dr. R. L. Pittman, conveyed to Margaret Blue Parker, a one-half undivided interest in fee and conveyed to Raymond L. Pittman, Jr., and Margaret Blue Parker, each a one-half undivided interest in the life interest and estate, and thereupon said life interest and estate of Maggie Williford Williamson was merged with the remainder in fee and both grantees became the owners of equal undivided interests in fee in and to the said lot subject only to the covenant to pay monthly rental."

Upon these findings of fact and conclusions of law, the court entered judgment decreeing that plaintiff, Margaret Blue

Parker, and defendant, Raymond L. Pittman, Jr., "are each the owners of an equal one-half undivided interest in fee simple in and to the Hay Street lot described in deed recorded in Book 995, page 25, Cumberland County Registry, subject to the right to monthly rental of Maggie Williford Williamson."

From this judgment, defendants appealed.

Clark, Clark, Shaw & Clark by Heman R. Clark for plaintiff appellee.

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

PARKER, Judge.

In her amended complaint plaintiff alleged that there was a "mutually agreed upon" testamentary plan between Grace S. Pittman (who was the mother of plaintiff and of the defendant, Raymond L. Pittman, Jr.) and Dr. R. L. Pittman (who was stepfather of the plaintiff and father of said defendant) "to give the plaintiff and defendant Raymond L. Pittman, Jr., a one-half undivided interest each in the property in question"; that following the death of Grace S. Pittman, Dr. Pittman "employed attorneys for the express purpose of making a deed which would convey a one-half undivided interest in this property to the plaintiff, and vest in the plaintiff and the defendant, Raymond L. Pittman, Jr., a one-half undivided interest each in the property"; that "through error and oversight" Dr. Pittman failed to mention to the attorneys the fact that Raymond L. Pittman, Jr., was already vested with a one-half undivided interest in the remainder; and that because the attorneys were "inadvertent" to this fact, they prepared the deed "without limiting the conveyance to the defendant, Raymond L. Pittman, Jr., to a one-half interest in the life estate only by express terms and language, so as to vest in the plaintiff and the defendant, Raymond L. Pittman, Jr., a one-half undivided interest each in and to the life estate and remainder interest in said property as was intended by all of said parties."

[1] If a deed fails to express the true intention of the parties it may be reformed to express such intent only when the failure is due to the mutual mistake of the parties, to the mistake of one party induced by fraud of the other, or to mistake of the draftsman. "The mistake of one party to the deed, or instru-

ment, alone, not induced by the fraud of the other, affords no ground for relief by reformation." *Crawford v. Willoughby,* 192 N.C. 269, 134 S.E. 494. Even where appropriate grounds for reformation are asserted, "[w]hen a solemn document like a deed is revised by court of equity, the proof of mistake must be strong, cogent and convincing." *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892. In the present case plaintiff alleged mistake of the draftsman as grounds for the equitable relief of reformation, but her proof failed to support her allegations.

[2] Plaintiff's evidence consisted solely of copies of recorded deeds in the chain of title, copies of the wills of her mother and stepfather, and her own testimony. The provisions in the two wills, neither of which is in the chain of title or otherwise directly affects title to the property involved, do not support plaintiff's allegations that there was a "mutually agreed upon" testamentary plan. Had the property passed under either will, the result would not have been to vest title in the manner for which plaintiff now contends. Her own testimony was confined principally to descriptions of the recorded documents and throws no light on the circumstances surrounding the preparation, execution, or delivery of the deed dated 5 April 1962 which she seeks to interpret or to reform. Plaintiff's proof being totally deficient to establish any grounds for reformation of that instrument, the trial court quite correctly did not grant that equitable relief, but limited its judgment to a legal interpretation of the instrument as drawn. In interpreting the legal effect of the instrument, however, in our opinion the trial court committed **error.**

"In construing a deed and determining the intention of the parties, ordinarily the intention must be gathered from the language of the deed itself when its terms are unambiguous." *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530. Only when the meaning of the language is in doubt may resort be had to evidence outside of the deed in order to determine the true intent of the grantor. 3 Strong, N. C. Index 2d, Deeds, § 11, p. 257. Here, not only was the language in the deed unambiguous, but there was simply no other evidence from which the grantor's intent might be found. Necessarily, therefore, we are limited in this case to the language contained in the deed itself in order to determine its legal effect.

[3] At the time Dr. Pittman executed the deed dated 5 April 1962 he owned (1) a life estate in the property for the life

of Maggie Williford Williamson (subject to the latter's right to receive $250.00 monthly from the rents of the property during her lifetime) and (2) a one-half undivided interest in the remainder. His son, Raymond L. Pittman, Jr., owned the other one-half undivided interest in the remainder. The trial court interpreted the deed dated 5 April 1962 as conveying (1) the life estate in equal shares to each of the two grantees and (2) the grantor's one-half interest in the remainder to only one of the two grantees, to the exclusion of the other. The deed itself, however, makes no such provision but throughout treats each of the two grantees equally. The language of the deed being clear and unequivocal, it must be given effect according to its terms, and we may not speculate that the grantor intended otherwise. "The grantor's intent must be understood as that expressed in the language of the deed and not necessarily such as may have existed in his mind if inconsistent with the legal import of the words he has used." *Pittman v. Stanley,* 231 N. C. 327, 56 S.E. 2d 657. Any other rule makes for too great instability of titles.

The judgment appealed from is reversed and this cause is remanded to the Superior Court in Cumberland County for entry of judgment in conformity with this opinion.

Reversed and remanded.

Judges CAMPBELL and MORRIS concur.

ARGO AIR, INC. v. LEROY SCOTT, TRUSTEE, AARON WATMAN AND DANIEL GINTIS

No. 732SC113

(Filed 27 June 1973)

1. Usury § 1— relationship of broker to parties — relevance to nature of transaction — failure to make necessary findings

Whether the transaction in question was usurious depended upon the questions (1) whether one Bartlett was acting as broker for plaintiff borrower and received, by payment or by cancellation of a note owed defendant lender or a combination of both, a $3800 commission, or (2) whether Bartlett was acting as agent for defendant and defendant received as a commission all but $500 of the $3800 commission; failure of the trial court to determine Bartlett's position as to

the parties and hence the nature of the transaction requires a new trial.

2. Usury § 5— usurious transaction — invalidation of note and deed of trust — improper remedy

Trial court erred in adjudging that the note and deed of trust in question were null and void as a usurious transaction and permanently enjoining the foreclosure of the deed of trust, since usury does not invalidate a contract but simply works a forfeiture of the entire interest and subjects the lender to liability to the borrower for twice the amount of interest paid. G.S. 24-2.

APPEAL by defendants from *Tillery, Judge,* at the 7 August 1972 Civil Session of BEAUFORT Superior Court.

Plaintiff instituted this action to have defendants enjoined from foreclosing a deed of trust on real estate, contending that the deed of trust purported to secure a usurious transaction and that plaintiff is entitled to have the security instruments cancelled. Jury trial was waived.

Material allegations of the complaint are summarized as follows:

On or about 5 March 1970, plaintiff executed and delivered to defendant Watman a promissory note for $21,600, payable $600 per month for 36 months. To secure the note, plaintiff executed to defendant Scott, as trustee, a deed of trust on a tract of land in Beaufort County. Consideration for the note was a loan from defendant Watman to plaintiff but plaintiff received only $15,000, being charged interest at the rate of 22%. Plaintiff has paid $6,600 on the indebtedness, which amount has been applied by defendants Gintis and Watman to interest. By virtue of North Carolina usury laws, defendant Watman owes plaintiff $13,200. Plaintiff is entitled (1) to have the note and deed of trust declared null and void as a usurious transaction, (2) to recover judgment against defendants Gintis and Watman for $13,200, (3) to have defendants enjoined from foreclosing the deed of trust, and (4) to have defendants render an accounting.

In their answer defendants denied any usury, alleged that plaintiff was in default, and owed $13,481.67 plus interest from 20 March 1971 on the indebtedness.

Following the final pretrial conference, the parties stipulated that the "applicable statute governing the lawful rate of interest to be charged in this transaction is Sec. 24-1.2(b) of

the 1969 Supplement and that the maximum lawful interest rate is twelve per cent," that plaintiff had paid $6,600 on the note, and that the contested issues to be tried by the court are:

"(a) The actual amount of the loan proceeds advanced by the defendants.

(b) The rate of interest charged by the defendants.

(c) The position of Odell Bartlett in the transaction, that is, if he was anyone's agent and, if so, was he the agent of the plaintiff or the agent of the defendant lender.

(d) Was the rate of interest charged usurious as being in violation of the lawful interest rate permitted under Sec. 24-1.2(b) of the 1969 Supplement?"

At trial plaintiff presented five witnesses including Odell Bartlett (Bartlett), and defendants Gintis and Scott. Pertinent evidence tended to show:

Defendant Gintis, 48, is a practicing chemist residing in Kinston, N. C. Defendant Watman, 80, is the father-in-law of defendant Gintis, is retired and resides in Florida. Because he needed some additional income, defendant Watman authorized defendant Gintis to loan some money for him. In January 1970 Bartlett, a loan broker residing in Raleigh, N. C., and other places, advised defendant Gintis that plaintiff was looking for a loan which could be secured by real estate. Defendant Gintis, his wife, Bartlett and a bank representative viewed the land and concluded that it was worth $20,000. Thereafter, defendant Gintis refused to make any loan on the property but later was "talked into it."

Defendant Gintis, called as an adverse witness, testified: The amount of money he loaned was $18,875, with $15,000 paid directly to plaintiff, $3,800 brokerage fee was paid to Bartlett and $75 "was thrown in for my time and my wife's appraisal." While he gave Bartlett a check for $3,800 covering the brokerage fee, Bartlett endorsed the check and gave it back to Gintis and the check was never deposited. At the time, Bartlett owed Gintis a note for $2,500 which was cancelled and delivered to Bartlett and the remaining $1,300 was paid in cash and checks.

In his testimony Bartlett (called as a witness by plaintiff) corroborated Gintis regarding the brokerage fee. He further testified: Although he had previously borrowed money from

Gintis, he had never before "brokered" a loan to or for Gintis. About a week before the loan in question was closed, he met with Gintis and Casey (plaintiff's president) in defendant Scott's office and "figured out the whole deal." He calculated the interest at 8%, the deal included a $3,800 brokerage fee for Bartlett and Gintis and Casey agreed to it. Bartlett got into the transaction through one John Whitford (also a loan broker) who was trying to obtain a loan for plaintiff and solicited Bartlett's assistance.

Casey testified that he met Bartlett in the spring or late winter of 1970 and that Bartlett "put me in touch with Mr. Gintis." He admitted executing the $21,600 note on behalf of plaintiff, received $15,000, but denied that he ever "designated" Bartlett as his agent.

Whitford testified that he was present when the loan was closed and that Bartlett had previously told him that he (Bartlett) was going to receive $500 out of the transaction from Gintis.

After reciting the stipulations, the judgment contains the following:

> "Daniel Gintis, one of the defendants, learned of the desire of Argo Air, Inc., the plaintiff, to borrow money through Odell Bartlett. Odell Bartlett is in the business of arranging loans by bringing together potential lenders and potential borrowers for a fee. Odell Bartlett and Daniel Gintis had been acquainted with one another for several years and Odell Bartlett had in prior times borrowed money from Daniel Gintis.
>
> At the time of closing of the loan made from Aaron Watman to the plaintiff the plaintiff received $15,000.00. In addition thereto Daniel Gintis handed to Odell Bartlett a check in the amount of $3,800.00 which Odell Bartlett endorsed and returned to Daniel Gintis. Daniel Gintis also received $75.00 which was charged against the loan to plaintiff. Subsequent to the time of loan closing Odell Bartlett received the sum of $500.00 represented by three checks on the bank account of Daniel Gintis. Odell Bartlett told John Whitford prior to settlement of the loan that he (Odell Bartlett) expected to receive $500.00 as a fee for arranging a transaction between Daniel Gintis and the

plaintiff. Odell Bartlett told John Whitford, who was interested in the transaction, that Daniel Gintis would see to payment for John Whitford.

Based upon the foregoing findings of fact, the court concludes as a matter of law that the actual amount of money advanced by the defendants, Daniel Gintis and Aaron Watman, to the plaintiff was $15,000.00; that the rate of interest charged by the defendants Gintis and Watman was twenty-two per cent, which was in excess of the lawful interest rate permitted under the general statutes of North Carolina and was, therefore, usurious."

The court adjudged that the note and deed of trust were null and void "as a usurious transaction" and ordered that defendants be permanently enjoined from foreclosing the deed of trust. Defendants appealed.

Gordon B. Kelley for plaintiff appellee.

Gerrans & Spence by William D. Spence for defendant appellants.

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

BRITT, Judge.

Defendants assign as error the failure of the court to allow their motions to dismiss interposed at the conclusion of the evidence. We hold that the evidence was sufficient to survive the motions.

By proper assignments of error, defendants contend (1) that the facts found by the court do not support its conclusion that the rate of interest charged by defendants Gintis and Watman was usurious, and (2) that the facts found do not support the judgment. The assignments of error are sustained.

[1] Crucial to a determination of this case is the position occupied by the broker, Bartlett. Was he acting as the agent of plaintiff in negotiating the loan or was he acting as the agent of defendant Gintis? In the final pretrial order, the parties agreed that this was an issue but the court did not make the determination.

In 12 Am. Jur. 2d, Brokers, § 31, pp. 795-796, we find: "A brokerage relationship is created by a contract between the parties, the elements of which are those that enter into the formation of any contract. There must be consideration, mutuality, and a meeting of the minds as to essential matters. The contract may arise either by virtue of a prearranged agreement, express or implied, between the parties, or by the principal's subsequent ratification of the broker's unauthorized acts."

In *Henderson v. Finance Company,* 273 N.C. 253, 263, 160 S.E. 2d 39 (1968), it is said: "By hypothesis, one who makes no loan but, as broker or agent of the borrower, finds a lender and procures the making of a loan by him, has not received usury when he collects a fee for his services. If, however, the lender, himself, charges a commission in addition to the maximum rate of interest permitted by the statute, such charge is usury. *Arrington et al. v. Goodrich et al.,* 95 N.C. 462."

Although the quoted statement from *Henderson* is not totally apropos to the instant case, we think it is analogous. In our opinion, if Bartlett was acting as broker for plaintiff and received, by payment or by cancellation of a note owed Gintis or a combination of both, the $3,800 commission, then the transaction complained of was not usurious; but, if Bartlett was acting as agent for Gintis and Gintis received as a commission all but $500 of the $3,800, then the transaction was usurious.

While plaintiff's president, Casey, testified that he did not at any time *designate* Bartlett as plaintiff's agent, there was evidence tending to show at least an implied contract between plaintiff and Bartlett and plaintiff's ratification of Bartlett's obtaining the loan and charging $3,800 commission. On the other hand, there was evidence from which the court could find that Bartlett was acting as agent for Gintis; that Bartlett received only a small part of the commission and that Gintis received *as a commission* a sufficient amount of the $3,800 to make the transaction usurious. It was incumbent on the court to make clear and specific findings of fact from the conflicting testimony. For failure of the court to make a proper determination as to Bartlett's position, there must be a new trial.

[2] Finally, defendants contend that the court erred in adjudging that the note and deed of trust are null and void "as a usurious transaction" and permanently enjoining the foreclosure of the deed of trust. This contention likewise has merit.

G.S. 24-2, our usury statute, provides in pertinent part as follows:

> "The taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter or other applicable law, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of action for debt."

The usury statute must be strictly construed. *Dixon v. Osborne,* 204 N.C. 480, 168 S.E. 683 (1933). Under the statute, usury does not invalidate a contract; it simply works a forfeiture of the entire interest, and subjects the lender to liability to the borrower for twice the amount of interest *paid. Kessing v. National Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971); *Wilkins v. Commercial Finance Company,* 237 N.C. 396, 75 S.E. 2d 118 (1953).

Upon a retrial of the case at bar, should the court determine that the transaction was usurious, the court will (1) eliminate the indebtedness of all interest *charged,* (2) determine the amount of interest *paid,* and (3) give plaintiff credit on the indebtedness for twice the amount of interest *paid.* Plaintiff then will be indebted to the holder of the note for the balance remaining, and unless the balance is paid, the holder will be entitled to have the deed of trust foreclosed as provided therein.

For the reasons stated, the judgment appealed from is vacated and the cause is remanded for a

New trial.

Judges BROCK and HEDRICK concur.

FORSYTH COUNTY v. MARIE MYERS BARNEYCASTLE, ADMINISTRATRIX OF THE ESTATE OF MATTIE MYERS SLOAN; AND VIRGINIA D. MYERS LUMSDEN

No. 7321SC307

(Filed 27 June 1973)

1. **Death § 9— wrongful death — compromise settlement by administrator**

An administrator has the right to compromise a claim for wrongful death if he acts in good faith and exercises the care which an ordinarily sensible and prudent man would exercise in dealing with his own property under like circumstances, and the funds received in compromise are to be distributed in the same manner as if obtained after litigation.

2. **Death § 7— damages for wrongful death**

Under the provisions of G.S. 28-174 all of the items of damage which might have been set out in a claim for personal injuries prior to death are now includable in an action for damages for death by wrongful act, and any recovery in an action for wrongful death would of necessity cover such items.

3. **Death § 9— wrongful death — compromise settlement — liability for public welfare assistance lien**

Funds obtained by compromise settlement of a wrongful death action are for damages recoverable for death by wrongful act within the meaning of G.S. 28-174; consequently, such funds are not assets of the estate liable for debts of the decedent and are thus not liable for payment of a county's lien for public welfare assistance rendered to the decedent. G.S. 28-173.

APPEAL by plaintiff from *Fountain, Judge,* 4 December 1972 Civil Session of Superior Court held in FORSYTH County.

Plaintiff, Forsyth County, has instituted this action against Marie Myers Barneycastle, defendant administratrix of the estate of Mattie Myers Sloan, to recover $7,222.00 pursuant to a lien arising under General Statutes 108-29 *et seq.* for public welfare assistance received by Mattie Myers Sloan. These statutes have been repealed by Chapter 204, 1973 Session Laws, effective 16 April 1973, but not made retroactive. The defendant, Virginia D. Myers Lumsden is the next of kin of Mattie Myers Sloan and sole beneficiary of her estate.

The uncontroverted facts disclosed that Mattie Myers Sloan died intestate in Forsyth County on 9 February 1971 as a result of injuries received in an automobile accident on 1 February 1971. She was a patient in North Carolina Baptist Hos-

pital in Winston-Salem from the date of the accident until her death.

On 16 February 1971 defendant qualified as the administratrix of the estate of Mattie Myers Sloan and subsequently negotiated a compromise settlement with the insurance carrier of L. A. Reynolds Company in the amount of $18,000.00 for the personal injuries to and death of decedent caused by the negligence of an employee of L. A. Reynolds Company.

Decedent, Mattie Myers Sloan, had received public assistance from Forsyth County from October, 1963, through February, 1971, receiving a total amount of $7,222.00 for which plaintiff, in apt time, filed claim against the estate.

Defendant administratrix has refused to pay the Forsyth County claim upon the ground, among others, that the funds obtained by compromise settlement for the injuries to and death of intestate were not assets of the estate subject to the payment of the County claim or any other debts of intestate other than those specified in G.S. 28-173.

Motions for summary judgment were filed by both plaintiff and defendant administratrix. The court granted summary judgment for the defendant administratrix and dismissed the plaintiff's claim. Plaintiff appeals.

P. Eugene Price, Jr., and Chester C. Davis for plaintiff appellant.

Randolph and Randolph, by Clyde C. Randolph, Jr., and Doris G. Randolph, for defendant appellee.

BALEY, Judge.

Since this appeal was filed, the North Carolina Supreme Court, speaking through Chief Justice Bobbitt, has issued a comprehensive opinion setting forth the present status of the law concerning death by wrongful act as it is or may be affected by the passage of Chapter 215, 1969 Session Laws, which was ratified on 14 April 1969—now codified as G.S. 28-174. *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789.

The court does not, however, make a definitive holding upon the precise questions raised by this appeal as they were not directly presented in the *Bowen* case. Here we have the question of whether a compromise settlement without litigation

is governed by the same rule applicable to recovery by trial, and the more troublesome question of what constitutes damages recoverable for death by wrongful act and how such damages are to be distributed.

[1] An administrator has the right to compromise a disputed claim if he acts in good faith and exercises the care which an ordinarily sensible and prudent man would exercise in dealing with his own property under like circumstances. *McGill v. Freight,* 245 N.C. 469, 96 S.E. 2d 438. This rule is applicable to a purely statutory cause of action for wrongful death, and money received by a compromise settlement stands on the same basis as if it had been recovered by litigation. *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807, 72 A.L.R. 2d 278, with annotation; *McGill v. Freight, supra.*

All concerned parties appear satisfied with the amount of the settlement obtained by the administratrix in this case. There is no evidence of bad faith or fraud and the administratrix seems to have exercised the care of an ordinarily prudent person in negotiating the compromise. The funds received in compromise should, therefore, be distributed in the same manner as if obtained after litigation.

To determine what constitutes damages recoverable for death by wrongful act and how such damages are to be distributed necessitates a careful look at the wrongful death statute, G.S. 28-173, which *was not* changed by the General Assembly in 1969, and the statute providing damages recoverable for death by wrongful act, G.S. 28-174, which *was* changed by the General Assembly in 1969.

Plaintiff, Forsyth County, seeks to recover a *debt* of decedent. Under G.S. 28-173, before 1969 and now, the amount recovered in an action for wrongful death under the statute "is not liable to be applied as assets, in the payment of debts . . . " with certain exceptions not here applicable. If the funds obtained by compromise settlement are for damages recoverable for death by wrongful act, the plaintiff has no enforceable claim against these funds or any portion of them.

G.S. 28-174, as rewritten in 1969, now reads:

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

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

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

(3) The reasonable funeral expenses of the decedent;

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

a. Net income of the decedent,

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

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

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

(6) Nominal damages when the jury so finds.

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

[2, 3] Under the present provisions of G.S. 28-174 the conclusion seems inescapable that all of the items of damage which might conceivably have been set out in a claim for personal injuries prior to death are now includable in an action for damages for death by wrongful act. Any recovery in an action for wrongful death would of necessity cover these express items. All damages "recoverable for death by wrongful act" as enumerated in G.S. 28-174 are subject to the exemption conferred by G.S. 28-173. The plain language of the two statutes as presently in effect, in our judgment, permits no other result. "Where the language of a statute is clear and unambiguous, there is no

room for judicial construction and the courts must give it its plain and definite meaning. . . . " 7 Strong, N. C. Index 2d, Statutes, § 5, p. 77; *Canteen Service v. Johnson, Comr. of Revenue,* 256 N.C. 155, 123 S.E. 2d 582, 91 A.L.R. 2d 1127; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129.

We cannot speculate about what the General Assembly may have intended to say when it is clear what they did say. In the context of the present factual situation, we hold that there is no inconsistency in the two statutes, G.S. 28-173 and G.S. 28-174, which cannot be reconciled and give effect to both as written. In *U. S. v. Missouri Pacific Railroad Co.,* 278 U.S. 269, 278, 73 L.Ed. 322, 377, 49 S.Ct. 133, 136 (1928), the Supreme Court said:

> " . . . [W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."

If there is to be any change in G.S. 28-173 or G.S. 28-174, which are now clear as written, it is a matter for the legislature, not the court.

We have carefully considered the other assignments of error brought forth by plaintiff and find them without merit.

As plaintiff's claim is a debt which is collectible only from the general assets of the decedent's estate, and the settlement here constitutes a specific fund recovered for death by wrongful act under the terms of G.S. 28-174, the payment of plaintiff's claim from the settlement would not be enforceable.

Defendant administratrix is entitled to summary judgment adjudicating that the funds represented by the compromise settlement are not subject to the payment of plaintiff's claim.

Affirmed.

Judges BRITT and HEDRICK concur.

C. K. STUART, ELIZABETH R. STUART, LAURA R. STUART, SAMMY S. SELL AND GEORGE H. SHELBY v. UNITED STATES FIRE INSURANCE COMPANY

No. 7320DC298

(Filed 27 June 1973)

1. **Insurance § 128— fire insurance — condition of occupancy of premises — waiver**

In an action to recover on a fire insurance policy for the total loss by fire of a barn and contents owned by the plaintiffs, the trial court erred in granting defendant's motion to dismiss where the evidence tended to show that the premises had been insured by defendant for ten years, that immediately prior to the issuance of the standard three year policy which preceded the policy upon which suit was brought, the agent of defendant was notified in writing that no one was living on the premises and that it was being looked after by a caretaker who lived a few miles away, that renewal policies containing the condition of occupancy of the premises were subsequently issued without further notice from plaintiffs or investigation by defendant, and that premiums due defendant had been paid.

2. **Insurance § 128— fire insurance — waiver and estoppel — failure to plead — consideration by court**

Waiver and estoppel were proper elements for consideration by the court in an action on an insurance policy, though they were not specifically pleaded, where the case was tried on the theory that defendant had accepted premiums with knowledge of the non-occupancy of the premises and the letter specifically setting out the notice of such non-occupancy was admitted in evidence without objection. G.S. 1A-1, Rule 8(c).

APPEAL by plaintiffs from *Mills, Judge,* 11 December 1972 Session of District Court held in RICHMOND County.

This is an action to recover on a fire insurance policy for the total loss by fire of a barn and contents owned by the plaintiffs. Defendant refused to make payment giving as its reason that the dwelling upon the premises was vacant and unoccupied for a period in excess of sixty consecutive days and the hazard was increased in violation of the terms of the policy.

The case was heard by the court without a jury.

Upon trial the parties stipulated that George Shelby was the agent of the plaintiffs who owned the premises in question and as such on 5 August 1967 wrote a letter to United Insur-

ance Agency, the authorized agent which issued the insurance policy for the defendant, which letter read as follows:

"2019 Chatham Avenue
Charlotte, N. C. 28205
August 5, 1967

United Insurance Agency
Carthage, N. C. 28327

Gentlemen:

Enclosing check in the amount of $135.00 covering United States Fire Insurance Company Policy No. 86 72 88 due August 27, 1967, your invoice No. 742591.

Please change the name from Anna S. Shelby to George H. Shelby, Agent, Guy Stuart Farm. Mrs. Shelby passed away on April 22, 1967.

As you know there is no one living on the premises, we have a care taker that lives a few miles from the farm.

Very truly yours,
George H. Shelby"

This letter was received and is on file with United Insurance Agency. It was further stipulated that the fair market value of the barn was in excess of the $5,000.00 coverage of the policy, that all premiums on the policy had been paid at the time of the fire, and that the dwelling house on the premises had been unoccupied for a period in excess of sixty days next preceding the destruction of the barn by fire.

The evidence of the plaintiffs, consisting of the testimony of George Shelby and James Leak, caretaker of the premises, the agreed stipulations and the pleadings, was substantially as follows:

The barn and contents—largely sawed timber and electrical equipment—were destroyed by fire on 1 March 1972. The barn had been constructed in 1947 for storage and had been continuously used for storage since that time. When Shelby came into possession of the premises, he wrote the letter of 5 August 1967 to United Insurance Agency, which was admitted in evidence, advising that there was no one living on the premises and a caretaker who lived a few miles from the farm looked after it. Insurance had been carried on the property with the

same company for at least ten years and all premiums had been paid. The contents of the barn were valued at between $1,100.00 and $1,200.00.

The insurance policy in question was issued to plaintiffs by United Insurance Agency on behalf of the defendant and covered a period from 27 August 1970 to 27 August 1973. It was a renewal policy replacing one issued by the same company covering the same premises for a period from 27 August 1967 to 27 August 1970. The renewal policy provided the following insurance:

> "1. $3,000.00 On the frame app. roof owner Dwg. Sit. 3 mi. S/W of Jackson Springs on E/S Hoffman Rd. Richmond County, N. C.
>
> 2. $2,500.00 On concrete block app. roof dwg.
>
> 3. $5,000.00 On brick metal roof 2 story barn located 250' southwest item 1.
>
> 4. $1,000.00 Machinery, etc., contained in item 3."

and contained the provision:

> "Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured; or (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days."

At the close of evidence for the plaintiffs the defendant moved for dismissal under Rule 41(b) of the Rules of Civil Procedure.

The court, hearing the case without a jury, found all the facts to be true according to the evidence submitted by plaintiffs and the facts admitted in the pleadings and by stipulation, and granted the motion of defendant for judgment of dismissal.

From this judgment the plaintiffs appealed.

Jones and Deane, by W. R. Jones, for plaintiff appellants.

Leath, Bynum & Kitchin, by Henry L. Kitchin, for defendant appellee.

BALEY, Judge.

The key question involved in this appeal is whether the insurance company had knowledge of the non-occupancy of the insured premises prior to the issuance of the insurance contract. If so, it would be estopped to assert this defense, and plaintiffs would be entitled to recover.

[1] It is the general rule that if an insurance company has knowledge through its agent prior to the issuance of a policy of fire insurance that the premises are vacant or unoccupied, the issuance of the policy waives any provision as to vacancy or non-occupancy, at least so far as it concerns the existing vacancy. *Fire Fighters Club v. Casualty Co.*, 259 N.C. 582, 131 S.E. 2d 430; *Johnson v. Insurance Co.*, 172 N.C. 142, 90 S.E. 124; Annot., 96 A.L.R. 1259 (1935).

In *Johnson v. Insurance Co., supra,* the court cites with approval from *Wood v. American Fire Ins. Co.*, 149 N.Y. 382, 386, 44 N.E. 80, 81 (1896):

> "The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation."

Conceding, *arguendo,* that both the dwelling and the barn covered by this insurance policy were unoccupied, the defendant knew of such non-occupancy prior to the issuance of its policy. The record shows that the defendant had carried insurance coverage upon the premises here involved for at least ten years. On 5 August 1967, immediately prior to the issuance of the standard three year policy which preceded the policy upon which suit was brought, the agent of defendant was notified in writing that no one was living on the premises and that it was being looked after by a caretaker who lived a few miles from the farm. With full knowledge of the factual situation then existing, the defendant issued its policy effective 27 August 1967 and, without further notice from plaintiffs or any apparent investigation, subsequently issued its renewal policy effective 27 August 1970. The notice that a caretaker who lived a few miles from the farm was in charge of the premises was ample notice to defendant that the premises were unoccupied and gives rise

to a logical inference that they would remain so unoccupied unless defendant was notified of any changed conditions.

It is undisputed that the defendant accepted premiums after notice of non-occupancy. The premium for the policy period beginning in 1967 and for the renewal period beginning in 1970 were conceded to have been paid.

It cannot be assumed that the defendant intended to accept premiums upon a policy which it knew did not extend coverage. *Williams v. Insurance Co.*, 209 N.C. 765, 185 S.E. 21.

[2] Ordinarily waiver and estoppel must be pleaded as affirmative defenses. Rule 8(c), Rules of Civil Procedure. However the plaintiffs presented their evidence and the case was tried on the theory that the defendant had accepted its premiums with knowledge of the non-occupancy of the premises. The letter specifically setting out the notice of such non-occupancy was admitted in evidence without objection. In a liberal construction of the pleadings upon the theory under which the case was tried and under the factual circumstances here appearing, we hold waiver and estoppel were proper elements for consideration by the court. *Laughinghouse v. Insurance Co.*, 200 N.C. 434, 157 S.E. 131; *Horton v. Insurance Co.*, 9 N.C. App. 140, 175 S.E. 2d 725, *cert. denied*, 277 N.C. 251.

In *Willis v. Ins. Co.*, 79 N.C. 285, 289 (1878), the Supreme Court made this practical observation:

> "Insurance contracts are prepared by insurers who have at their command in their preparation the best legal talent and business capacity, and every precaution is taken for their protection. This is made necessary to prevent the frauds of bad men. But on the other hand the insured are generally plain men without counsel, or the capacity to understand the involved and complicated writings which they are required to sign, and which in most cases probably they never read. What they understand is that they are to pay the insurers so much money, and if they are burnt out the insurers pay them so much. Where therefore there has been good faith on the part of the insured and a *substantial* compliance with the contract on their part, the Courts will require nothing more."

This makes good sense today as it did in 1878 and is applicable to the present case.

The judgment appealed from is reversed and a new trial ordered.

New trial.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES RICHARD FOX

No. 7311SC281

(Filed 27 June 1973)

1. **Witnesses § 1— competency of nine-year-old to testify**

The trial court in a murder prosecution did not err in allowing a nine-year-old to testify where the court conducted a *voir dire* in the absence of the jury and then concluded that the witness had sufficient intelligence and knowledge to give evidence.

2. **Homicide § 30— death by shooting — failure to submit involuntary manslaughter — no error**

Where the State's evidence tended to show that defendant, who earlier "had been in a bad mood," shot and killed his sister as she was about to climb the steps to the house, but defendant's evidence tended to show that he entered his home to obtain his gun for the purpose of killing a snake and that he killed his sister when the gun discharged as he was coming out of the door of the house, the trial court did not err in failing to submit to the jury the possible verdict of involuntary manslaughter.

APPEAL by defendant from *Braswell, Judge,* 23 October 1972 Session of LEE County Superior Court.

Defendant was charged in an indictment with the first-degree murder of Vera Davis Hooker. At trial the State elected to try defendant for murder in the second degree or manslaughter as the jury might find. Counsel for defendant was furnished by the State, and defendant entered a plea of not guilty.

Briefly summarized, the evidence for the State tended to show the following:

On 22 July 1972, defendant James Richard Fox was living with his mother, Lula Davis Fox, and his sister, Vera Davis Hooker, the deceased. At approximately 6:00 a.m. that day, defendant went next door to check on his sister-in-law, Geraldine Fox, as he usually did before leaving for work. After staying a

short while defendant left and Geraldine went to her bedroom. She then heard a shot and went outside and observed the body of Vera Davis Hooker lying on the steps of defendant's house. Defendant went out his front door holding a shotgun in his hand and left the premises. He soon returned to Geraldine's house where he tried unsuccessfully to flag down a passing motorist. He then went into Geraldine's house and said he wanted to report that he had killed his sister. He then phoned the police and reported the shooting.

Anthony Hooker, great-nephew of defendant and grandson of deceased, was also staying in defendant's house and testified that he was looking through a window early that morning and saw the deceased go to a utility house and put up a lawn mower. As deceased came back and was about to climb the steps to the house, the defendant opened the door and shot her. Anthony then went to a neighbor's house and reported the incident to his mother.

It was reported that earlier that morning at approximately 2:00 a.m. defendant had been in a bad mood. Betty Hooker, a niece of defendant who also lived in the same house testified that "[f]or four months he had been raising cain, morning, noon and night when he didn't go to work, fussing at everybody and carrying on and drinking."

Officers from the Lee County Sheriff's Department soon arrived and after advising defendant of his rights, placed him under arrest. On cross-examination, Deputy Holt testified that defendant came to their car as they arrived and said, "[c]ome on I have shot her, she is around on the porch and it was an accident."

Defendant then took the stand in his own behalf and testified as follows:

> "My mother was sitting on the back porch and I came out to talk to my mother. Vera was out burning garbage just out by the house. Me and my mother were talking on the porch. She said to me 'There goes a snake.' I saw the snake. I came back in the room where I sleep and gets the gun, a single barrel gun. That looks like part of it over there. I came outside, came through the door, I opened the screen door and when I opened the screen door the gun went off and my sister was coming up the steps. I did not intend to shoot my sister.", and "It accidentally went off."

On cross-examination he further stated:

> "I did not notice whether the hammer was cocked or not when I came out of the house. The gun stayed loaded. I would not keep such a gun with the hammer pulled back in a cocked position. I had to cock the gun in my coming out of the house. I wouldn't say that when I shot the gun it was pointed directly at the chest of Vera Davis Hooker. I don't even know where she was shot at. All I know is the gun went off."

On State's rebuttal to defendant's evidence, Vera Hooker Watson, mother of Anthony Hooker, testified that upon learning of the shooting from her son, she attempted to call the rescue squad. She picked up the party line phone and overheard defendant talking to the rescue squad. She asked defendant to get off the line and let her call, and she stated that he told her, "he had killed one and did I want him to get me too."

The jury found defendant guilty of second-degree murder. From a judgment imposing an active sentence of 22 years, defendant appealed.

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

Love and Ward, by Jimmy L. Love, for defendant appellant.

MORRIS, Judge.

[1] In his first assignment of error, defendant contends that it was improper for the trial court to allow State's witness, Anthony Hooker, age 9, to testify after his competency as a witness had been challenged. We do not agree.

Upon defendant's objection the trial court conducted a voir dire examination in the absence of the jury and upon being asked why he placed his hand on the Bible before testifying, Anthony Hooker stated, "[S]o to tell the truth." The trial court then concluded that the witness had sufficient intelligence and knowledge to give evidence. In *State v. Turner*, 268 N.C. 225, 230, 150 S.E. 2d 406 (1966), where the competency of a nine-year-old was in issue, the following was stated:

> "There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under

the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness."

In the case at hand, as in *State v. Turner, supra,* there is nothing in the record to indicate an abuse of discretion in permitting the child to testify.

[2] We next examine defendant's contention that the trial court erred in failing to submit to the jury involuntary manslaughter as a permissible verdict. The trial judge did instruct that the jury could return one of three possible verdicts: (1) Murder in the second degree, (2) voluntary manslaughter, or (3) not guilty. Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation or deliberation. *State v. Wynn,* 278 N.C. 513, 180 S.E. 2d 135 (1971). Clearly there was sufficient evidence to support the trial court's instructions on these possible verdicts.

Involuntary manslaughter however has been defined as the unintentional killing of a human being without malice, premeditation or deliberation, which results from the performance of an unlawful act not amounting to a felony, or not naturally dangerous to human life; or from the performance of a lawful act in a culpably negligent way; or from culpable omission to perform some legal duty. *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971).

" 'Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts . . . Culpable negligence 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.' (Citations omitted.)" *State v. Early,* 232 N.C. 717, 720, 62 S.E. 2d 84 (1950).

Defendant testified that the shooting was purely accidental, and our examination of the record reveals no evidence that the gun was handled so recklessly as to constitute culpable negligence. " 'Where the death of a human being is the result of

accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer . . .' (Citation omitted.)" *State v. Faust,* 254 N.C. 101, 112, 118 S.E. 2d 769 (1961). Upon defendant's evidence the trial court properly charged the jury as follows:

> "Or if you are simply satisfied that at the time the defendant acted in the manner complained of that the discharge of the shotgun was accidental then it would become your duty to return a verdict of not guilty, for it is the law where a shotgun is discharged accidentally though held in the hands of the defendant it is not done intentionally or in the manner described to you under the charge of murder in the second degree or voluntary manslaughter, then the defendant would not be guilty of any offense and it would be your duty to acquit him."

The trial court properly charged the jury as to the law arising upon the evidence, and the absence of any instruction as to involuntary manslaughter was not error. Also, there was clearly enough evidence to take the case to the jury and withstand defendant's motion to dismiss. In the trial below, we find

No error.

Judges BROCK and PARKER concur.

A. L. STONESTREET, PLAINTIFF v. COMPTON MOTORS, INC., DEFENDANT v. PETHEL CHRYSLER-PLYMOUTH, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. MOORESVILLE CHRYSLER-PLYMOUTH, INC., FRANK E. COX, MR. A. B. HAMILTON, AND MRS. A. B. HAMILTON, THIRD PARTY DEFENDANTS

No. 7319DC415

(Filed 27 June 1973)

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

Upon a motion for summary judgment it is not the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried.

2. **Bills and Notes § 20— action on note — summary judgment — issue of fact as to validity of note and chattel mortgage**

In this action to recover on a promissory note purportedly executed by corporate defendant and to recover possession of property in

the possession of the corporate codefendant which is the subject of a chattel mortgage securing the note, the trial court erred in granting summary judgment for plaintiff against the codefendant where there are genuine issues of fact as to the corporate existence of defendant affecting the validity of the note and chattel mortgage.

APPEAL by defendant Pethel Chrysler-Plymouth, Inc., from *Warren, Judge,* 8 May 1972 Session of CABARRUS District Court. (Judgment entered 27 November 1972.)

In his complaint, filed 8 September 1970, plaintiff alleged: On 17 June 1965 defendant Compton Motors, Inc., (Compton), for value received, executed and delivered to plaintiff its note for $5,500.00, due on demand. A copy of the note, purportedly signed by F. E. Cox as president of Compton, and attested by Hoyle A. Parker as secretary, is attached to the complaint as an exhibit. To secure the note Compton conveyed to plaintiff by chattel mortgage certain items of personal property, the mortgage being duly recorded in Iredell County Registry. Compton is indebted to plaintiff on account of the note in the sum of $2,208.33 with interest from 17 June 1965. The personal property conveyed in the chattel mortgage is in possession of defendant Pethel Chrysler-Plymouth, Inc., (Pethel), and simultaneously with the institution of this action, plaintiff has instituted claim and delivery proceedings for the recovery of the property. Plaintiff prayed for judgment against Compton for the amount of the indebtedness aforesaid and for possession of the property to the end that it might be sold and the proceeds from the sale applied to the indebtedness.

Compton filed no answer or other pleading. Pethel filed an undertaking and retained possession of the property. On 8 January 1971 Pethel filed answer denying the material allegations of the complaint and in a further defense denied the validity of the note and chattel mortgage, alleging, among other things, that F. E. Cox was never the president of Compton and that the purported chattel mortgage created no lien on the personal property. Pethel further pleaded the three years statute of limitations. Pethel also pleaded an action against the third party defendants but it is not relevant to the questions presented on this appeal.

Subsequent to 8 January 1971 and prior to 6 April 1972 various motions were filed and proceedings had in this action but they are not relevant to the questions presented on this appeal.

On 6 April 1972 plaintiff filed motion for summary judgment "pursuant to Rules 54 and 56 of the North Carolina Rules of Civil Procedure" for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law. On 28 April 1972 Pethel filed motion for summary judgment in its favor on the ground that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.

At the 8 May 1972 Session of Cabarrus District Court, the cause came on for hearing "upon default of the defendant Compton Motors, Inc.," and cross motions of plaintiff and defendant Pethel for summary judgment. The evidence included plaintiff's oral testimony and seven affidavits introduced by Pethel. The parties agreed that the court might enter its order or judgment "out of term." On 27 November 1972 the court entered a judgment containing twenty-one findings of fact, concluded as a matter of law that Compton is indebted to plaintiff for the sum of $2,208.00 plus interest from 17 June 1965 and that plaintiff is entitled to the possession of the personal property described in the chattel mortgage, and rendered judgment pursuant to the conclusions of law. Defendant Pethel appealed.

Hartsell, Hartsell & Mills by William L. Mills, Jr., and Fletcher L. Hartsell, Jr., for plaintiff appellee.

Collier, Harris, Homesley & Jones by Walter H. Jones, Jr., for defendant appellant (Pethel Chrysler-Plymouth, Inc.).

BRITT, Judge.

Defendant Pethel contends the court erred in its findings of facts and conclusions of law that the note and chattel mortgage are valid and that plaintiff is entitled to possession of the personal property in question, and entering judgment awarding plaintiff possession of the property. The contention has merit.

As to Pethel, we think the court went far beyond the purview of summary judgment. It appears from the judgment that the court treated the hearing as a nonjury trial of the case on the merits and considered it the court's function to find facts on conflicting evidence, make conclusions of law and enter final judgment between the parties.

[1] Since the new Rules of Civil Procedure were adopted by the 1967 General Assembly and became effective on 1 January 1970, the Supreme Court and this court have emphasized in numerous opinions that upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. The cases include *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E. 2d 113 (1971); *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). It is not the purpose of the summary judgment procedure to resolve disputed material issues of fact. *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147 (1971). Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56; *Lee v. Shor, supra.*

[2] At the hearing in the case at hand, Pethel showed that while it obtained the personal property in question from parties associated with Compton, there are genuine questions as to the corporate life of Compton affecting the validity of the note and chattel mortgage. Plaintiff testified that in about April of 1965, he and several others "purchased" Compton but that no stock was ever transferred; that he was on the board of directors and F. E. Cox was elected president with plaintiff elected vice-president; that when they could not get the Chrysler-Plymouth franchise, Compton ceased operations; that the note and chattel mortgage were executed for value received by duly elected and authorized officers of Compton. Plaintiff's testimony was contradicted in several affidavits including that of F. E. Cox (who plaintiff alleges executed the note and chattel mortgage on behalf of Compton) who stated: During the months of June and July of 1965, he, together with Hoyle A. Parker and plaintiff, attempted to purchase Compton but the purchase was never consummated; that it was agreed that in the event the transaction was consummated, he would be president, plaintiff would be vice-president and Buford Compton would be secretary-treasurer; that the money advanced by plaintiff to be used in purchasing Compton was withdrawn by plaintiff; that he (Cox) was never an officer of Compton and did not sign the promissory note in question.

We hold that while Compton filed no answer to plaintiff's complaint, Pethel has the right to challenge the validity of the note and chattel mortgage. Pethel showed that there is a genuine issue as to a material fact, therefore, the court erred in entering judgment in favor of plaintiff against Pethel.

We come now to Pethel's contention that the court erred in not allowing its motion for summary judgment, particularly on its plea of the three years statute of limitations. We have held that ordinarily the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. *Motyka v. Nappier,* 9 N.C. App. 579, 176 S.E. 2d 858 (1970). We do not feel impelled to consider the court's failure to allow Pethel's motion. We think the ends of justice will be met at this point in the litigation if the judgment appealed from is vacated as to Pethel and the cause remanded for trial on the merits. It is so ordered.

We deem it appropriate to comment on a deficiency in the record on appeal. The record reveals that on 15 December 1970 default was entered against Pethel by the Clerk of the Superior Court of Cabarrus County. Subsequent proceedings indicate that the entry was ignored by the parties, and their attorneys stated at the time of oral arguments in this court that they had agreed that "no point would be made" because of the entry. We do not look with favor on oral agreements affecting written portions of the record.

Judgment vacated.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JIMMY GATTIS JONES AND GRADY CLEE JONES

No. 7310SC185

(Filed 27 June 1973)

1. Assault and Battery § 16— assault with deadly weapon with intent to kill — no submission of lesser degree of crime — no error

In a prosecution charging defendant with assault with a deadly weapon with intent to kill where the evidence tended to show that defendant deliberately fired his pistol into the face of an officer at point-blank range, even if he may have done so to save his own life

as he contended, the trial court did not err in failing to instruct the jury on the lesser included offense of assault with a firearm resulting in serious bodily injury.

2. Assault and Battery § 8— instruction on self-defense — no error

Where defendant's testimony tended to show that the police officer opened his car door and shoved defendant up against the hood of the car, defendant came up and he and the officer went down on the ground in a struggle, the trial court's instruction on self-defense was proper and the jury clearly understood the applicable law.

APPEAL from *Blount, Judge,* at the 25 September 1972 Session of Superior Court held in WAKE County.

Defendants were tried upon bills of indictment charging them with assault with a deadly weapon with intent to kill, inflicting serious injury.

The evidence for the State tended to show the following. On 3 May 1971 at about 7:00 p.m., Officer George Booth of the Garner police force received a call from the police dispatcher reporting a stolen car. Shortly after that, Officer Booth received a call from a city councilman, whose car was equipped with a police radio, to the effect that he was following a car that matched the description of the stolen car. Since the suspect car was reportedly traveling about 100 miles an hour, Officer Booth answered the radio call quickly, using his siren and blue light. Following the city councilman's directions, Officer Booth proceeded to a residence located on rural paved road 2555 about 200 yards off old Garner Road. He drove into the driveway of this residence at about 7:20 p.m. and observed a parked vehicle that matched the description and license number of the stolen vehicle. At the time Officer Booth drove into the driveway, the defendants and two other men came out of the back door of the house and approached his police car. The men refused to answer Officer Booth's questions, became aggravated and began cursing. They told Officer Booth to leave and threatened to kill him if he didn't. At that time Officer Booth had been in the yard 3 or 4 minutes. He began to back out of the driveway intending to wait for assistance. As he was backing out, Officer Booth picked up the radio microphone and began broadcasting for assistance. Defendant Grady Jones then said "He is using the g . . d . . . radio." Grady Jones ran to the passenger side of the patrol car, jumped in, and grabbed Officer Booth; Jimmy Jones grabbed him from the driver's side and they pulled him from the driver's side of the car. The two pinned him to the ground,

Grady Jones holding his right arm and Jimmy Jones holding his left arm. One of the defendants fired a .25 caliber automatic pistol point-blank into Officer Booth's face. Officer Booth was shot under the left eye and lost consciousness.

Trooper Weatherly of the State Highway Patrol arrived at the scene shortly after the shooting. Grady Jones told him "I shot him but let's hurry up and get him to the hospital. We will talk about it later." Grady Jones produced the pistol he said he used to shoot Officer Booth. Officer Booth was hospitalized for two months as a result of the shooting and suffered voice damage as a result of the bullet entering his face.

The evidence for the defendants tended to show the following: that when Officer Booth drove into the driveway, he drove up to the back door of the residence; that Mr. Paul Jones, father of the defendants, asked Officer Booth to turn off the blue light of his patrol car and to back the car away from the back door because he didn't want the light and loud noise from the radio to upset his wife, who had a heart condition; that Mr. Paul Jones told Officer Booth he did not know who had been driving the suspect car; that Officer Booth had been asked to leave 8-10 times; that Officer Booth started to back his patrol car up, then got out of his car and pushed Grady Jones up against the hood of the car; that Booth and Grady Jones began to struggle; that Jimmy Jones went between the two and attempted to break it up, but that Grady Jones pushed him back out of the way; that both Booth and Grady Jones fell to the ground; that Booth drew his revolver and pointed it at Grady Jones; that Grady Jones drew his own gun and shot Booth thinking that if he didn't Booth would shoot him; that Jimmy Jones was not involved in the tussle except when he attempted to break it up at its inception; that Officer Booth never advised Grady Jones that he was under arrest; that Grady Jones told Trooper Weatherly that he shot Booth and wanted to get him help as soon as possible.

A jury found defendants guilty as charged. From sentences of active imprisonment, defendants appealed.

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

Tharrington, Smith & Hargrove, by Roger W. Smith, for defendants.

BROCK, Judge.

Each defendant assigns as error the trial judge's explanation of the first element of the offense charged against each defendant. We think that the instruction as given leaves something to be desired, but we do not believe the jury was in any way misled. The charge taken as a whole fairly explained to the jury each element of the offense. These assignments of error are overruled.

[1] Defendant Grady Jones assigns as error the Court's failure to instruct the jury on the lesser included offense of assault with a firearm resulting in serious bodily injury. When a lesser included offense is supported by some evidence a defendant is entitled to have the different permissible views arising on the evidence presented to the jury under proper instructions. *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535 (1970). The presence of such evidence of an offense of lesser degrees is the determinative factor. *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954).

An intent to kill is a mental attitude which ordinarily must be proved by circumstantial evidence. *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915. An intent to kill "may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Revels,* 227 N.C. 34, 40 S.E. 2d 474.

In the present case, the uncontradicted evidence is that defendant Grady Jones shot Officer Booth at close range in the face. Defendant's version of the shooting is summed up in his testimony as follows: "At that time, I saw there wasn't nothing else for me to do, and Mr. Booth cocked his gun back at that same time. During the course we were weaving back and forth. His gun was cocked. I in turn pulled my gun and shot. I shot him because I believed with all my heart if I had not, I wouldn't be sitting here; I would be dead. He would have likely shot me."

In our view this evidence does not justify submission of the issue of guilt of a lesser included offense. At best, this evidence only requires an instruction on the issue of self-defense. A person who deliberately fires a pistol into the face of his victim at point-blank range must be held to intend the normal and natural results of his deliberate act. The fact that in this case the victim's life was spared may be cause for a salute to medical science, but it hardly changes the intent apparently present when defendant pulled the trigger. We hold this assignment of error to be without merit.

[2] Defendant Grady Jones assigns as error that the court erred in its explanation of the right of self-defense. Defendant testified as to how the altercation began as follows: "But, as Mr. Booth opened his door, he shoved me back up against the hood of the car and I was bent back over the hood of the car, and when I came up, Officer Booth and I went down on the ground in a struggle . . . . " The trial judge gave defendant the full benefit of the above testimony by submitting to the jury the question of self-defense. A reading of the charge as a whole upon the issue of self-defense convinces us that the jury clearly understood the applicable law. This assignment of error is overruled.

A discussion of the several remaining assignments of error would serve no useful purpose. In our opinion defendants had a trial which was free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

PHYLLIS MONTAGUE BLACKLEY (NOW PHYLLIS DANIEL) v. ROBERT HARRY BLACKLEY

No. 739DC377

(Filed 27 June 1973)

Divorce and Alimony § 24— child custody — no finding of changed circumstances — modification of order improper

Evidence was insufficient to show a change of circumstances affecting the welfare of the parties' son so as to justify a modification of the prior orders awarding custody to the mother where such evidence tended to show that the mother had remarried, her husband had paid several antenuptial overnight visits to her home, the child's stepfather had "popped him on the bottom" several times to discipline him, the child's natural father had remarried, but there was no indication that the father wanted custody of the children, that his wife wanted the children in their home, or where and under what circumstances the children would live if placed in his custody.

APPEAL by plaintiff from orders entered by *Banzet, District Judge* on 5 June 1972 and 27 December 1972.

Plaintiff and defendant were married on 2 July 1961. Plaintiff was then 16 years old. Two children were born of this

marriage, Robert on 24 December 1962 and Teresa on 6 February 1965. The parties separated on 4 January 1966 and were divorced on 21 July 1967. Plaintiff was awarded custody of and support for the children. Defendant married his present wife, Janet, a few days after the divorce. Plaintiff married Don Daniel on 5 December 1971.

On 24 November 1971 defendant filed a motion in the cause alleging that plaintiff was unfit to have custody of the children. The motion was heard on the 9th and 20th of December, 1971. The essence of defendant's evidence to support his allegations of unfitness was that prior to plaintiff's marriage to her present husband, she allowed Daniel to spend the night in her residence several times and the children had seen Daniel in plaintiff's bedroom prior to the marriage. There was also evidence that on several occasions Daniel had "popped" the male child on his bottom. Defendant called his son, Robert, to the witness stand. Robert confirmed his stepfather's premarital visits in his mother's home and that his stepfather had spanked him a few times. In his words, "[e]very now and then people make mistakes and they get popped on the bottom." Robert told the court that he has a good time in his father's home and likes to stay there; he knows his mother loves him and his sister and that he has never been mistreated by his mother or his stepfather; he has a good time with his stepfather; they go camping, fishing and make model airplanes together. Defendant offered evidence to the effect that, in other respects, plaintiff has been a fit mother and has taken good care of the children. Defendant now lives with his present wife, Janet, and Janet's ten-year-old child of another marriage. Janet works as a beauty operator and frequently works at night. When both defendant and his wife have to work during the children's weekend visits, the children stay with defendant's parents who live nearby. Defendant's wife did not testify and no evidence was offered as to her wishes or her willingness to accept the responsibility of caring for the children born to plaintiff and defendant.

Plaintiff offered evidence tending to show: there was nothing improper about her present husband's premarital visits to her home; the children are loved and given excellent care; her present husband is good to the children and has never been unfair to them, though he has, with plaintiff's permission, "popped" Robert on the bottom to discipline him; Daniel loves the children and wants them to have the training that is vital

for their well-being; the children are well adjusted and happy; the children are happy when they are with plaintiff's husband and are devoted to each other.

At the end of the hearing on 20 December 1971, the judge advised the litigants that he would consider the case and render judgment at a later date. An order was entered on 5 June 1972 directing that Robert be taken from plaintiff, his mother, and placed with his father, the defendant. Teresa was left in the custody of her mother. On 14 June 1972, plaintiff filed a motion for a new trial as provided by Rule 59. In addition to alleging errors in law and the insufficiency of the evidence to support the judgment, plaintiff alleged matters tending to show the excellent relationship that had continued to develop between plaintiff, her husband and the children during the long period between the hearing and the entry of the order; that defendant's relationship with his wife Janet had deteriorated; that there is turmoil and confusion in defendant's home and that defendant's wife, Janet, has threatened to leave when defendant gets custody of the children. The motion was supported by affidavits of plaintiff, her husband and others. No responsive pleadings or counter affidavits were filed by defendant. On 27 December 1972 the judge entered an order denying plaintiff's motion. Plaintiff appealed from the order entered 5 June 1972 changing the custody of her son and the order entered 27 December 1972 denying her motion made under Rule 59.

Arthur Vann for plaintiff appellant.

No brief filed for defendant appellee.

VAUGHN, Judge.

No findings were made as to fitness of either party to have custody of the children, the court saying only that defendant's evidence was inconclusive and failed to show unfitness on the part of plaintiff. The court found: " . . . that the plaintiff respondent has cared for the physical needs of the children, that both are well and healthy; that they have been properly schooled, and that they have been taken to Sunday School regularly, and have responded satisfactorily to all such training." The court also found that, prior to plaintiff's marriage to Daniel, Daniel spent the night in the home of plaintiff on Christmas Eve 1970 and on November 4 and November 5, 1971, one month before the marriage; that on numerous occasions

Daniel had taken what was described as naps of ten minutes to two hours duration in plaintiff's bedroom; that before the marriage and after it Daniel had, with plaintiff's permission, spanked the male child or "popped him on the rear" by way of correction or punishment. The court further found "that Bobby is old enough to understand the impropriety of Mr. Daniel's antenuptial sojourns overnight in the home of plaintiff respondent and to resent the same; that the knowledge and recognition of these improprieties and the chastisement by his stepfather adversely affect him and will continue to do so; that it will be for the best interest of Bobby that the care, custody and control of him be given to his father, the movant"; " . . . that Teresa Annette is seven years of age; that she appeared in Court with her stepfather, sat in his lap during part of the proceedings, appeared to be friendly or affectionate with him, and has not been shown by the evidence to have been spanked or chastised by her stepfather and is found not to be adversely affected by his relationship; that the Court finds that it is for the best interest of said Teresa that the care, custody and control of her continue to remain with her mother, the respondent, Mrs. Phyllis Daniel."

The evidence is insufficient to support the judge's findings that Robert has been and will be adversely affected because of the chastisement by his stepfather or his stepfather's premarital visits with plaintiff. There was no evidence offered to support the finding that it will be for the benefit of Robert to remove him from the custody of his mother, with whom he has lived for his entire life and who has been his sole custodian since the separation of the parties on 4 January 1966, thereby separating him from his sister. There is no evidence to support the finding that it will be to the child's best interest to place him in the custody of defendant. Defendant testified in detail as to his nocturnal surveillance of plaintiff's home but offered no evidence as to where or under what circumstances the children would live if placed in his custody. He did not testify that he wanted the children placed with him or offer evidence as to wishes of his present wife as to having the children placed in their home. In his motion in the cause defendant did not ask the court to place the children with him but did ask the court to inquire into the conduct of plaintiff and make such orders regarding the custody of the children that might appear to be for their best interest.

The evidence is insufficient to show a change of circumstances affecting the welfare of the child so as to justify a

modification of the prior orders awarding custody to the mother. The order of 5 June 1972, from which plaintiff appealed, is vacated. Earlier orders in the cause, which the order appealed from sought to modify, remain in full force and effect.

Vacated.

Judges BROCK and HEDRICK concur.

THE BIMAC CORPORATION v. HARLEY HENRY AND MURRAY H. WILLITTS

No. 7318SC206

(Filed 27 June 1973)

Judgments § 14— nonappearing defendant — default judgment — jurisdiction of Ohio court to enter

In an action instituted in Ohio to recover upon an open account where plaintiff, an Ohio corporation, alleged that defendants, residents of North Carolina, had transacted business in the state of Ohio and attached to the complaint a copy of the account involved, the Ohio court had personal jurisdiction over defendants, and the default judgment rendered against defendants in Ohio was valid and entitled to full faith and credit in North Carolina. Ohio Rules of Civil Procedure, Rule 4.3.

APPEAL by defendants from *Exum, Judge,* 27 March 1972 Session of Superior Court held in GUILFORD County, High Point Division.

Action to enforce a judgment obtained by plaintiff against defendants in Ohio in the amount of $5,962.31 plus interest.

On 4 September 1970 plaintiff, a manufacturer of plastic molding tools, instituted suit in Montgomery County, Ohio, against defendants, partners doing business as M & H Plastics Company, who were then residing in High Point, North Carolina. Plaintiff alleged that defendants had transacted business in Ohio, "to wit, the transaction which is the subject of this suit. . . . , " that plaintiff was seeking recovery of $5,962.31 upon an open account, a copy of which was attached to the complaint, and that the Ohio court had jurisdiction over the parties. The statement of account included three invoices on two dates totaling the amount claimed. Defendants were served by registered mail but did not appear in the action. Judgment

by default was entered for the amount claimed plus interest from 26 June 1969. On 8 September 1971 plaintiff filed suit in Guilford County to enforce the Ohio judgment.

Plaintiff introduced a copy of the Ohio judgment, affidavits of the Clerk of the Court of Common Pleas of Montgomery County, Ohio, a certificate of the judge of that court and the affidavit of Clyde McQuiston, President of Bimac Corporation. McQuiston's affidavit tended to show that plaintiff is an Ohio corporation located in Montgomery County, Ohio, is in the business of producing molding tools for the manufacture of plastic woodgrain furniture and molds were purchased in Ohio by defendants after they had made special trips to Ohio for that purpose. The affidavit states that all negotiations related to the purchasers took place in Ohio and, other than some molds which were shipped to Virginia, all of the other merchandise was shipped to places within Ohio. The affidavit of the Clerk of Court tended to show that copies of the complaint and process were mailed to defendants in compliance with applicable Ohio statutes.

Defendants introduced numerous exhibits including, among others, the original and amended complaints from the Ohio action, the return of service of summons and entry of the foreign judgment.

The parties stipulated, among other things, that: the defendants in this case are the same individual defendants named in the Ohio proceeding and that they did receive copies of the amended summons and amended complaint in that action; and that the exhibits were offered without objection and that there would be no evidence other than the exhibits.

The judge made findings of fact, conclusions of law and entered judgment awarding plaintiff the relief sought.

Schoch, Schoch, Schoch and Schoch by Arch Schoch, Jr., for plaintiff appellee.

Morgan, Byerly, Post & Herring by William L. Johnson, Jr., for defendant appellants.

VAUGHN, Judge.

Defendants contend that the Court of Common Pleas of Montgomery County, Ohio, did not have jurisdiction over the parties and that the judgment rendered by that court is invalid.

Rule 4.3 of the Ohio Rules of Civil Procedure governs procedures for out-of-state service of process. Rule 4.3 became effective on 1 July 1970. Rule 86, Ohio Rules of Civil Procedure. Pertinent sections of Rule 4.3 are:

> "(A) When service permitted. Service of process may be made outside of this state, as provided herein, in any action in this state, upon a person who at the time of service of process is a nonresident of this state or is a resident of this state who is absent from this state. The term 'person' includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim which is the subject of the complaint arose, from the person's:
>
> (1) Transacting any business in this state; . . . .
>
> * * *
>
> (B) Methods of service.
>
> (1) Service by certified mail. Service of any process shall be by certified mail unless otherwise provided by this rule. . . ."

Before a court may enter judgment in a case where defendant fails to appear in the action within apt time, the statutes of North Carolina require proof by affidavit or other evidence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over a defendant. G.S. 1-75.11(1). Defendant acknowledges that Ohio has no statutory counterpart to G.S. 1-75.11(1). Defendant contends, however, that the same requirements have been judicially established in Ohio. We disagree. Prior to adoption of Ohio Rule 4.3, Section 2307.382, Ohio Revised Code, made provision for personal jurisdiction in the following terms: "(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: (1) Transacting any business in this state; . . . ." We have examined reported decisions interpreting the Ohio statute and find no judicially imposed requirement comparable to G.S. 1-75.11(1).

Specifically, defendants cite *Wright v. Automatic Valve Co.*, 20 Ohio St. 2d 87, 253 N.E. 2d 771 and *Lantsberry v. Tilley*

Lamp Co., 27 Ohio St. 2d 303, 272 N.E. 2d 127, in support of their position. In the Wright case it was held that plaintiff's allegations were insufficient to support a reasonable inference that defendant did anything which would place him within the act and plaintiff failed to allege that defendant performed any of the specifically enumerated acts established as prerequisites to personal jurisdiction. A similar error was committed by the plaintiff in the Lantsberry case where defendant's denial of activities relevant to each and every section of the statute went unchallenged and there was nothing in the pleadings to support application of the statute.

In *Air Transport, Inc. v. Ransom Aircraft Sales & Brok., Inc.*, 333 F. Supp. 1106 (1971), plaintiff brought suit against defendant for breach of a joint venture agreement entered 3 March 1970 to buy and sell used aircraft. Defendant, a Florida corporation, moved to dismiss for lack of *in personam* jurisdiction stating that defendant " 'maintained no offices, bank account, telephone listing or warehouse for the storage of goods [in Ohio], nor does it employ any salesmen, solicit any orders, make any sales or conduct any shipping activities' in this state." The issue framed by the court was "whether the creation of such joint venture agreement constituted the 'transaction of any business' in Ohio by defendant, so as to make it amenable under due process standards to suit in Ohio" under the provisions of Section 2307.382, Ohio Revised Code. Because plaintiff failed to allege that the agreement had been negotiated or signed in Ohio, a provision of the joint venture agreement, made part of the record, that "[t]he joint venture is organized in Columbus, Ohio, and will have its principal place of business at the offices of Air Transport at Port Columbus, Ohio" was insufficient itself to invest the court with jurisdiction. The case does not support defendants' contention.

In these and other cases found which construe the "transacting any business" provision of the Ohio statute, defendants raised the specific question of jurisdiction by challenging the adequacy of the allegations of the plaintiffs in the Ohio court. In cases where jurisdiction was denied, it appears that plaintiffs failed to allege a specific section of the statute *and* failed to make other allegations sufficient to support a reasonable inference that the challenging defendant's activities came within the scope of any specific provision of the statute. In the present case, plaintiff alleged that defendants "have transacted busi-

ness in the State of Ohio," and attached to the complaint a copy of the account involved. Defendants did not challenge the allegations of that complaint until plaintiff sought to enforce the judgment in North Carolina. The record in the Ohio case discloses that the court had personal jurisdiction and the grounds for such jurisdiction. We hold that the Ohio judgment in question is valid and entitled to full faith and credit in North Carolina.

Affirmed.

Judges BROCK and MORRIS concur.

RUTH BAIN GURTIS AND SARAH M. BALLARD v. CITY OF SANFORD AND SOUTHERN NATIONAL BANK OF NORTH CAROLINA, TRUSTEE U/W OF SARAH K. MANESS

No. 7311DC270

(Filed 27 June 1973)

1. **Rules of Civil Procedure § 52— allowance of motion to dismiss — entry of judgment on merits**

Although the court allowed defendants' motion to dismiss in a nonjury trial, the effect of the court's action was to enter judgment on the merits where the court made findings of fact as provided in G.S. 1A-1, Rule 52(a), and concluded that plaintiffs are not entitled to recover anything from either defendant.

2. **Landlord and Tenant § 14— ten-year lease — absence of holding over**

In an action to recover rent allegedly due on property leased by defendant city for use as a parking lot, the evidence was sufficient to support the court's determination that defendant city did not hold over at the termination of its ten-year lease of the property but merely left its meters on the property pending negotiations with respect to purchasing the property and that defendant bank, acting as trustee for plaintiffs, acquiesced until negotiations terminated.

APPEAL by plaintiffs from *Morgan, Judge,* 5 September 1972 Civil Session of District Court held in LEE County.

In their amended complaint, filed 15 May 1972, plaintiffs allege in pertinent part as follows:

Plaintiffs, residents of the State of Ohio, are the owners of a life estate in a lot of land located on Carthage Street in

the City of Sanford, N. C. Said land was devised to defendant bank as trustee for plaintiffs. Pursuant to a court order, defendant bank, by lease agreement dated 7 September 1960, leased said land to defendant city for a term of ten years, beginning 7 September 1960. The lease provided that defendant city would pay $125 monthly rental and taxes on the property. The lease also gave defendant city the option to purchase the property at the end of the ten years for the sum of $25,000, provided defendant city notified lessor of its desire to exercise the option at least fifteen days prior to the expiration date of the lease. At the expiration of the lease, defendant city continued to "hold over" and to use the property as a parking lot, collecting income from parking meters thereon until May of 1971. Defendant city is entitled to pay rent on the property until 7 September 1971, the ten years covered by the lease and for one year "held over." For the eleven years, defendant city should pay 132 payments of $125 each but has paid only 127 payments. Defendant city has also failed to pay 1971 taxes due Lee County and defendant city. Plaintiffs prayed judgment that would require defendant city to pay $898.91 and require defendant bank to receive said funds and account to plaintiffs for the same.

Following a nonjury trial, the court entered judgment finding as facts, among others, that defendant city did not hold over and continue to possess the premises after 7 September 1970 and that defendant city has paid defendant bank all rents and other charges due to be paid under or by virtue of the lease, and concluded that plaintiffs were not entitled to recover anything. Plaintiffs appealed.

Adams, Lancaster, Seay, Rouse & Sherrill by Basil Sherrill for plaintiff appellants.

Lowry M. Betts for City of Sanford, defendant appellee.

Jimmy L. Love for Southern National Bank of North Carolina, Trustee, defendant appellee.

BRITT, Judge.

By two assignments of error, plaintiffs contend the court erred (1) in allowing defendant city's motion to dismiss at the close of all the evidence and (2) in signing and entering the judgment.

[1] The record reveals that when plaintiffs rested their case, defendants moved to dismiss but the court overruled their mo-

tions; that after defendant city rested its case, it renewed its motion to dismiss and the motion was allowed. However, in its judgment the court made findings of fact as provided in G.S. 1A-1, Rule 52(a), based upon the evidence, concluded that plaintiffs are not entitled "to recover anything from the defendants, or either of them," and adjudged that plaintiffs recover nothing from either defendant.

We hold that the effect of the court's action was to enter judgment on the merits rather than dismiss the case and that being true, the only assignment of error to be considered is that the court erred in signing and entering the judgment. In *Morris v. Perkins,* 11 N.C. App. 152, 180 S.E. 2d 402 (1971), cert. den. 278 N.C. 702, we quoted from the case of *Fishing Pier v. Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968), as follows: "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."

In the case at bar, while we hold that error of law does not appear on the face of the record proper, the facts found or admitted support the judgment, and the judgment is regular in form, we will proceed further and answer plaintiffs' argument that there was a "holding over" as a matter of law.

[2] The principle of law applicable here appears to be well stated in Webster's *Real Estate Law in North Carolina,* as follows:

> (§ 65, p. 79.) "Every estate which by the terms of its creation must expire at a period certain and prefixed by whatever words created, is an estate for years. An estate for years arises from a contract whereby a tenant is to have the right to possession of lands or tenements for some determinate period. Whether the term be for a hundred years, or for only one year, or for a month or week or day even, still the estate of the lessee is termed in law an 'estate for years.'"
>
> * * *
>
> (§ 78, p. 90.) "When a tenant holds over, the landlord has the initial option to treat the tenant who holds over as a trespasser and may eject him. If the landlord recognizes

> the tenant, however, by accepting rent, a presumption arises that a tenancy from year to year is intended and the law creates a tenancy from year to year between the parties under the same terms and conditions of the previously existing lease for years so far as the same may be applicable.
>
> This presumption of a tenancy from year to year is rebuttable, however, and will yield to an actual intention of the parties not to create such a tenancy. For instance, the fact that a tenant has been compelled to continue in possession of necessity due solely to his sickness or by reason of the sickness of some member of his family, making removal dangerous or impracticable, or pending negotiation of a new lease wherein the landlord acquiesces in the tenant's remaining in possession until the matter is determined, will rebut the presumption that a tenancy from year to year was intended."

See also *Murrill v. Palmer,* 164 N.C. 50, 80 S.E. 55 (1913).

The evidence in the case at bar was sufficient to rebut the presumption of a tenancy from year to year following the ten years lease period. A question of fact was presented and the court, sitting as a jury, resolved the question in favor of defendant city. Mr. Harris, who served as defendant city's manager during 1970 and 1971, testified: In the summer of 1970 he was aware of the option to purchase but did not think the property was worth $25,000. At that time he began negotiating with defendant bank with respect to a lower figure and continued negotiations until May of 1971. Prior to 7 September 1970, the city "bagged" the meters it had placed on the property and exercised no control over the property after 7 September 1970 except to remove the meters shortly after May of 1971. He felt defendant city had a moral obligation to pay rent through May of 1971 and on his recommendation, the city council authorized a final rental payment of $1,125.

Plaintiffs' evidence showed that "the family" erected a barricade around the lot in August of 1971. Defendant bank presented no testimony but the evidence disclosed that it filed a final account on 2 August 1971 showing receipt of $1,125 from defendant city on 3 June 1971 and disbursement of that amount. The evidence further tended to show that defendant bank attempted to resign as trustee because of "differences" with plaintiffs over the subject property.

Defendant city's contention that it did not hold over but merely left its meters on the property pending negotiations with respect to purchasing the property, and that defendant bank, acting as trustee for plaintiffs, acquiesced until negotiations terminated is fully supported by the evidence.

The judgment appealed from is

Affirmed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROBERT LEE THACKER

No. 7310SC255

(Filed 27 June 1973)

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

In a prosecution charging defendant with assault with a deadly weapon with intent to kill inflicting serious injury, an in-court identification of defendant by his victims was not tainted by confrontations between the victims and defendant in hospital emergency rooms where the victims were receiving treatment and to which the police took defendant upon his apprehension shortly after commission of the alleged offense.

2. **Assault and Battery § 17— assault with deadly weapon with intent to kill — sufficiency of verdict**

Though the court in a prosecution charging defendant with assault with a deadly weapon with intent to kill inflicting serious injury charged the jury that it might return a verdict of guilty as charged, guilty of assault with a deadly weapon *per se* inflicting serious injury or not guilty, the verdict of "guilty as charged in the bill of indictment" was sufficiently specific.

APPEAL by defendant from *Godwin, Special Judge,* 30 October 1972 Session of WAKE County Superior Court.

Defendant was tried upon a bill of indictment charging assault upon Brenda Gail Waddell with a deadly weapon with intent to kill inflicting serious injury. At trial defendant entered a plea of not guilty through his court-appointed counsel. The jury returned a verdict of guilty, and from a judgment impos-

ing an active sentence of not less than nine nor more than ten years, defendant appealed.

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

Boyce, Mitchell, Burns and Smith, by Robert E. Smith, for defendant appellant.

MORRIS, Judge.

[1] At trial and before the presentation of any evidence, defendant, through counsel, advised the court that defendant anticipated that the State would offer in evidence testimony of Miss Brenda Gail Waddell and Swain Pierce to identify defendant as Miss Waddell's assailant, and that it was the contention of the defendant that any in-court identification of the defendant by either Miss Waddell or Mr. Pierce would be tainted by an unlawful viewing for identification of the defendant by Miss Waddell and Mr. Pierce at Wake Memorial Hospital on 10 March 1971. Upon defendant's motion to suppress such testimony, a voir dire was conducted by the court. Evidence was presented by the State which tended to show the following:

On 10 March 1971 at approximately 7:40 a.m., Miss Brenda Gail Waddell, an employee of the Farmers Co-operative Exchange (FCX) arrived for work at the offices of that concern located on East Davie Street, Raleigh, N. C. Shortly thereafter, she heard a knock at a side door and upon opening the door found herself facing the defendant. The defendant inquired as to whether this was the Triangle Glass Company and upon learning from Miss Waddell that he was at the FCX, defendant asked if he could use a telephone. He was directed to a phone by Miss Waddell and while at the phone defendant told Miss Waddell that there was someone at the back door. Miss Waddell went to open the door and upon finding no one there, she turned around and found that defendant had followed her. She partially turned her back to defendant to permit him to leave through the door and when she did, defendant grabbed her from the rear and put his hand around her neck. A struggle ensued and upon observing a knife in defendant's hand, Miss Waddell grabbed the blade with her left hand and sustained a cut to one of her fingers. Miss Waddell was then stabbed in the upper right arm and abdomen by defendant, who then released her from his grip and fled. Another FCX employee, Swain Pierce, emerg-

ing from a rest room on the premises, observed defendant approximately 15 to 25 feet away running toward an alley that ran through the parking area. At approximately the same time Pierce observed Miss Waddell as she opened the office door and screamed for help. Defendant then grabbed Pierce, stabbed him in his left side and ran away. Both Miss Waddell and Mr. Pierce were carried to Wake Memorial Hospital for emergency treatment, and it was then that Miss Waddell gave police officers a description of defendant as the man who attacked her. In the meantime defendant had been apprehended by police officers for breaking and entering as a result of falling through a skylight in a building near the FCX, and he was brought before Miss Waddell in the emergency room where she identified him as her assailant. Defendant was also identified by Mr. Pierce who was unaware of Miss Waddell's prior identification. Both witnesses had ample opportunity to observe defendant on the FCX premises and both testified on voir dire that their identification of defendant in court was in no way influenced by their identification of defendant at the hospital but based solely on observations at the FCX.

Following the voir dire the trial judge made findings of fact which in substance are in accord with the evidence summarized above and in overruling defendant's motion to suppress concluded as a matter of law that any in-court identification of defendant by Mr. Pierce or Miss Waddell was in no way tainted or influenced by their respective observations of defendant at the Wake Memorial Hospital emergency room on 10 March 1971.

Defendant was tried earlier for the same offense. On appeal, he was granted a new trial. *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972). We note the following language by Justice Huskins in that case:

> ". . . At the next trial, upon objection, the origin of the in-court identification of defendant by each victim should be determined by the trial court on a voir dire examination with appropriate findings of fact and conclusions based thereon. The present record contains no such findings.
>
> In light of the foregoing facts, we do not decide whether defendant's constitutional rights were violated at the hospital emergency room confrontation. At the time of that confrontation it should be noted that both victims had been

stabbed and their chance of survival was uncertain and unknown. Defendant had been immediately apprehended under circumstances strongly indicating guilt. The need for immediate action was apparent, and the police followed the most, and perhaps the only, feasible procedure when they took defendant to the hospital emergency room for immediate identification or exoneration. Under these circumstances defendant's claimed violation of due process by a 'one-man lineup' and his claimed violation of Sixth Amendment rights to counsel at that confrontation are arguable matters, *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967); *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732 (1970), and resolution of them is not necessary to a decision in these cases." 281 N.C. at 458.

In the case *sub judice,* the trial judge conducted a voir dire examination and entered findings of fact and conclusions of law thereon in compliance with the requirements set forth in *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970), and these findings of fact are conclusive, when, as here, they are supported by competent evidence. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966).

[2] Defendant also contends that the trial court erred in denying his motion to arrest judgment on grounds that the jury verdict was ambiguous. The trial judge instructed the jury that they could return a verdict of (1) guilty as charged, (2) guilty of assault with a deadly weapon per se inflicting serious injury, and (3) not guilty, and defendant contends that since the trial judge instructed the jury as to a lessor offense the verdict returned by them, "guilty as charged in the bill of indictment," was not sufficiently specific. We do not agree.

Defendant relies on *State v. Talbert,* 282 N.C. 718, 194 S.E. 2d 822 (1973). That case, however, is inapposite. Here the jury's verdict was completely free of any ambiguity.

No error.

Judges BROCK and VAUGHN concur.

Lasater v. Lasater

JACKSON L. LASATER, MALCOLM LASATER, BETTY LASATER FARMER, GILBERT LASATER, MARY FRANCES LASATER TIERNAN, ROBERT LASATER, AND MARY FRANCES LASATER, WIDOW, PETITIONERS v. WILLIAM EARL LASATER, RESPONDENT

No. 7311SC389

(Filed 27 June 1973)

Trusts § 13— purchase of land at tax foreclosure sale — issue as to resulting trust raised — summary judgment improper

In an action to partition lands allegedly owned by the petitioners and respondent, heirs at law of deceased, as tenants in common, the pleadings of the parties disclosed an issue of material fact as to whether the deceased agreed with respondent and his wife to purchase at a tax foreclosure sale 2.6 and 7 acre tracts of land and hold the title thereto in trust for the benefit of the respondent and his wife until such time as he was reimbursed the purchase price when he would convey the legal title to the land to respondent and his wife; therefore, trial court erred in allowing summary judgment for petitioners.

APPEAL by respondent from *Braswell, Judge,* 11 December 1972 Session of Superior Court held in HARNETT County.

This proceeding was instituted by petitioners, heirs at law of William Barrett Lasater, deceased, before the Clerk of Superior Court of Harnett County to partition lands allegedly owned by the petitioners and respondent as tenants in common. Respondent filed an answer admitting that he is a tenant in common with petitioners of the first, second and third tracts described in the petition but denying that petitioners have any interest in the fourth tract described therein. Respondent and his wife filed a counterclaim in which they alleged that they were the owners of the fourth tract described in the petition by virtue of a parol trust. Petitioners filed a reply to the counterclaim denying the existence of a parol trust and moved for summary judgment. Summary judgment for petitioners was allowed on 11 December 1972, and the proceeding was remanded to the Clerk of Superior Court of Harnett County for partition. Respondent appealed.

McLeod & McLeod by Max E. McLeod and J. Michael McLeod for petitioner appellees.

W. A. Johnson for respondent appellant.

HEDRICK, Judge.

The record on appeal was docketed in this court more than ninety days after the judgment appealed from. Respondent's petition for *certiorari* is allowed.

Respondent contends the pleadings show there is a genuine triable issue as to whether he and his wife are the beneficial owners by virtue of a parol trust of a 2.6 acre tract of land described in the petition and a 7 acre tract of land allegedly conveyed to William Barrett Lasater in the tax foreclosure deed recorded in Book 430, Page 344, in the Office of the Register of Deeds in Harnett County.

In his answer, respondent denied that he and petitioners were tenants in common of the 2.6 acre tract of land and in his counterclaim, respondent alleged that:

> "William Barrett Lasater purchased and acquired said lands [the 2.6 and 7 acre tracts] under an express agreement and understanding with this respondent and his wife under the terms of which the said William Barrett Lasater agreed that he would take such title to said lands as could be conveyed in consequence of said proceeding and hold the same in trust for this respondent and his wife until such time as they could reimburse him for the sum of Thirty-One Hundred Dollars ($3,100.) paid to the County of Harnett in consequence of said tax foreclosure, and the said William Barrett Lasater further agreed that upon the payment thereof he would transfer and convey to the said respondent and his wife, Louise Lasater, such right, title and interest as he, the said William Barrett Lasater, had acquired in said lands in consequence of said tax foreclosure proceeding and tax deed."

Respondent also alleged in his counterclaim that petitioners and William Barrett Lasater "did and have at all times recognized and acknowledged this respondent and his wife to be the beneficial owners of said 2.6 acre and 7 acre tracts"; that respondent and his wife have been in possession of and "have used, farmed and/or rented the same with the full knowledge and consent of . . ." William Barrett Lasater until the time of his death, "and with the full knowledge, consent and approval of the petitioners since the death of . . . William Barrett Lasater." Additionally, respondent alleged that he has at all times listed said

property for tax purposes and neither William Barrett Lasater nor petitioners have ever done so, and that the only claim William Barrett Lasater made to said lands during his lifetime was with respect to his right to be reimbursed for the $3,100.00 which he paid to Harnett County.

In their reply to the counterclaim, petitioners denied that respondent's wife had any interest in the property and alleged that they and respondent were tenants in common of not only the 2.6 acre tract of land described in the petition, but also of the 7 acre tract of land first mentioned by respondent in the counterclaim.

In 7 Strong, N. C. Index 2d, Trusts § 13, p. 422, it is stated:

> "A parol agreement to purchase at a foreclosure or judicial sale and hold the title for the debtor, and to reconvey the legal title to the debtor upon repayment of the amount advanced, creates a resulting trust, provided the agreement is made at or before the time the legal estate passes."

In *Paul v. Neece,* 244 N.C. 565, 568, 94 S.E. 2d 596, 598 (1956), it is stated:

> "[I]t is uniformly held to be the law in this State that where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement."

At the time of entry of summary judgment, the court had before it only the pleadings of the parties which we hold show there is a genuine issue of material fact as to whether William Barrett Lasater agreed with respondent and his wife to purchase at the foreclosure sale the 2.6 and 7 acre tracts of land and hold the title thereto in trust for the benefit of the respondent and his wife until such time as he was reimbursed the purchase price when he would convey the legal title to the land to the respondent and his wife.

Although respondent's wife apparently signed the answer and counterclaim which was verified by her husband, the record before us does not indicate that she has been made a party to

this proceeding by an order of the court. Since our decision requires a trial of the issue raised by the pleadings, the parties may well consider taking appropriate action to clarify her status in the proceedings.

For the reasons stated, the judgment appealed from is

Reversed.

Judges BROCK and VAUGHN concur.

IN THE MATTER OF THE WILL OF SALLIE K. PEACOCK, DECEASED

No. 7311SC292

(Filed 27 June 1973)

Wills § 13— caveat proceeding — acceptance of estate funds by caveator — no estoppel

Where the testatrix devised and bequeathed a one-third undivided interest in all her property to each of her two daughters and bequeathed the remaining one-third to two co-trustees to hold in trust for the benefit of her son, acceptance by the son of a check in an amount substantially less than one-third of the estate was insufficient to constitute an estoppel against the son to attack the validity of the will; therefore, the son's caveat having been timely filed under G.S. 31-32 and no sufficient grounds for estoppel being shown, summary judgment dismissing the proceeding was improper.

APPEAL by caveator from *Braswell, Judge,* 13 November 1972 Session of Superior Court held in JOHNSTON County.

This is an appeal from summary judgment dismissing caveat filed 12 August 1971 by Percy Glenn Peacock to probate of the will of his mother, Sallie K. Peacock. Judgment was entered on the grounds that the caveator, by accepting and cashing a check given him by trustees of a trust for his benefit created by the will, became estopped to contest the will.

Sallie K. Peacock died 13 September 1968. As her sole heirs she left surviving three children, two daughters, Percelle Peacock Bailey and Texie Peacock Hale, and her son, Percy. On 26 September 1968 an attested instrument, dated 14 August 1962, was probated in common form as her will. By this she devised and bequeathed a one-third undivided interest in all of

her property to each of her daughters. The remaining one-third was devised and bequeathed to two co-trustees to hold in trust for the benefit of her son, Percy. The will states that the object of the trust is to "manage and conserve" the one-third interest devised to the trustees for the benefit of the son "with the express authority given to said Co-Trustees to sell, rent, reinvest, and manage the assets . . . devised to them according to their sole discretion and to use the income therefrom and also to invade the principal if it becomes necessary for the support and maintenance of . . . said son, Percy Glenn Peacock, during his lifetime, amount and time of payments made to Percy Glenn Peacock for his use are to be governed only by the decision of Co-Trustees as to necessity." The will then provides that upon the death of Percy the trust terminates and any property or funds left in the hands of the co-trustees is devised and bequeathed to testatrix's two daughters, to be theirs absolutely. One of the daughters and her husband are named as co-executors of the will and as the co-trustees of the trust for the benefit of the son.

On 12 August 1971 the son filed caveat to his mother's will, alleging undue influence exerted by his sisters and lack of mental capacity on the part of his mother. The sisters answered, denying the allegations of undue influence and lack of mental capacity. By leave of court amendments to these answers were filed in which it is alleged that on 18 May 1971 the co-trustees had distributed to the caveator by check $564.27 as a distributive share under the terms of the trust created in the will and that by acceptance and cashing of the same the caveator "is estopped to question the validity of said will by virtue of his participation in the benefits arising to him under said will." A copy of the check was attached to the amended answers. The answers prayed that the caveat be dismissed as a matter of law.

On 20 October 1972 the sisters filed motion for summary judgment to obtain the relief requested in their amended answers. The caveator filed his own affidavit in opposition to this motion. In this he stated that when he received the check for $564.27 on or about 18 May 1971, "it was his assumption that it was an advance of the money to which he was entitled; that at the time he was in desperate financial circumstances; that he is not versed in the law; that he had no way of knowing and did not know that by accepting the check there would be any question about his right to protest the validity of the will of

his mother; that the check in the amount of $564.27 is the only money which he has ever received, although there is considerable money in the estate; that the interests of the other heirs of his mother, Sallie K. Peacock, to wit: his sisters, Percelle Peacock Bailey and Texie Peacock Hale, have not been prejudiced in any way, by his having cashed the check."

The court, concluding as a matter of law that the acceptance and cashing of the check was a "ratification, affirmation, and approval" of the validity of the will and that caveator " is now estopped from contesting the validity thereof," granted the motion for summary judgment and ordered the caveat dismissed. Caveator appealed.

L. Austin Stevens and Wiley Narron for caveator appellant.

Albert A. Corbett, Jr., and P. D. Grady, Jr., for propounder appellees.

PARKER, Judge.

Under certain circumstances, one who accepts and retains benefits under a will may thereby become estopped to attack its validity. Annot: Will Contest—Estoppel, 28 A.L.R. 2d 116. Such is not the present case. One cannot be estopped by accepting that which he would be legally entitled to receive in any event. 28 Am. Jur. 2d, Estoppel and Waiver, § 60, p. 680. Should the will be set aside in the present case, appellant will be entitled to a full one-third of his mother's estate. His acceptance of a check for less than that amount could in no way prejudice his sisters in event probate of the will is subsequently set aside. Nothing in the circumstances indicates any reason why it would be inequitable for appellant to proceed with his caveat. Should he succeed, he will ultimately receive no more than the law will allot him; should he fail, he will receive no more than the trustees in proper perfomance of their duties under his mother's will may distribute to him. His caveat having been timely filed under G.S. 31-32 and no sufficient grounds for estoppel being shown, the summary judgment dismissing this proceeding is

Reversed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM LOGAN

No. 7326SC397

(Filed 27 June 1973)

1. **Searches and Seizures § 3— variance between affidavit and affiant's testimony — validity of warrant**

Where the affidavit was clearly sufficient to establish the reliability of the informer and to establish probable cause for issuance of the search warrant, testimony of the affiant on *voir dire* was unnecessary, and any slight variance between the affidavit and the affiant's testimony was insignificant.

2. **Criminal Law § 113— instruction as to fact not in evidence — prejudicial error**

The trial court committed error requiring a new trial where the judge in giving instructions to the jury recapitulated testimony of an officer which was given only on *voir dire* in the absence of the jury and which was material to the charge against defendant.

APPEAL by defendant from *Copeland, Judge,* 15 January 1973 Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a bill of indictment, proper in form, with felonious possession of heroin. Upon his plea of not guilty, he was tried by jury and found guilty. A sentence of imprisonment of not less than four nor more than five years was imposed. Defendant appealed.

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

Olive, Howard, Downer, Williams and Price, by Paul J. Williams, for defendant.

BROCK, Judge.

[1] Defendant assigns as error the denial of his motion to suppress the evidence obtained under authority of the search warrant issued in this case. Defendant argues that the affidavit upon which the search warrant was issued is insufficient because there are variations between the statements in the affidavit and the statements of the affiant on voir dire at the trial. There are some variations, but we consider them to be insignificant.

When a defendant moves to suppress evidence obtained by a search warrant upon the ground that there was no probable

cause for issuance of the search warrant, the inquiry before the court is whether the issuance of the warrant comports with G.S. 15-26, and whether the magistrate was justified in finding probable cause. The court should determine from an examination of the affidavit and warrant whether (1) the premises, person, or other place to be searched and the contraband, instrumentality, or evidence for which the search is made are described with reasonable certainty; (2) the attached affidavit *indicates the basis* for the finding of probable cause; and (3) the warrant is signed by the issuing official and shows the date and hour of issuance. If the foregoing three tests are met, the warrant complies with the statute. *State v. Bush,* 10 N.C. App. 247, 178 S.E. 2d 313. If, in addition to meeting the foregoing three tests, the affidavit contains sufficient facts to *establish* probable cause for the issuance of the search warrant, it also satisfies Fourth Amendment requirements, *State v. Bush, supra,* and there is no need for testimony of witnesses to establish the validity of the search warrant. If the affidavit *indicates the basis* for the finding of probable cause, but is not in itself sufficient to establish probable cause, testimony of witnesses will be necessary to establish whether there was in fact sufficient evidence before the magistrate to justify his finding of probable cause to issue the search warrant. For a discussion of the requirements for a valid search warrant, see the majority and concurring opinions in *State v. Milton,* 7 N.C. App. 425, 173 S.E. 2d 60.

In the case presently under consideration, the affidavit was clearly sufficient to establish the reliability of the informer and to establish probable cause for issuance of the search warrant. Therefore, the testimony on voir dire was unnecessary. The State carried its burden of showing a properly issued search warrant in this case by merely offering the warrant itself with the attached affidavit. There was no purpose to be served by offering on voir dire the same testimony as was already contained in the affidavit.

If the defendant wishes to attack the motives and the credibility of the affiant or the magistrate, defendant should be given the opportunity to offer evidence for that purpose. However, if the affidavit is sufficient to establish probable cause the defendant's objection does not impose the burden upon the State of going back through the testimony and the motions of the warrant issuing process for the purpose of allowing defend-

ant an opportunity to pick out some insignificant and inconsequential inconsistency between the present testimony and the affidavit which was before the magistrate. Upon the motion to suppress, the inquiry is not whether probable cause to issue the search warrant exists at the time of trial. The proper inquiry is whether there were sufficient facts before the magistrate at the time of issuing the search warrant to justify the magistrate's finding of probable cause, and whether the warrant complies with the statute. This assignment of error is without merit.

[2] Defendant assigns as error that the court expressed an opinion upon a vital issue in its charge to the jury. We think the expression was clearly unintentional; nevertheless, the message was given to the jury. One of the vital issues in the case was whether the substance obtained from defendant was in fact heroin. The State had the burden of proving beyond a reasonable doubt that the substance was heroin.

In his charge to the jury the trial judge undertook an unnecessary and laborious recapitulation of the testimony of each witness. In this case, the judge went even further and recapitulated the testimony of each witness on direct examination and then on cross-examination. Undertaking this unnecessary and laborious technique caused his honor to fall into error which requires a new trial.

Unfortunately, his honor recapitulated testimony of the officer which was given only on voir dire in the absence of the jury. In recapitulating this testimony his honor inadvertently reviewed for the jury testimony which was not before it. It was testimony which was material to the charge against defendant. Regardless of whether the testimony would have or would not have been competent before the jury, it was, in fact, not before the jury. This constituted a misstatement of a material fact not shown in evidence. 1 Strong, N. C. Index 2d, Appeal and Error § 31, p. 169.

Defendant's remaining assignments of error have been considered and we hold them to be without merit.

New trial.

Judges MORRIS and PARKER concur.

IN RE: THE CONFINEMENT OF GRACIE MAE HAYES

No. 7314SC149

(Filed 27 June 1973)

Habeas Corpus § 2; Insane Persons § 1— commitment of insane person to hospital — constitutionality of statutes

G.S. 122-59, G.S. 122-63 and G.S. 122-65 providing for temporary detention of persons becoming suddenly violent and dangerous to themselves or others and for commitment by the clerk of superior court of such persons for observation and treatment do not comport with constitutional requirements of procedural due process and are therefore unconstitutional on their face; hence, the writ of habeas corpus was properly granted for petitioner who had been hospitalized for three years under those statutes.

ON *certiorari* to review an order of *Bailey, Judge* of Superior Court, entered 20 October 1972 in DURHAM County.

On 14 April 1969, Gracie Mae Hayes, a seventeen year old female, was living with her sister in Durham, N. C. On that same day, she was hospitalized in John Umstead Hospital in Butner, North Carolina, by virtue of an affidavit executed by Dr. Byron McLean pursuant to the emergency hospitalization statute. G.S. 122-59. The affidavit was addressed to the Sheriff of Durham County and stated: "I have carefully examined Gracie Mae Hayes . . . and believe her to be suddenly (homicidal) or (suicidal), or dangerous to himself (sic) or others." Dr. McLean certified that Miss Hayes "should be taken into protective custody and transported immediately to John Umstead Hospital. . . ."

On the same day, 14 April 1969, Miss Hayes was examined by two physicians—Dr. McLean, the affiant, and Dr. Steven J. Davis. The two signed a statement that they had carefully examined Miss Hayes and believed her "to be suffering from (mental illness) or (inebriacy) and to be, in the opinion of each of the undersigned, a fit subject for admission into a psychiatric hospital."

On 28 April 1969, a hearing was held at John Umstead Hospital by the Assistant Clerk of Court, Granville County, to determine whether Miss Hayes should be committed for observation and treatment pursuant to G.S. 122-63. Notice of this hearing was given Miss Hayes by service on a member of the hospital staff at 3:00 p.m., 28 April 1969. The hearing was held at 3:50 p.m. that same day.

The information before the Assistant Clerk of Court included the 14 April 1969 affidavits by Dr. McLean and Dr. Davis, and an affidavit by a Durham County Department of Social Services caseworker, executed on 15 April 1969 stating that she believed Miss Hayes to be mentally ill and "a fit subject for admission into a psychiatric hospital."

Included with the affidavits as State's Exhibit # 2 is a "Medical Questionnaire for Physician." This questionnaire is unsigned and undated, though presumably it was before the Assistant Clerk at the 28 April hearing. It stated the following: that the conduct of the patient had been to leave "home several days at a time . . . having intercourse with several members of (the) community sustaining vaginal bleeding endangering health"; that the patient had previously been treated in a mental institution for approximately three years; that the patient does not use alcohol or drugs; that the patient had never attempted or threatened suicide; and that the patient had never attempted or threatened homicide.

Miss Hayes was committed for a period of observation and treatment not exceeding 180 days pursuant to G.S. 122-63. On 13 October 1969, the Superintendent of John Umstead Hospital signed a recommendation stating that Miss Hayes' condition had been essentially the same, and "it is recommended that she be hospitalized for a minimum necessary period." On 6 November 1969, Miss Hayes signed a waiver of her right to appear and protest her commitment to John Umstead Hospital. On 7 November 1969, following the recommendation of the Superintendent of John Umstead Hospital, the Clerk of Court, Granville County, ordered that Miss Hayes be hospitalized in John Umstead Hospital "for a minimum necessary period according to law."

On 12 October 1972, an application for a writ of habeas corpus was filed with Judge Bailey on behalf of Miss Hayes. On the same date, the writ of habeas corpus was issued setting a hearing on 16 October 1972. On 20 October 1972 following the hearing, Judge Bailey ordered Miss Hayes released from the custody of John Umstead Hospital. In his order Judge Bailey found that Miss Hayes had not had assistance of counsel at any of the commitment proceedings and that her restraint since 15 April 1969 was illegal because "N C GS 122-59, 122-63, and 122-65 are unconstitutional in that they do not require adequate notice, counsel, witnesses and a hearing before a judicial officer

at all stages of procedures which may result in deprivation of liberty, contrary to the mandates of due process of law."

The State of North Carolina petitioned for certiorari and asked for a stay of execution of Judge Bailey's order. This court allowed the petition for certiorari and denied the motion for a stay of execution.

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

William Woodward Webb for the plaintiff.

BROCK, Judge.

In our opinion, the provisions of G.S. 122-59, G.S. 122-63, and G.S. 122-65 do not comport with constitutional requirements of procedural due process. Therefore, we hold that the said three statutes as written are unconstitutional on their face.

We are advertent to the fact that House Bill 1081, which repeals the three statutes set out above, and which extensively rewrites Chapter 122 of the General Statutes, was ratified 23 May 1973 as Chapter 726 of the 1973 Session Laws. By its terms the effective date of Chapter 726 is 1 September 1973.

While we are not in full agreement with the trial judge's reasons for declaring the statutes unconstitutional, we nevertheless agree with his ultimate conclusion that they are unconstitutional.

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. BEULAH MAE SCALES

No. 7318SC312

(Filed 27 June 1973)

1. Robbery § 5— common law robbery — sufficiency of instructions

The trial court in a robbery case properly instructed the jury that to find defendant guilty they would have to find that she acquiesced and assisted by her presence at the crime scene or helped in some way in the commission of the robbery.

2. **Robbery § 5— common law robbery — failure to submit lesser included offense — no error**

In a prosecution for common law robbery where the State's evidence, if believed, showed that defendant and a third person accosted their victim on the street and beat him severely, after which defendant took all his money, and where the defendant's evidence, if believed, showed that defendant was two blocks away while a third person was attacking the victim, the trial court properly failed to submit to the jury the lesser included offenses of larceny from the person and simple assault.

APPEAL by defendant from *Crissman, Judge,* 25 September 1972 Session of Superior Court held in GUILFORD County.

Defendant, and one Joseph Pete Lowery, were indicted (in separate bills of indictment) for a robbery alleged to have been committed on 24 June 1972.

The evidence for the State tended to show that defendant and Joseph Pete Lowery (Lowery), both of whom were known to Frank Daniel Thompson, Jr. (Thompson), attacked Thompson while he was walking along Bingham Street. Lowery knocked Thompson to the ground and beat him about the face with his fists. After Thompson was knocked to the ground, defendant beat him about his face and head with her shoe. While Thompson was on the ground, defendant put her hand in his pocket and took all of his money, about fourteen dollars. The last thing Thompson recalls either defendant or Lowery saying was just before he lost consciousness; defendant said "let's put that s.o.b. in the manhole."

Police officers found Thompson lying in the street with his head on the concrete curbing. The officer testified that Thompson appeared to be semi-conscious; had severe bruising and swelling around his eyes; and was bleeding from the eyes and the nose area. Thompson was carried by ambulance to Cone Memorial Hospital where he remained in intensive care for about four days. The police officer was unable to talk to Thompson until 30 June, but at that time Thompson told him that defendant and Lowery were the ones who had beaten and robbed him.

Defendant's evidence tended to show that Thompson tried to attack Lowery with a knife; that Lowery knocked him down and left; and that defendant was about two blocks up the street when this happened. Defendant testified: "And the next thing I knowed they was arguing. Yes, the two of them.

And started fighting. I didn't touch him or at any time hit this man. No, I did not at any time take any money off him. The two of them, they started fighting. When they started fighting, I was standing in the street. I was not too far from them. I was just standing in the street, and they got to fighting, and I moved back from them, from about here to that desk, I guess, (indicating). I broke back, I mean I moved back, you know, started backing back. Yes, when they started fighting. No, I didn't see nothing about a pocketbook or billfold. I didn't see nothing but a fight. They were fighting, that is all."

The jury found defendant and Lowery each guilty of robbery. Lowery gave notice of appeal, but six days later withdrew it and began serving his sentence (Guilford County Docket No. 72CR51822). Defendant has perfected her appeal.

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

Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, for defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge instructed the jury that defendant could be found guilty by merely finding that she was present at the time the robbery occurred. We find, however, the court was considerably more specific than suggested by defendant. The trial judge clearly pointed out that defendant would have to be acquiescing and assisting by her presence, or helping in some way in the commission of the robbery. The charge of the court must be read as a whole. This assignment of error is overruled.

Defendant assigns as error the trial court's definition of common law robbery. We do not quote the portion of the charge objected to, but point out that the definition is the same as the definition given in *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476. Also, the trial judge pointed out and explained each of the essential elements which are required to be found in order to convict one of the offense of common law robbery. This assignment of error is overruled.

[2] Defendant assigns as error that the trial judge failed to submit to the jury the lesser included offenses of larceny from the person and simple assault. It is not proper for the trial

judge to charge the jury on a lesser included offense unless there is some evidence from which a commission of such lesser included offense can be found. *State v. Wrenn,* 279 N.C. 676, 185 S.E. 2d 129. If the State's evidence is believed, the only offense for consideration is the offense of common law robbery. If the defendant's evidence is believed she was two blocks, or some distance, away when Lowery struck Thompson. In this case there is no evidence of the commission of a crime of less degree by defendant. This assignment of error is overruled.

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

No error.

Judges MORRIS and PARKER concur.

BETTY CASTLEBERRY RHYNE v. JOE GARRETT, N. C. COMMISSIONER OF MOTOR VEHICLES

No. 7319SC477

(Filed 27 June 1973)

1. **Automobiles § 2— mandatory revocation of license — no right to appeal**

   There is no right to appeal to the superior court from a mandatory revocation of a driver's license.

2. **Automobiles § 2— permanent revocation of license — drunken driving — bond forfeiture as conviction — mandatory revocation — no right to appeal**

   Permanent revocation of plaintiff's driver's license for a third offense of drunken driving was mandatory where plaintiff had twice been convicted of drunken driving and plaintiff's bond was forfeited for failure to appear in the superior court upon her appeal after conviction of drunken driving in the district court, which bond forfeiture was equivalent to a conviction of drunken driving, G.S. 20-24(c), and the superior court was without authority to revoke or make any order with reference to such revocation. G.S. 20-17(2); G.S. 20-19(e).

APPEAL by defendant, Joe Garrett, North Carolina Commissioner of Motor Vehicles, from *McConnell, Judge,* 20 November 1972 Session of Superior Court held in ROWAN County.

Plaintiff, Betty Castleberry Rhyne, instituted this proceeding in the superior court on 17 April 1972 by filing a complaint in which she prayed that:

> " . . . the Defendant be ordered to rescind and strike from its records the permanent revocation of Plaintiff's driver's license which was entered February 7, 1970."

It is uncontroverted that on 5 July 1957 and 27 February 1967, plaintiff was convicted of driving upon a public highway while under the influence of intoxicating liquor. On 17 August 1969, plaintiff was arrested for driving while under the influence of intoxicating liquor. She appealed from a conviction in the district court and deposited a cash bond in the amount of $100.00 for her appearance in the superior court. Plaintiff failed to appear in the superior court; and on 2 February 1970, a judgment absolute was entered on the cash appearance bond. After receiving notice of the bond forfeiture, pursuant to G.S. 20-17(2) and G.S. 20-19(e), the Department of Motor Vehicles on 25 February 1970 mailed to plaintiff a notice of permanent revocation of her operator's license effective 7 March 1970.

The trial court made findings of fact substantially the same as those set out above and concluded:

> "1. That the bond forfeiture recorded against the plaintiff as a conviction on February 2, 1970 in the Charlotte Superior Court is not a conviction upon which permanent revocation of operator's license may be based in that the plaintiff was not personally notified by the Court or counsel to appear before the Superior Court for Mecklenburg County, North Carolina or of the date to appear, or of the scheduled date of her court appearance in the Superior Court of Mecklenburg County, North Carolina and therefore no valid conviction resulted from her bond forfeiture.
>
> 2. That, as the February 2, 1970 conviction on the bond forfeiture is not a valid conviction against the plaintiff, the departmental action of the North Carolina Department of Motor Vehicles in permanently revoking the plaintiff's driver's license for three or more offenses of driving under the influence under G.S. 20-17 is invalid."

The trial court declared "invalid" defendant's action in permanently revoking plaintiff's operator's license and ordered defendant to rescind and strike the permanent revocation from its records "on the ground that Plaintiff has not received three

valid convictions for driving under the influence of alcoholic beverages." Defendant appealed.

Carlton & Rhodes by Graham M. Carlton and Gary C. Rhodes for plaintiff appellee.

Attorney General Robert Morgan and Assistant Attorneys General William W. Melvin and William B. Ray for defendant appellant.

HEDRICK, Judge.

G.S. 20-25 in pertinent part provides:

> "Any person denied a license or whose license has been cancelled, suspended or revoked by the Department, *except where such cancellation is mandatory under the provisions of this article,* shall have a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside . . . and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon thirty (30) days' written notice to the Department, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this article." (Emphasis added.)

[1, 2] There is no right to appeal to the superior court from a mandatory revocation of one's operator's license. *In re Austin,* 5 N.C. App. 575, 169 S.E. 2d 20 (1969). Upon receiving notice of the bond forfeiture, which is equivalent to a conviction of driving while under the influence of an intoxicant, G.S. 20-24(c), the Department of Motor Vehicles merely followed the mandate of the statute by permanently revoking plaintiff's driver's license for a third offense of driving while under the influence, G.S. 20-17(2) and G.S. 20-19(e); and because the departmental action was *mandatory,* the superior court was without authority to revoke or make any order with reference thereto.

The judgment appealed from is

Reversed.

Judges CAMPBELL and BALEY concur.

M. PARKS BLAIR v. ARTHUR ELLWOOD HONEYCUTT AND H & M TIRE AND FURNITURE COMPANY

No. 7320DC436

(Filed 27 June 1973)

Automobiles § 90— automobile collision case — sufficiency of instructions

In an action for damages arising from an automobile collision the trial court's instructions as to negligence, the duty to exercise due care, contributory negligence, and the proper manner in which to proceed in the event the jury returned an answer of either yes or no to the issue of plaintiff's contributory negligence were proper.

APPEAL by plaintiff from *Crutchfield, Judge,* 13 November 1972 Session of District Court, UNION County.

This action for damages arose out of an automobile collision between plaintiff's Lincoln automobile and the corporate defendant's Ford pickup truck driven by the defendant Honeycutt. Plaintiff alleged in the complaint that defendant Honeycutt negligently drove the pickup truck into the rear of plaintiff's automobile. The parties stipulated that Honeycutt was driving the pickup truck in the course of his employment by the defendant corporation. Defendants answered, denying any negligence, and alleged that, in any event, the plaintiff was contributorily negligent. Defendants also asserted a counterclaim for damages to the pickup truck arising out of the collision.

The uncontradicted evidence tended to show that at approximately 10:40 a.m. on 11 May 1970, plaintiff had stopped his automobile behind several other cars at the intersection of Walkup Avenue and U. S. Highway 74 in Monroe, North Carolina. Highway 74 runs in an east and west direction and Walkup Avenue runs north and south. Plaintiff was headed in a southerly direction, and defendant corporation's pickup truck, driven by defendant Honeycutt, was stopped immediately behind the plaintiff's automobile. When the light controlling the intersection turned green, the cars preceding plaintiff proceeded through the intersection.

Plaintiff's evidence tended to show that he proceeded through the intersection slowly, signaling with his car blinker lights that he intended to turn left onto Highway 74, bearing in an easterly direction. Walkup Avenue slopes upward toward Highway 74 on both the northerly and southerly sides of the

highway. Prior to turning left, plaintiff stopped to allow a car headed north on Walkup Avenue to pass through the intersection, when defendant Honeycutt drove the pickup truck into the rear end of plaintiff's automobile, causing property damage and personal injuries to plaintiff.

Defendants' evidence tended to show that Honeycutt proceeded into the intersection approximately one car length behind plaintiff's car, and that, without giving any warning signal or turn signal, plaintiff suddenly stopped his automobile so that Honeycutt was unable to avoid hitting the rear of the plaintiff's car.

Issues as to the negligence of the defendants, the contributory negligence of the plaintiff, the negligence of the plaintiff (arising on the defendants' counterclaim), and the damages suffered by the plaintiff and the defendants were submitted to the jury. The jury answered the issue of defendants' negligence in favor of the plaintiff, and the issue of contributory negligence in favor of the defendant.

From a judgment on the verdict that plaintiff have and recover nothing of the defendants, the plaintiff appealed, assigning error.

Griffin and Humphries, by James E. Griffin and Charles D. Humphries, for plaintiff appellant.

C. Frank Griffin and Kenneth W. Parsons for defendant appellees.

MORRIS, Judge.

Plaintiff's assignments of error are to the charge of the court to the jury. Plaintiff contends that the court erred in defining negligence, the duty to exercise due care, contributory negligence, and in explaining to the jury the proper manner in which to proceed in the event the jury returned either an answer of "Yes" or of "No" to the issue relating to plaintiff's contributory negligence. The charge must be read and considered in its entirety, and not in detached fragments, and if, when read as a composite whole, error prejudicial to the appealing party is not shown, a new trial will not be granted. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967).

We have examined each challenged portion of the charge to the jury in this case, and are of the opinion that, when the

charge is read contextually as a whole, prejudicial error sufficient to warrant a new trial is not shown.

Affirmed.

Judges BRITT and PARKER concur.

WILLIAM T. VASSOR, EMPLOYEE, PLAINTIFF v. ALBEMARLE PAPER COMPANY, EMPLOYER; PACIFIC EMPLOYERS INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 736IC400

(Filed 27 June 1973)

Master and Servant § 65— workmen's compensation — absence of accident — customary work in usual way

Plaintiff employee was not injured by accident when he felt a pain in his back while keeping logs straight on a conveyor by use of a cant hook where he was merely carrying out his customary duties in the usual way at the time the injury occurred.

APPEAL by plaintiff from Order of the North Carolina Industrial Commission filed 29 January 1973 denying compensation.

On appeal by the defendants to the Full Industrial Commission from an award of compensation by the hearing commissioner in Roanoke Rapids, North Carolina, the Commission adopted the evidentiary rulings of the hearing commissioner and the stipulations of record and made the following findings of fact:

"1. Plaintiff is thirty-eight years old and had been employed with the defendant employer for more than ten years as a laborer in the employer's logging operation. His duties consisted of cleaning up the wood yard and other logging-related duties, such as keeping the logs straight on the conveyors by the use of a cant hook, when the prentice loader would break down.

2. The prentice loader would pick up logs and place them on the conveyor. When this particular piece of machinery would have occasion to break down, the logs would jam on the conveyor. Ordinarily, two employees would work to-

gether to keep the logs from jamming up by using cant hooks to move or turn the logs to a straight position on the conveyor, with each employee being stationed at an opposite end of the log. A cant hook is a device constructed of metal and wood in such a fashion so as to give or bend when used to move or turn logs. In the performance of the work, a protective rail exists between the employees and the logs which are located on the conveyor. The logs which the employees moved on the conveyor with cant hooks varied in size from sixteen to forty feet long and four to six inches in diameter.

3. On December 4, 1971 at about 10:15 a.m., prentice loader broke down and the operator of the conveyor signaled to the plaintiff to assume his duties on the conveyor with a cant hook. After plaintiff had been working alone with a cant hook for approximately one and one-half hours, four logs jammed on the conveyor. While pulling back on one of the logs with the cant hook, he felt a pain in his back. He was unable to straighten up his body and motioned to the operator of the conveyor for assistance. When the operator arrived, plaintiff told him he had hurt his back and the operator took charge of the cant hook but could not turn the logs alone.

4. At the time complained of, plaintiff was performing his usual work in his ordinary and customary fashion. The particular movement which he was making at this time was no different from the movement he had made on other times while in the process of positioning logs on the conveyor. The logs on the day in question were no different from those which he had moved previously. The work which he was performing was his usual and customary work. The fact that only one employee was working on the logs did not increase the amount of effort required of plaintiff, and the only unusual aspect of the work on December 4, 1971 was that plaintiff felt a pain in his back while performing his regular duties. Plaintiff was not injured by accident arising out of and in the course of his employment on the day in question."

From the order of the Full Commission denying any benefits on the basis that the injury suffered was not an injury by accident, plaintiff appealed.

Theaoseus T. Clayton and Samuel S. Mitchell for plaintiff appellant.

Allsbrook, Benton, Knott, Allsbrook and Cranford, by J. E. Knott, Jr., for defendant appellees.

MORRIS, Judge.

We are of the opinion that the findings of fact of the Industrial Commission are supported by competent evidence and are binding upon us on this appeal. Therefore, the only issue to be discussed is whether the findings of fact support the conclusions of the Industrial Commission as a matter of law. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952).

There is no controversy concerning the fact that the injury suffered by the employee Vassor arose out of and in the course of his employment. The sole question presented on this appeal is whether the injury suffered by Vassor resulted from an injury by accident. A back injury, such as was suffered by Vassor here, does not arise by accident if the employee at the time of injury was merely carrying out his usual customary duties in the usual way. *Lawrence v. Mill*, 265 N.C. 329, 144 S.E. 2d 3 (1965); *Gray v. Storage, Inc.*, 10 N.C. App. 668, 179 S.E. 2d 883 (1971).

In that regard we are of the opinion that the findings of fact in this case supported by competent evidence, justify the legal conclusion that the employee's injury did not result from an injury by accident.

Affirmed.

Judges BRITT and VAUGHN concur.

WALTRAUD IRMGARD BLAKE v. TERRY WRENN CARROLL AND TOMMY CARROLL

No. 7311SC502

(Filed 27 June 1973)

Automobiles § 79— intersection collision — no contributory negligence as matter of law

In this action to recover for personal injuries sustained in an intersection collision, plaintiff's evidence did not establish her contributory negligence as a matter of law but presented a jury question on that issue where it tended to show that plaintiff approached the intersection on the servient street, stopped, looked to her right, then to her left and again to her right, that she could see 300 feet to her right on the dominant street, that she saw no car approaching and proceeded into the intersection, that she was struck on her right when she was halfway through the intersection, that the speed limit on both streets was 25 mph, and that immediately prior to the collision defendant was driving 50 mph two blocks away from the intersection where the collision occurred.

APPEAL by plaintiff from *Winner, Judge,* 19 February 1973 Session of HARNETT Superior Court.

This is an action to recover damages for personal injury allegedly sustained by plaintiff in a collision between an automobile operated by plaintiff and an automobile owned by defendant Tommy Carroll (Tommy) and operated by defendant Terry Carroll (Terry). The collision occurred at the intersection of Orange and Washington Streets in the Town of Coats, N. C. Plaintiff was driving south on Orange Street and defendant Terry was driving east on Washington Street. At this intersection Washington was the dominant street with traffic on Orange required to yield the right-of-way.

When the case was called for trial, plaintiff submitted to a voluntary dismissal as to Tommy.

At the conclusion of plaintiff's evidence, defendant Terry moved for a directed verdict on the ground that plaintiff's evidence established her contributory negligence as a matter of law. The motion was allowed and from judgment dismissing her action, plaintiff appealed.

W. A. Johnson for plaintiff appellant.

Bryan, Jones, Johnson, Hunter & Greene by Robert C. Bryan for defendant appellees.

BRITT, Judge.

Did the court err in holding that plaintiff's evidence established her contributory negligence as a matter of law and dismissing her action? We answer in the affirmative.

The admissions and plaintiff's evidence pertinent to the question presented tended to show: The collision occurred around 5:15 p.m. on 27 March 1970. Each street was paved for a width of twenty feet and had shoulders three to four feet wide. Weather conditions were good, the pavement dry and the speed limit on each street was 25 m.p.h. When plaintiff approached the intersection, she stopped, looked first to her right, then to her left, and again to her right. She could see approximately 300 feet to her right on Washington Street. Seeing no car approaching on Washington Street, she proceeded into the intersection and was struck on her right when she was about halfway through the intersection. Plaintiff was traveling about 5 m.p.h. when she was hit. Immediately prior to the collision and two blocks west of Orange Street, Terry was seen driving east on Washington Street at a speed of at least 50 m.p.h. Plaintiff does not remember anything after she was struck until she "woke up" in the hospital. The Carroll automobile came to rest about 38 feet from the intersection and plaintiff's vehicle came to rest in a yard southeast of the intersection and approximately 70 feet therefrom. Following the collision there were no skid marks leading up to the intersection on either Orange or Washinton Streets.

We hold that the question of plaintiff's contributory negligence was for the jury. It is well settled in this jurisdiction that the driver along the servient highway is not required to anticipate that a driver along the dominant highway will travel at excessive speed or fail to observe the rules of the road applicable to him. 1 Strong, N. C. Index 2d, Automobiles, § 19, p. 424. See also *Farmer v. Reynolds*, 4 N.C. App. 554, 167 S.E. 2d 480 (1969), cert. den. 275 N.C. 499.

The judgment appealed from is

Reversed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. GENE L. RICE

No. 7315SC428

(Filed 27 June 1973)

1. **Rape § 17— assault with intent to commit rape — failure to accomplish rape — nature of assault unchanged**

Where the evidence tended to show that defendant assaulted the prosecuting witness with the intent to have sexual intercourse with her notwithstanding resistance on her part, the fact that he finally desisted without accomplishing his purpose in no wise changed the nature of the assault.

2. **Indictment and Warrant § 17— variance with respect to date immaterial**

Where evidence tended to show the alleged offense took place around 12:15 on the morning of 12 November 1972, but the bill of indictment charged the offense occurred on 11 November 1972, the variance did not mislead or prejudice defendant and was not fatal.

APPEAL by defendant from *Bailey, Judge,* 15 January 1973 Session of Superior Court held in ALAMANCE County.

Defendant was charged in a bill of indictment, proper in form, with the felony of assault with intent to commit rape upon a female. G.S. 14-22. The jury returned a verdict of guilty as charged in the bill of indictment.

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

Wiley P. Wooten for the defendant.

BROCK, Judge.

The State's evidence tended to show that defendant, a 25-year-old male Caucasian, crudely and viciously assaulted the prosecuting witness, a 45-year-old female Negro. The assault occurred in the Delux Laundromat on Harden Street in Graham, N. C., at about fifteen or twenty minutes after midnight, the early hours of Sunday, 12 November 1972. The prosecuting witness had finished her day's work at the Embers Restaurant and had stopped by the laundromat to do her family laundry. The State's evidence tended to identify defendant as being present in the laundromat while the prosecuting witness was there. A lifelong acquaintance of defendant testified that when he left the laundromat about 12:15 a.m. the defendant and the prosecuting witness were there. The prosecuting witness testi-

fied as to the description and dress of defendant to be the same as that given by the lifelong acquaintance.

[1] No useful purpose will be served by recounting here the details of the assault. Suffice it to say the evidence tended to show that defendant assaulted the prosecuting witness with the intent to have sexual intercourse with her notwithstanding resistance on her part. The fact that he finally desisted without accomplishing his purpose in no wise changes the nature of the assault. Defendant's assignment of error to the failure of the State to establish the intent of the defendant is without merit.

[2] Defendant assigns as error the denial of his motion to dismiss because the bill of indictment charges the offense on 11 November 1972, and the evidence tended to show it occurred on 12 November 1972. Ordinarily, where the statute of limitations is not involved and time is not of the essence of the offense charged, a variance of a few days between the date alleged and the date proved is not fatal. 4 Strong, N. C. Index 2d, Indictment and Warrant, § 17. In this case, the statute of limitations is not involved, nor is time of the essence of the offense. Actually, the variance amounts to only a matter of fifteen to thirty minutes, and defendant could not have been misled or prejudiced. This assignment of error is overruled.

Defendant assigns as error certain portions of the trial judge's charge to the jury. We have reviewed the charge as a whole and in our opinion it is fair and nonprejudicial to the defendant. This assignment of error is overruled.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. PETER ANTHONY YOUNG

No. 7310SC447

(Filed 27 June 1973)

1. **Homicide § 12— murder indictment — plea of voluntary manslaughter**

Indictment in the form declared by G.S. 15-144 to be sufficient to charge the offense of murder is sufficient to sustain judgment entered upon defendant's plea of *nolo contendere* to the lesser included offense of voluntary manslaughter.

2. Criminal Law § 25— plea of nolo contendere — voluntariness

Acceptance of defendant's plea of *nolo contendere* will not be disturbed on appeal where the trial judge examined defendant and found that his plea was freely, understandingly and voluntarily made, and defendant's signed transcript of plea supports these findings.

APPEAL by defendant from *Braswell, Judge,* 29 January 1973 Criminal Session of Superior Court held in WAKE County.

Defendant was indicted for the murder of his sister. He pled *nolo contendere* to voluntary manslaughter. From judgment sentencing him to prison for five years with credit allowed against the sentence for time spent in custody awaiting trial, he appealed.

Attorney General Robert Morgan by Associate Attorney Diederich Heidgerd for the State.

Gulley & Green by Charles P. Green, Jr. for defendant appellant.

PARKER, Judge.

[1] The indictment was in the form declared by G.S. 15-144 to be sufficient to charge the offense of murder. It was also sufficient to sustain judgment entered upon defendant's plea of *nolo contendere* to the lesser included offense of voluntary manslaughter. Appellant's contention to the contrary is without merit.

[2] Defendant was represented in the trial court and on this appeal by court-appointed counsel who, so the record indicates, has been diligent in his behalf. Before accepting defendant's plea, the able trial judge carefully 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. A careful review of the entire record reveals

No error.

Judges BROCK and MORRIS concur.

State v. Oliver; State v. Spencer

STATE OF NORTH CAROLINA v. DALE OLIVER

No. 7312SC523

(Filed 27 June 1973)

Criminal Law § 23— guilty plea

Defendant's plea of guilty to a charge of distributing heroin was entered freely, understandingly and voluntarily.

ON *certiorari* to review the trial of defendant, Dale Oliver, before *Clark, Judge,* 30 October 1972 Session of Superior Court held in CUMBERLAND County.

Attorney General Robert Morgan and Assistant Attorney General Charles M. Hensey for the State.

Sol G. Cherry, Public Defender, for defendant appellant.

HEDRICK, Judge.

The record affirmatively shows that the defendant, represented by the Public Defender, freely, understandingly and voluntarily entered a plea of guilty to a bill of indictment, proper in form, charging him with the distribution of the narcotic drug heroin to Brian Twiddy. The judgment imposing a prison sentence of four (4) years is within the limits prescribed by statute for the offense charged. The judgment is

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES SPENCER

No. 732SC385

(Filed 27 June 1973)

ON *certiorari* to review the order of *Rouse, Judge,* 26 April 1971 Session of Superior Court held in WASHINGTON County.

Defendant was charged in a bill of indictment with first degree murder of one John Willie Wilkins on 2 April 1971. Defendant entered a plea of not guilty.

At trial the State presented evidence which tended to show the following. On 2 April 1971 at approximately 9:00 p.m.,

defendant and John Willie Wilkins, the deceased, were in Warren Everett's "night spot" on Highway 32 near Plymouth, North Carolina. Warren Everett, the proprietor, was working behind the drink counter on the night in question and heard a shot. Everett turned around and saw defendant shooting a pistol at John Willie Wilkins. He heard approximately four shots and then the deceased turned and ran out the back door of the "night spot." Two other eyewitnesses also saw defendant shooting at the deceased and then saw the deceased run out the back door. Another witness, who was outside the building at the time of the shooting, heard shots from inside the building and then saw deceased rush out the back door. Deceased died from internal hemorrhaging caused by bullet wounds.

Defendant presented evidence which tended to show the following: that immediately prior to the shooting defendant placed a quarter in the juke box at Everett's "night spot"; that at this time the deceased tried to "walk up" to defendant; that deceased said something to defendant; that defendant walked away from deceased and said "I don't want to hear it"; that deceased hollered "Don't walk away from me when I am talking to you"; that deceased followed defendant as he was walking toward the door; that deceased made some motion toward his pocket, and defendant pulled out a pistol and fired at the floor; that deceased and defendant began struggling, and during the struggle two or three shots went off; that after the third shot the deceased fell against the counter and ran out the back door; that automatic rifle shots were heard outside the building as well as the shots heard inside the building; that a tire on one of the cars in the parking lot was punctured by a bullet and that two bullet holes were found under the front door of the same car.

A jury returned a verdict of guilty of second degree murder. Defendant appealed.

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

Forrest V. Dunstan for defendant.

BROCK, Judge.

Defendant was represented by counsel during his trial and on this appellate review. The bill of indictment is proper in form and sufficient to charge the felony of murder. The court

was properly organized and had jurisdiction of the subject matter and the person of defendant. Trial was by jury which found defendant guilty of second degree murder. The evidence was sufficient to overcome defendant's motion for nonsuit, and to require submission of the case to the jury. The verdict was proper in form and the prison sentence imposed is within statutory limits.

We have reviewed the record and in our opinion defendant had a fair trial, free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CLARENCE WADY LEE, JR.

No. 7312SC455

(Filed 27 June 1973)

APPEAL by defendant, Clarence Wady Lee, Jr., from *Braswell, Judge,* 15 January 1973 Session of Superior Court held in CUMBERLAND County.

Defendant was charged in separate bills of indictment, proper in form, with the manslaughter of Willie Foster Sampson III, and John Roger Tew, arising out of his operation of a motor vehicle on 17 June 1972. The defendant, represented by privately employed counsel, pleaded not guilty and was found guilty as charged in each bill of indictment. From a judgment imposing a prison sentence of seven years, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Eugene Hafer for the State.

Sol G. Cherry, Public Defender, for defendant appellant.

HEDRICK, Judge.

In his brief, defendant states:

"After a thorough review of the record in this case, counsel finds no errors of consequence in this case. It is requested that the members of the court examine the record

for any errors which counsel may have neglected to bring forth or argue."

Accordingly, we have carefully examined the record and find and hold that the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

S. H. HURSEY, JR., t/b/a HURSEY'S HANDY CORNER; DWIGHT SHOFFNER, t/b/a HILLTOP GROCERY; TROY E. PERKINS, t/b/a PERKINS GROCERY, AND JOWEL BARRINGER, t/b/a GIBSONVILLE RED AND WHITE GROCERY STORE, PLAINTIFFS

— v. —

THE TOWN OF GIBSONVILLE, A MUNICIPAL CORPORATION, AND M. W. MILLIGAN, CHIEF OF POLICE OF THE TOWN OF GIBSONVILLE, DEFENDANTS

— AND —

ROBERT MORGAN, ATTORNEY GENERAL OF NORTH CAROLINA, ADDITIONAL DEFENDANT

No. 7318SC374

(Filed 11 July 1973)

Constitutional Law § 12; Intoxicating Liquor § 1— prohibiting sale of beer and wine on Sunday — exemption of holders of brown bagging permits — unconstitutionality

The proviso of G.S. 18A-33(b) excluding the holders of "brown bagging" permits from provisions of that statute authorizing municipalities and counties to prohibit beer and wine sales from 1:00 p.m. on Sunday until 7:00 a.m. on Monday is unconstitutional as an impermissible discrimination arbitrarily established between competing businesses in similar situations which has no reasonable relation to the purpose of the law; however, the remainder of that statute is a valid exercise of the police power and grants to municipalities the authority to place and enforce a total ban on the sale of beer and wine on Sundays after 1:00 p.m.

APPEAL by plaintiffs and Attorney General from *Exum, Judge,* 18 December 1972 Session of Superior Court held in GUILFORD County.

Plaintiffs operate retail businesses in Gibsonville, North Carolina. They hold G.S. 18A-38(e) (2) and/or (d) (2) alcoholic

beverage control permits which allow them to sell wine and beer (or just beer) for off-premises consumption.

They are subject to G.S. 18A-33(a) which imposes a statewide prohibition on beer and wine sales from 1:00 a.m. (EST) to 1:00 p.m. (EST) on Sundays. (This statute provides for daylight savings time variations, but these variations are not pertinent to this appeal.) G.S. 18A-33(b) gives municipalities and counties the power to regulate and prohibit beer and wine sales from 1:00 p.m. Sunday until 7:00 a.m. Monday and, pursuant to this grant of authority, the town of Gibsonville has enacted an ordinance (Gibsonville, N. C. Ordinance, Ch. L, Art. IV, Sec. 1) which prohibits beer and wine sales from 1:00 p.m. Sunday until 7:00 a.m. Monday. G.S. 18A-33(b) however has a proviso which states that " . . . municipalities and counties shall have no authority under this subsection to regulate or prohibit sales after 1:00 p.m. on Sundays by establishments having a permit issued under Article 3 of this Chapter." Permits issued under Article 3 are commonly known as "brown bagging" permits and allow the holder to permit consumption of alcoholic beverages on the premises covered by the permit.

The local ordinance here is a total ban on the sale of beer and wine, but, presumably acting under the G.S. 18A-33(b) proviso, the town authorities do not enforce the ordinance against the holders of "Article 3" or "brown bagging" permits. The result is that "brown bagging" permit holders who also have beer and wine permits are allowed to sell wine and beer for off-premises consumption after 1:00 p.m. on Sunday whereas those who have off-premises permits only, and not the "brown bagging" permit, such as the plaintiffs, are not allowed to engage in such sales on Sunday at all.

The court below concluded: "2. Insofar as the proviso of G.S. 18A-33(b) permits businesses which hold BROWN BAGGING PERMITS to sell beer on Sundays after 1:00 o'clock p.m. for off-premises consumption while other competing businesses holding merely OFF-PREMISES BEER PERMITS may be prohibited by local ordinances from such sales, the proviso creates an invidious discrimination and a classification without any reasonable basis and is, to this extent unconstitutional, void, and of no further force and effect."

The judgment decreed: "1. The Town of Gibsonville shall hereafter give no further force or effect to the proviso of G.S.

18A-33(b) insofar as it purports to prohibit Gibsonville from enforcing its ORDINANCE against businesses holding BROWN BAGGING PERMITS to the extent that these businesses sell beer on Sundays for consumption off-premises.

2. The Town of Gibsonville shall hereafter enforce the ORDINANCE against all businesses whether or not the businesses hold a BROWN BAGGING PERMIT to the extent that these businesses sell beer on Sundays for consumption off their own premises.

3. The Town of Gibsonville shall comply fully with the proviso of G.S. 18A-33(b) insofar as it prohibits Gibsonville from enforcing the ORDINANCE against the sale of beer for consumption on-premises by any business which has a BROWN BAGGING PERMIT."

Plaintiffs appeal from the total ban now imposed on Sunday beer and wine sales and the State appeals from the court's determination that a portion of the statute is unconstitutional. The town of Gibsonville was designated as the appellee on appeal and they assert that G.S. 18A-33(b) and their ordinance are constitutional in all respects.

Walker, Short & Alexander, by W. Marcus Short, and Forrest E. Campbell, for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter, by Beverly C. Moore, for defendant appellees.

Robert Morgan, Attorney General, by Howard A. Kramer, Associate Attorney, for additional defendant State of North Carolina.

BALEY, Judge.

G.S. 18A-33(b) reads in pertinent part:

> "In addition to the restrictions on the sale of malt beverages and/or wines (fortified or unfortified) set out in this section, the governing bodies of all municipalities and counties in North Carolina shall have, and they are hereby vested with, full power and authority to regulate and prohibit the sale of malt beverages and/or wine (fortified or unfortified) from 1:00 p.m. on each Sunday until 7:00 a.m. on the following Monday. Provided, however, that municipalities and counties shall have no authority under

this subsection to regulate or prohibit sales after 1:00 p.m. on Sundays by establishments having a permit issued under Article 3 of this Chapter."

Plaintiffs assert that the statute is unconstitutional as it violates the equal protection clause of the Constitution of North Carolina, Article 1, Section 19, and the Fourteenth Amendment of the Constitution of the United States, and that the ordinance of the town of Gibsonville based thereon which prohibits sale of beer and wine on Sunday after 1:00 p.m. is void.

The State maintains that the enactment of G.S. 18A-33(b) is within the constitutional power of the General Assembly and the holding of the court below limiting the effect of the proviso contained in G.S. 18A-33(b) is error.

We hold that G.S. 18A-33(b) *without the proviso limiting its application* is a valid exercise of the police power of this State and grants to the town of Gibsonville the authority to place and enforce a total ban on the sale of beer and wine on Sundays after 1:00 p.m. There is a total ban imposed upon Sunday sales until 1:00 p.m. by G.S. 18A-33(a).

The proviso in G.S. 18A-33(b) confers a special privilege upon holders of Article 3 or "brown bagging" permits who also hold beer and/or wine permits to sell beer and/or wine on Sundays after 1:00 p.m. when other competing businesses, such as plaintiffs, are not so allowed.

Conceding that the General Assembly has the authority to establish different permit categories for types of establishments which sell beer and wine and establishments which permit the consumption of other alcoholic beverages on their premises, the classification of the types of permit holders must be based on reasonable distinctions and affect all persons in like situations or engaged in the same business without discrimination. This principle was succinctly stated in *Cheek v. City of Charlotte,* 273 N.C. 293, 298, 160 S.E. 2d 18, 23, as follows: "Statutes and ordinances 'are void as class legislation . . . whenever persons engaged in the same business are subject to different restrictions or are given different privileges under *the same conditions.*' "

The General Assembly likewise has the unquestioned authority to grant to municipalities the authority to pass ordinances relating to the sale of beer and wine as long as they are not

discriminatory. Here the town of Gibsonville has exercised this authority granted by the General Assembly and has passed an ordinance which places a ban on Sunday sales of beer and wine. The effect of the proviso in G.S. 18A-33(b), however, is to exclude a class of citizens from the application of the ordinance without any logical basis for such exclusion. As the statute now reads with the proviso holders of Article 3 or "brown bagging" permits who also hold permits to sell beer and/or wine are not to be governed by the same regulations which are applicable to other competing establishments which hold only permits to sell beer and/or wine and who may desire to engage in the sale of beer and/or wine after 1:00 p.m. on Sundays. This cannot be sustained.

It is difficult to see how permitting one group to sell beer and wine after 1:00 p.m. on Sundays and forbidding another competing group to do so, particularly in the sale of beer for consumption off premises, can be other than discriminatory. This is all the proviso does, and it cannot be rationally justified upon any basis in keeping with the regulation and control of the sale of beer and wine. As to the sale for off-premises consumption, which is the area in which plaintiffs are in competition with holders of "brown bagging" permits, it makes little difference where beer or wine may be purchased if it is to be consumed elsewhere. Indeed it would seem logical that an establishment which is authorized to permit consumption of alcoholic beverages on its premises (holders of "brown bagging" permits) may be less desirable as a place to purchase beer and/or wine on Sunday after 1:00 p.m. than a grocery store which could only sell beer for off-premises consumption. Suffice it to say the proviso excluding "brown bagging" permit holders from the ban on Sunday sales of beer and/or wine after 1:00 p.m. is an impermissible discrimination arbitrarily established between competing businesses in similar situations which has no reasonable relation to the purpose of the law. *State v. Greenwood,* 280 N.C. 651, 187 S.E. 2d 8; *Cheek v. City of Charlotte, supra; State v. Smith,* 265 N.C. 173, 143 S.E. 2d 293; *State v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860.

The ordinance of the town of Gibsonville as authorized by G.S. 18A-33(b) is valid and enforceable against all its citizens without discrimination. G.S. 18A-33(b) is a constitutional exercise of the power of the General Assembly except for the proviso which excludes businesses with Article 3 or "brown

bagging" permits from the remainder of G.S. 18A-33(b). The proviso is unconstitutional and void. The judgment below is modified to permit the town of Gibsonville to enforce its ordinance against the sale of beer and wine on Sundays after 1:00 p.m. without restriction.

Modified and affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. JEFFREY L. CAMPBELL

No. 7316SC484

(Filed 11 July 1973)

1. **Criminal Law § 15— change of venue — special venire — pretrial publicity**

In a prosecution for possession with intent to distribute controlled substances, the trial court did not abuse its discretion in the denial of defendant's motion for a change of venue or for a special venire from another county on the ground of unfavorable publicity where there was no indication that any of the jurors had been unduly influenced by press reports or other information or would be prejudiced against defendant in any way, and defendant did not exhaust his peremptory challenges.

2. **Narcotics § 2— possession with intent to distribute — indictment**

An indictment for possession of controlled substances with intent to distribute need not set out to whom defendant intended to distribute the controlled substances.

3. **Criminal Law § 84; Searches and Seizures § 1— narcotics in plain view — seizure without warrant**

No search warrant was required for the seizure of plastic bags containing marijuana, LSD, and MDA from defendant's car where the seized articles were found in plain view on the front seat of the car and were not discovered by any search.

4. **Narcotics § 5— possession of controlled substances with intent to distribute — sentences**

Sentence of five years for possession of LSD with intent to distribute and possession of MDA with intent to distribute and consecutive sentence of from two to five years for possession of marijuana with intent to distribute were within statutory limits and not reviewable on appeal. G.S. 90-95.

APPEAL by defendant from *McKinnon, Judge,* 27 November 1972 Session of Superior Court held in SCOTLAND County.

Defendant was charged in three separate bills of indictment under the Controlled Substances Act, G.S. 90-86 *et seq.*, with felonious possession with intent to distribute controlled substances, to wit, marijuana in excess of five grams, Lysergic Acid Diethylamide (LSD), and 3, 4-Methylenedioxy amphetamine (MDA).

In proceedings before trial the defendant filed motions for a change of venue or for a special venire from another county because of prejudicial publicity, to quash the indictments, and to suppress evidence because of illegal search and seizure. The court denied the first two motions prior to trial and after a *voir dire* hearing during the course of the trial denied the motion to suppress evidence.

The evidence for the State in summary was as follows: Deputy Sheriff Wayne Davis received information from a confidential informant about 5:00 p.m. on 22 July 1972 that a drug party was planned that evening at Jones's Ocean, a lake about ten miles northwest of Laurinburg, and that the defendant, Jeffrey Campbell, who was selling drugs, would be there. Deputy Davis and nine other officers went to Jones's Ocean to investigate possible drug violations. They parked a mile and a half from Jones's Ocean and walked through the woods to avoid discovery. There were some ten to fifteen cars which they observed coming into the area. At about 10:30 p.m. the officers moved to within twenty-five yards of where the cars were parked. Deputy Davis walked toward a 1969 Buick with a black vinyl top which he had previously seen being operated by the defendant Campbell. It was dark outside the car but the headlights were on and the door on the driver's side was open. Davis recognized the defendant sitting in the driver's seat with his feet out on the ground. The light was on inside. An individual named Pate was standing on the front side of the door facing Campbell. There were other occupants in the car. Campbell was talking to Pate and Pate had both hands extended for an exchange. Deputy Davis heard Campbell say, "Is that enough?" and Pate replied, "Yes." At that time Deputy Davis was three or four feet away and coming toward them. He walked directly to the door, presented his badge, and identified himself. Campbell took a plastic bag in his right hand and put his hand behind him, and Davis advised him not to move. Davis looked directly behind the defendant in the seat of the lighted car and there were several plastic bags, one containing green vegetable material he believed to be marijuana,

and another, containing plastic tubing commonly used for tying off the arm for injection. Deputy Davis arrested the defendant, had him stand up outside the car for search for weapons, and then examined the other plastic bags. There was one plastic bag with white powder material in it directly behind where defendant was sitting and other bags containing plastic tubing and one bag containing pills or capsules. There were three hand-rolled cigarettes which the officer examined and believed to be marijuana. No compartments of the car were opened at that time. All of the articles described were in plain view before or after the defendant got out of the car. Deputy Davis testified he had seen similar material used before in connection with the drug traffic—the plastic bags—approximately 150 to 200 times.

Defendant Campbell was advised of his constitutional rights by Deputy Davis and then voluntarily admitted having the drugs in his possession but denied selling them.

Deputy Davis knew the defendant and had seen him on numerous occasions driving the Buick car in which he was arrested.

The materials seized in the car were forwarded to the State laboratory for analysis, and an expert chemist for the State testified that the green vegetable material was marijuana, the capsules were LSD, and the white powder was MDA.

The defendant presented evidence from others at the scene of the arrest which tended to show that Deputy Davis was unable to see the materials he described in the car prior to the arrest and seizure.

The jury returned a verdict of guilty upon all three charges. The charges of possession with intent to distribute LSD and possession with intent to distribute MDA were consolidated for judgment and defendant was sentenced to a term of five years. In addition he received a term of two to five years for possession with intent to distribute marijuana to begin at the expiration of the preceding sentence. From this judgment, defendant appealed.

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

Downing, David & Vallery, by Edward J. David, for defendant appellant.

BALEY, Judge.

[1] The defendant assigns as error the denial of his motion for a change of venue on the grounds of unfavorable publicity, or, in the alternative, for a special venire from another county. This motion is addressed to the discretion of the trial judge, and his decision in the exercise of such discretion will not be disturbed on appeal unless a manifest abuse is shown. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123; *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457; *State v. Brown* and *State v. Maddox* and *State v. Phillips,* 13 N.C. App. 261, 185 S.E. 2d 471, *cert. denied,* 280 N.C. 723. In the examination of the jury there was no indication that any of the jurors had been unduly influenced by press reports or other information or would be prejudiced against the defendant in any way. The defendant did not exhaust his peremptory challenges and has not shown that he was required to accept any juror to whom he had any legal objection. There is no abuse of discretion. This assignment of error is without merit.

[2] The motion to quash the indictment was based on the premise that the indictments must set out to whom the defendant intended to distribute the particular controlled substances. The motion was properly denied. The defendant was not charged with the sale or distribution of these substances, but *with possession with intent to distribute.* This constitutes the crime and was charged in the indictments.

[3] The motion of defendant to suppress the evidence seized when defendant was arrested was properly denied. Under the circumstances of this case the constitutional guaranty against unreasonable search and seizure would not apply. Upon information that the defendant would be distributing narcotics at Jones's Ocean, Deputy Sheriff Wayne Davis and nine other officers went to investigate these possible violations of the criminal law. In approaching the defendant's automobile Officer Davis saw the defendant make some transfer to one Pate. He walked directly to the door of the automobile and identified himself. He saw the defendant take a plastic bag in his right hand and put the hand behind him. The light was on inside the car and he could see several plastic bags which he knew were commonly used to transport narcotics, one containing green vegetable material resembling marijuana, another containing plastic tubing used by narcotics violators. He arrested the defendant and examined the other plastic bags which contained

white powder, plastic tubing, pills and capsules. All of the articles were in plain view of the officer either before or after the defendant got out of the car. Officer Davis was familiar with the narcotics traffic. He had seen similar material before and he knew that these plastic bags could be used in the transfer of narcotics. No search warrant was necessary since the articles were found in plain view on the front seat of the car and not discovered by any search. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706; *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25; *State v. Parks,* 14 N.C. App. 97, 187 S.E. 2d 462, *cert. denied,* 281 N.C. 157.

We have carefully considered the other assignments of error presented by the defendant including denial of his motion for nonsuit and his objections to the charge of the court and find them without merit. The charge of the court when taken as a whole presented every element of the offenses charged and instructed the jury fairly and impartially upon all the law arising on the evidence. The defendant filed no request for additional instructions.

[4] Finally, the defendant complains that the sentences imposed were excessive. Each offense was a felony punishable under the statute, G.S. 90-95, by imprisonment of not more than five years and a fine of not more than $5,000.00. The sentences were well within statutory limits and are not reviewable on appeal. *State v. Fleming,* 202 N.C. 512, 163 S.E. 453.

Defendant was caught with LSD, MDA, and marijuana in his possession on the front seat of his car. The evidence of his guilt is overwhelming. Upon this record the defendant has received a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. SHERMAN CAUTHEN AND WILLIE LEON DUNN

No. 7310SC426

(Filed 11 July 1973)

1. **Criminal Law § 66— observation of defendant at robbery scene — in-court identification proper**

In-court identifications of defendants as perpetrators of an armed robbery by victims of the robbery and a third person were based on observation of defendants at the crime scene and were not the result of improper out-of-court confrontation.

2. **Robbery § 3— pistol and holster of victim — admissibility**

Trial court in an armed robbery prosecution did not err in refusing to suppress testimony with respect to a pistol and holster taken from the victim during the robbery where there was plenary evidence to connect defendant with the pistol and holster found in the parking lot beneath the left rear door of the police car in which defendant had been driven to police headquarters.

3. **Criminal Law § 43— police mug shot of defendant — prejudicial markings — harmless error**

Where a witness positively identified defendant as the perpetrator of the robbery in question, introduction for the purpose of illustration of a police "mug shot" of defendant without covering prejudicial markings thereon, though erroneous, was harmless beyond a reasonable doubt, particularly since the court instructed the jury to disregard any writing on the photograph.

APPEAL by defendants from *Brewer, Judge,* 6 November 1972 Session of Superior Court held in WAKE County.

Defendants, Sherman Cauthen and Willie Leon Dunn, were charged in separate bills of indictment, proper in form, with the armed robbery of Edna and Howard Young. Upon their pleas of not guilty, the State offered evidence tending to show the following:

Shortly after 9:00 a.m., 18 August 1972, defendant Dunn entered the Person Street Grocery, owned and operated by Edna and Howard Young. He walked to the meat counter and asked Howard Young to turn the light on in the meat counter. From two to five minutes later, defendant Cauthen entered the store and asked for two eggs. After Howard Young placed the eggs on the counter, defendant Dunn, "turned around and throwed a pistol right at my head and said, 'Give it up. Give it up.' " When Edna Young, reached for a pistol, defendant Cauthen aimed a pistol at her and stated "[d]on't draw."

After forcing Mr. and Mrs. Young to lie on the floor behind the counter, defendants took the money from the cash register, then removed from the person of Mr. Young his wallet, watch, and pistol and took Mrs. Young's watch from her arm and ring from her finger. One of the defendants fired a shot into the floor near Mr. Young's head. Before leaving the store, defendants tied Mr. and Mrs. Young with stockings.

Minnie Ashe met the defendants as they left the store. She untied the Youngs, who immediately called the police. At approximately 9:20 a.m., defendant Dunn, accompanied by a subject resembling defendant Cauthen, was seen by the police walking on Walnut Street. When the police approached, the subject resembling defendant Cauthen ran and was not apprehended. Defendant Dunn was arrested for carrying a concealed weapon.

At the police station the Youngs' wedding rings and Howard Young's wristwatch and wallet, containing his driver's license and social security card, were found in the possession of defendant Dunn. Beneath the left rear door of the automobile in which Dunn was driven to police headquarters was found the pistol and holster taken from the person of Howard Young during the robbery.

Defendant Dunn testified that he had purchased the articles identified as the Young's property from a subject named "Coco." Defendant Cauthen offered no evidence.

The defendants were found guilty as charged and from judgments imposing prison sentences of thirty years each, they appealed.

Attorney General Robert Morgan and Emerson D. Wall, Associate Attorney, for the State.

Poyner, Geraghty, Hartsfield & Townsend by John L. Shaw for defendant appellant Cauthen.

Boyce, Mitchell, Burns & Smith by Benjamin F. Clifton, Jr., for defendant appellant Dunn.

HEDRICK, Judge.

[1] Defendants contend that Mr. and Mrs. Young's and Miss Ashe's in-court identifications of them as the perpetrators of the robbery were tainted by unlawful and unconstitutional out of court confrontations and identification procedures.

Upon objection by defendants to the in-court identification of them as the perpetrators of the crime charged, the trial court conducted a *voir dire* hearing in the absence of the jury where, after hearing the testimony of Howard Young, Edna Young, Minnie Ashe and various police officers as to all out of court identification procedures, the judge made the following findings and conclusions:

> "That the photographic identification procedure and confrontation was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mistaken identification by the witnesses, Howard Young, Edna Young and Minnie Ashe, and that the identification procedure met the standards of decency, fairness and justice; that the in-court identification of the defendants, Sherman Cauthen and Willie Leon Dunn, by the witnesses, Howard Young, Edna Young and Minnie Ashe, were of independent origin and was based on the witnesses' observation of each of the defendants at the scene of the alleged armed robbery rather than on the photographic identification or confrontation at the store and was untainted by the illegality, if any, underlying the photographic identification and confrontation by Howard Young, Edna Young and Minnie Ashe."

The conclusions of the trial court are supported by competent evidence and are binding on appeal. *State v. Brown*, 18 N.C. App. 35, 195 S.E. 2d 567 (1973), cert. denied, 283 N.C. 586 (1973). These assignments of error are without merit.

[2] Defendant Dunn contends the trial court erred in refusing to suppress testimony pertaining to State's exhibit 8, the pistol and holster taken from Howard Young during the robbery.

Upon defendant's motion to suppress this testimony, the trial court conducted a *voir dire* examination in the absence of the jury, to determine whether there was sufficient evidence to connect defendant with the pistol and holster, found in the parking lot beneath the left rear door of the police car in which defendant had been driven to police headquarters. After hearing testimony of Patrolman S. E. Cobb and Detective D. C. Williams, the trial court denied the motion. We find and hold that there was plenary competent evidence to connect defendant with the pistol and holster found in the police parking lot and that the trial court did not err in denying Dunn's motion to suppress.

[3] Defendant Cauthen contends the trial court erred in admitting into evidence and allowing the jury to view a "mug shot" photograph of him without covering the "prejudicial markings" thereon and instructing the jury to disregard the "prejudicial markings" and consider the photograph solely as illustrative of the testimony of Edna Young.

The challenged photograph depicts defendant in front and side views and bears the following information:

"N.C. PRISON—RALEIGH

168-267 A-B

AGE 36

HT 5-8″

WT 160 1-21-65"

Before the challenged photograph was introduced into evidence, Mrs. Young had positively identified defendant Cauthen as a participant in the robbery. Immediately after the robbery, she gave the police a description of the men and on the following day, when the police brought a package of 15 to 20 photographs to the store, she picked out the photograph in question. The State offered the photograph to illustrate her testimony.

In *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970) it was held that a police department "mug shot" photograph of the defendant was properly admitted to illustrate the testimony of a witness regarding defendant's identity, where the words "Greensboro Police Department" and the date "11/67" were covered on the photograph prior to its admission.

In *State v. Bumper,* 5 N.C. App. 528, 169 S.E. 2d 65 (1969), it was held that the admission into evidence of a photograph of defendant bearing the following information, "Police Department, Burlington, N. C., 9495, 7-10-66" was not prejudicial, since defendant sought to impeach the testimony of a witness relating to his photographic identification of defendant, and the photograph was used to illustrate the witness' testimony that defendant's name did not appear thereon.

There has been no prior North Carolina decision directed to the precise question with which we are confronted, and the law of other jurisdictions appears to be sharply divided on this point. See Annot., 30 A.L.R. 3rd 908 (1970).

While we feel the court erred in admitting into evidence the unexpurgated photograph of defendant, it has not been made to appear that defendant was prejudiced thereby and that a different result likely would have ensued had the photograph been excluded. *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970). Therefore, the error was harmless beyond a reasonable doubt. *State v. Hudson,* 281 N.C. 100, 187 S.E. 2d 756 (1972); *State v. Barrow, supra.* Moreover, the trial court's precautionary instruction to the jury to disregard any writing on the photograph was proper and minimized the possibility of any prejudice to defendant. This assignment of error is overruled.

There was plenary competent evidence to require submission of the case to the jury as to both defendants and to support the verdicts.

Defendants have additional assignments of error which we have carefully considered and find to be without merit. The trial of the defendants in the Superior Court was free from prejudicial error.

No error.

Judges CAMPBELL and BALEY concur.

CABARRUS MEMORIAL HOSPITAL v. WILLIAM WHITLEY

No. 7319DC410

(Filed 11 July 1973)

1. **Contracts § 17— agreement to pay another's hospital expenses — termination**

An agreement signed by defendant at the time his stepfather was admitted to a hospital in which he promised to pay the hospital expenses of his stepfather from date of admission to discharge was an executory contract which involved continuing performance from day to day with no time fixed for its duration and was subject to termination by either party upon reasonable notice; consequently, defendant is not liable for hospital expenses of his stepfather after defendant notified the hospital he would no longer be responsible for such expenses and the hospital chose to honor the request of the patient's son that his father remain in the hospital even though defendant had requested his discharge.

2. Trial § 48— erroneous instructions as to damages — correct result by jury — refusal to award new trial

The trial court did not abuse its discretion in refusing to set aside the verdict and order a new trial where the court erroneously instructed the jury to award plaintiff the full amount requested in the complaint or nothing at all, but the jury disregarded such instructions and reached the proper result.

APPEAL by plaintiff from *Montgomery, Judge,* 22 January 1973 Session of District Court held in CABARRUS County.

This action was instituted by Cabarrus Memorial Hospital to recover from the defendant, William Whitley, the sum of $3,369.50 which is alleged to be the balance due on the hospital bill of Walter Alexander Edgison.

The only evidence submitted by the plaintiff was the hospital bill of Walter Alexander Edgison, shown as Exhibit A, together with a stipulation by the defendant that the signature of William Whitley appearing thereon was genuine and that he had signed such agreement. The agreement which appears as a form on the hospital in-patient ledger for W. A. Edgison is as follows:

> "I agree to pay the hospital, at the customary rate charged, for the expenses of the patient named hereon, from the date of admission shown to discharge. (Signed) William Whitley (seal) 6-1-69. Witness: R. Webb."

Exhibit A shows a total bill of $4,265.60 of which $896.10 has been paid by Medicare leaving a balance due of $3,369.50.

Exhibit A also shows admission date as 1 June 1969 and date of discharge as 30 September 1969 with a continuing daily record of the amount then due. On 3 July 1969 the amount due was $1,069.85.

The defendant testified in substance that he took his stepfather, Walter Alexander Edgison, to the plaintiff hospital on 1 June 1969 in a helpless condition. At the time of the admission of Mr. Edgison, defendant signed the agreement introduced by plaintiff but made an effort to move his stepfather from the hospital on 3 July 1969 and put him in a nursing home. His son would not permit such removal, and defendant went to the collections manager for the hospital, James M. Byrd, and told him that he would not be responsible any longer for the hospital bill. This was on 3 July 1969 and again upon a later occasion.

James M. Byrd confirmed that the defendant came to see him at the hospital in July 1969 and told him that he (defendant) could no longer be responsible for the bill, and he told the defendant he could not relieve him of the responsibility.

The court instructed the jury that plaintiff was entitled to recover the full sum of $3,369.50 or nothing at all. The following issue was submitted to the jury and answered as indicated:

"What amount, if any, does the defendant owe the plaintiff?

ANSWER: Defendant should be liable for payment up to July 3, 1969."

Plaintiff's motion to set aside the verdict was denied and judgment was entered against the defendant for the sum of $1,069.85 which was the amount of the hospital bill on 3 July 1969.

From this judgment, plaintiff appealed.

Hartsell, Hartsell & Mills, by W. Erwin Spainhour, for plaintiff appellant.

Williams, Willeford & Boger, by John R. Boger, Jr., for defendant appellee.

BALEY, Judge.

The plaintiff assigns as error the failure of the court to set aside the verdict of the jury and grant a new trial upon the ground that the jury disregarded the instructions of the court with respect to the amount which could be awarded as recovery. The court instructed the jury if it believed the evidence of the plaintiff to award recovery of $3,369.50, the amount requested in the complaint, or nothing at all.

[1] The determination of this question requires an interpretation of the agreement signed by the defendant in which he promised to pay the hospital expenses of his stepfather, Walter Alexander Edgison, from date of admission to discharge. We hold that this agreement was an executory contract which involved continuing performance from day to day with no time fixed for its duration and was subject to termination by either party upon reasonable notice. The time of "discharge" was uncertain and within the control of either party with or without

the consent of the other. Plaintiff-hospital could not be forced to render services indefinitely upon a mere promise to pay, and the defendant could not be oligated to pay for an indeterminate period. The only reasonable intention that can be imputed to the parties is that the contract may be terminated by either on giving reasonable notice to the other.

In North Carolina, a contract which calls for continuing performance and does not establish any time duration is terminable at will by either party assuming proper notice is given. *Fulghum v. Selma* and *Griffis v. Selma,* 238 N.C. 100, 76 S.E. 2d 368.

> " 'When the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other.' " *Fulghum v. Selma, supra* at 104, 76 S.E. 2d at 371. See also *Rubber Co. v. Distributors,* 253 N.C. 459, 117 S.E. 2d 479; *Atkinson v. Wilkerson,* 10 N.C. App. 643, 179 S.E. 2d 872.

The evidence is undisputed that the defendant notified the hospital on 3 July 1969 that he would no longer be responsible for the accumulating charges and attempted to discharge his stepfather from the hospital. The hospital chose to honor the request of the patient's son, a third party who had assumed no responsibility under the original contract, that his father remain in the hospital even though the defendant had requested his discharge. Plaintiff acted at its own risk and could not hold the defendant responsible for additional expenses which accrued after the notice and attempted discharge but only for the amount of the hospital bill to the date of the attempted discharge.

The objections of the plaintiff to the admissibility of evidence of the notice to the hospital on 3 July 1969 and the attempted discharge of the patient in order to terminate defendant's obligation to pay cannot be sustained. The evidence was both relevant and material to show that defendant's actions would prevent the plaintiff from continuing to perform services

in the expectation of receiving payment from the defendant and would permit the plaintiff to protect itself from future loss. *See* Stansbury, N. C. Evidence, § 78 (Brandis Revision, 1973).

[2] The instructions of the court with respect to the issue of damages were erroneous, and the jury disregarded them. There was evidence before the jury to sustain a finding of some amount less than $3,369.50. The hospital bill of the patient offered in evidence by the plaintiff was itemized and indicated the amount due at the end of each day. The jury found that "[d]efendant should be liable for payment up to July 3, 1969." According to the hospital bill this was $1,069.85. Although there is some question about the application of Medicare funds, the defendant has not appealed from the judgment. The court in its discretion accepted the verdict of the jury and awarded judgment for $1,069.85. We find no abuse of discretion and hold that his refusal to grant the motion for a new trial was proper. *Robinette v. Wike,* 265 N.C. 551, 144 S.E. 2d 594; 7 Strong, N. C. Index 2d, Trial, § 48.

The result in this case although obtained in unorthodox manner affords substantial justice between the parties. We find no prejudicial error.

No error.

Judges BROCK and VAUGHN concur.

ROLAND HICKS v. JAMES MICHAEL ALBERTSON

No. 7318DC420

(Filed 11 July 1973)

Attorney and Client § 9; Costs § 3— offer of judgment — award of attorney fee

Where judgment of $150 was entered upon defendant's offer of judgment pursuant to G.S. 1A-1, Rule 68(a) in an action to recover for damage to plaintiff's automobile, the presiding judge of the district court had authority to award a reasonable attorney fee to the plaintiff under G.S. 6-21.1 even though there was no actual trial.

Judge CAMPBELL dissents.

APPEAL by defendant from *Haworth, Judge,* 26 February 1973 Session of District Court (High Point Division) held in GUILFORD County.

This is an action instituted 15 September 1972 to recover the sum of $150.00 for damage to plaintiff's automobile arising out of an accident which occurred 16 March 1972 alleged to have been caused by the negligence of the defendant. In his prayer for relief the plaintiff specifically requested ". . . costs to include a reasonable attorney fee for plaintiff's attorney pursuant to G.S. 6-21.1."

The defendant filed answer denying the material allegations of the complaint and setting forth a counterclaim against the plaintiff for the sum of $350.00 which was denied in plaintiff's reply.

On 1 February 1973 under the terms of Rule 68(a) of the Rules of Civil Procedure the defendant through his attorney made an offer of judgment ". . . for the sum of $150.00 plus the costs accrued to the date of this offer."

On 6 February 1973 the plaintiff through his attorney accepted the offer of defendant to allow judgment to be taken against him ". . . for the sum of $150.00 plus the costs accrued to the date of said offer *to include as a portion of said cost attorney's fees to be taxed against the defendant pursuant to G.S. 6-21.1 accrued to said date in the discretion of the Court.*" (Emphasis added.) Upon the same date notice of motion by plaintiff to have the court enter an order allowing reasonable attorney fee was served upon counsel for defendant.

On 16 February 1973 the assistant clerk of court entered judgment for plaintiff for $150.00 ". . . together with the costs accrued to January 31, 1973 including as a portion of said costs such attorney's fees as the court may order as having accrued in this matter as of January 31, 1973 pursuant to G.S. 6-21.1."

After hearing on 28 February 1973 the presiding judge of the district court made findings of fact concerning the institution of the suit, the negotiations which resulted in obtaining a judgment for the entire amount claimed in the complaint, and the reasonable value of the services of plaintiff's counsel in connection with his representation of the plaintiff, and the court, in its discretion, awarded the sum of $75.00 as attorney fee for plaintiff's counsel to be included as a part of the court costs which were taxed against the defendant.

From this judgment defendant appealed.

Clontz, Gardner & Tate, by J. W. Clontz and Rossie G. Gardner, for plaintiff appellee.

Henson, Donahue & Elrod, by Joseph E. Elrod III, for defendant appellant.

BALEY, Judge.

In this appeal the defendant seeks to avoid the payment of an attorney fee under G.S. 6-21.1 upon the ground that his offer of judgment and its acceptance by the plaintiff eliminated any trial, and that only a presiding *trial* judge can allow an attorney fee to the successful litigant. We do not agree.

Ordinarily, in the absence of any contractual or statutory liability, attorney fees are not recoverable as an item of damages or part of the costs of litigation. *Piping, Inc. v. Indemnity Co.*, 9 N.C. App. 561, 176 S.E. 2d 835; *Perkins v. Insurance Co.*, 4 N.C. App. 466, 167 S.E. 2d 93.

However, G.S. 6-21.1 is a statutory exception to this general rule and expressly authorizes the payment of an attorney fee as a part of the court costs. In pertinent part it provides:

> "In any personal injury or property damage suit . . . *instituted* in a court of record, where the judgment for recovery of damages is two thousand dollars ($2,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the *litigant obtaining a judgment for damages in said suit,* said attorney's fee to be taxed as a part of the court costs." (Emphasis added.)

The act refers specifically to the "institution" of a suit, not its trial, and allows an attorney fee to be awarded to the "duly licensed attorney representing the litigant obtaining a judgment for damages in said suit" without regard to how that judgment is obtained. To permit an offer of judgment, or indeed any settlement prior to a completed trial, to avoid the payment of a reasonable attorney fee in the discretion of the court would defeat in large measure the purpose of the statute. If a party wishes to avoid payment of attorney fee in cases to which G.S. 6-21.1 may be applicable, he should make his offer of settlement before the suit is instituted.

Here the facts are clear that this suit was instituted in a court of record and that a judgment for recovery of damages

of less than $2,000.00 was obtained. While it is proper that the trial judge in an action which proceeds to trial may allow a reasonable attorney fee to the successful litigant under G.S. 6-21.1, the presiding judge of the court in which the suit is instituted may allow such fee when judgment is obtained without the necessity for trial. In cases where the judge who presided at the trial is unable because of death, disability, or other valid reason to make such allowance, the presiding judge of the court in which the suit is instituted would have such authority.

In *Colby v. Larson,* 208 Ore. 121, 299 P. 2d 1076, the Supreme Court of Oregon in interpreting a statute somewhat similar to G.S. 6-21.1 in a case where judgment was entered upon an offer of judgment filed by the defendant determined that the court which entered judgment retained its power to award a reasonable attorney's fee—even though there was no actual trial. The Oregon court stated that:

> "The judgment of the court directing the clerk to pay the deposited money to the plaintiff was a 'recovery' within the meaning of this statute. To 'recover' means, among other things, to '"obtain by course of law."' [Citations omitted.] It was through a legal proceeding and the order and judgment of a court that the plaintiff obtained the damages for which he sued." *Colby v. Larson, supra,* at 129-30, 299 P. 2d at 1077.

Throughout the entire chronological sequence of events from the filing of complaint on 15 September 1972 until the judgment awarding attorney fee was entered on 28 February 1973, there is a clear indication in this record that an application for attorney fee as a part of the costs was to be considered by the court, and the settlement was effected with knowledge of this proposed application.

Defendant maintains that only the clerk of court had jurisdiction to determine and tax costs in this case and did not tax an attorney fee as a part of such costs. The judgment entered by the clerk awarded costs to include "such attorney's fee as the court may order." This contention has no merit. The district judge found facts concerning the reasonable value of services performed by plaintiff's attorney and awarded the sum of $75.00 as attorney fee. The judgment recites that the findings of fact are made "upon the record and judicial admissions of counsel . . ." at the hearing. The findings are sufficient to sup-

port the judgment. In the absence of any contrary evidence in the record, it is presumed that they are supported by competent evidence.

The judgment is affirmed.

Affirmed.

Judge BRITT concurs.

Judge CAMPBELL dissents.

STATE OF NORTH CAROLINA v. HARRELL RAY PHELPS

No. 731SC251

(Filed 11 July 1973)

1. **Criminal Law § 66— failure to object to lineup at trial — issue raised for first time on appeal**

Where defendant did not object to a witness's in-court identification of him or request a *voir dire*, defendant could not for the first time on appeal raise the argument that a pretrial lineup as conducted was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

2. **Criminal Law § 84— evidence of items in plain view in trunk of car — no search**

Though defendant refused officers permission to search his car, a witness could properly testify as to items he saw in the trunk of defendant's car when the trunk was opened by a police officer at defendant's request to secure a coat for defendant.

3. **Criminal Law § 174— failure to object to evidence obtained from allegedly illegal search — consideration on appeal**

Where exhibits consisting of articles obtained from the trunk of defendant's automobile were admitted at trial without objection, any violation of constitutional rights was waived and defendant could not make objection for the first time on appeal.

APPEAL by defendant from *Cowper, Judge*, 11 September 1972 Session of Superior Court held in DARE County.

Defendant was charged in separate indictments with (1) felonious breaking and entering and felonious larceny and (2) assault with intent to kill resulting in serious injury. Defendant entered a plea of not guilty.

The State presented evidence which tended to show the following: that William Z. Burrus is proprietor of a grocery store located on Highway No. 12 in Hatteras, N. C.; that on 26 March 1972 at 9:00 p.m., Burrus closed the store, locking it, and went to his house approximately 75 feet away; that about 10:00 p.m. he returned to the store and, upon entering, heard the rustling of papers; that Burrus walked to the back of the store and saw two men in the area of the back wall by the milk display case; that the milk display case was a lighted case and that one of the two men was standing directly under the light from the display case; that Burrus, unnoticed, observed the two men for a moment and then stepped out and asked them to put back what they had taken and leave; that Burrus opened a pocketknife and stepped toward defendant; that the second man started out behind Burrus, holding something shiny on his hip; that Burrus turned to look at the second man and was hit three times on the head by defendant; that the back door of the grocery store had been broken in, the safe opened, and $7,200 in money and other papers were taken; that defendant was stopped at a roadblock at approximately 12:45 a.m. on 27 March 1972 and charged with improper car registration; that defendant refused to permit a search of his vehicle and a search warrant was sent for; that while waiting defendant, in shirt sleeves, stated that he was cold and requested his coat out of the trunk of his car; that with defendant's permission the trunk to his car was opened for the purpose of getting defendant's coat; that on opening the trunk police observed a leather satchel, a pry bar and other tools; that on the day following the burglary, Burrus identified defendant out of a lineup.

Defendant offered evidence which tended to show that he was a mechanic and that the tools found in the trunk of his car were normal implements of his trade, and that he was elsewhere in Hatteras at the time of the commission of the crime.

The jury, under appropriate instructions, found defendant guilty of felonious breaking and entering, felonious larceny, and simple assault. Defendant appealed.

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

Kellogg, Wheless, and White, by Thomas L. White, Jr., for defendant.

BROCK, Judge.

[1] Defendant assigns as error the allowance of the in-court identification of defendant by the prosecution witness, William Z. Burrus. Witness Burrus first identified defendant at a lineup prior to trial. Defendant contends, on appeal, for the first time, that the lineup as conducted was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. He argues that the record is void of any evidence that defendant was advised of his right to have an attorney present at the lineup or that he had waived this right to counsel at the lineup. Defendant also argues that the in-court identification by Burrus was tainted by the improprieties of the lineup and should not have been allowed.

"When the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged in the indictment, and the defendant interposes timely objection and requests a *voir dire* or asks for an opportunity to 'qualify' the witness, such *voir dire* should be conducted in the absence of the jury and the competency of the evidence evaluated." *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583. The record does not support defendant's contention that the pretrial lineup was conducted in an impermissibly suggestive manner. In the present case, there was no objection to the in-court identification of the defendant and there was no request for a *voir dire.* Defendant cannot for the first time raise this challenge on appeal. *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104. This assignment of error has no merit.

[2] Defendant excepts to the admission of testimony by Deputy Sheriff Pledger as to the presence of certain articles in the trunk of defendant's automobile. The witness testified, over objection, that he saw a small pry bar and a leather satchel similar to State's Exhibits 6 and 7 in the trunk of defendant's automobile. The witness observed these items when Officer Pilgreen opened the trunk of defendant's automobile to secure for defendant a coat which was located in that portion of the car. After being stopped at the roadblock and while the police waited for a search warrant, defendant stated that he was cold and wanted his coat which was in the trunk of his car. Defendant gave his permission to open the trunk and gave his car keys to Officer Pilgreen for that purpose. Witness Pledger testified only to what he observed in plain view when Officer Pilgreen opened the trunk. This assignment of error is without merit.

[3] Defendant excepts to the introduction into evidence of State's Exhibits 6-16, consisting of articles obtained from the trunk of defendant's automobile. Defendant contends for the first time on appeal that these exhibits were obtained through an illegal search and seizure and should be excluded. No objection was made at trial to the introduction of these exhibits into evidence. When exhibits are received in evidence without objection, any violation of constitutional rights involved is waived. Stansbury, N. C. Evidence (Brandis Revision) § 121a, p. 376; *State v. Mitchell,* 276 N. C. 404, 172 S.E. 2d 527. This assignment of error is overruled.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM TELL JOHNSON

No. 7310SC459

(Filed 11 July 1973)

1. **Criminal Law § 43— video tape — admissible as other photographic evidence**

   A video tape recording of sight and sound taken by means of a closed circuit television camera is a motion picture admissbile under the rules and for the purposes of any other photographic evidence.

2. **Criminal Law § 43— observation through closed circuit TV — admissibility of video tape for illustration**

   Where three witnesses watched on a closed circuit television monitor as defendant approached and made contact six times with a desk on which a billfold containing fifteen dollars lay, the video tape of the events was admissible for the purpose of illustration in a prosecution charging defendant with larceny, even though the witnesses did not observe the events with the naked eye.

APPEAL by defendant from *Blount, Judge,* First January 1973 Special Criminal Session of WAKE County Superior Court.

Defendant was convicted in District Court of larceny of property of the value of not more than two hundred dollars, a misdemeanor in violation of G.S. 14-72(a). Defendant was sentenced to imprisonment for four months. He appealed and was tried *de novo* in the superior court. Upon a finding of guilty by

the jury, defendant was sentenced to imprisonment for eighteen to twenty-four months.

Attorney General Robert Morgan by Assistant Attorney General William F. O'Connell for the State.

T. Dewey Mooring, Jr. for defendant appellant.

CAMPBELL, Judge.

Defendant was employed by Occidental Life Insurance Company as a mail supply clerk. On the afternoon of 10 October 1971 Mr. Carl S. Biathrow mounted a closed circuit television camera in the ceiling of the third floor hallway of the building in which Occidental Life Insurance Company is located. He aimed the camera toward a desk in the hallway, and connected it by electrical cable to a television monitor in an adjoining room. The TV camera was also connected to a magnetic tape recorder which was capable of recording both sound and vision.

Biathrow testified that he had had about two hours' instruction on the use and operation of the video tape equipment; that he focused the camera lens to give a clear and accurate picture of the desk and surrounding area on the TV monitor screen; and that the video tape is capable of and did in fact accurately record a true picture of that part of the hallway which he observed, and all activity of people within the view of the camera.

On the morning of 11 October 1971 Biathrow placed a billfold on the desk which contained a five dollar bill and one ten dollar bill, part of each bill extending from the billford. He recorded the serial numbers of the two bills on a piece of paper which he kept in his possession. At about 11:00 a.m. he went into the room in which the monitor and tape were located and switched on the video tape machinery. At that time he was receiving a clear and accurate picture of the hallway and desk. Mrs. Betty Jo Spivey was standing at the desk when Biathrow went into the monitor room; he saw her on the screen. She then joined him in the monitor room, and the two of them were later joined by Mr. Billy Hare, defendant's immediate supervisor. Both Hare and Biathrow planned the surveillance for a morning on which they knew that defendant would be delivering mail to the third floor desk.

The witnesses watched the TV monitor screen from about 11:00 a.m. until 11:30 a.m. They saw four persons enter the

field of vision: two secretaries who worked on the third floor walked quickly across the picture and did not approach the desk; Mrs. Linda Perry entered the picture twice, and approached the desk one time; the defendant, William Tell Johnson, entered the picture about six times, and "made contact with the desk either four or five times. By making contact, I mean that he was touching either the desk or something on it."

Biathrow watched Mrs. Spivey return to her desk. He then switched off the camera and recorder and went to the desk. The money was no longer in the billford. About one hour after the filming, the tape was shown to defendant and he identified himself in the picture. He explained that he was receiving and delivering the mail at the desk. Johnson was searched, but the money was not found on his person; his automobile was also searched, but no money was discovered.

On 11 February 1972 the two bills were found hidden behind boxes in the supply room where defendant worked.

The video tape film was admitted into evidence to explain or illustrate the testimony of the witnesses, and was shown to the jury.

Defendant contends that since the witnesses did not view any of the events with the naked eye, but were able to see only by means of the television camera, therefore they were not actually witnesses, and the video tape could not be used to illustrate their testimony.

[1] A motion picture is admissible in evidence to explain or illustrate the testimony of witnesses. *State v. Strickland,* 276 N.C. 253, 173 S.E. 2d 129 (1970). A video tape recording of sight and sound taken by means of a closed circuit television camera is a motion picture. *People v. Heading,* 39 Mich. App. 126, 197 N.W. 2d 325 (1972). The video tape should be admissible under the rules and for the purposes, then, of any other photographic evidence.

In the instant case there was testimony that the video tape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area "photographed." A proper foundation was made for its admission.

[2] The witnesses, however, did not observe the events recorded with the naked eye. We feel that such is not a prerequisite to the admission of the video tape. The witnesses actually ob-

served a factual event at the time it was actually taking place. The mechanical or electrical device by which they were enabled to view is of no consequence so long as it is accurate. We are not constrained to believe that a sequence of events in fact did not occur simply because the only witnesses to that event saw it on television. With respect to the "naked eye" requirement, compare the language of *Williams v. State,* 461 S.W. 2d 614 (Tex. Crim. App. 1971), in which a camera recorded the crime simultaneously while the victim saw with his naked eye that he was being robbed.

The situation in the instant case is analogous to that of the physician testifying as an expert with respect to the subject of an X-ray photograph, which photograph is admissible. *Branch v. Gurley,* 267 N.C. 44, 147 S.E. 2d 587 (1966). The eyes of the physician-witness did not penetrate the flesh of the patient to see the bones within, yet the X-ray photograph of that bone structure is admissible to illustrate his testimony of what he saw *by means of the X-ray itself.*

We feel that in the instant case the video tape was properly admitted, and the jury was properly instructed as to its limited use for illustration of oral testimony of the witnesses.

It has been held in North Carolina that a photographic reconstruction of the crime is inadmissible. *State v. Matthews,* 191 N.C. 378, 131 S.E. 743 (1926). "But where the motion picture is taken *without artificial reconstruction,* i.e., at the time and place of the actual event (a possibility not infrequent), it lacks the above element of weakness [i.e., the risk of misleading] and is entitled to be admitted on the same principles as still photographs." 3 Wigmore, Evidence, § 798a, p. 260 (Chadbourn Rev. 1970).

No error.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. WILLIAM PENN HOWELL AND DWIGHT ELLIOT SYMONDS

No. 7319SC451

(Filed 11 July 1973)

Searches and Seizures § 3— insufficient affidavit — oral information before issuing magistrate — sufficiency of affidavit and information together

Though the affidavit in question was insufficient on its face to support the issuance of a search warrant in that it did not state the underlying circumstances from which the affiant concluded that the undisclosed informant was reliable and it did not state the underlying circumstances upon which the informant concluded that a crime had taken place or was taking place at the named premises, information given orally and under oath to the issuing magistrate and the affidavit together were sufficient to support issuance of the search warrant; therefore, defendants' motions to exclude from evidence the LSD gained as a result of the search were properly denied.

APPEAL by defendants from *Long, Judge,* 22 January 1973 Session of RANDOLPH Superior Court.

Defendants were found guilty of possession of lysergic acid diethylamide (LSD) on 3 August 1972 in Asheboro, North Carolina, and sentenced to imprisonment each for a term of two to four years.

The prosecution arose out of the discovery of LSD in Symonds' apartment pursuant to a search conducted on 3 August 1972, which search was authorized by a search warrant.

Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey for the State.

Bell, Ogburn & Redding by John N. Ogburn, Jr., for defendant appellants.

CAMPBELL, Judge.

The affidavit supporting the issuance of the search warrant reads as follows:

> "David Marshall, Special Agent, SBI, being duly sworn and examined under oath, says under oath that he has probable cause to believe that Dwight Symonds has on his premises certain property, to wit: Lysergic acid diethylamide, the possession of which is a crime, to wit:

possession for the purpose of distribution of a controlled substance, included in Schedule I of the North Carolina Controlled Substance Act. The property described above is located on the premises described as follows: Top apartment of a two story structure, green asbestos siding, located at 1332 South Fayetteville St., Asheboro, N. C. The downstairs was Formally (sic) Kearns Television and is now unoccupied. The facts which establish probable cause for the issuance of a search warrant are as follows: On Thursday morning, August 3, 1972, affiant received information from a confidential source that that affiant has been found to be accurate and reliable in the past. This source advised that there were 25 four way hits of 'Orange Berkley' located in the back room of the aforementioned and described location. Affiant believes 'Orange Berkley' to be same as 'Orange Sunshine' which is drug jargon for Lysergic acid diethylamide."

This affidavit, on its face, is insufficient to support the issuance of a search warrant. It does not contain a statement of the underlying circumstances from which the affiant concluded that the undisclosed informant is reliable, and it does not contain the underlying circumstances upon which the informant concluded that a crime had taken place, or was taking place at the named premises. *Aguilar v. Texas,* 278 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964).

On voir dire examination Agent Marshall testified that he told the issuing magistrate, under oath, the following facts (in summary): (1) That the informant was newly employed as such by the agent, and that the agent did not want to give facts in the affidavit which may lead to disclosure of the informant's identity; (2) That on 2 August 1972 the informant had personally been inside the apartment and there purchased a quantity of LSD; (3) That the informant described the house and the upstairs apartment; (4) That while the informant had not given in the past any information leading to the arrest of any persons, he had given the agent names of people in the drug business, with which names the agent was familiar.

The issuing magistrate testified that the S.B.I. agent had told him that there was a large amount of traffic to and from defendant's residence.

The above information, if it had been contained in the written affidavit, would have been sufficient to supply reason-

able cause to believe that search of the described premises would reveal the presence of LSD. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972).

Must that information be contained in a written affidavit made under oath?

Fed. R. Crim. P. 41(c) states: "A warrant shall issue *only on affidavit* sworn to before the judge or commissioner and establishing the grounds for issuing the warrant." (Emphasis added.) At least six federal courts of appeals have interpreted that rule to require a "four corners" approach: That all data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath. See *United States v. Anderson,* 453 F. 2d 174 (9th Cir. 1971); *United States v. Pinkerman,* 374 F. 2d 988 (4th Cir. 1967); *United States v. Sterling,* 369 F. 2d 799 (3rd Cir. 1966); *United States v. Freeman,* 358 F. 2d 459 (2d Cir. 1966); *Rosencranz v. United States,* 356 F. 2d 310 (1st Cir. 1966); and *United States v. Whitlow,* 339 F. 2d 975 (7th Cir. 1964).

G.S. 15-25.1 (now repealed) tracked the language of Federal Rule 41 in requiring a warrant to issue "only on affidavit," and in *State v. Milton,* 7 N.C. App. 425, 173 S.E. 2d 60 (1970), this Court held that an insufficient affidavit could not be supplemented by oral testimony before the issuing magistrate.

G.S. 15-25(a) now provides that designated judicial officers "may issue a warrant to search . . . upon finding probable cause for the search." G.S. 15-26(b) now provides that "An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant." There is no language in these North Carolina statutes which limits the judicial officer's attention only to those facts recited in a written affidavit taken under oath. *State v. Flowers,* 12 N.C. App. 487, 183 S.E. 2d 820, *cert. denied,* 279 N.C. 728, 184 S.E. 2d 885 (1971).

In 1972 our Supreme Court held:

> "It is not necessary that the affidavit contain all the evidence properly presented to the magistrate. *State v. Elder,* 217 N.C. 111, 6 S.E. 2d 840. G.S. 15-26(b) requires only that the affidavit indicate the basis for the finding of probable cause. We do not interpret this portion of the

statute to impose a requirement upon the magistrate to transcribe all the evidence before him supporting probable cause. Such an interpretation would impose an undue and unnecessary burden upon the process of law enforcement." *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1972).

We hold that the affidavit and the supporting testimony heard by the issuing magistrate together were sufficient to support a finding of probable cause to issue the search warrant, and that therefore the defendants' motions to exclude the evidence gained as a result of that search were properly denied.

We have reviewed all other assignments of error and find no prejudicial error.

Affirmed.

Judges MORRIS and PARKER concur.

NEWMAN BROTHERS, INC., PLAINTIFF v. WIND KING MANUFACTURING COMPANY, DEFENDANT, AND G. H. BUTLER, ADDITIONAL DEFENDANT

No. 7323SC263

(Filed 11 July 1973)

Sales § 17— breach of warranty action — erroneous entry of summary judgment

In this action for breach of warranty against the manufacturer of a trenching machine, there were genuine issues of material fact as to the agency of the seller of the machine for the manufacturer and with respect to the alleged breach of warranty by the manufacturer, and the trial court erred in entering summary judgment against plaintiff.

APPEAL by plaintiff from *Kivett, Judge,* 30 October 1972 Session of Superior Court, WILKES County.

This action was commenced by plaintiff to recover damages from the defendant for an alleged breach of warranty. Additional defendant, G. H. Butler, was joined in the action upon the motion of the defendant. The appeal raises no questions involving the additional defendant.

Defendant, Wind King Manufacturing Company, moved for summary judgment. At the hearing on the motion, the trial

judge considered the record in the cause, the pleadings of the parties, and the deposition of Silas J. Newman, president of the plaintiff corporation.

The foregoing tended to show that the plaintiff is a corporation organized under the laws of North Carolina, having its principal place of business in Elkin, North Carolina. The defendant is a corporation organized under the laws of Iowa, and was the manufacturer of the "Mark 20 Digz-All" trench and ditch digging machine. G. H. Butler sold the trenching machines in North Carolina. On 20 May 1970, Butler sold to Silas J. Newman a Digz-All trenching machine for the amount of $3500. Prior to the purchase of the machine, Butler demonstrated the machine to Newman and represented to Newman that " . . . the hydraulic system and hydraulic pump on the machine was a revolutionary and superior design over all other existing ditch and trench digging machines; and represented to the plaintiff that because of the revolutionary design in the machine's hydraulic systems, the machine had been designed and manufactured as a light weight compact unit which was easy to transport . . . , yet the same horsepower and digging capacity of much larger and heavier machines. . . . "

At the time of purchase, Newman also received a written warranty reading as follows:

> "Digz-All Trenchers are manufactured with the best materials by skilled workmen under supervised quality control. Therefore, the manufacturer guarantees warranty on material and workmanship for a period of 90 days from the date of purchase. Except on expendable items such as teeth, belts, chain, etc., which are subject to normal wear and the engine which is warranted by the manufacturer. Warranty parts must be returned to the factory for credit."

In his deposition, Mr. Newman testified that, " . . . Mr. Butler told me, that . . . you only used the amount of oil that was required to manipulate the machine, and therefore, the overheating problem had been resolved and it was a revolutionary break-through in hydraulics. . . . As far as I was concerned, it was revolutionary. And that's how it was represented to me as being. The power unit itself supplies power to the pump and the pump itself delivers the transporting of the machine. Everything that it does is done by the hydraulic motor.

" . . . The part of [the] machine that I have had my major problem with is what was represented to me as being the heart

of the machine—this revolutionary hydraulic pump. . . . The wheels wouldn't turn. It wouldn't crawl. . . . The problems that I had with this hydraulic pump, it would get where it wouldn't deliver enough horsepower to move the machine out of its tracks. . . . "

Newman further testified that Butler attempted to repair the trenching machine 18 or 20 times, and that before the 90-day written warranty expired Newman told Butler that he wanted a new machine or his money refunded, and that "I waited till they got a factory man there to give them another chance to see what they was going to do. I mean, you know, I tried to be reasonable." The factory representative attempted to repair the machine in September, 1972, but his efforts were also unavailing.

The evidence also tended to show that Butler resided in Raleigh, North Carolina, and that he traveled to plaintiff's place of business to demonstrate the Digz-All trenching machine. Newman testified in his deposition that Butler " . . . demonstrated this machine to me and represented himself as being a representative of Digz-All Trencher Manufacturing Company [a division of Wind King Manufacturing Company]. He never represented himself to me as being a dealer or an independent contractor. He was a salesman for or a representative of the manufacturer. . . . " In the complaint, the plaintiff alleged, in paragraph four:

> "That on the 20th day of May, 1970, when G. H. Butler of Raleigh, North Carolina, sold to the plaintiff the Mark 20 Digz-All trench and ditch digging machine, that he was acting as the agent of the defendant, Wind King Manufacturing Company and as a distributor and agent in the State of North Carolina while engaged in the business of the defendant as the employee and agent and distributor of the defendant and on the 20th day of May, 1970, made the sale to the plaintiff while acting within the course and scope of such agency and employment."

From summary judgment entered against the plaintiff on 30 October 1972, the plaintiff appealed to the Court of Appeals, assigning error.

Franklin Smith for plaintiff appellant.

Finger and Park, by Daniel J. Park, for defendant appellee.

MORRIS, Judge.

Upon the record before us, it is clear that there are genuine issues of material fact in regard to the agency of the additional defendant Butler for the corporate defendant, and also with respect to the alleged breach of warranty by the corporate defendant. Summary judgment is proper only where there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). Therefore, it was error for the trial judge to enter summary judgment in this case, dismissing the plaintiff's claim.

The judgment entered is

Reversed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN WAYNE SHELTON

No. 7321SC313

(Filed 11 July 1973)

1. **Criminal Law § 43— photographs of crime scene — admissibility for illustration**

Trial court in a safecracking case properly admitted photographs of the premises broken into where the photographs were identified by the owner of the premises and illustrated his testimony as to the location of the safe, layout of the building, markings on the floor and various items scattered around the building.

2. **Criminal Law § 112; Safecracking — sufficiency of accomplice testimony alone — instructions**

Trial court's instruction to the jury to be cautious in examining an accomplice's testimony was a sufficient instruction, particularly since the evidence of the accomplice was supported by other evidence.

3. **Criminal Law § 86— cross-examination of defendant — inquiry as to prior crimes**

Trial court in a safecracking case properly allowed the State to cross-examine defendant as to whether he had committed prior breakins with his alleged accomplice in the crime under consideration.

4. **Criminal Law § 91— motion for continuance — basis unstated — denial proper**

Where defendant's motion for continuance was made at the beginning of his trial but the basis therefor was not stated, defendant

was not prejudiced and the trial court did not abuse its discretion in denying the motion, though defendant suggested after the verdict was in and judgment entered thereon that he had not been notified by the solicitor which of the several cases against him calendared for that session would be tried.

APPEAL by defendant from *Wood, Judge,* 16 October 1972 Session of Superior Court, FORSYTH County.

Defendant was charged in a bill of indictment with attempted safecracking and entered a plea of not guilty. At trial the State introduced evidence which tended to show the following:

On 28 September 1971 at approximately 1:30 a.m., officers of the Winston-Salem Police Department arrived on the premises of Builder's Harbor, Inc., in response to a call that there was a breaking and entering in progress. As they arrived, the officers observed a white male running in front of the building. The officers gave chase and caught the subject who was later identified as Eddie Ray Spivey. After placing Spivey under arrest the officers entered the building. The front door had been pried open and a safe combination dial, a broken safe hinge, a hammer and a screwdriver were found in an inner office area. Scratch marks were observed on the floor leading to the rear of the building where the officers found a large black safe. A loaded 32-caliber revolver, a flashlight, a hatchet and a tire tool were found near the safe. The hinges were off the safe as well as the handle which opened the safe door, and the owner of Builder's Harbor, Emory Crawford, testified that there were marks on the safe that hadn't been there the evening before when he closed for business. With the exception of the gun and flashlight, the tools found scattered about the premises were taken from the inventory of Builder's Harbor.

The officers then proceeded through the building and out the front door where they found a 1968 Plymouth automobile parked in front of the building. Later it was determined that the automobile was registered in the name of the defendant, John Wayne Shelton. The key was in the ignition switch and the hood was still warm. A screwdriver and pry-bar could be seen on the floorboard inside the car. Officers then opened the car and searched inside. A wallet was found in the dash with identification showing that defendant was the owner.

Since another suspect had been seen running from the premises a bloodhound was called to the scene in an attempt

to pick up the subject's trail. The bloodhound led officers to a service station where one of the attendants told officers that he had given a ride to two strangers who were later determined to be AWOL servicemen and not in any way connected with the break-in at Builder's Harbor. Meanwhile Officer S. L. Harmon checked the Builder's Harbor building for fingerprints and one print of defendant Shelton was detected on the butt of the flashlight found near the safe.

Eddie Ray Spivey took the stand and testified that in the early evening hours of 27 September 1971, he and defendant were drinking beer and shooting pool at the Ardmore Taproom. They left the taproom and went to a chicken place called the Wishbone where they broke in and took some money and a gun. They then proceeded to Builder's Harbor, broke open the front door and attempted to open the safe they found in one of the inner offices. They knocked the combination dial off the safe and attempted to take the safe door off its hinges. Being unsuccessful they dragged the safe to the rear of the building and were trying to open it when police officers arrived at the scene. Both men ran from the building, and defendant was not caught by the officers.

The gun found at Builder's Harbor was identified by the owner of the Wishbone as being the one missing from his premises after the break-in on 27 September.

The State rested and in brief summary the following evidence was presented by defendant:

On the evening of 27 September 1971 defendant and Eddie Ray Spivey were drinking beer at the Ardmore Taproom and at about 8:30 defendant left with Doris Miller. Since defendant felt he had had too much to drink he asked Doris to drive her own car and gave the ignition key to his own vehicle to Spivey. Defendant and Doris went to another night spot and then went to Spivey's trailer near Stanleyville at approximately midnight. Defendant testified that no one was at home and that he and Doris watched the late show on TV before retiring for the night. The next morning defendant heard on the news that Spivey had been apprehended and then called the police to report that his automobile was missing. Defendant also offered testimony that tended to show the presence of the two AWOL servicemen in the area of Builder's Harbor on the night in question.

On State's rebuttal, Cathy Spivey, wife of Eddie Ray Spivey, testified that on 27 September 1971 before she and Eddie were married, she was living at Eddie's trailer. Vicky McBride and Doris Miller stopped in that evening for approximately 15 minutes and they were the only visitors she had all night. She also testified there was no TV in the trailer. The next morning defendant Shelton called and informed her that Eddie had been apprehended by the police at Builder's Harbor and that he had been with Eddie but had eluded the officers.

The case was submitted to the jury who found defendant guilty. Judgment was entered imposing an active sentence of not less than 15 nor more than 25 years from which defendant appealed.

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

H. Glenn Pettyjohn for defendant appellant.

MORRIS, Judge.

Defendant brings forward 17 assignments of error in his brief. However, he has not set forth any properly numbered exceptions upon which those assignments of error are based as required by Rule 28, Rules of Practice in the Court of Appeals of North Carolina, and those exceptions "will be taken as abandoned by him." Nevertheless, in order to determnie that justice is done, we have carefully reviewed the record on appeal with respect to all assignments of error brought forward in defendant's brief.

[1] Defendant's first assignment of error is directed to the action of the trial court in allowing into evidence, for the purpose of illustration, photographs of the premises of Builder's Harbor following the break-in. His contention that the State did not properly authenticate the photographs prior to their introduction is not supported by the record. Prior to the introduction of the photographs, Emory Crawford, owner of Builder's Harbor, described the premises immediately following the break-in as to the location of the safe, layout of the building, markings on the floor and the various items found scattered around the building. When handed the photographs depicting various scenes of the premises and asked if he could identify them, Crawford in each instance did so.

The accuracy of a photograph as a true representation of the scene, object or person it purports to portray may be established by any witness who is familiar with such scene, object or person, or who is competent to speak from personal observation. *State v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824 (1948). The photographs were properly admitted into evidence for the purpose of illustrating Crawford's testimony, and this assignment of error is overruled.

[2] Next we examine defendant's contention that the trial court erred in failing to charge the jury that there must be evidence to corroborate the accomplice's (Spivey's) testimony that connects defendant with the crime.

> "In some jurisdictions an *accomplice* must be corroborated, but in North Carolina the unsupported testimony of an accomplice is sufficient to convict if it satisfies the jury beyond a reasonable doubt. However, it is proper to instruct the jury to be cautious in convicting on such testimony, and refusal to give an appropriate instruction when requested is prejudicial error." 1 Stansbury's North Carolina Evidence, Brandis Rev., § 21, pp. 52-53, and cases cited therein.

The trial court did instruct the jury to be cautious in examining Spivey's testimony. Additionally, in this case the evidence of the accomplice was supported by other evidence. This assignment of error is also without merit.

[3] Defendant also contends that the trial court erred in permitting the State to cross-examine defendant about the commission of other crimes of which there was no evidence. Most of the questions dealt with whether the defendant had committed prior break-ins with Eddie Ray Spivey and to each question defendant answered in the negative.

> "It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. (Citations omitted.) Such questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial

judge, and (2) the questions must be asked in good faith." *State v. Williams,* 279 N.C. 663, 675, 185 S.E. 2d 174 (1971).

Nothing appears in the record that would indicate any abuse of discretion by the trial court or lack of good faith on the part of the State, and defendant's argument is without substance.

[4] Finally, we examine defendant's contention that the trial court improperly denied his motion for a continuance. When the motion was made at the beginning of the trial, the basis therefor now relied upon was not stated. It was only after the verdict was in and judgment entered thereon that defendant suggested that he was not notified by the solicitor which of the several cases against defendant calendared for that session would be tried. Nor has defendant shown any prejudice. Absent an abuse of discretion, a motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling thereon is not subject to review on appeal. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971). No abuse of discretion has been shown. This assignment of error is overruled.

All of defendant's other assignments of error have been carefully examined. No prejudicial error has been made to appear.

No error.

Judges BROCK and PARKER concur.

STATE OF NORTH CAROLINA v. ALPHONZO CLARK

No. 7315SC453

(Filed 11 July 1973)

1. **Indictment and Warrant § 13— bill of particulars — denial proper**

Trial court in a murder prosecution did not abuse its discretion in denying defendant's motion for a bill of particulars.

2. **Jury § 7— non-capital case — number of peremptory challenges**

In this murder prosecution where the court announced that under no circumstances would the death penalty be imposed on defendant on account of the charges for which he was being tried, the case ceased to be a capital case, and defendant was therefore entitled to only six peremptory challenges. G.S. 9-21(a).

3. **Criminal Law § 76— admission of codefendant's confession — no prejudice to defendant**

Trial court did not err in admitting into evidence the confession of a codefendant with whom defendant was tried where the confession made no reference to defendant by name and was not prejudicial to him.

4. **Criminal Law § 34— murder prosecution — evidence of assault by defendant — admissibility to show quo animo**

In a prosecution for the murder of a student on school grounds, the trial court did not err in admitting evidence of an assault on another student occurring immediately before the alleged crime, since such evidence was competent to show *quo animo*, the intention or motive of defendant.

APPEAL by defendant from *Cooper, Judge,* 11 December 1972 Session of ORANGE Superior Court.

By indictment proper in form, defendant was charged with the murder of Donnie Riddle (Riddle) on 1 February 1972. In a separate indictment one Archie Parker was charged with the same offense and, over defendant's objection, the cases were consolidated for trial.

Evidence for the State tended to show:

On 1 February 1972, during school hours, defendant, Archie Parker (Archie) and several other nonstudents, armed with knives, went onto the Orange High School premises at Hillsborough looking for one Stewart Horn who allegedly had kidnapped Archie the night before.

Around 3:15 that afternoon Vernon F. Copeland (Copeland), assistant principal at Orange High School, left the school building to supervise the loading of school buses. Copeland went to the bus parking lot located between Stanford Junior High School (Stanford) and the high school. After supervising the loading of four buses, he heard a "commotion" and saw students "gathered around." He approached the group and saw that one student's eye was bleeding. Copeland took the injured student to get medication, then proceeded back to the bus parking lot where he saw some boys who were not students going through the buses. As Copeland entered the front door of a bus, two boys whom he recognized as Archie Parker and Alvin Parker (Alvin) went out the back door of the bus. Copeland approached the boys and Alvin said, "Mr. Copeland, what do you have to do with this," to which Copeland replied: "I have to protect the students. [N]o one is looking for trouble so I suggest you leave or else you will be picked up for trespassing."

At this point Copeland recognized the defendant and one Richard Crocker (Crocker) in company with Archie and Alvin. After Alvin spoke to Copeland, defendant, Archie, Alvin, Crocker and one Joe Clark (Joe) pulled open knives from their pockets and advanced toward Copeland. Copeland began to back up, then turned and walked toward the buses. Moments later a student yelled for Copeland to "look out." Copeland turned around and saw defendant, Archie, Alvin, Crocker and Joe running after him; Alvin was out in front swinging a golf club. Copeland motioned to Billy Goodwin (Goodwin), a student bus driver, to help him; Goodwin took a few steps toward Copeland and the five turned and chased Goodwin. They grabbed him, threw him on the ground and began beating him. Defendant stabbed Goodwin with a knife, inflicting a wound requiring hospitalization.

Copeland told a student to tell Mr. Claytor, principal at the high school, to call the police and then sought medical aid for Goodwin.

While Goodwin was being beaten, Riddle (decedent) was standing on the hill at Stanford, saw Goodwin being attacked, ran to his car, got a B.B. gun, and ran back toward the bus parking lot. Defendant and Archie grabbed Riddle and threw him on the ground. Riddle kicked Archie and Archie swung at Riddle and stabbed him in the abdomen with a knife. Defendant then picked up the B.B. gun, hit Riddle in the stomach with it and broke the gun over Riddle's head.

Riddle died approximately six hours after receiving the wounds aforesaid. A pathologist testified that on 2 February 1972 at about 9:00 a.m., he examined Riddle's body and found three different wounds. There was a tear and bruise on the left side of the scalp above the ear which produced bleeding into the tissues beneath the tear, bleeding into the cranial cavity under the skull bone and bleeding into the brain itself. The pathologist attributed this wound to a blunt blow to the head. The second wound was a stab wound to the upper abdominal region below the right rib cage. This wound had penetrated a small tip of the right lung, penetrated the pancreas, gone through the liver and had torn both major abdominal blood vessels. The third wound was a sharp cut on the deceased's left hand. The doctor expressed the opinion that death resulted from severe abdominal bleeding attributable to the laceration of the main abdominal vessels.

Defendant offered no evidence. A jury found defendant guilty of voluntary manslaughter and from judgment imposing prison sentence of twenty years, defendant appealed. (Archie Parker was also found guilty of voluntary manslaughter but his is a separate appeal.)

Attorney General Robert Morgan by Howard P. Satisky, Assistant Attorney General, for the State.

Chambers, Stein, Ferguson & Lanning by Adam Stein for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the denial of his motion for a bill of particulars, contending that the court violated G.S. 15-143 and his right to due process of law. This assignment has no merit. The statute clearly provides that a motion for a bill of particulars is addressed to the discretion of the trial judge and our courts have held consistently that the trial judge's ruling on the motion is not subject to review except for palpable and gross abuse of discretion. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967); *State v. Robinson,* 15 N.C. App. 362, 190 S.E. 2d 270 (1972); cert. den. 281 N.C. 762. We perceive no abuse of discretion.

[2] Defendant assigns as error the court's limiting him to six peremptory jury challenges. This assignment is without merit.

G.S. 9-21(a) provides that in *capital* cases each defendant is entitled to fourteen peremptory challenges and in all other criminal cases, each defendant is entitled to only six peremptory challenges. A *capital* case has been defined as one in which the death penalty may, but need not necessarily, be imposed. *Lee v. State,* 31 Ala. App. 91, 13 So. 2d 583, 587 (1943). The case at bar ceased to be a capital case when, before the selection of jurors began, the court announced that under no circumstances would the death penalty be imposed on defendant on account of the charges for which he was being tried. Furthermore, assuming *arguendo* that defendant was entitled to fourteen peremptory challenges, it would appear that he waived his right to complain when he used only five peremptory challenges. See *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969).

[3] Defendant assigns as error the admission into evidence of the confession of codefendant Archie Parker with whom de-

fendant was tried. Defendant contends that the confession implicated him and constituted prejudicial error, particularly when defendant had objected to a consolidated trial and in the absence of an instruction to the jury not to consider the confession as against defendant. We find no merit in this assignment.

The record discloses that the confession, provided through the testimony of Deputy McCullock, made no reference to defendant by name. Defendant contends that when McCullock referred to "one of the men" or made a similar reference in relating the confession, the jury was able to conclude that the reference was to defendant. We reject the contention. The evidence showed that several others in addition to defendant and Archie were together at various times during the day of the alleged offense and were present when the offense occurred. We hold that the confession was not prejudicial to defendant. See *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972).

[4] Defendant assigns as error the admission of evidence pertaining to the assault on Billy Goodwin, contending that the only effect of evidence of that separate offense was to excite prejudice against defendant. This assignment has no merit.

The general rule is that evidence of a distinct, substantive offense is inadmissible to prove another and independent crime; but to this there is the exception that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, *scienter,* or to make out the *res gestae,* or to exhibit a chain of circumstantial evidence in respect to the matter on trial, when such crimes are so connected with the offense charged as to throw light on one or more of these questions. *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232 (1943).

The evidence complained of under this assignment tended to show that defendant and Parker went onto the Orange High School grounds on 1 February 1972 "looking for trouble." We hold that evidence of the assault on Goodwin was competent to show *quo animo,* the intention or motive of defendant. The 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 to be without merit, they too are overruled.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. ARCHIE PARKER

No. 7315SC458

(Filed 11 July 1973)

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

Where a witness's identification of defendant was based on her observation of defendant when he looked at her in the face at the crime scene, the in-court identification of defendant was of independent origin and not connected with any photographic exhibition or tainted by illegal procedures.

2. **Criminal Law § 90— State's witness — questioning by solicitor**

The court may allow the solicitor to cross-examine either a hostile or an unwilling witness to refresh the witness's recollection and enable him to testify correctly and for this purpose the solicitor may call the attention of the witness to statements made by him on other occasions.

3. **Criminal Law § 89— prior statement by witness — admissibility for corroboration**

The trial court did not err in admitting for the purpose of corroboration a statement made by a witness to a deputy sheriff prior to trial as to what occurred at the time of the murder under consideration, particularly where the deputy's statement and the witness's testimony were generally consistent.

APPEAL by defendant from *Cooper, Judge,* 11 December 1972 Session of Superior Court held in ORANGE County.

This defendant is the Archie Parker referred to in *State v. Alphonzo Clark, ante.* 621. As stated in that opinion, written by Judge Britt, Parker was tried with Clark for the murder of Donnie Riddle. Parker was convicted of voluntary manslaughter and judgment was entered imposing a prison sentence of twenty years. The evidence as summarized in the opinion in *Clark* will not be repeated here. Facts not set out in *Clark* and necessary for an understanding of our decision in this case will be set out in the opinion.

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

Midgette, Page & Moore by Joseph I. Moore, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant argues that the court erred in allowing, after objection and *voir dire,* the in-court identification of defendant by one Ida Chambers, a girl who had been talking with Riddle, the deceased, just before he was fatally stabbed. The witness testified that after Riddle returned to the scene with a "BB" gun, he was jumped and beaten by two people, ". . . then one of them took out a knife and stabbed [Riddle] and then looked me in the face and that's how I can identify him. The one who looked up at my face is Archie Parker." After making appropriate findings of fact, all of which are supported by the evidence, the court concluded that this in-court identification of defendant was of independent origin and not connected with any photographic exhibition or tainted by illegal procedures. The record supports the judge's conclusions. The photographic identification procedures used were not impermissibly suggestive and the witness's identification of defendant is shown by clear and convincing evidence to be of independent origin. This assignment of error is overruled.

[2] Other assignments of error arise out of the testimony of Richard Crocker, driver of the car in which defendant, Clark and others rode to the school on the day of the killing. The State called Crocker to testify. Defendant contends the State was allowed to impeach the witness by cross-examination and by allowing another witness, a deputy sheriff, to testify as to an earlier statement made by Crocker. The court may allow the solicitor to cross-examine either a hostile or an unwilling witness to refresh the witness's recollection and enable him to testify correctly and for this purpose the solicitor may call the attention of the witness to statements made by him on other occasions. *State v. Anderson,* 283 N.C. 218, 195 S.E. 2d 561. The trial judge did not abuse his discretion in this case.

[3] We also hold that there was no prejudicial error in allowing the deputy sheriff to testify as to earlier statements by Crocker. The solicitor asked the deputy if, when he talked with Crocker on 2 February 1973, Crocker gave him a statement as to what occurred at the time of the killing. Defendant objected to the question. The court, without request, instructed the jury that the testimony was for the purpose of corroborating Crocker if the jury should find that it did corroborate. The court then overruled defendant's objection. The deputy, without further objection, testified as to what Crocker had told him, apparently

reading from a written statement signed by Crocker. Defendant did not object to or move to strike any part of the deputy's testimony as to the statement. It was not error for the court to overrule defendant's objection to the solicitor's question because the question was proper. If defendant was of the opinion that any part of the statement constituted the introduction of new evidence or that it was a contradictory statement disguised as corroborative evidence it was his duty to object to that part. *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354. We have, nevertheless, compared the deputy's statement with Crocker's testimony and find that the two are generally consistent. The slight variations do not render the statement inadmissible but only affect credibility, which is always for the jury. *State v. Brooks, supra.*

This defendant, as did defendant Clark, assigns error because of admission of evidence of the attack on Billy Goodwin. For the reasons stated in *Clark,* this assignment of error is overruled.

Defendant assigns error to the admission, over objection, of testimony which related a statement he had made prior to trial. The court's finding and conclusion after *voir dire* are supported by the record and need not be set out here. The court did not err in admitting the testimony.

Defendant's other assignments of error have been considered and are overruled. We find no prejudicial error in defendant's trial.

No error.

Judges BRITT and HEDRICK concur.

DOROTHY C. HILKER v. LUCY KNOX

No. 7310SC496

(Filed 11 July 1973)

1. **Negligence § 59— duty of landowner to licensee**

An invited guest in the home of the owner is a licensee to whom the owner owes the duty to refrain from willful or wanton negligence and from the commission of any act which would increase the guest's hazard.

2. **Negligence § 59— injury to licensee — failure to show actionable negligence — summary judgment proper**

In an action to recover for personal injury sustained by plaintiff when she fell off defendant's porch, the trial court properly granted defendant's motion for summary judgment where plaintiff's evidence tended to show that, on the night of the accident, it was windy, raining and very dark, that plaintiff preceded defendant through the front door and onto the front porch where plaintiff paused to wait for defendant to lock the house, that the porch was partially lit but that defendant caused the area suddenly to become pitch-black, either by closing the front door or by extinguishing the light.

APPEAL by plaintiff from *Godwin, Judge,* 5 February 1973 Civil Session, WAKE Superior Court.

In this action plaintiff seeks to recover damages for personal injuries arising out of a fall suffered by plaintiff while visiting as a social guest at the home of defendant.

At the hearing on defendant's motion for summary judgment, plaintiff introduced her affidavit, pertinent parts of which are summarized as follows: On the evening of 24 September 1969, she was an invited guest in the home of defendant, arriving at said home at approximately 6:15 p.m. After supper plaintiff and defendant planned to visit plaintiff's husband who was then a patient at Rex Hospital, and following the visit they intended to proceed to plaintiff's home for the remainder of the night. As plaintiff and defendant were leaving defendant's home at approximately 8:15 p.m., it was windy, raining and very dark. Plaintiff preceded defendant through the front door and onto the front porch where plaintiff paused to wait for defendant to lock the house. The distance from the front door to the edge of the porch was approximately twelve feet, and at the edge of the porch there were two steps leading down to a paved walkway. There were outside light fixtures on both sides of the front door. The front porch was faintly lit, either by the outside lights or by light coming from inside the house through the open doorway. As plaintiff approached the edge of the porch, defendant, either by extinguishing the porch lights or by closing the front door, suddenly and without warning caused the entire porch area to become "pitch-black." As a result of suddenly being thrown into complete darkness, plaintiff stepped past the edge of the porch and fell "headlong" down the steps and onto the paved walkway.

At the hearing defendant introduced plaintiff's deposition, pertinent portions of which are summarized as follows:

Plaintiff was born on 26 June 1907. On 14 July 1961 she had an accident involving her left leg and hip and on the night in question was walking with the aid of a cane. Prior to the night in question, plaintiff had visited defendant's home approximately ten times and on those occasions she would enter the home at the front door. As one approaches the front of defendant's home, there is a short sidewalk that goes up to the porch. Then there are two steps leading up to the porch and beyond the porch from the steps is the front door. On the date in question, plaintiff arrived at defendant's home about 6:15 p.m. Plaintiff parked her car in front of defendant's home, turned the lights off, walked up the front sidewalk, up the steps and onto the porch. It was raining, windy and dark. With respect to leaving defendant's home, plaintiff testified:

> "As we were leaving we both walked to the hall and she opened the front door and pushed the screen open and said 'Go ahead, Dot, and let me find my keys and lock the door and I will come on.' I started out and with the light on in the hall I could see the porch there for about four or five feet, and I went to the right side because I wanted a column or something to help me get down the steps. I did not hold on to the column because I never reached the column. The column is at the edge of the porch. It was so dark that I could not see one thing after she locked that door and I would assume turned out the light.
>
> Q. But you don't know?
>
> A. I wouldn't swear to it, no.
>
> I fell on the porch before I got to the column. One minute I was on the porch and the next minute I was laying flat on the sidewalk. The edge of the porch there was covered with water and, of course, I was trying to dodge that rubber mat with the holes. I do not know what caused me to fall. Like I said one minute I was on the porch walking toward the column to help me down and the next thing I was lying on the sidewalk."

Defendant moved for summary judgment pursuant to Rule 56(b) on the grounds that the pleadings and other materials presented to the court show as a matter of law that there is

no triable issue of material fact and that defendant is entitled to judgment as a matter of law. Following a hearing, the motion was allowed and from judgment denying plaintiff any recovery and taxing her with the costs, plaintiff appealed.

Young, Moore & Henderson by Charles H. Young, Jr., for plaintiff appellant.

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

BRITT, Judge.

[2] We hold that the court did not err in rendering summary judgment in favor of defendant. In our opinion, neither in her affidavit nor in her deposition did plaintiff show actionable negligence on the part of defendant that would support a verdict on the issue of negligence.

[1] Plaintiff concedes that on the occasion in question, she was a licensee. This concession, that an invited guest in the home of the owner is a licensee and not an invitee, is fully supported by the authorities. *Cobb v. Clark,* 265 N.C. 194, 143 S.E. 2d 103 (1965); *Murrell v. Handley,* 245 N.C. 559, 96 S.E. 2d 717 (1957); *Clarke v. Kerchner,* 11 N.C. App. 454, 181 S.E. 2d 787 (1971); cert. den. 279 N.C. 393.

The duty defendant owed plaintiff in the case at bar was to refrain from willful or wanton negligence and from the commission of any act which would increase plaintiff's hazard. *Dunn v. Bomberger,* 213 N.C. 172, 195 S.E. 364 (1938); *Clarke v. Kerchner, supra.* Although plaintiff testified orally that she would not swear that plaintiff extinguished the light, and "I do not know what caused me to fall," she argues that on the motion for summary judgment she was entitled to have the evidence and materials presented considered in the light most favorable to her and that in her affidavit she stated that defendant caused the sudden darkness on the porch either by extinguishing the light or closing the front door.

[2] Should we agree with plaintiff that she was entitled to have the evidence and materials considered in the light most favorable to her, with all conflicting statements resolved in her favor, we do not think her statement that defendant *either* extinguished the light or closed the door would entitle plaintiff to go to the jury on the question of negligence. Assuming,

arguendo, that extinguishing the light would be "an act which would increase the hazard," we cannot perceive that closing the front door under the circumstances shown would constitute actionable negligence. If the jury were allowed to consider the issue of negligence on two alternative possibilities, one of which does not constitute negligence, there would be no way of knowing that a finding of negligence was based on a showing of negligence.

The judgment appealed from is

Affirmed.

Judges MORRIS and PARKER concur.

LEROY CASTLE v. B. H. YATES COMPANY, INC.

No. 7314DC382

(Filed 11 July 1973)

1. **Trial § 14— motion to reopen case**

The trial court did not abuse its discretion in the denial of plaintiff's motion made at the close of all the evidence that he be permitted to reopen his case in order to offer additional evidence.

2. **Rules of Civil Procedure § 41— nonjury trial — motion to dismiss at close of evidence**

Although G.S. 1A-1, Rule 41(b), does not provide for a motion for involuntary dismissal made at the close of all the evidence, plaintiff was not prejudiced by the allowance of such a motion made by defendant where the trial court thereafter entered a judgment on the merits pursuant to G.S. 1A-1, Rule 52.

APPEAL by plaintiff from *Read, District Court Judge,* at the 30 October 1972 Session of District Court held in DURHAM County.

Plaintiff instituted this action to recover $3,897 in commissions allegedly due from defendant pursuant to a written contract entered into on 23 September 1969. Defendant counterclaimed alleging damages for lost profits as a result of plaintiff's breach of contract. This case was heard before the court sitting without a jury.

In September 1969, plaintiff and defendant entered into a written "Sales Representative Agreement" in which plaintiff

agreed to act as sales representative for defendant company in North and South Carolina. Plaintiff presented evidence which tended to show: that defendant company, at the time of this agreement, was a manufacturer's representative in those two states for several companies, including Nester/Faust, Inc., and Forma Scientific, Inc.; that plaintiff, as an independent contractor, "subcontracted" with defendant company to represent its clients; that plaintiff did in fact sell various equipment manufactured by Nester/Faust, Inc., and Forma Scientific, Inc., between 4 November 1969 and 2 July 1970, for which he had not received any commission; that this contract was terminated, pursuant to the provisions of the contract, on 15 September 1970; and that as of 26 May 1971, the date this action was instituted, such commissions due from defendant company totaled $3,897.

The contract provided that plaintiff's commission would be 50% of all commissions that defendant company received on orders credited to plaintiff's territory. The contract also specifically provided that no commissions shall be due or payable to plaintiff until defendant company receives payment of its commissions from the manufacturer.

At the close of the plaintiff's evidence, defendant's motion for an involuntary dismissal pursuant to Rule 41(b) of the N. C. Rules of Civil Procedure was denied. Defendant offered no evidence, rested its case, and sought to withdraw its counterclaim and submit to a voluntary dismissal without prejudice. At the close of all the evidence, defendant renewed its motion for an involuntary dismissal of plaintiff's action.

After the renewal of defendant's motion for an involuntary dismissal at the close of all the evidence, plaintiff made a motion to reopen his case by recalling B. H. Yates, president of defendant company, for the purpose of inquiring into the amount of commissions which defendant company had received on orders taken by plaintiff and represented by invoices introduced as plaintiff's evidence. The court denied this motion.

Defendant's motion for an involuntary dismissal was allowed in an order dated 24 November 1972. On that same day, the court entered a judgment on the merits which included the following findings of fact: that pursuant to the terms of the contract, plaintiff was entitled to no commissions until defendant received payment of said commissions from the manufac-

turer; and that plaintiff does not know and did not offer any evidence that any commissions had, in fact, been paid to defendant and the amounts thereof. The court concluded that plaintiff had failed to prove that defendant owed him any commissions pursuant to the terms of the contract, and ordered that plaintiff have and recover nothing of the defendant. The court also dismissed defendant's counterclaim without prejudice. Plaintiff appealed.

Powe, Porter, Alphin & Whichard, P.A., by J. G. Billings, for plaintiff.

Haywood, Denny & Miller, by John C. Martin, for defendant.

BROCK, Judge.

[1] Plaintiff assigns as error the trial court's refusal of his motion to be permitted to reopen his case in order to offer additional evidence. Plaintiff proposed to recall B. H. Yates, president of defendant company, for the purpose of inquiring into the amount of commissions defendant company had received on certain orders taken by plaintiff. This motion was made at the close of all the evidence. The court denied this motion after noting that Mr. Yates was present in court and capable of walking to the witness stand.

The trial court, in its discretion, may allow plaintiff or defendant to introduce further evidence after they have rested. *Rose & Day, Inc. v. Cleary,* 14 N. C. App. 125, 187 S.E. 2d 359. Plaintiff had ample opportunity, before he rested, to offer any evidence he wished to offer in support of his claim. He has failed to demonstrate any abuse of discretion in the trial court's denial of his motion. This assignment of error is overruled.

[2] Plaintiff assigns as error the court's allowance of defendant's motion for involuntary dismissal at the close of all the evidence. Plaintiff contends that the allowance of this motion at the end of all the evidence is inconsistent with the denial of an identical motion at the close of plaintiff's evidence and so constitutes reversible error. We find no merit in this contention.

In this case, defendant aptly made a motion for involuntary dismissal at the close of plaintiff's evidence. The motion was denied at that time. At the close of all the evidence, defendant sought to renew such motion for involuntary dismissal on the

grounds that upon the facts and the law plaintiff had shown no right to relief. The trial court allowed this motion and then entered a judgment on the merits, making findings of fact and conclusions of law pursuant to G.S. 1A-1, Rule 52 of the North Carolina Rules of Civil Procedure.

Rule 41(b) of the Rules of Civil Procedure does not provide for a motion for involuntary dismissal made at the close of all the evidence. The fact that defendant made such a motion which is not sanctioned under the rules and that the trial judge inadvertently allowed it, in no way prejudiced plaintiff. The trial judge thereafter entered a judgment on the merits pursuant to Rule 52. Plaintiff has not excepted to any of the findings of fact or conclusions of law contained in that judgment.

Affirmed.

Judges HEDRICK and VAUGHN concur.

PAUL J. WILLIAMS v. PEGGY W. WILLIAMS

No. 7326DC25

(Filed 11 July 1973)

Divorce and Alimony § 23— child support — failure to consider ability of father to pay

Where plaintiff did not appear and no evidence was offered as to his health, employment, earnings or earning capacity in a hearing instituted by defendant seeking an increase in the amount of child support paid by plaintiff, the trial court erred in granting the increase without first making a finding of fact as to plaintiff's ability to pay.

APPEAL by plaintiff from *Belk, District Judge*, 17 July 1972 Session of District Court held in MECKLENBURG County.

Defendant and plaintiff entered into a separation agreement in March 1968 which provided, among other things, that plaintiff should pay $350/month to defendant as child support for the benefit of the two children born of the marriage. Defendant retained custody of the two minor children. Plaintiff obtained an absolute divorce in March 1969.

Defendant filed this motion in the cause on 26 April 1972, seeking an increase in the amount of child support paid by

plaintiff for the support of their two minor children. Defendant also sought an award of attorney's fees. She alleged a substantial increase in expenses for the support and maintenance of the two children, and that, because of this increase, the $350/month child support specified under the separation agreement was insufficient to support the children in accordance with the custom and standards to which they were previously accustomed. The court issued an order to plaintiff to appear at a hearing in district court on defendant's motion, and to show cause why, if there were any, he should not be required to increase the support payments for the children born of the marriage. The order also directed plaintiff to bring with him to the hearing all books and records indicating: the plaintiff's earnings in the previous year, including Federal tax returns; all amounts he may have on deposit in Building & Loan and other institutions; and all real and personal property owned by plaintiff. Defendant was also served with a subpoena directing her to bring to the hearing all records of her expenditures during 1971-1972, including bank statements and cancelled checks.

At the hearing, defendant testified as to the increased expenses related to the support of the two minor children. She was not able to produce any bank statements or cancelled checks, which she explained she did not save after she checked her monthly balance. Plaintiff was not called as a witness, nor did he appear on his own behalf. Plaintiff's financial records were also not produced into evidence.

The court found as a fact that defendant had experienced an increase in expenses for the support and maintenance of the children, that the sum of $350 paid by plaintiff as child support pursuant to the separation agreement was insufficient to support the children in light of the increased expenses related to child support, and that there was "no evidence presented in Open Court as to the circumstances of the plaintiff." The court ordered plaintiff to pay child support to defendant in the amount of $550, and also to pay defendant's attorney's fees.

Plaintiff appealed.

Mraz, Aycock, Casstevens & Davis, by Gary A. Davis, for plaintiff.

Robert F. Rush for defendant.

BROCK, Judge.

Plaintiff excepts to the court's order allowing an increase in the amount of child support which plaintiff was paying to defendant under the separation agreement. Plaintiff contends that it was necessary for the court to make a finding of fact that plaintiff was financially able to pay such an increase, and that no such finding of fact was made.

No evidence was offered at the hearing with respect to plaintiff's health, condition, employment, earnings, or earning capacity. Defendant did allege in her motion that plaintiff was a practicing attorney in Charlotte, N. C., that he earned large sums of money, that he had income of several thousand dollars from an estate, and that he was able to support his children in accordance with the custom and standard formerly enjoyed by them. However, no evidence was offered at the hearing to support these allegations. In fact, the court specifically found that no evidence was presented in open court "as to the circumstances of the plaintiff."

It is generally recognized that decrees entered by our courts in child custody and support matters, or written agreements with respect to such matters, are impermanent in character and are subject to alteration by the court upon a change of circumstances affecting the welfare of the child. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77; *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487. The welfare of the child is paramount in matters of custody and maintenance, "yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child *and* the ability of the father to meet the needs." (Emphasis added.) *Crosby v. Crosby, supra; accord, Fuchs v. Fuchs, supra.*

At the hearing, no evidence was offered as to plaintiff's ability to pay increased child support. A determination of such ability to pay was an essential prerequisite of an order for increased child support payments. Appellant is entitled to another hearing in which the court will consider the ability of the plaintiff to pay increased child support—*i.e.,* plaintiff's earnings or earning capacity, his financial circumstances, and his living expenses—as well as the needs of the minor children. The defendant and the court are not without a method to compel the production of plaintiff's records, and to compel plaintiff's attendance and testimony. G.S. 1A-1, Rule 45(f).

The order appealed from is vacated and the case remanded for a new hearing on defendant's motion.

Vacated and remanded.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. LARRIE D. GIBBS AND WILLIAM TAYLOR

No. 7312SC398

(Filed 11 July 1973)

1. **Robbery § 4— aiding and abetting in robbery — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of armed robbery where it tended to show that defendant and his codefendant approached the victim at a bus stop, that the codefendant engaged the victim in conversation, pulled a pistol, and forced the victim to surrender money and a cigarette lighter, that before anything was taken from the victim the defendant came up to the codefendant and they exchanged words, that defendant then went to the corner and waited, that defendant and the codefendant fled together and were discovered together shortly thereafter in a pool hall, that the codefendant was holding a coat worn by defendant at the time of the robbery, and that the gun used in the robbery, the stolen cigarette lighter and some money were found in the pocket of the coat.

2. **Criminal Law § 84; Searches and Seizures § 1— coat in immediate control — search incident to arrest**

Where defendant stood up and placed a trench coat on a poolroom bar when he saw officers enter the poolroom, and defendant was ordered up against the wall and frisked, the trench coat was in the "immediate control" of defendant so as to permit officers to search the coat without a warrant as an incident of defendant's arrest, and a pistol and cigarette lighter found in a pocket of the coat were properly admitted in defendant's trial for armed robbery.

APPEAL by defendants from *Braswell, Judge,* 8 January 1973 Criminal Session, Superior Court, CUMBERLAND County.

Defendants were charged in separate bills of indictment with the armed robbery of Terry L. Hilderbrand. After pleading not guilty, they were found guilty by a jury, and from judgments imposing active sentences of 15 years for Taylor, and 5 years for Gibbs, both appealed.

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

Kenneth Glusman, Assistant Public Defender, Twelfth Judicial District, for defendant appellants.

MORRIS, Judge.

Appeal of Defendant Gibbs

[1] Defendant Gibbs contends on appeal that the trial court erred in denying his motion for judgment as of nonsuit because insufficient evidence was presented that would support a reasonable inference that he acted in concert with defendant Taylor, the actual perpetrator of the crime. On motion for nonsuit the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. Only the evidence favorable to the State is considered, and contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. *State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845 (1971). Taking the State's evidence in its most favorable light, that evidence tended to show the following:

On 17 November 1972 at approximately 6:00 p.m., Terry Leverne Hilderbrand was waiting at a bus stop at the corner of Hay and Hillsboro Streets in Fayetteville, N. C., when approached by the defendants, Larrie D. Gibbs and William Taylor. Taylor walked directly up to Hilderbrand, and Gibbs walked behind the bus stop out of Hilderbrand's sight. Taylor engaged Hilderbrand in a short conversation and then pulled a pistol out and ordered Hilderbrand to step back from the corner. Hilderbrand was forced to surrender approximately $15 to $16 from his wallet, approximately $2 in change from his pocket, and a cigarette lighter with a missing emblem. Before Taylor actually took anything from Hilderbrand, Gibbs came up to Taylor, and they exchanged a few words. Gibbs then walked to the corner and waited. He was wearing glasses, a hat and a white trench coat at the time. After Taylor took Hilderbrand's money and lighter, he and Gibbs ran down Hillsboro Street toward Bragg Boulevard. Hilderbrand then flagged down two policemen, reported the holdup and gave the officers a description of the two men. Hilderbrand and the two policemen then proceeded in the general direction in which the defendants had fled and

checked out several bars. They entered the Action Pool Room and Hilderbrand pointed out both defendants to the officers who placed the defendants under arrest.

Taylor had a white trench coat draped over his arm, and, upon seeing the officers, he stood up and placed the coat on the bar. Taylor was ordered up against the wall and frisked. Also the trench coat was picked up by the officers and a pistol, cigarette lighter and six one dollar bills were found in the pockets. The cigarette lighter had an emblem missing. Hilderbrand also identified the pistol as the one used by Taylor. Gibbs was also searched, but no money or weapon was found on his person.

Clearly the evidence adduced above is sufficient to raise a reasonable inference that Gibbs was acting in concert with Taylor. This assignment of error is overruled.

Appeal of Defendant Taylor

[2] Defendant Taylor asserts on appeal that the trial court erred in allowing into evidence the pistol and cigarette lighter taken from the white trench coat in violation of his Fourth Amendment rights. Defendant concedes that a valid arrest was made but argues, on the authority of *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969), that a warrantless search incident to a valid arrest is limited to that area in the immediate vicinity from which defendant could possibly obtain a weapon and do damage to an arresting officer and that the officers exceeded this limitation in the case at hand. We do not agree.

In *Chimel* the following was stated:

> "In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefor, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain pos-

session of a weapon or destructible evidence." 395 U.S. at 763, 89 S.Ct. at 2040, 23 L.Ed. 2d at 694.

Our State Supreme Court has also held:

"In the course of such search, the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof." *State v. Roberts,* 276 N.C. 98, 102, 171 S.E. 2d 440 (1970).

In light of the above principles, it was clearly permissible for the officers to seize the trench coat, which had been connected to the defendants by Hilderbrand's description, and search for weapons and items related to the crime charged. Not only was the coat itself evidence, but it was in the "immediate control" of defendant at the time of his arrest.

No error.

Judges BROCK and PARKER concur.

MID-STATE SERVICE CO., INC. v. THEODORE A. DUNFORD, INDIVIDUALLY, AND THEODORE A. DUNFORD T/A BIFF BURGER

No. 7321SC432

(Filed 11 July 1973)

1. **Taxation §§ 33, 34— tax liens on personalty and on realty**

As a general rule a tax on real property becomes a lien on that real property as of the date the property is listed; a tax on personal property becomes a lien on that personal property only after levy or attachment of the personal property taxed and becomes a lien on real property only when both the realty and personalty are owned by the same owner.

2. **Taxation § 34— improvements — tax lien on land — effective date of statute**

Statute creating a tax lien on land for improvements made thereon by one other than the owner of the land, G.S. 105-355(a)(2), did not become effective to create a lien until the first business day of January 1972.

3. **Taxation § 25— sale of building and personalty by lessee of land — no duty to list for taxes**

Where the lessee of land sold a building and all personal property on the land in 1968, the lessee had no statutory duty to list that prop-

erty for taxation or to pay ad valorem taxes thereon for the years 1969-1971.

4. **Taxation § 25— lessee's obligation to pay taxes — termination by cancellation of lease**

Defendant lessee's obligation under a lease to pay ad valorem taxes on improvements to the land for the years 1969-1971 was extinguished when plaintiff lessor, for consideration paid by defendant, released and cancelled the lease in 1971.

APPEAL by plaintiff from *Collier, Judge,* 15 January 1973 Session of FORSYTH County Superior Court.

This is a civil action in which plaintiff sought recovery of the amount of taxes paid to avoid a lien on its real property, along with damages.

Plaintiff alleged that on 8 April 1963 defendant leased from it a tract of real property located in Winston-Salem, North Carolina, and renewed that lease for five years on 29 April 1968. It was alleged that the terms of the lease obligated defendant to pay ad valorem taxes on all improvements to the land, while the plaintiff was to continue to list and pay tax on the realty alone. The lease contract was not made a part of the record.

The defendant moved a trailer building onto the land, and operated a small restaurant. In 1968 the defendant sold the building and all personal property on the land to Arthur R. Miller.

In 1971 the tenant's building and other personal property were destroyed by fire. On 25 October 1971 in consideration of $2,100.00 and a sign installed and located on the property, plaintiff released and cancelled the lease. Defendant was to remove all personal property.

In April 1972 plaintiff received notice from the Forsyth County-City Tax Collector that defendant had failed to pay ad valorem taxes on the building and other personal property for the years 1969, 1970 and 1971, and that these taxes were a lien on the plaintiff's land.

Plaintiff made demand that defendant pay the taxes, defendant refused, and plaintiff paid $2,964.23 in assessed taxes and instituted this action.

Defendant moved to dismiss under Rule 12(b) (6) for failure of the complaint to state a claim upon which relief may be

granted. As grounds for allowing such motion the trial court found (1) that the ad valorem taxes for the years "1968, 1969, and 1970" were assessed against personal property of the defendant, not listed in the name of the plaintiff, that the taxes therefore did not constitute a lien on plaintiff's real property, and that the plaintiff voluntarily paid without protest that tax assessment; (2) and that the plaintiff released the defendant from all obligation under the lease contract which release is a bar to this action.

Goodale and Daetwyler by Ralph E. Goodale for plaintiff appellant.

Dees, Johnson, Tart, Giles & Tedder by J. Sam Johnson, Jr. for defendant appellee.

CAMPBELL, Judge.

[1] As a general rule a tax on real property becomes a lien on that real property as of the date the property is listed. A tax on personal property becomes a lien on that personal property only after levy or attachment of the personal property taxed. Also generally, a tax assessed against personal property becomes a lien on real property only when both the realty and personalty are owned by the same owner.

[2] G.S. 105-355(a)(2) provides that "Taxes levied on improvements on or separate rights in real property owned by one other than the owner of the land . . . shall be a lien on both the improvements or rights and on the land." That statute authorizes a tax lien on the land to which improvements are connected for the value of the tax on those improvements. This lien attaches the date the land is listed. Section 355(a)(2), however, was not effective until 1 July 1971, and could not operate to create a lien until the next listing period, which, under G.S. 105-307, began on the first business day of January 1972.

The tax against the personal property located on plaintiff's land for the years 1969, 1970, and 1971 was not a lien on plaintiff's real property.

[3] Nevertheless, did the defendant have an obligation to pay those taxes which the plaintiff paid and now seeks to recover? We think not.

In 1968 defendant sold the personal property to Arthur R. Miller. G.S. 105-304, effective in 1968, and G.S. 105-306(c)(1),

effective 1 July 1971, both provide that personal property shall be listed in the name of the owner thereof, and that it is the duty of the owner to list personal property for taxation. Further, the owner of the equity of redemption in personal property subject to a chattel mortgage shall be considered the owner of the property.

Since the defendant was not the owner of the property in the years 1969, 1970, or 1971, he had no statutory duty to list that property for taxation, or obligation to pay ad valorem taxes assessed against that property.

[4] Defendant's only obligation to pay, then, must arise from the lease contract, which the plaintiff did not incorporate into its complaint. The plaintiff did plead, however, that on 25 October 1971, by mutual agreement, the plaintiff and defendant terminated the lease. Any obligation the defendant may have had to pay taxes was extinguished with the release and cancellation of the lease contract.

The complaint alleged tax arrearages for the years 1969, 1970, and 1971. The judgment of the trial court recited years 1968, 1969, and 1970. Except for the inconsistency of the judgment and complaint, which is immaterial, the judgment is

Affirmed.

Judges BRITT and BALEY concur.

FIRST-CITIZENS BANK AND TRUST COMPANY v. WILLIAM K. McDANIEL, ROBERT D. LASLOCKY, ROBERT R. BAKER, AND J. STERLING DAVIS, JR.

No. 7310SC439

(Filed 11 July 1973)

Process § 9— action on endorsement — personal service on nonresident individual

Where defendant individually endorsed a promissory note given to a bank in this State by the corporate borrower of which defendant was the vice president, defendant's promise by his endorsement to repay the loan made to the corporation is a promise to pay for a service rendered in this State within the purview of G.S. 1-75.4 and constitutes sufficient minimal contact upon which the courts of this State may assert personal jurisdiction over defendant; therefore, courts

of this State obtained *in personam* jurisdiction over defendant, a resident of New Jersey, in the bank's action against defendant on his endorsement when the summons and complaint were personally served on him in New Jersey.

APPEAL by defendant Laslocky from *Hobgood, Judge,* 17 January 1973 Civil Session of WAKE County Superior Court.

In July 1969 Cameron Village Pet Center, Inc., a North Carolina corporation also known as Docktor Pet Center of Cameron Village and Docktor Pet Stores of Cameron Village, applied to plaintiff, First-Citizens Bank and Trust Company, for a loan of money. On condition that the corporate officers endorse the note, a loan agreement was made. On 8 July 1969 a promissory note in the amount of $51,999.60 was signed for Docktor Pet Center of Cameron Village by R. D. Laslocky as Vice President of the corporation and by William K. McDaniel as Treasurer. On the reverse side of the note both Laslocky and McDaniel signed individually as endorsers.

The corporation has since defaulted in payment and has gone into bankruptcy. First-Citizens Bank and Trust Company brought suit against defendants on their endorsements, and on the written guarantee of payment executed under seal by defendants other than Laslocky.

Laslocky is a citizen and resident of the State of New Jersey. Summons and complaint were personally served on him on 4 November 1972 by a deputy sheriff of Camden County, New Jersey.

Defendant moved under Rule 12 that the action be dismissed against him because he was not personally served within North Carolina, and for the reason that there were no grounds for service outside the State under G.S. 1-75.4.

Laslocky's motion to dismiss was denied, and he appealed.

Hatch, Little, Bunn, Jones & Few by David H. Permar for plaintiff appellee.

Poyner, Geraghty, Hartsfield and Townsend by Marvin D. Musselwhite, Jr. for defendant appellant.

CAMPBELL, Judge.

In *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), the United States Supreme Court

defined the outer limits of *in personam* jurisdiction over nonresident defendants: "[D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

In *McGee v. International Life Ins. Co.,* 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957), the Court upheld jurisdiction over a nonresident defendant based only upon one contract to be performed in the forum state.

And in *Hanson v. Denckla,* 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958), the court indicated that "longarm" jurisdiction was not unlimited. A trust had been created in Delaware, the trustee being located in that State. Some ten years thereafter the settlor of the trust moved to Florida. That State attempted to exercise *in personam* jurisdiction over the Delaware trustee. The court found that the trustee had no contacts with the State of Florida and could not be forced to defend a lawsuit in that State. The *trustee* had not engaged in " . . . some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."

Thus, under *International Shoe, McGee,* and *Hanson* a single contract executed in North Carolina or to be performed in North Carolina may be a sufficient minimal contact in this State upon which to base *in personam* jurisdiction, with respect to the parties so contracting.

The above premise is codified in the North Carolina "longarm" statutes, G.S. 1-75.4(1) through (10), which statutory provisions are a legislative attempt to assert *in personam* jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the United States Constitution.

G.S. 1-75.4(5)(a) confers personal jurisdiction over foreign defendants in any action which

> "Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; . . . "

Where the nonresident defendant promises to pay the debt of another, which debt is owed to North Carolina creditors, such promise is a contract to be performed in North Carolina and is sufficient minimal contact upon which this State may assert personal jurisdiction over the defendant. *Koppers Co., Inc. v. Chemical Corp.*, 9 N.C. App. 118, 175 S.E. 2d 761 (1970).

We are of the opinion that clearly the lending of money to be repaid by the borrower is the rendering of a service by the lender to that borrower. It clearly follows therefrom that defendant's promise to pay the loan made by plaintiff to defendant's corporation is the promise to pay for a service rendered in this State, which payment also is to be made in this State.

Defendant's contract within this State comes within the provision of G.S. 1-75.4, and his connection with this State is sufficient to justify his being subjected to the jurisdiction of this State's courts.

No error.

Judges MORRIS and PARKER concur.

IN THE MATTER OF THE CHANGE OF NAME OF PEGGIE LORAIN DUNSTON TO PEGGIE LORAIN WEBB BY HER MOTHER, VELVET WEBB

No. 7314SC403

(Filed 11 July 1973)

Infants § 1— change of infant's name to that of stepfather — mother's consent only required

Neither the consent of a child's stepfather, nor a finding that the stepfather has abandoned that child is necessary in a petition by the natural mother of that child to have the child's name changed to that of the stepfather, as G.S. 101-2 requiring consent or abandonment is applicable only to parents, natural or adoptive, and not to stepparents.

APPEAL by petitioner from order of *Hall, Judge,* of the Superior Court, DURHAM County, 22 March 1973.

On 15 November 1972 Velvet Webb filed a petition with the Clerk of Superior Court of Durham County seeking to change the last name of her daughter, Peggie Lorain Dunston,

to Webb. This would make her name similar to that of her half sisters and be more convenient for school and social purposes.

Peggie Lorain Dunston, now age 15 years, was the illegitimate child of Velvet Dunston [Webb] and an unknown father. Her birth certificate listed no father's name.

On 30 January 1973, the Clerk of Superior Court of Durham County entered an order denying the name change on the ground that Sam Webb, the stepfather, had not consented to the application for change of name.

Velvet Webb appealed to the Superior Court, and on 22 March 1973, Judge C. W. Hall entered an order finding that absent the consent of Peggie Dunston's stepfather to her application for change of name, the name change could be accomplished only upon finding that Sam Webb had abandoned Peggie Dunston, his stepdaughter.

Attorney General Robert Morgan by Assistant Attorney General James Blackburn for the State.

William Woodward Webb for petitioner appellant.

CAMPBELL, Judge.

G.S. 101-2 provides that the Clerk of Superior Court may change the name of an applicant, upon 10 days' public notice of the filing of such application, and upon finding by the Clerk of good and sufficient reason for the change of name.

However, the name of a minor child may not be changed without the consent of both parents, if both be living, unless one of the parents has abandoned the minor child.

Abandonment is proved by filing with the Clerk a copy of an order of a court of competent jurisdiction adjudicating that such parent has abandoned such minor child.

In the event that a court of competent jurisdiction has not previously declared the child to be an abandoned child, the Clerk is authorized to determine whether an abandonment has taken place. Written notice of not less than 10 days to the parent alleged to have abandoned the child is required.

Petitioner contends that a stepparent is not a parent within the meaning of G.S. 101-2 whose consent is required in order to effect a change of name. It has not been contended either in

the lower court, or on appeal, that the child's natural father, whose identity is unknown, must consent to the name change.

It would appear that G.S. 101-2 was not designed to require the consent of the natural father to a name change where the child was born out of wedlock. This is apparent from G.S. 130-54.

G.S. 130-54 provides that when a child is born out of wedlock, the last name of the child shall be the same as that of the mother, or the person caring for the child when requested by such person *with the consent of the mother.* If it has been adjudicated in a court of competent jurisdiction that a mother has abandoned her child, then the consent required *of the mother* by this section shall not be necessary.

The issue, then, is whether G.S. 101-2 requires the consent of the *stepfather whose name the child wishes to adopt,* or in the alternative, a finding of his abandonment of the stepchild.

G.S. 101-2 speaks in terms of "parents," a father or mother. One is either a natural parent, or an adoptive parent. A stepfather is under no duty to support the children of his wife by a former marriage but can become so bound by placing himself *in loco parentis* to those children; he can become a parent only by adoption of the children born to his wife by a former marriage, or born out of wedlock, but not of his parentage.

G.S. 101-2 contemplates only the situation where one natural or adoptive parent petitions for the change of name of a child, and the other parent stands to lose his name with respect to that child. It has no application to a stepfather.

Under G.S. 130-54, a third person having care of an illegitimate child can petition to have the name of the child changed with only the consent of the child's natural mother. Where the natural mother petitions to change the name of her illegitimate child, the consent of no other person is logically required, as no other person has any "rights" inherent in that child's name.

We hold that neither the consent of a child's stepfather, nor a finding that the stepfather has abandoned that child is necessary in a petition by the natural mother of that child to have the child's name changed.

Reversed and remanded.

Judges MORRIS and PARKER concur.

ANTONIA UMEKA WILSON, MINOR, BY HER GUARDIAN AD LITEM, R. KASON KEIGER AND DELORES A. MOYER v. LORENZER GARDNER AND HUBERT JONES, D/B/A RUBY'S ICE CREAM COMPANY

No. 7321SC169

(Filed 11 July 1973)

Automobiles § 63— child struck by ice cream truck — insufficient evidence of negligence

Trial court properly directed verdict for defendants in a personal injury action where the evidence tended to show that defendant operated an ice cream truck, that he stopped in plaintiff's neighborhood to sell ice cream to children, that, when most of the children were gone, defendant determined that both sides of the truck were clear and it was safe to move, and that plaintiff fell into the side of the truck, sustaining injury, after it had progressed only a few feet.

APPEAL by plaintiff from *Gambill, Judge,* 2 October 1972 Civil Session of FORSYTH County Superior Court.

This is a civil action in which the minor plaintiff sought damages for personal injury arising out of an accident which was alleged to have been a proximate result of the defendant Gardner's negligence. Defendant Jones operated a business known as Ruby's Ice Cream Company and employed defendant Gardner to drive a truck from which ice cream was sold to customers in their neighborhoods. The truck was equipped with a bell and music box used to attract customers. On 30 July 1970 at about 8:15 p.m. a truck operated by Gardner entered the 900 block of Mock Street in Winston-Salem, North Carolina, and traveled slowly along the street broadcasting music. A group of about twenty children gathered at the curb by the truck. Plaintiff, among that group, was hit by the truck, and suffered the personal injury complained of.

On direct examination plaintiff's witnesses offered little evidence as to how the injury occurred. Joann Blackwell testified that:

> " . . . As to how the little girl got hurt, the children was running to meet the ice cream truck and in a few minutes I heard something that sounded like grit against the curb and she was hit by the ice cream truck. . . . When she was hit, I saw her there on the street. She was right against the curb. . . . After she was hit, the truck just rolled past her. The rear wheel hit her. I couldn't

tell you whether it ran over her. The noise I heard at the time she was hit sounded like grit or rocks against the curb."

Lorenzo Wilborn testified on direct examination that:

" . . . As to what happened from that point, he was coming down Mock Street, Lorenzer Gardner, he wasn't going fast, and when the children was going toward him, he—usually some of them turns off the bell, but his stayed on, and she ran out and got hit by the truck . . . . "

On cross-examination Joann Blackwell testified that:

" . . . She fell off the curb at a point when the front end of the truck had already gone by her. She fell off the curb right at the rear side of the truck. As soon as the child fell, Curley Mae, [a passenger in the truck] hollered out. As soon as that happened, Lorenzer stopped the truck. He just stopped immediately. . . . "

Lorenzo Wilborn further testified on cross-examination that:

" . . . What I saw happen was that the little girl fell off the sidewalk kind of into the side of the truck. I don't know if it was there at the back wheel. I saw her fall off the curb, but not so far out in the street, though; off the sidewalk, anyway. . . . "

Neither of these two witnesses were certain, or believed, that the defendant Gardner had stopped and sold ice cream to these children before the accident occurred.

Lorenzer Gardner, the defendant, testified as a witness for the plaintiff. He stated that he stopped about a foot from the curb beside the group of children, and that he had parked there for about thirty minutes selling ice cream before the accident occurred.

Gardner testified that before he began to leave most of the children had gone. He checked the rear vision mirror on the left side of the truck and saw nothing. His passenger, Curley Mae Wiseman, was standing in the doorway on the right side of the truck, looking to the rear. She told him that the right side of the truck was clear. He began to move forward, and immediately thereafter the passenger "started screaming and I stopped." Defendant estimated that he traveled four to five

feet before he was alerted to danger, and about four to five feet after the child was hit before the truck was completely stopped.

At the close of this evidence, on motion of defendants, the court directed a verdict for the defendants.

Wilson & Morrow by John F. Morrow for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr. and W. A. Holland, Jr. for defendant appellees.

CAMPBELL, Judge.

The plaintiff's evidence shows without contradiction that the plaintiff was on the curb and then fell into the rear of the moving truck. The evidence is undisputed that the defendant Gardner had determined before moving the truck that both sides of the truck were clear and that it was safe to move. Although some of the group of children were still in the vicinity, the driver had no duty to wait until all the children had left before he could move the truck. His duty was to exercise reasonable care to determine that the movement could be made in safety. The evidence shows that he took reasonable precaution to avoid any injury.

We feel that the proper rule of law to apply in this case is that followed in *Westbrook v. Robinson,* 11 N.C. App. 315, 181 S.E. 2d 231 (1971): A motorist operating his vehicle at a lawful speed is not liable for injuries to a child who runs into the street so suddenly that the motorist could not avoid striking him. And this is the rule even where the motorist was aware at the time of the presence of children on the sidewalk along the street.

No error.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. CLIFTON WOOTEN, JR.

No. 733SC411

(Filed 11 July 1973)

Shoplifting— allegation as to ownership of property — sufficiency of warrant

A warrant charging shoplifting under G.S. 14-72.1 was not rendered fatally defective though there was no allegation that the mer-

chandising firm from which the property was purportedly taken was a natural person or a corporation.

APPEAL by defendant from *Rouse, Judge,* 8 January 1973 Session, PITT Superior Court.

The complaint in the warrant on which defendant was tried charges as follows:

> "The undersigned, W. A. MacKenzie, being duly sworn, complains and says that at and in the County named above and on or about the 13 day of July, 1972, the defendant named above did unlawfully, wilfully, and feloniously and without authority conceal a Suede belt size 34—blue with 2 white stitched lines, an item of merchandise of Kings Dept. Store, 264 By Pass, Greenville, N. C., while still upon the premises of the Store and not having theretofore purchased such merchandise.
>
> The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 14-721."

Defendant was found guilty in district court and from judgment imposed there, he appealed to superior court where he pleaded not guilty. A jury found him guilty as charged and from judgment imposing prison sentence of six months, defendant appealed to the Court of Appeals.

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

Laurence S. Graham for defendant appellant.

BRITT, Judge.

The only assignment of error brought forward and argued in defendant's brief is that the trial court erred in denying defendant's motion to arrest the judgment. Defendant contends that the warrant is fatally defective for the reason that it does not show that King's Department Store, 264 By-Pass, Greenville, N. C., is a natural person or a legal entity capable of owning property; that shoplifting is a "descendent" of the crime of larceny, therefore, the rule applicable to larceny applies to shoplifting.

Defendant relies on *State v. Biller,* 252 N.C. 783, 114 S.E. 2d 659 (1960), and *State v. Thompson,* 6 N.C. App. 64, 169 S.E. 2d 241 (1969), in which cases the Supreme Court and this court declared that a warrant for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is fatally defective. Our attention has been directed also to *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901 (1960), in which the same rule was applied to the charge of embezzlement.

While we recognize the rule stated in *Biller* and *Thornton,* we do not think it is applicable to G.S. 14-72.1, the shoplifting statute under which defendant was charged.

Larceny is a common law offense, defined as the felonious taking by trespass and carrying away by any person of the goods or personal property *of another,* without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. *State v. McCrary,* 263 N.C. 490, 139 S.E. 2d 739 (1965).

The crime of embezzlement, unknown to the common law, was created and is defined by statute. *State v. Ross,* 272 N.C. 67, 157 S.E. 2d 712 (1967). With respect to the owner of the property embezzled or misappropriated, our embezzlement statute, G.S. 14-90, provides that the property alleged to have been misappropriated belonged "to any other person or corporation, unincorporated association or organization."

Our shoplifting statute, G.S. 14-72.1, provides in pertinent part as follows: "(a) Whoever, without authority, willfully conceals the goods or merchandise of *any store,* not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than six months, or by both such fine and imprisonment. Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment." (Emphasis added.)

It is well settled in this jurisdiction that statutes creating criminal offenses must be strictly construed, *State v. Ross, supra,* and it appears that our Supreme Court has applied the strict construction rule to common law offenses. The common law offense of larceny contemplates that the property taken must belong to or be in the possession of *another* and the

statutory offense of embezzlement provides that the misappropriated property must belong to "any other person or corporation, unincorporated association, or organization." In view of the breadth of the offenses of larceny and embezzlement, it is understandable that the court has declared that the warrant or bill of indictment charging these offenses must allege the ownership of the property either in a natural person or a legal entity capable of owning property.

Our statutory offense of shoplifting, however, is very limited in its application, particularly with respect to the owner or possessor of the property covered. In *State v. Hales,* 256 N.C. 27, 33, 122 S.E. 2d 768 (1961), we find: "The statutory offense created by G.S. 14-72.1 is composed of four essential elements: Whoever, one, without authority, two, willfully conceals the goods or merchandise *of any store,* three, not theretofore purchased by such person, four, while still upon the premises of *the store,* shall be guilty of a misdemeanor." (Emphasis added.)

Presumably G.S. 14-72.1, due to its narrow scope, would not cover property in a residence, bank, school or church—only "the goods or merchandise of any store." While drafters of warrants charging a violation of this statute would be well advised to allege whether the merchandising firm is a natural person or a corporation, we do not think the failure to do so in the case at bar rendered the warrant fatally defective.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. SHEILA GREER

No. 7325SC486

(Filed 11 July 1973)

1. Constitutional Law §§ 31, 32— trial two days after appointment of counsel

Where defendant was arrested on 3 August 1972 on a warrant, the indictment was returned in October 1972, and defendant filed an affidavit of indigency on 2 January 1973, the trial court did not err in appointing counsel for defendant on 2 January 1973 and placing de-

fendant on trial two days later where nothing occurred prior to the time defendant filed her affidavit of indigency to put the court or prosecution on notice that she could not provide her own counsel, no motion for a continuance was made and the record affirmatively shows that defendant was afforded effective assistance of counsel.

2. **Criminal Law § 113— recapitulation of testimony — no expression of opinion — failure to object**

In this prosecution for felonious distribution of heroin, the trial court did not misstate defendant's testimony and thereby express an opinion as to her credibility; furthermore, defendant waived objection to the court's recapitulation of the evidence by failing to object thereto at the trial.

ON *Certiorari* to review defendant's trial before *Falls, Judge,* 1 January 1973 Criminal Session of Superior Court held in CALDWELL County.

Defendant was indicted for feloniously distributing a controlled substance, LSD, by selling the same to one Nelson. She pled not guilty, was found guilty by the jury, and from judgment imposing a prison sentence, gave notice of appeal to the Court of Appeals. Petition for certiorari was granted to permit perfection of the appeal.

Attorney General Robert Morgan by Associate Attorney General Ralf F. Haskell for the State.

Paul L. Beck for defendant.

PARKER, Judge.

[1] Defendant was arrested on 3 August 1972 on a warrant which charged the offense for which she was ultimately tried and convicted. The indictment on which she was tried was returned as a true bill in October 1972. On 2 January 1973 she filed her affidavit of indigency and on the same date the court appointed Paul L. Beck attorney to represent her. Her trial occurred on 4 January 1973. She now contends that the trial court erred "in appointing counsel for defendant on 2 January 1973 and then placing defendant on trial on 4 January 1973." We find this contention without merit.

While "[u]nquestionably, the courts should make every effort to effect early appointments of counsel in all cases," *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975, in the present case the court did appoint counsel on the same day defendant's affidavit of indigency was filed. So far as

the record reveals nothing occurred prior to that date to put the court or the prosecution on notice that defendant was not well able to provide her own counsel. Further, the record affirmatively shows that defendant was afforded effective assistance of counsel at her trial. The case was a simple one factually and presented no unusual or difficult legal questions. The trial was completed in a single day. The State's witnesses were adequately cross-examined and defendant's alibi defense was fully developed through witnesses presented in her behalf. Nothing in the record suggests that defendant's counsel was in any way hampered by lack of time in preparing for and representing her at the trial. Apparently neither defendant nor her counsel then felt that additional time would have been to her advantage, for no motion for continuance was made. This assignment of error is overruled.

[2] We find defendant's only other assignment of error also without merit. In this she contends that in charging the jury the trial judge misstated her testimony and thereby expressed an opinion as to her credibility. Review of the record, however, reveals that the trial judge recapitulated defendant's testimony with reasonable accuracy and in no way expressed any opinion as prohibited by G.S. 1-180. "Furthermore, it is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge 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. The record does not indicate any objection made by defendant at the trial to the court's recapitulation of her testimony.

In defendant's trial and the judgment imposed, we find

No error.

Judges CAMPBELL and MORRIS concur.

JOAN CROFT SNYDER v. THOMAS B. SNYDER

No. 7310DC513

(Filed 11 July 1973)

Divorce and Alimony § 22— custody proceedings — prior acquired jurisdiction waived

Where an absolute divorce action was instituted in Mecklenburg County District Court and that court entered an order awarding custody of one child to defendant and providing for defendant to make support payments for the other three children who were in the custody of plaintiff pursuant to an out of court agreement, the District Court in Mecklenburg County had undertaken jurisdiction and became the proper venue of the case; however, when plaintiff instituted a custody action in Wake County where all four children had subsequently come to reside with defendant and defendant made no objection to it, the Wake County District Court had jurisdiction and the prior acquired jurisdiction in Mecklenburg County was waived by the parties.

APPEAL by plaintiff from *Winborne, Judge,* 12 February 1973 Session of District Court held in WAKE County.

This is a civil action wherein plaintiff, Joan Croft Snyder, seeks custody of four minor children born of her marriage to defendant, Thomas B. Snyder. The following facts are uncontroverted:

Plaintiff and defendant were formerly husband and wife, having been married on 26 March 1958. Subsequently, on 13 January 1969, they were divorced in the District Court held in Mecklenburg County. By order in that action dated 28 January 1970, custody of the oldest child of the marriage, Thomas B. Snyder, Jr., was awarded to his father, the defendant herein, and defendant was ordered to pay the sum of $262.50 per month for the support of Mark J. Snyder, Daniel L. Snyder, and Elizabeth A. Snyder, then residing with their mother, the plaintiff, pursuant to the terms of a separation agreement entered by the parties on 5 September 1967.

Thereafter, the three minor children, Mark J. Snyder, Daniel L. Snyder, and Elizabeth A. Snyder came to be under the direct control and supervision of their father in Wake County, North Carolina. Plaintiff then instituted this action on 15 July 1971 in the District Court held in Wake County to obtain their custody.

By an order dated therein on 26 April 1972, the custody of Mark J. Snyder and Daniel L. Snyder was awarded to the

defendant; and by order dated therein on 13 February 1973, the custody of Elizabeth A. Snyder also was awarded to the defendant.

Plaintiff appealed from the order dated 13 February 1973.

Hamel & Cannon, P.A., by Thomas R. Cannon for plaintiff appellant.

George M. Anderson for defendant appellee.

HEDRICK, Judge.

By her one assignment of error, plaintiff contends the District Court held in Wake County lacked jurisdiction to hear evidence and enter orders relating to the custody of Mark J. Snyder, Daniel L. Snyder, and Elizabeth A. Snyder, since the District Court held in Mecklenburg County, before the present proceeding was instituted, had entered an order relating to their custody and support.

We do not agree. The question is one of venue rather than jurisdiction. G.S. 50-13.5(f), captioned "Venue," in pertinent part provides:

> "An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, *until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action.*" (Emphasis ours.)

In discussing the foregoing statute in *In re Holt,* 1 N.C. App. 108, 112, 160 S.E. 2d 90, 93 (1968), Judge Brock wrote:

> "[W]here custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court. * * * Of course, if the custody and support has been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support

remains *in fieri* until the children have become emancipated." (Citations omitted.)

When the present action was commenced, plaintiff was a resident of the State of Maryland and the defendant and the three children were residents of Wake County. Therefore, unless an issue of custody and support of the three children had been raised and determined in the divorce action in Mecklenburg County, the District Court held in Wake County had authority to enter orders as to their custody. G.S. 50-13.5(f); *Wilson v. Wilson,* 11 N.C. App. 397, 181 S.E. 2d 190 (1971); *In re Holt, supra.*

In the complaint for absolute divorce the father alleged that the four children were in the custody of their mother and that he was contributing to their support under the terms of a deed of separation. The judgment of absolute divorce, entered 13 January 1969, does not appear as an exhibit in the record.

The record before use contains an order of the District Court held in Mecklenburg County awarding custody of the eldest child, Thomas B. Snyder, Jr., to his father. This order also provides for the father to make support payments for the other three children but makes no specific provision for their custody and merely recites that they are in the custody of their mother pursuant to an out of court agreement. Having made an order of support, the District Court held in Mecklenburg County had undertaken jurisdiction and thus became the proper venue of the case. *Tate v. Tate,* 9 N.C. App. 681, 177 S.E. 2d 455 (1970). Despite this, however, when the plaintiff instituted this action in Wake County and the defendant made no objection to it, the action was subject to determination in Wake County.

It is not a question of jurisdiction, which cannot be waived or conferred by consent, but it is a question of a prior pending action and this can be waived by failure to raise it. *Hawkins v. Hughes,* 87 N.C. 115 (1882). Under the statute, the District Court held in Wake County had jurisdiction and the prior acquired jurisdiction in Mecklenburg County was waived by the parties.

The order appealed from is

Affirmed.

Judges CAMPBELL and BALEY concur.

SHIRLEY HOLT WRIGHT v. LORINE WILSON HOLT

No. 7319SC478

(Filed 11 July 1973)

1. **Automobiles § 43; Judgments § 36— action by wife — prior action by husband — same defendant — no res judicata**

In an action to recover for injuries sustained by plaintiff in a collision between the vehicle driven by her husband and defendant's vehicle, the trial court did not err in refusing to allow into evidence the record of another action based on the same collision, but brought by plaintiff's husband against defendant, in which the issue of negligence had already been determined, since plaintiff was not a party to the prior action and was not bound by the judgment entered in that action.

2. **Trial § 50— statement overheard by juror — effect on verdict —refusal to set aside verdict**

In an action to recover for injuries sustained in an automobile collision where one of the jurors disclosed after the verdict that she had heard defendant make a statement in the rest room that the windshield of plaintiff's car was not broken, the trial court concluded after investigation that the statement had no prejudicial effect on the verdict and therefore refused to set it aside.

3. **Automobiles § 90— instruction on yielding right of way — duty to use reasonable care under circumstances**

The trial court's instruction in an automobile collision case with respect to G.S. 20-158 which provides that vehicles must stop and yield right-of-way at through highways properly told the jury that defendant's duty was reasonable care under the circumstances.

APPEAL by plaintiff from *Seay, Judge,* 8 January 1973 Session of Superior Court of RANDOLPH County.

Plaintiff instituted this action to recover for personal injuries arising out of an automobile collision allegedly due to the negligence of the defendant. Plaintiff was a passenger in an automobile operated by her husband which was proceeding north on North Carolina Highway #22 approaching its intersection with rural paved road #2498. Defendant's car was on #2498 approaching the intersection with highway #22 from the east. A stop sign was erected on rural paved road #2498 governing traffic entering highway #22. The collision between the two automobiles occurred at some point within the intersection.

Both plaintiff and defendant offered evidence at the trial which presented somewhat conflicting versions of the accident.

The following issues were submitted to the jury and answered as indicated: "(1) Was the plaintiff injured and damaged by the negligence of the defendant as alleged in the Complaint? Answer: No. (2) What amount, if any, is the plaintiff entitled to recover of the defendant for personal injuries? Answer: ....."

From judgment for defendant, the plaintiff appeals.

Ottway Burton for plaintiff appellant.

Smith & Casper, by Archie L. Smith, for defendant appellee.

BALEY, Judge.

[1] The plaintiff assigns as error the failure of the court below to admit into evidence the record of another case brought by the husband of the plaintiff against the defendant for personal injuries and property damage arising out of the same accident upon which the present case is based. She contends that the issue of negligence had already been determined on the prior case and that only the issue of damages should have been submitted in her case.

Plaintiff was not a party to the prior action. She is not bound by the judgment entered in that action. Since estoppel by judgment must be mutual, plaintiff cannot assert the judgment in the prior action against the defendant as *res judicata* in the present case. *Kayler v. Gallimore,* 269 N.C. 405, 152 S.E. 2d 518; *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688.

In *Coach Co. v. Burrell, supra* at 436, 85 S.E. 2d at 692, the court dealt with the precise point raised by plaintiff: "The great weight of authority seems to be that a judgment for the plaintiff in an action growing out of an accident is not *res judicata,* or conclusive as to issues of negligence or contributory negligence, in a subsequent action growing out of the same accident by a different plaintiff against the same defendant."

[2] Plaintiff assigns as error the refusal of the court to set aside the verdict because one of the jurors disclosed after the verdict that she had overheard the defendant make a statement in the rest room that the windshield of plaintiff's car was not broken. The record shows that the court made a careful investigation, and after a full revelation of all the circumstances surrounding the making of the statement and its relevance upon

the issue of negligence which was decided adversely to plaintiff, concluded that it had no prejudicial effect upon the verdict. This was a matter addressed to the discretion of the trial court and will not be disturbed on appeal in the absence of a showing of manifest abuse of discretion. *O'Berry v. Perry*, 266 N.C. 77, 145 S.E. 2d 321; *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363; *Brown v. Products Co.*, 5 N.C. App. 418, 168 S.E. 2d 452.

[3] The plaintiff's assignments of error which relate to the charge of the court cannot be sustained. With particular reference to G.S. 20-158 which provides that vehicles must stop and yield right-of-way at through highways the court stated:

> "The test is whether or not a reasonable and careful and prudent person would have stopped and yielded the right-of-way under the circumstances as they existed."

The jury was clearly told that defendant's duty was reasonable care under the circumstances. There are no reasonable grounds to believe that it was misled in any respect. *Cowan v. Transfer Co.* and *Carr v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228; *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356.

The weight and credibility of the testimony was for the jury to decide. Plaintiff must now abide the result.

No error.

Judges CAMPBELL and HEDRICK concur.

VIOLA H. PHILPOTT v. ALLEN F. KERNS AND JEAN KERNS

No. 7314SC342

(Filed 11 July 1973)

1. **Process § 2— strict compliance with statutory requirements**

Statutory provisions prescribing the manner of service of process must be strictly complied with or there is no valid service.

2. **Process § 16— nonresident motorist — service on Commissioner of Motor Vehicles — defective summons**

Purported service of process on nonresident motorists through the Commissioner of Motor Vehicles was invalid where the summons failed to designate the defendants as parties to be served and failed to command the process officer to summon them.

3. Appearance § 2— enlargement of time to file answer — no general appearance

Enlargement of time obtained by defendants in which to file answer or other pleadings did not constitute a general appearance to confer jurisdiction over the persons.

APPEAL by plaintiff from *Bailey, Judge,* 11 December 1972 Session of Superior Court held in DURHAM County.

This is a civil action in which complaint was filed 6 October 1972 to recover damages for personal injuries sustained in an automobile collision which occurred 8 October 1969 in Durham, North Carolina. It was alleged in the complaint that the plaintiff is a citizen of North Carolina and the defendants are citizens of Florida.

On the summons which was issued on 6 October 1972 the following appears:

"To each of the defendants named below—GREETING:

Defendant	*Address*
Serve Commissioner of Motor Vehicles	Department of Motor Vehicles, Raleigh, North Carolina"

In the section of the summons provided for "Return of Service" it is recited that summons and complaint were served on the Commissioner of Motor Vehicles on 16 October 1972.

Upon motion on 15 November 1972 defendants were granted an enlargement of time to 5 December 1972 in which to answer or otherwise plead. On 1 December 1972 the defendants filed motion to dismiss under Rule 12(b) asserting that process was insufficient and that the court did not acquire jurisdiction over the persons of the defendants under such process.

The court granted the defendants' motion to dismiss, and plaintiff moved to vacate the judgment of dismissal on the ground that defendants had entered a general appearance on 15 November 1972 when an order enlarging the time within which to file pleadings had been obtained. The motion to vacate was denied.

From the judgment of dismissal, plaintiff appealed.

Pearson, Malone, Johnson & DeJarmon by W. G. Pearson II and W. W. Perry for plaintiff appellant.

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

BALEY, Judge.

[1] Statutory provisions prescribing the manner of service of process must be strictly complied with, and, unless the procedural requirements are followed, there is no valid service. *Distributors v. McAndrews,* 270 N.C. 91, 153 S.E. 2d 770; 62 Am. Jur. 2d, Process, § 68, p. 848.

[2] It seems clear that the summons issued in this case was defective on its face in that it fails to designate the defendants as parties to be served and fails to command the process officer to summon them. The precise point in question was determined adversely to plaintiff in *Distributors v. McAndrews, supra.*

[3] The enlargement of time obtained by defendants did not constitute a general appearance to confer jurisdiction over the persons. *Leasing, Inc. v. Brown,* 14 N.C. App. 383, 188 S.E. 2d 574; *Williams v. Hartis,* 18 N.C. App. 89, 195 S.E. 2d 806.

Plaintiff in her brief for the first time suggests amendment of process under Rule 4(i), Rules of Civil Procedure. Any amendments of process at this time would prejudice substantial rights of the defendants.

Judgment entered in the court below is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

ETHEL SHORE CAMPBELL v. HARVEY DWIGHT CAMPBELL

No. 7322DC347

(Filed 11 July 1973)

1. **Divorce and Alimony § 11— constructive abandonment — indignities to person — instructions on provocation**

In an action for alimony in which plaintiff contended that she left the home because of indignities offered to her person by defendant, the trial court erred in failing to instruct the jury that it was necessary for plaintiff to satisfy the jury that such acts by her husband were not the result of adequate provocation on her part.

2. **Trial § 33— failure to apply law to evidence**

A charge which contains a general explanation of the law but fails to apply the law to the evidence is insufficient.

APPEAL by defendant from *Olive, District Court Judge,* 13 November 1972 Session of District Court held in DAVIE County.

On 3 August 1971, plaintiff started this action for alimony against her husband. In the statement of the case on appeal it is said that plaintiff brought her action "upon the theory of 'constructive abandonment' " by defendant causing plaintiff to leave the marital residence on 22 July 1971. Plaintiff bottomed her allegations of constructive abandonment on two separate charges: "(a) defendant wilfully failed and refused to provide adequate support and (b) offered such indignities to her person as to render her condition intolerable and life burdensome. . . ."

The parties were married in 1960. It was plaintiff's second marriage and defendant's first. Questions of custody and support of the two children born of the marriage have apparently been settled to the satisfaction of the parties and are not before this court on appeal.

Testimony by plaintiff and defendant was the only evidence introduced.

Plaintiff's testimony was to the effect that she left defendant because she could not tolerate his abuse, which she related in detail, and because he did not provide adequate support in that, particularly, she had to buy a substantial part of the groceries and other necessities from her own earnings.

Defendant denied abusing his wife and, in effect, testified that she had left him without just cause or excuse and that the separation was caused by his wife who, for several years, had abused, nagged and neglected him; that trouble began in 1964 when he discovered that his wife had secretly withdrawn all of the funds in their joint savings account ($11,000.00), finally returning half of it after much discussions; that as a result of the dispute over these funds his wife evicted him from their bedroom and they have since maintained separate bedrooms; that after a vacation trip, when his wife became aware that she was pregnant with their second child, she continuously harassed him about this condition and that he "caught devilment over this constantly;" that after plaintiff took the joint savings in 1964, the parties kept their money separate; that he paid for the house, bought two lots and provided for the needs of his family out of his earnings.

The jury found plaintiff to be a dependent spouse of defendant and answered issues framed in the language of G.S. 50-16.2(4),(7) and (10) in favor of plaintiff. Judgment was entered awarding alimony.

William E. Hall for plaintiff appellee.

Burke & Donaldson by George L. Burke, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant's assignments of error directed against the charge are well taken.

[1] Plaintiff alleged and offered evidence tending to show that she left the home because of the indignities heaped upon her person by defendant. It was also necessary for her to satisfy the jury that such acts by her husband were not the result of adequate provocation on her part. The judge's failure to so instruct the jury constituted prejudicial error and requires a new trial. *Howell v. Howell,* 223 N.C. 62, 25 S.E. 2d 169; *Barker v. Barker,* 232 N.C. 495, 61 S.E. 2d 360. The relative fault of the parties must be weighed. *Dowdy v. Dowdy,* 154 N.C. 556, 70 S.E. 917.

[2] We also hold that the judge failed to declare and explain the law arising on the evidence as required by G.S. 1A-1, Rule 51(a). A charge which contains a general explanation of the law but fails to apply the law to the evidence given in the case then being tried is insufficient. We specifically observe that the jury was not instructed as to the legal principles applicable to defendant's evidence, if they found it to be true.

New trial.

Judges BROCK and BALEY concur.

WILLIE L. VINCENT v. ARTHUR H. VINCENT

No. 7328DC393

(Filed 11 July 1973)

Appeal and Error § 39— expiration of initial time for docketing — further extension of time for docketing

After the time for docketing the record on appeal in the Court of Appeals has expired, the trial tribunal is without authority to enter a valid order extending the time for docketing.

APPEAL by defendant from *Weaver, District Judge,* 11 December 1972 Session of District Court held in BUNCOMBE County.

Civil action for alimony without divorce. The jury answered issues in favor of plaintiff, finding that she is the dependent spouse and defendant is the supporting spouse, that defendant has abandoned plaintiff, has wilfully failed to provide her with necessary subsistence according to his means, and has offered such indignities to her person as to render her condition intolerable and her life burdensome. The trial court heard evidence and made findings of fact with regard to plaintiff's needs and defendant's income and ability to pay alimony. From judgment awarding plaintiff alimony and directing defendant to pay a fee to plaintiff's attorneys for their services in this action, defendant gave notice of appeal.

Morris, Golding, Blue & Phillips, by James N. Golding for plaintiff appellee.

Robert L. Harrell, Joseph C. Reynolds and Earl J. Fowler, Jr., for defendant appellant.

PARKER, Judge.

The judgment appealed from was dated 15 December 1972. The record on appeal was not docketed in the Court of Appeals and no order extending the time for docketing was entered within 90 days after the date of the judgment. After the expiration of the 90-day period, and on 21 March 1973, the trial judge signed an order purporting to extend the time for docketing. After the time for docketing the record on appeal in the Court of Appeals has expired, the trial tribunal is without authority to enter a valid order extending the time for docketing, and this appeal is therefore subject to dismissal. *State v. Lee,* 15 N.C. App. 234, 189 S.E. 2d 505; *Simmons v. Textile Workers*

Union, 15 N.C. App. 220, 189 S.E. 2d 556; *Distributing Corp. v. Parts, Inc.,* 10 N.C. App. 737, 179 S.E. 2d 793; *Dixon v. Dixon,* 6 N.C. App. 623, 170 S.E. 2d 561; *Roberts v. Stewart* and *Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58.

Nevertheless, we have carefully reviewed the record and have considered such of the assignments of error as are properly set forth therein and in support of which any argument is stated or authority cited in appellant's brief. We find no prejudicial error sufficient to warrant granting a new trial. No abuse of discretion by the trial judge in fixing the amount of the alimony and counsel fees has been shown.

Appeal dismissed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. DONALD RAY TYNDALL

No. 738SC99

(Filed 11 July 1973)

1. **Criminal Law § 75— statement by person stopped for drunken driving — absence of Miranda warnings**

The requirements of *Miranda v. Arizona* were inapplicable when a highway patrolman stopped defendant and asked him whether he had been drinking, and defendant's statement that he had been drinking was properly admitted in his prosecution for drunken driving although he had not been given the *Miranda* warnings.

2. **Automobiles § 126— breathalyzer test — statutory warnings**

The evidence on *voir dire* supported the trial court's determination that defendant had been advised of his rights under the provisions of G.S. 20-16.2(a) prior to the time he consented to take a breathalyzer test and that defendant waived those rights and consented to take the test.

APPEAL by defendant from *Webb, Judge,* 18 September 1972 Session of Superior Court held in WAYNE County.

Defendant, Donald Ray Tyndall, was charged in a warrant, proper in form, with driving an automobile upon a public highway of this State while under the influence of intoxicating liquor. Upon his plea of not guilty, the State offered evidence

tending to show that at about 11:35 p.m., 12 March 1972, R. D. McQuage of the North Carolina Highway Patrol observed an automobile on U. S. 70 near Goldsboro being operated by the defendant. The patrolman stopped the vehicle and observed that the defendant had an odor of alcohol on his breath. A breathalyzer test administered by Officer Kenneth Ross revealed that the defendant had a blood alcohol content of .17 percent.

Defendant testified and admitted that he had drunk about two quarts of beer but denied that he was under the influence of an alcoholic beverage.

Defendant was found guilty as charged and from a judgment imposing a jail sentence of 90 days, suspended on condition that he pay a fine of $100.00 and costs, he appealed.

Attorney General Robert Morgan and Assistant Attorney General Donald A. Davis for the State.

Douglas P. Connor for defendant appellant.

HEDRICK, Judge.

[1] The defendant contends the court erred in not striking the testimony of the Highway Patrolman that the defendant stated that he had been drinking. When the patrolman stopped the defendant, he asked him whether he had been drinking and the defendant made the admission complained of. Defendant argues that the challenged statement was inadmissible because the officer had not given him the "Miranda warnings." We do not agree. Under the circumstances of this case, the rules of *Miranda* have no application. *State v. Beasley,* 10 N.C. App. 663, 179 S.E. 2d 820 (1971). This assignment of error is not sustained.

[2] The defendant contends that he never waived his right to counsel and was not informed of his statutory rights under G.S. 20-16.2(a) prior to the time he consented to take the breathalyzer examination. Before admitting into evidence the results of the breathalyzer test, the trial judge conducted a *voir dire* in the absence of the jury and made findings and conclusions that the defendant had been advised of his rights under the provisions of G.S. 20-16.2(a) and that he waived those rights and consented to take the test. *State v. Shadding,* 17 N.C. App. 279, 194 S.E. 2d 55 (1973). The findings made by the

trial judge are supported by plenary competent evidence in the record. This assignment of error is overruled.

Defendant's trial in the Superior Court was free from prejudicial error.

No error.

Judges BROCK and VAUGHN concur.

WALTER G. GREEN v. THAD EURE, AS SECRETARY OF STATE

No. 7310SC324

(Filed 11 July 1973)

Rules of Civil Procedure § 41— legitimate delay in prosecution — dismissal for failure to prosecute error

Where plaintiff's failure to proceed with his action did not arise out of a deliberate attempt to delay, but out of the mistaken assumption that the calendar committee would, of its own accord, place the action on the calendar in Wake County, the trial court erred in dismissing plaintiff's action for failure to prosecute.

APPEAL by plaintiff from *Canaday, Judge,* 27 November 1972 Civil Session of WAKE County Superior Court.

On 24 November 1970 plaintiff filed a complaint seeking to enjoin the North Carolina Secretary of State from "receiving, enrolling and preserving in his office" several constitutional amendments submitted to popular vote and approved by the voters of the State in a general election held on 3 November 1970, and to declare those named sections unconstitutional and void.

Defendant filed answer on 22 December 1970. No action of any nature was taken by plaintiff or defendant until 14 November 1972, at which time defendant filed a motion to dismiss under Rule 41(b) for failure of the plaintiff to prosecute the case. Notice of the motion to dismiss was sent to and received by the plaintiff.

On 4 December 1972 plaintiff and counsel for defendant were heard on the motion to dismiss before Judge Canaday. Upon finding that over two years' time has elapsed since the

complaint was filed, that plaintiff has taken no steps to prosecute his action, and that plaintiff never requested the Calendar Committee to place the case on the calendar in Wake County, Judge Canaday dismissed the action. Plaintiff's only reason for his failure to prosecute this action was that he felt it was the duty of the Calendar Committee to act on its own accord.

Attorney General Robert Morgan by Associate Attorney Howard A. Kramer for the State, defendant appellee.

Walter G. Green, in propria persona, plaintiff appellant.

CAMPBELL, Judge.

North Carolina Civil Procedure Rule 41(b), substantially the same as its federal counterpart, authorizes dismissal with prejudice of a plaintiff's claim for failure to prosecute. It was held in *Link v. Wabash R. Co.*, 370 U.S. 626, 8 L.Ed. 2d 734, 82 S.Ct. 1386 (1962), that courts have inherent power to dismiss stale actions, even on their own motion, and without notice or hearing by the parties if the circumstances indicate a knowledge of the party of the consequences of his own conduct.

The courts, however, are primarily concerned with trial of causes on their merits. Therefore, mere lapse of time does not justify dismissal if the plaintiff has not been lacking in diligence. Expedition for its own sake is not the goal. Thus in the *Link* case the Supreme Court was careful to detail the six-year delay in prosecution and to review facts from which it could reasonably be inferred that the plaintiff had been deliberately proceeding in dilatory fashion.

Dismissal for failure to prosecute is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion. 5 Moore's Federal Practice, Paragraph 41.11[2].

In the instant case plaintiff's failure to proceed did not arise out of a deliberate attempt to delay, but out of misunderstanding. Plaintiff assumed that upon filing the action, it would be calendared by the Clerk of Superior Court of Wake County and the Wake County Calendar Committee as provided by Rule 2 of the General Rules of Practice for the Superior and District Courts.

We hold that dismissal of plaintiff's action was improper.

Reversed.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. HARVEY LEE MURCHISON

No. 7310SC408

(Filed 11 July 1973)

Larceny § 7— larceny of automobile — sufficiency of evidence

Evidence was sufficient to withstand defendant's motion for nonsuit in a larceny case where it tended to show that on the same day a car owner discovered his vehicle missing, a deputy sheriff saw seven Negro males in the car, that the deputy later saw the car with its passengers and defendant driving, that the deputy asked to see defendant's driver's license and the vehicle registration, that defendant fled from the deputy, was apprehended later that day, and again attempted to escape.

APPEAL by defendant from *Hobgood, Judge,* First January 1973 Regular Criminal Session of WAKE County Superior Court.

Defendant was tried by proper indictment for larceny of an automobile. He was found guilty by a jury and sentenced to imprisonment for three years.

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

Sanford, Cannon, Adams & McCullough by John H. Parker for defendant appellant.

CAMPBELL, Judge.

The evidence stated in the light most favorable to the State tends to show that on 18 July 1972 William Prentice Baker III, Vice President of Baker Roofing Company, drove a 1971 Buick station wagon to his office. He left the keys in the automobile and did not lock the doors. When Baker left the office after 6:00 p.m. the car was missing and he had not given permission to anyone to use the car.

On 18 July 1972 Deputy Sheriff James Brown saw a green 1971 Buick station wagon with seven Negro males. Later the

same day he again saw the automobile with all its passengers at a ball park in Fuquay-Varina. Deputy Brown saw that the defendant was driving the automobile.

At the ball park the deputy had parked his car behind the Buick, and defendant asked the deputy to move his car so that the Buick could get out of the parking lot. Deputy Brown asked to see defendant's operator's license and the automobile registration. The Buick was registered to Baker Roofing Company; the defendant did not have an operator's license. Defendant ran from Deputy Brown.

Later that day defendant was apprehended by police in a city park in Raleigh, and again attempted to escape. Deputy Brown saw defendant in Raleigh at the police station and identified him as the driver of the stolen Buick.

That the above evidence is sufficient to withstand a motion for judgment as of the case of nonsuit is clearly established by law, and needs no elaboration. See for example, *State v. Coleman,* 17 N.C. App. 119, 193 S.E. 2d 292 (1972), in which the stolen automobile was found by police more than three months after the theft, and the automobile had been in defendant's possession for two months of that time; and *State v. Franklin* and *State v. Hughes,* 16 N.C. App. 537, 192 S.E. 2d 626 (1972), in which the defendant was arrested twenty-four hours after theft of the automobile which he was driving.

The defendant has had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and BALEY concur.

JIMMY RAY NEWMAN v. CELATHA GENE NEWMAN

No. 7317DC107

(Filed 11 July 1973)

Appeal and Error § 39— time for docketing record on appeal

Appeal is subject to dismissal for failure to docket the record on appeal within ninety days after the date of judgment appealed from.

APPEAL by plaintiff from *Harris, Judge,* 24 July 1972 Session of SURRY County District Court.

Sometime prior to April 1972 the plaintiff and defendant entered into a separation agreement which provided in part for the payment by the plaintiff to the defendant of $25.00 per week for the support of their four minor children. On 5 July 1972 the plaintiff applied for and obtained an absolute divorce based upon separation of the parties. Defendant was not present nor heard on her two affirmative claims for relief filed in answer to the divorce complaint. On 14 July 1972 the defendant-wife filed a motion in the cause requesting that the case be reopened so that she could be heard on her two affirmative claims for relief. Such motion was allowed, evidence was taken, and the court ordered the plaintiff to pay defendant $200.00 per month for the support of the four minor children born of the parties.

Folger & Folger by Fred Folger, Jr. for plaintiff appellant.

Gardner, Gardner and Bell by Fred L. Johnson for defendant appellee.

CAMPBELL, Judge.

It is imperative that attorneys be familiar with the Rules of Practice in the Court of Appeals of North Carolina as well as with the statutory enactments of this State concerning appellate practice contained in Chapter 1, Article 27 of the North Carolina General Statutes.

Failure to comply with either these Rules or the applicable statutes will subject the appeal to dismissal.

There being no extension of time to docket the record on appeal with this Court in the instant case, Rule 5 of the Court of Appeals requires that the record be docketed within 90 days after the date of judgment appealed from.

Judgment in the instant case was dated 27 July 1972. By virtue of Rule 5 this appeal must have been docketed on or before 25 October 1972; it was not docketed until 4 December 1972. For failure to comply with the Rules of Practice, the appeal may be dismissed. Rule 48.

Nevertheless, we have reviewed the record and find no error. The evidence warrants the court's findings of fact, and the facts found support the judgment.

Appeal dismissed.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. ALBERT LEE SOLES

No. 735SC444

(Filed 11 July 1973)

APPEAL by defendant from *Wells, Judge,* 13 November 1972 Session of NEW HANOVER Superior Court.

By six indictments defendant was charged with (1) felonious breaking, entering and larceny on 31 March 1972, (2) felonious breaking, entering and larceny on 9 July 1972, (3) felonious larceny on 25 March 1972, (4) felonious breaking, entering and larceny on 25 March 1972, (5) felonious breaking, entering and larceny on 24 July 1972 and (6) felonious breaking and entering on 3 March 1972. At trial defendant, through his court appointed counsel, tendered pleas of guilty to five counts of felonious breaking or entering and five counts of felonious larceny. After due inquiry as to the voluntariness of the pleas and an adjudication that the pleas were freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, the court entered judgments imposing lengthy prison sentences from which judgments, defendant appealed.

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

Herbert P. Scott for defendant appellant.

BRITT, Judge.

Inasmuch as 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 (1971). A careful review of the record discloses no error. The bills of indictment are regular in all respects; defendant's pleas were understandingly and voluntarily made; and the sentences imposed are within the statutory limits. *State v. Roberts, supra; State v. Wyatt,* 16 N.C. App. 626, 192 S.E. 2d 683 (1972).

The judgments appealed from are

Affirmed.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. JOHN FLOYD

No. 7310SC435

(Filed 11 July 1973)

APPEAL by defendant from *Braswell, Judge,* 29 January 1973 Session of Superior Court held in WAKE County.

Defendant was convicted by a jury for possession and sale of heroin. The State's evidence showed that an officer acting in an undercover capacity bought fifteen bags of heroin from the defendant for $90.00. Defendant had been previously known to the witness and was positively identified at the trial. Defendant denied the sale and claimed mistaken identity.

From judgment imposing prison sentence of five years, defendant appeals.

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

Robert P. Gruber for defendant appellant.

BALEY, Judge.

After a careful examination of the record we are unable to find error in the proceedings in the court below. Defendant was convicted by a jury upon a plea of not guilty. The indictments were proper in form and the evidence of the State was sufficient to support the verdict. Sentence imposed was within statutory limits.

Upon the record, defendant received a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM ANTHONY LAND AND HAROLD LEE BARROW

No. 7317SC232

(Filed 11 July 1973)

APPEAL by defendants from *Seay, Judge,* 9 October 1972, Session of Superior Court, ROCKINGHAM County.

Defendants were each charged, in indictments proper in form, with felonious breaking and entering and felonious larceny. They were represented at trial and are represented on appeal by court-appointed counsel furnished at the expense of the taxpayers. They pled not guilty, and the jury returned a verdict as to each of guilty of wrongful breaking and entering and felonious larceny. Each appealed from the judgment entered on the verdict.

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

Benjamin R. Wrenn for defendant appellant Harold Lee Barrow.

J. S. Moore, Jr., for defendant appellant William Anthony Land.

MORRIS, Judge.

A confederate of defendants' testified that early in the evening of 24 December 1971, he entered the Sport Land Cycles building and took a minibike. He gained entrance by breaking a window with a rock wrapped in a shirt. After he got the window out, he entered through the window and took the bike out the back door. He then rode the bike down the Mispah Church Road to the trailer court where defendants lived. Barrow asked him where he got the bike and was told that it came from the Sport Land Cycles shop. Later Barrow said he wanted one, too; so Barrow and the witness "doubled" on the bike and went back to the Sport Land Cycles shop. They went in the back door, left unlocked by the witness, and got another motorcycle and a helmet. Later the witness, Barrow, and Land went back and again entered the shop and got another motorcycle for Land. They rode around a good part of the night and then hid the motorcycles, each in a different place. They later

sold the motorcycles. Very shortly after the sale, they were arrested.

Defendants did not testify nor put on any evidence. On the breaking and entering count, each defendant was sentenced to a term of 24 months in the Rockingham County jail. On the felonious larceny count, each defendant was sentenced to a term of not less than five years nor more than seven years in the State Department of Correction.

Defendants do not bring forward any exceptions or assignments of error. The appeal itself, however, presents the face of the record for review.

We have carefully reviewed the record and find no error. The indictments were proper in form, the defendants were ably represented by competent counsel who adequately protected their rights, and the sentences imposed are within the statutory limits.

The judgments from which defendants appealed are

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. DAVID HAMILTON

No. 7313SC441

(Filed 11 July 1973)

APPEAL from *Clark, Judge,* February 1973 Session of Superior Court, BLADEN County.

Defendant was charged with first-degree murder. Upon the call of the case for trial, defendant, through his counsel, entered a plea of guilty to involuntary manslaughter. The court questioned defendant at length to determine whether his plea was being voluntarily, understandingly, and freely entered. The questioning by the court consumes four pages of the record. There then appears in the record the transcript of plea as signed by defendant and the adjudication by the court that the plea was entered freely, understandingly, and voluntarily, without

undue influence, compulsion or duress, and without promise of leniency.

From judgment committing defendant to the State Prison for a term of not less than eight nor more than ten years, defendant appealed. He is represented on appeal by counsel furnished by the State.

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

Reuben L. Moore, Jr., for defendant appellant.

MORRIS, Judge.

Defendant's counsel requests this Court to review the record to determine whether prejudicial error was committed at defendant's trial. We have carefully reviewed the record and find no error. The bill of indictment was proper in form; the record affirmatively shows that the plea of guilty was freely, understandingly and voluntarily made; and the sentence imposed is within statutory limits. The judgment is

Affirmed.

Judges BROCK and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD BARRETT

No. 7322SC468

(Filed 11 July 1973)

APPEAL by defendant from *Rousseau, Judge,* 22 January 1973 Criminal Session of DAVIDSON County.

By indictment proper in form defendant was charged with safecracking. At trial defendant orally and in writing tendered a plea of guilty as charged. The court accepted the plea after due inquiry after which it was adjudged that the plea was freely, understandingly and voluntarily made without undue influence, compulsion or duress, and without promise of leniency. From judgment imposing an active prison sentence, defendant appealed.

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

Larry E. Leonard for defendant appellant.

MORRIS, Judge.

There was a proper adjudication that defendant's plea of guilty was freely, understandingly, and voluntarily entered. Defendant having pled guilty, the sole question presented for review is whether error appears on the face of the record proper. *State v. Roberts*, 279 N.C. 500, 183 S.E. 2d 647 (1971). We have carefully examined the record, and no error appears.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JESSE LEWIS

No. 737SC329

(Filed 25 July 1973)

1. **Criminal Law § 138— punishment — credit for time already served**

The constitutional guaranty against multiple punishments for the same offense requires that punishment already enacted must be fully credited in imposing a new conviction for the same offense.

2. **Criminal Law § 138— credit to breaking and entering sentence only for time served subsequent to expiration of secret assault sentence**

Where defendant was given credit on his sentence for secret assault for time spent in jail and in a hospital, defendant was not entitled to have that time already credited to the previously imposed sentence of secret assault credited to a subsequently imposed sentence for breaking and entering; rather, defendant was entitled to credit as against his sentence for breaking and entering only for time of confinement subsequent to expiration of the secret assault sentence.

3. **Constitutional Law § 30— speedy trial — lapse of 3½ years — no denial of right**

Though three and one-half years elapsed from the time defendant's prior conviction for breaking and entering was vacated in 1967 until he was declared incompetent to stand trial in 1970, defendant was not denied his right to a speedy trial where, during that time, he was twice placed in a hospital for mental examination and evaluation, a case for secret assault which was pending against him was called

for trial but continued for six months at defendant's request, defendant was tried and convicted of secret assault but the conviction was reversed, defendant was again tried and convicted for secret assault and again appealed; moreover, defendant did not show that he was prejudiced by the delay or that the delay was the studied choice of the prosecution.

4. **Burglary and Unlawful Breakings § 5— evidence outside confession — sufficiency**

There was sufficient evidence of the *corpus delicti* in a breaking and entering case to permit submission of defendant's alleged confession to the jury.

APPEAL by defendant from *Copeland, Special Judge,* 13 November 1972 Session Superior Court, NASH County.

Defendant was tried and convicted on three charges of forgery in cases No. 6469, 6470 and 6471 at the 31 January 1955 Session of Superior Court. These cases were consolidated for trial and judgment, and defendant was sentenced to not less than three nor more than four years in prison. Also at that session, in case No. 6472, defendant was convicted on charges of breaking and entering and larceny. Prayer for judgment was continued on the larceny charge, and defendant was sentenced to not less than seven nor more than ten years on the breaking and entering charge. This sentence was to begin at the expiration of the sentence imposed upon defendant's forgery convictions.

On 16 August 1955 defendant was sentenced to prison for two years in case No. 28014 for escape. Also defendant was convicted in case No. 6713 for secret assault with a deadly weapon with intent to kill inflicting serious bodily injury and committed on 24 August 1955 to serve a ten-year prison sentence to begin at the expiration of the escape sentence.

Subsequently defendant escaped from prison on two separate occasions and was out of custody (1) from 3 November 1955 to 19 September 1956 and (2) from 3 October 1957 to 12 July 1965. The time he was out of custody was not, of course, credited toward the completion of any of his sentences. From 12 July 1965 to the present, defendant has either been in the custody of the North Carolina Department of Correction, the Nash County Sheriff's Department, or Cherry Hospital.

Defendant completed the sentence imposed for his forgery convictions and began serving his breaking and entering sentence on 29 September 1966. On 13 February 1967 as a con-

sequence of a hearing on defendant's petition for a writ of habeas corpus, Judge Cowper vacated all of defendant's prior convictions and ordered new trials because defendant had not been afforded his right to court-appointed counsel at any of the previous trials. In the same order, Judge Cowper committed the defendant to Cherry Hospital for mental examination and evaluation.

On 12 April 1967, the medical staff of Cherry Hospital certified that defendant was competent to stand trial and after a series of continuances requested by defendant, he was finally tried and convicted on the charge of secret assault at the October 1967 Session of Nash County Superior Court. Defendant received a sentence of ten years with credit given for all time previously served on the charge. This conviction was affirmed by this Court, *State v. Lewis,* 1 N.C. App. 296, 161 S.E. 2d 497 (1968), and, by the Supreme Court, reversed and a new trial granted, 274 N.C. 438, 164 S.E. 2d 177 (1968).

At the 19 May 1969 Session of Superior Court defendant was again tried and convicted for secret assault and sentenced to ten years. This conviction was upheld but the case was remanded for a determination of the amount of credit to be given for time previously served. *State v. Lewis,* 7 N.C. App. 178, 171 S.E. 2d 793 (1970), cert. denied and purported appeal as of right dismissed, 276 N.C. 328 (1970). Defendant completed serving his sentence for secret assault on 25 October 1971.

On 1 April 1970 defendant's present counsel was appointed by Judge Peel and on 1 June 1970 defendant was sent, pursuant to court order, to Cherry Hospital for a period of 60 days' observation and mental examination.

On 8 October 1970 after a bill of indictment charging defendant with breaking and entering and larceny (case No. 6472—now 70CR4340) was read to defendant in open court, defendant's counsel made a motion that defendant not be required to plead pending a hearing on the competency of the defendant to stand trial. This motion was allowed.

After a hearing was held, Judge Cohoon declared that defendant was incompetent to stand trial and ordered that he be returned to Cherry Hospital until such time as the hospital authorities determine that he is mentally capable of standing trial.

Defendant remained at Cherry Hospital until 13 August 1972 when he was returned to Nash County upon a finding that he was competent to stand trial. At the 13 November 1972 Session of Superior Court, defendant was tried and convicted of felonious breaking and entering and nonfelonious larceny. Defendant was sentenced to not less than three nor more than five years on the breaking and entering charge and prayer for judgment was continued on the larceny charge. Judgment was entered allowing defendant credit for time spent in confinement either in Cherry Hospital or Nash County jail since 25 October 1971 awaiting trial in this case. It was also ordered that defendant was to receive credit for any other time so determined by the Prison Department that he had spent in jail or Cherry Hospital awaiting trial in this case. From this judgment defendant appealed.

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

Battle, Winslow, Scott and Wiley, P.A., by Samuel S. Woodley, for defendant appellant.

MORRIS, Judge.

Defendant contends in his first assignment of error, upon the authority of *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), that the sentence imposed upon his 1972 conviction for breaking and entering constitutes an unlawful and multiple punishment for the same offense as prohibited by the Fifth Amendment of the United States Constitution. Defendant's argument is basically as follows: He began serving his original sentence for breaking and entering on 29 September 1966, more than six years before his retrial in November 1972. Applying the standard gain time rate, he would have probably completed the original sentence in September of 1971 or at most in October of 1973. Therefore, the sentence of not less than three nor more than five years imposed in November 1972 would keep him in custody for a longer period than the sentence originally imposed, even with the amount of time allowed as credit by the trial court. This assignment of error is without merit.

[1] It was held in *North Carolina v. Pearce, supra,* that the constitutional guaranty against multiple punishments for the same offense requires that punishment already enacted must

be fully credited in imposing a new conviction for the same offense. Also the General Assembly of North Carolina recently passed "An Act To Provide Credit For All Time Spent In Custody," Chapter 44, 1973 Session Laws, in which the statute, G.S. 15-196.1, provides as follows:

> "*Credits allowed.*—The term of a determinate sentence or the minimum and maximum term of an indeterminate sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement *in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence.* The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole and probation revocation hearing: *Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.*" (Emphasis supplied.)

The act repealed former G.S. 15-176.2 and 15-186.1 and was made applicable to all prisoners, including those convicted prior to its enactment who are entitled to, but who have not heretofore received all such allowable credit.

Defendant began service on the original sentence of not less than seven nor more than ten years on 29 September 1966 and actually served until 13 February 1967, some four and one-half months until his first conviction was vacated. He is clearly entitled to credit for this (which is impliedly given in the trial court's order of 16 November 1972). Also defendant was given credit for the time spent in confinement either in Cherry Hospital or the Nash County jail since 25 October 1971, the date he completed his sentence for secret assault. Yet defendant would have the trial court order that he be given credit for the time after his convictions were vacated (13 February 1967) until 25 October 1971 when he completed serving the secret assault sentence.

[2] By an order entered 8 October 1970 Judge Cohoon gave defendant credit for all the time he had spent in jail or in Cherry Hospital prior to the judgment entered upon his conviction for secret assault. Defendant finished serving his secret assault sentence on 25 October 1971 and it was from that date that

defendant was given credit as against his sentence for breaking and entering. Clearly the trial court committed no error in failing to credit time already credited to the previously imposed sentence for secret assault. G.S. 15-196.1, supra. We hold that the trial court credited defendant with all the time that was properly due him and this assignment of error is overruled.

[3] By his second assignment of error, defendant contends that he was denied his Sixth Amendment right to a speedy trial on the breaking and entering charge upon the State's failure to try him from the time his prior conviction was vacated in February of 1967 until he was committed to Cherry Hospital in October of 1970.

Principles governing the right to a speedy trial were ably set forth by Justice Sharp in *State v. Johnson,* 275 N.C. 264, 269-270, 167 S.E. 2d 274 (1969), and are as follows:

> "1. The fundamental law of the State secures to every person *formally accused* of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution (made applicable to the State by the Fourteenth Amendment, *Klopfer v. North Carolina,* 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967)).
>
> 2. A convict, confined in the penitentiary for an unrelated crime, is not excepted for the constitutional guarantee of a speedy trial of any other charges pending against him.
>
> 3. Undue delay cannot be categorically defined in terms of days, months, or even years; the circumstances of each particular case determine whether a speedy trial has been afforded. Four interrelated factors bear upon the question: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant.
>
> 4. The guarantee of a speedy trial is designed to protect a defendant from the dangers inherent in a prosecution which has been negligently or arbitrarily delayed by the State; prolonged imprisonment, anxiety and public distrust engendered by untried accusations of crime, lost evidence and witnesses, and impaired memories.
>
> 5. The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfullness of the prosecution. A defendant who has himself caused the delay, or acquiesced

in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. (Citations omitted.)"

Similarly, the U. S. Supreme Court has adopted a balancing test as enunciated in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), in which the conduct of both the prosecution and the defendant are weighed.

"A balancing test necessarily compels courts to approach speedy-trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed. 2d at 116-117.

* * *

"We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." 407 U.S. at 533, 92 S.Ct. at 2193, 33 L.Ed. 2d at 118.

Applying the above principles to the case *sub judice,* we are of the opinion that defendant's right to a speedy trial was not abridged.

From the time the breaking and entering judgment against defendant was vacated in February 1967 until he was adjudged incompetent to stand trial on 8 October 1970 is a period of more than three and one-half years. During that period the following took place: (1) From the date the judgments against defendant were vacated in February 1967 until 12 April 1967 defendant underwent mental examination and evaluation in Cherry Hospital. (2) from the time defendant returned from Cherry Hospital on 12 April 1967 he was in the custody of the Sheriff of Nash County and each time his case (for secret assault) was called for trial, defendant at his own request had the matter continued until October 1967. (3) Defendant was tried and convicted of secret assault at the October 1967 Session of Nash Superior Court, and, on his appeal, this conviction was subsequently reversed, 20 November 1968. (4) Defendant was

again tried and convicted for secret assault on 19 May 1969, and again appealed. This conviction was upheld on appeal but remanded for a determination of the proper credit to be given defendant for time spent in custody. (5) On 1 June 1970 defendant's case for breaking and entering was placed on the trial calendar and defendant was sent to Cherry Hospital for a 60-day period of observation and mental examination. Taking the above factors into consideration, the delay in bringing defendant to trial on the breaking and entering and larceny charges was not as inordinate as might first appear.

Moreover, any prejudice suffered by defendant as a result of the delay was minimal and we can perceive nothing that would indicate that defendant was deprived of any means of proving his innocence. Most of the key witnesses were still alive. Defendant did testify that he received the allegedly stolen property involved from one Henry Dunn in payment of a debt owed him by Dunn, yet Dunn had been dead since the 1950's and any delay from 1967-1970 would have been immaterial to this defense. Also defendant mentioned nothing about Dunn or any debt owed him when he confessed to police officers that he picked the lock to Dunn's home and took the goods in question.

We also note that no demand was made for a speedy trial until done so by defendant's court-appointed counsel on 1 June 1970. It is true that defendant's counsel in this case was not appointed until 1 April 1970, and while we realize a rigid "demand-waiver" rule was rejected by the U. S. Supreme Court in *Barker v. Wingo, supra,* we are obliged to take note of the many petitions filed in the court by defendant without benefit of counsel seeking relief as to other matters. Obviously defendant was aware of the indictment pending against him and capable during the period of making such a demand himself. Furthermore defendant has not shown that the delay in bringing him to trial was "the studied choice of the prosecution." *State v. Johnson, supra,* at 273.

A balancing of the factors established as guidelines by both the Supreme Court of North Carolina and the Supreme Court of the United States results in our determination that defendant was not deprived of his due process right to a speedy trial.

[4] Finally, defendant contends that the trial court committed error in allowing into evidence his alleged confession. Counsel for defendant concedes that the requirements of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), do not apply in this case since the alleged confession was made prior to the date of that decision. But counsel for defendant does contend that there was insufficient corroborative evidence to establish the *corpus delicti* and thereby permit submission of his alleged confession to the jury. We do not agree. Clearly there was sufficient evidence that the home in question was illegally entered and goods wrongfully taken therefrom.

In the proceedings in the Superior Court, we find

No error.

Judges CAMPBELL and VAUGHN concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. WEEKS-ALLEN MOTOR COMPANY, INC., FORD MOTOR COMPANY AND THE BENDIX CORPORATION

No. 7314SC282

(Filed 25 July 1973)

1. **Indemnity § 3; Limitation of Actions § 4— action for contribution or indemnity — statute of limitations**

Where plaintiff liability insurer settled before trial all claims against the insured for injuries arising out of a 1969 automobile accident, plaintiff's 1971 action for contribution or indemnity against the manufacturer, distributor and retailer of an allegedly defective master brake cylinder sold to the insured in 1964 was not barred by the three-year statute of limitations since plaintiff's claim for contribution or indemnity did not arise until the injured parties brought claims against the insured.

2. **Sales § 22— latent defect in automobile part — accident — liability of retailer**

The retailer of a master brake cylinder is not liable for injuries sustained in an automobile accident allegedly caused by a defect in the cylinder where the defect did not manifest itself until the automobile had been driven over 20,000 miles after the cylinder was installed and the defect was not discernible by reasonable inspection at the time of sale.

3. **Torts § 4— contribution from joint tort-feasor — joint liability**

No right to contribution exists where the person seeking contribution takes the position that he is free of negligence or where the party from whom contribution is sought is not shown to be a tort-feasor and jointly liable.

4. **Indemnity § 3— primary-secondary liability — failure to allege passive negligence**

Where plaintiff liability insurer settled all claims against the insured for injuries arising out of an automobile accident, plaintiff insurer is not entitled to indemnity on the basis of primary-secondary liability from the manufacturer, distributor and retailer of a defective master brake cylinder on insured's car which allegedly caused the accident where plaintiff alleged that the insured was passively negligent in driving his automobile when there existed in the brake cylinder a latent defect not discoverable by him, since such conduct on the part of the insured would not constitute negligence at all.

5. **Insurance § 112; Subrogation— automobile liability insurance — settlement by insurer — no subrogation**

Plaintiff automobile liability insurer was not subrogated to the rights of its insured where the liability policy required it to pay all sums which its insured should become legally obligated to pay as damages and plaintiff settled all claims against the insured without an adjudication of liability.

APPEAL by plaintiff from *Bailey, Judge,* 6 November 1972, Session Superior Court, DURHAM County.

On 16 August 1969, plaintiff's insured, Bruce Bryant Goodwin, was involved in a collision resulting in the death of three persons, with two persons sustaining personal injuries. As the result of the deaths and injuries, suits were brought against plaintiff's insured in the District Court and Superior Court, Durham County. All of the claimants were occupants of a car operated by one of the deceased which was struck by the car operated by plaintiff's insured. Each complaint alleged negligence on the part of plaintiff's insured, including an allegation that his car at the time of the collision was equipped with improper brakes.

Plaintiff settled all the claims prior to trial at a figure which was within its policy limits, and obtained a release from the administratrix of the estate of one decedent. Judgments were entered as to all other claims.

On 6 April 1971 this action was instituted. Plaintiff alleges that its insured was not negligent in any respect, but the defendants were negligent in the manufacture and sale of a defective

master brake cylinder for installation on the automobile of plaintiff's insured and that defendants are joint tort-feasors with the plaintiff's insured in causing the injuries and deaths of the claimants. Plaintiff seeks to recover on theories of negligence and breach of warranty and seeks to recover contribution of the defendants and, in the alternative, indemnity from the defendants. The cylinder was sold to plaintiff's insured in 1964 for installation on his automobile.

Each defendant filed answer denying the material allegations of the complaint. Each defendant also moved to dismiss for failure to state a claim upon which relief can be granted and, among other defenses, pled the statute of limitations. Discovery proceedings, by way of interrogatories and requests for admissions were begun. Before the discovery proceedings were completed, each defendant moved for summary judgment upon the grounds that there was no genuine issue as to any material fact and that movant was entitled, as a matter of law, to a dismissal of the action as to it. Each motion was allowed, and plaintiff appealed.

Bryant, Lipton, Bryant and Battle, by Victor S. Bryant, Jr., for plaintiff appellant.

Young, Moore and Henderson, by Joseph W. Yates, III, for Ford Motor Company, defendant appellee.

Teague, Johnson, Patterson, Dilthey and Clay, by Robert M. Clay, for the Bendix Corporation, defendant appellee.

Spears, Spears, Barnes, Baker, Boles and Pinna, by Alexander H. Barnes, for Weeks-Allen Motor Company, Inc., defendant appellee.

MORRIS, Judge.

[1] In the judgments entered by Judge Bailey, he concluded as a matter of law that plaintiff's claim against each defendant was barred by the statute of limitations. Through answers to interrogatories and answers to requests for admission, it was established without dispute that the master brake cylinder alleged to be defective was purchased by plaintiff's insured from Weeks-Allen Motor Company and installed by plaintiff's insured on his automobile in 1964. The court noted in the judgments that G.S. 1-15(b) was ratified on 21 July 1971 and did not affect pending litigation. Had that statute affected pending litigation,

this action would not have been barred by the statute of limitations. However, G.S. 1-15(b) notwithstanding, the action was not barred. This Court, in *Hager v. Equipment Co.*, 17 N.C. App. 489, 195 S.E. 2d 54 (1973), held that the trial court erred in dismissing a third-party action for indemnity against the seller of an allegedly defective elevator sold more than three years earlier on the ground that the statute of limitations barred the indemnity action. We held that the claim for indemnity did not arise until the injured party had brought an action against the one seeking indemnity, and that the claim for indemnity was separate and distinct from any possible claim that may have arisen at the time the elevator was purchased. All defendants concede that, although the opinion was not available to the court at the time the judgment was entered, it is controlling here, and the action is not barred by the statute of limitations.

In the judgment filed as to Weeks-Allen Motor Company, the court made 23 findings of fact. Plaintiff excepted to 10 of them. In the judgment filed as to Ford and Bendix, the court made 15 findings of fact, and plaintiff excepted to three of them. As we have pointed out on previous occasions, finding the facts in a judgment entered on a motion for summary judgment presupposes that the facts are in dispute. " . . . [T]he Supreme Court and this Court have emphasized in numerous opinions that upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." *Stonestreet v. Compton Motors, Inc., et als.*, 18 N.C. App. 527, (Filed 27 June 1973). If findings of fact had been necessary, and if plaintiff had been required to except thereto in order to assign them as error on appeal, in this case all findings are supported by the uncontradicted evidence. On the undisputed facts, the court concluded, as to Weeks-Allen, that the defendant was not under a duty to test and examine the die-casting of the high pressure section of the master brake cylinder for latent defects before its sale to plaintiff's insured, and its failure to do so did not constitute negligence; that plaintiff's insured was not negligent in the operation of his automobile; that plaintiff is not subrogated to the rights of its insured; and that Weeks-Allen is entitled to summary judgment in its favor as a matter of law. On the undisputed facts, the court concluded as a matter of law, as to Ford and Bendix, that under the pleadings and facts plaintiff's insured was not negligent, was not a tortfeasor, and plaintiff is not entitled to recover either indemnity,

contribution or for breach of warranty of Bendix and Ford; that plaintiff is not subrogated to the rights of its insured; there is no genuine dispute as to any material fact necessary to decision in this case and Bendix and Ford are entitled to summary judgment in their favor as a matter of law.

[2] With respect to Weeks-Allen, the undisputed facts are these: Plaintiff's insured purchased the master brake cylinder from Weeks-Allen in 1964 and himself installed it in his automobile. Plaintiff's insured was himself an automobile mechanic. He detected no defect in the cylinder and no defect manifested itself until the car had been driven over 20,000 miles. The defect consisted of a flaw in the high pressure section of the brake cylinder. Plaintiff concedes the defect was a latent one and further concedes that it was of such nature that plaintiff's insured could not reasonably be expected to discover it. Plaintiff's insured was an automobile mechanic by trade. He disassembled the cylinder at the time he purchased it and installed it by assembling all the component parts. He tested it by driving the car for over 20,000 miles after installation. Any liability of Weeks-Allen could only be predicated upon the existence of a defect of which it was aware or by reasonable diligence could have discovered at the time of sale. It would not, however, be responsible for a defect subsequently discovered which was not discernible by reasonable inspection at the time of sale. *Hudson v. Drive It Yourself, Inc.*, 236 N.C. 503, 73 S.E. 2d 4 (1952). The court properly concluded that defendant Weeks-Allen had no duty to test and examine the die-casting of the high pressure section of the master brake cylinder for latent defects prior to its sale to plaintiff's insured.

As to Bendix and Ford, Bendix manufactured the cylinder; sold it to Ford, a distributor; and Ford sold it to Weeks-Allen, a retailer.

[3] Plaintiff alleged in its complaint and has contended all along that its insured was not negligent. It has alleged that the rupture of the brake cylinder was "the sole, direct and proximate cause of the collision." Obviously the court's conclusion that plaintiff's insured was not negligent was entirely proper. Right to contribution under G.S. 1B-1 exists only "where two or more persons become jointly or severally liable in tort." G.S. 1B-1(a). Where the person seeking contribution takes the position that he is free of negligence, he is not entitled to contribution. Additionally where the party from whom contri-

bution is sought is not a tort-feasor and not jointly liable, there is no right to contribution. Plaintiff here, in order to show a right to contribution, must allege facts tending to show liability of its insured and Weeks-Allen as joint tort-feasors predicated upon negligence of *each* concurring in proximately producing the injuries. *Clemmons v. King,* 265 N.C. 199, 143 S.E. 2d 83 (1965); *Potter v. Frosty Morn Meats, Inc.,* 242 N.C. 67, 86 S.E. 2d 780 (1955). This plaintiff has not done.

[4] Plaintiff, by its second cause of action, seeks indemnity upon the basis of primary-secondary liability, alleging that Weeks-Allen was negligent in failing to make such tests as would discover the defect, that Ford was also negligent as a distributor in failing to make such tests as would discover the defect, and that Bendix negligently manufactured the cylinder. Plaintiff alleges that it is entitled to indemnification upon the basis of primary-secondary liability in that the negligence of defendants in manufacturing a defect in a critical part of the safety system of plaintiff's insured's automobile and in distributing and selling this part to plaintiff's insured without performing tests required of them was active negligence and the use of the cylinder by plaintiff's insured with a latent defect not discoverable by him was passive negligence; that the negligence of defendants was primary and the negligence, if any, of plaintiff's insured was secondary entitling plaintiff to indemnity for the amount of its loss.

Justice Sharp, in *Edwards v. Hamill,* 262 N.C. 528, 531, 138 S.E. 2d 151 (1964), set out the test for determining indemnity based on primary-secondary liability as follows:

> "Primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff, (citations omitted); and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former. (Citations omitted.)
>
> The doctrine of primary-secondary liability cannot arise where an original defendant alleges that the one whom he would implead as a third-party defendant is solely liable to plaintiff. (Citations omitted.)"

Here plaintiff's allegations do not allow for joint liability between plaintiff's insured and defendants. Although plaintiff alleges its insured was passively negligent, the allegation that he drove the car when there existed in the brake cylinder a latent defect not discoverable by him is not an allegation of negligence at all. *Stephens v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39 (1963). Plaintiff alleges the collision was caused solely by the negligence of defendants. In this case, the only way plaintiff's insured could be held liable would be for a jury to find that he was either negligent in driving or drove the car knowing it had defective brakes or in a situation in which he should have known the brakes were defective. Any one of the possibilities would be active negligence. Plaintiff disclaims each possibility. We see no possible way for plaintiff to meet the tests set out in *Edwards, supra.* See also *Anderson v. Robinson,* 275 N.C. 132, 165 S.E. 2d 502 (1969).

[5] Plaintiff admitted that its policy of insurance required it to pay on behalf of its insured all sums which its insured should become *legally obligated to pay* as damages. Plaintiff further admits that it settled with all the claimants without an adjudication of liability because it was able to settle all claims within the limits of its policy. Plaintiff by paying the funds in settlement of claims for damages did so voluntarily. Even though suits had been filed, plaintiff's liability under its policy had not arisen. Therefore, because plaintiff was a volunteer in paying the claims, it did not succeed to the rights of its insured. *Insurance Co. v. Hylton,* 7 N.C. App. 244, 172 S.E. 2d 226 (1970), cert. denied, 276 N.C. 497 (1970); 50 Am. Jur., Subrogation, § 38, p. 707.

The court properly concluded that plaintiff, as to each defendant, was not subrogated to the rights of its insured and is not entitled to indemnity.

We conclude that the trial court properly entered summary judgment in favor of each defendant.

Affirmed.

Judges BROCK and PARKER concur.

WILLIAM E. TOMLINSON v. KIDD BREWER AND WIFE, MARY FRANCES LINNEY BREWER

No. 7310SC487

(Filed 25 July 1973)

1. **Trusts § 18— parol trust — admissibility of evidence**

In North Carolina parol evidence may be admitted for the purpose of engrafting a parol trust on the legal title provided the declaration of trust is not one in favor of the grantor.

2. **Evidence § 32— parol evidence rule**

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.

3. **Evidence § 32; Trusts § 18— action to establish parol trust — written instruments admissible — oral testimony excluded by parol evidence rule**

In an action to establish a parol trust on a parcel of land where defendant's evidence consisted of (1) a deed transferring the property in fee simple to defendant and his wife and (2) an instrument executed contemporaneously with the deed giving plaintiff the option to purchase 49/100 interest in the property within a year for a stipulated sum, the parol evidence rule applied to exclude plaintiff's oral evidence that defendants held the 49/100 interest in the property in trust for him and that he owned such interest by virtue of an oral agreement with male defendant.

APPEAL by plaintiff from *Godwin, Special Judge,* 2 January 1973 Session of Superior Court held in WAKE County.

This is a civil action instituted by the plaintiff seeking to establish a parol trust in a parcel of land described as 4510 Raleigh-Durham highway located across from Crabtree Valley Shopping Center in Raleigh and to have plaintiff declared to be the owner of 49/100 undivided interest in said property. Defendants denied the existence of any trust and asserted that a written instrument executed by the defendant, Kidd Brewer, contemporaneously with the execution of the fee simple deed to Brewer and his wife from one John S. Hill II, constituted the sole and entire agreement of the parties with respect to the purchase of the land.

After the jury was selected and empaneled, counsel for both parties during a pretrial conference agreed that the ruling of the court upon the admissibility of parol evidence to show possible agreements prior to the execution of the written in-

strument would determine whether the evidence was sufficient to be submitted to the jury upon plaintiff's cause of action. In the absence of the jury the court then conducted a *voir dire* hearing at which evidence was heard from both plaintiff and defendant.

The evidence on *voir dire* tended to show, in substance, that plaintiff had previously owned the property in question and had sold it to Mr. Hill retaining a right to repurchase, and that he consulted with the defendant, Kidd Brewer, about some business arrangement for its purchase, joint ownership, and eventual development. The parol evidence was conflicting about the finality of any arrangement between plaintiff and Brewer, but the property was transferred by deed in fee simple to Brewer and his wife on 26 May 1967 in the office of Attorney Howard Manning. The defendant, Brewer, paid $35,300.00 to Mr. Hill and $9,700.00 to the plaintiff. Brewer was not represented by counsel at the time the transaction for the sale of the land was closed, but the plaintiff was present and was represented by his attorney, Walter Early. Mr. Early drafted the written instrument which was signed by the defendant, Kidd Brewer, contemporaneously with the execution of the deed, and this instrument was delivered to the plaintiff or his counsel. It was introduced into evidence as exhibit 3 on *voir dire* and is set out as follows:

> "The undersigned hereby agrees to sell to William E. Tomlinson Jr. or assigns 49/100 interest in the property briefly described as 4510 Raleigh, Durham Hy Raleigh, N. C. at the price of $22,500.00 within 1 year from date.
>
> This 26th Day of May 1967
>
> /s/ Kidd Brewer"

It is undisputed that the plaintiff did not tender the $22,500.00 referred to in *voir dire* exhibit 3 within the one year time limit therein allowed and did not exercise his right to purchase the 49/100 undivided interest in the described property. He did, however, continue to occupy a building on the premises as a residence and business office and paid rent to the defendants for some period after 26 May 1967. Later such payments were discontinued, and defendants have filed counterclaim for past due rents.

The defendants maintain that *voir dire* exhibit 3 constituted the sole agreement between the parties relating to the

purchase or transfer of any interest in the land, and the failure of the plaintiff to exercise his rights under this agreement terminates any possible interest he could have had in the property.

The court below found as a fact:

"That, upon closure of the transaction, John S. Hill and wife were paid $35,300.00 purchase money by Kidd Brewer and wife; plaintiff Tomlinson was paid $9,700.00 by defendants as consideration for the privilege of exercising the plaintiff's option to purchase the land from Hill; and at the same time and place, the defendants loaned plaintiff an additional $5,000.00.

* * *

That, prior to May 26, 1967, the date of the transfer of the land to the defendants by John S. Hill and wife, the plaintiff and Kidd Brewer had entered into no agreement providing that the plaintiff should have any record or beneficial interest in the land except upon the payment to the defendants of the sum of $22,500.00, within a year of the date of defendants' voir dire Exhibit 3, i.e., May 26, 1967; that plaintiff has made no tender or offer to pay this amount to the defendants."

The court then concluded as a matter of law:

"1. That the paper writing dated May 26, 1967, introduced herein as the defendants' voir dire Exhibit 3, is a written instrument or written agreement as between the parties and all prior agreements and negotiations between the parties pertaining to an acquisition of interest in the land merged into such written instrument.

2. That the parol evidence rule is applicable and precludes the plaintiff from introducing evidence contrary to or in conflict with the written instrument dated May 26, 1967, and received in evidence as defendants' voir dire Exhibit 3."

The court further concluded that there was no genuine issue as to any material fact, granted the motion of defendants for summary judgment, and dismissed the plaintiff's action.

From the entry of summary judgment plaintiff appealed.

Twiggs & McCain, by Howard F. Twiggs and Grover C. McCain, Jr., for plaintiff appellant.

Wolff, Harrell and Mann, by Bernard A. Harrell, for defendant appellees.

BALEY, Judge.

The sole question for determination on this appeal is the admissibility of parol evidence to vary, add to, or contradict the written instrument executed by the defendant, Kidd Brewer, and delivered to the plaintiff, Tomlinson, contemporaneously with the transfer to Brewer and his wife of a fee simple deed to the property involved upon which the plaintiff seeks to engraft a parol trust.

[1] In North Carolina parol evidence may be admitted for the purpose of engrafting a parol trust on the legal title provided the declaration of trust is not one in favor of the grantor. *Electric Co. v. Construction Co.*, 267 N.C. 714, 148 S.E. 2d 856; *Thompson v. Davis*, 223 N.C. 792, 28 S.E. 2d 556; *Insurance Co. v. Morehead*, 209 N.C. 174, 183 S.E. 606.

Conceding that the parol evidence rule would not prohibit evidence to vary or contradict the provisions of the deed to the defendants and would permit the establishment of a parol trust, that is not the situation which is presented in this case. We are confronted with another written instrument which was delivered to the plaintiff at the same time the deed was executed and granted to him an option to purchase an interest in the land described in the deed. It set out the terms under which such option could be exercised. The written instrument primarily involved is this option agreement, not the deed.

The plaintiff contends that the written agreement executed by the defendant, Kidd Brewer, was not intended by the parties to be final and was accepted by him only until the total agreement could be reduced to writing.

[2] As stated in 2 Stansbury's N. C. Evidence, Brandis Revision, § 251:

> "Translated into the language of the substantive law, the parol evidence rule may be expressed thus: *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.*"

The parol evidence rule thus applies to *any or all parts* of a transaction prior to or contemporaneous with a written instrument which was intended to record them finally.

In *Neal v. Marrone,* 239 N.C. 73, 77, 79 S.E. 2d 239, 242, the rule is stated as follows:

> "A contract not required to be in writing may be partly written and partly oral. However, where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements *as to the elements dealt with in the writing.* Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent." (Emphasis added.)

In this case the written instrument executed contemporaneously with the transfer of title dealt with the following elements:

1. Names the parties and specifically the plaintiff, William E. Tomlinson, Jr., or assigns.

2. Made a direct unequivocal promise to sell.

3. Set out the 49/100 interest involved.

4. Described and identified the property.

5. Named the price at $22,500.00.

6. Limited the time for exercise of the right to purchase, that is, within one year from date.

7. Had a specific date confirming its execution at the time the deed was made on 26 May 1967.

8. Was properly signed by the defendant Kidd Brewer.

[3] If the parol evidence offered by the plaintiff will vary, add to, or contradict any of the elements dealt with in the written instrument, it is inadmissible. Fortunately, the court conducted a *voir dire* hearing and all the evidence which plaintiff

proposes to offer is known. In material part it does vary, add to, or contradict the written instrument. The written instrument is clear that the plaintiff was entitled to purchase 49/100 interest in the Brewer property at a price of $22,500.00 within one year from 26 May 1967. If the plaintiff had exercised his option, there would have been no legal action. None of the plaintiff's oral testimony is consistent with the privilege accorded him by the option to purchase 49/100 interest in the property within one year for a purchase price of $22,500.00. To the contrary, plaintiff attempts to submit oral evidence that the defendants held the 49/100 interest in the property in trust for him and that he owned such interest by virtue of an oral agreement with defendant Kidd Brewer. Plaintiff's testimony concerned an alleged agreement to own the land together and split the profits out of which the $22,500.00 was to be paid to Brewer. All of this evidence is contrary to the terms of the written instrument, and the parol evidence rule forbids its admission as evidence.

In *Williams v. McLean,* 220 N.C. 504, 17 S.E. 2d 644, the plaintiff alleged a parol trust arising from an oral agreement by defendant and plaintiff that defendant would buy 158 acres of land for the plaintiff and take title in defendant's name and then convey to the plaintiff. Defendant purchased the land and later gave plaintiff a written option to purchase 145 acres for a set price which option the plaintiff exercised. In plaintiff's action to secure the additional 13 acres, the court referred to the prior oral negotiations as merged in the subsequent written option and stated:

> "Thus it seems the parties integrated their negotiations and agreements into the written memorial embodying an unequivocal offer to sell a certain number of acres of land on definite terms. This written designation of the terms of the contract was executed by the defendants and accepted by the plaintiff. It is established, not only as a rule of evidence, but also as one of substantive law, that matters resting in parol leading up to the execution of a written contract are considered merged in the written instrument. . . . The writing is conclusive as to the terms of the bargain." *Williams v. McLean, supra* at 506, 17 S.E. 2d at 645-46.

While it is true the option was actually exercised in the *Williams* case, it is quite similar in facts to the case at bar and the principles involved are here applicable.

The court below was correct in excluding the parol testimony offered by the plaintiff and in granting summary judgment for the defendants.

Affirmed.

Judges BROCK and VAUGHN concur.

DEWEY T. YOUNG AND LACY BOWLING YOUNG, PLAINTIFFS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, RUBY MOORE, LINDA JACKSON AND COLDEN SPEARS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ELIZABETH SPEARS, DEFENDANTS

— AND —

RUBY MOORE, LINDA JACKSON AND COLDEN SPEARS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ELIZABETH SPEARS, THIRD-PARTY PLAINTIFFS v. PENNSYLVANIA LUMBERMEN'S MUTUAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY AND SOUTH CAROLINA INSURANCE COMPANY, THIRD-PARTY DEFENDANTS

No. 7310SC512

(Filed 25 July 1973)

1. **Insurance § 84— automobile liability policy — replacement vehicle**

A "replacement vehicle" within the purview of an automobile liability policy must be (1) acquired after the issuance of the policy on the named vehicle, (2) and during the policy period, and (3) it must replace the vehicle described in the policy (4) which must be disposed of or be incapable of further service at the time of replacement.

2. **Insurance § 84— automobile liability policy — replacement vehicle**

Where an insurance company issued a liability policy covering a 1961 Oldsmobile ambulance and a 1960 Plymouth ambulance, the 1961 Oldsmobile became inoperative on 27 June 1970, insured purchased and placed in service a 1966 Mercury ambulance on that date, the medical supplies and emergency equipment in the Oldsmobile were transferred to the Mercury, and the Oldsmobile was placed in a storage shed and was not removed therefrom until after the Mercury was involved in an accident on 30 September 1970, the Oldsmobile ambulance was "incapable of further service" on the date of the accident and the Mercury was a "replacement vehicle" within the terms of the liability policy, and the insured was not required to notify the insurance company of its acquisition.

Young v. Insurance Co. and Moore v. Insurance Co.

APPEAL by defendant Aetna Casualty and Surety Company (Aetna) from *Canaday, Judge,* 4 December 1972 Civil Session of WAKE County Superior Court.

On 30 September 1970 John W. Core, Jr., was involved in a collision between a vehicle he was driving and another operated by plaintiff Dewey T. Young, in which Lacy B. Young was a passenger. Both Youngs were injured. On 10 January 1972 Dewey T. Young recovered judgment against Core in the amount of $10,000, and Lacy B. Young recovered judgment in the amount of $7,000.

Core's insurance carrier, Aetna, denied coverage and would not pay the judgment. The Young's uninsured motorist insurance carrier, State Farm Mutual Automobile Insurance Company, (State Farm) paid the Youngs' judgment recovery, and now, being subrogated to the Youngs' legal rights, contends that Aetna was liable on its insurance policy. The Youngs are no longer involved in the suit.

Additionally, Ruby Moore, Linda Jackson, Colden Spears, and Elizabeth Spears, a minor (now deceased), were riding in the vehicle operated by Core at the time of the accident. Moore, Jackson and Spears contended that they suffered personal injury as a proximate result of Core's negligence, and have filed claims against Core's insurer, Aetna. Each having been notified by Aetna that it denies coverage, they also filed claims against their respective uninsured motorist insurance carrier, which companies have been joined in this action. Moore's uninsured motorist insurer is Pennsylvania Lumbermen's Mutual Insurance Company (Pennsylvania); Jackson's uninsured motorist insurer is Nationwide Mutual Insurance Company (Nationwide); and Colden Spears' uninsured motorist insurer is South Carolina Insurance Company.

At the time of the accident Core was doing business as Dunn Ambulance Service and operating a 1966 Mercury ambulance. Aetna had issued an automobile liability policy covering a 1961 Oldsmobile ambulance and a 1960 Plymouth ambulance, but not the 1966 Mercury.

Judge Canaday, on 13 December 1972, concluded that the 1966 Mercury was a replacement vehicle, and that it was an insured vehicle. It was ordered that State Farm (the Youngs' insurance carrier) recover from Aetna the sum of $17,000 with interest and costs, and that Pennsylvania, Nationwide, and

South Carolina insurance companies had no liability on their policies arising out of the accident.

Defendant Aetna appealed; third-party defendants Moore, Jackson and Spears also appealed.

Smith, Anderson, Blount & Mitchell by James D. Blount, Jr., for defendant appellee State Farm Mutual Automobile Insurance Company.

Anderson, Nimocks & Broadfoot by Henry L. Anderson for third-party defendant appellee Pennsylvania Lumbermen's Mutual Insurance Company.

Bailey, Dixon, Wooten & McDonald by Wright T. Dixon, Jr., and John N. Fountain for third-party defendant appellee Nationwide Mutual Insurance Company.

Edgar R. Bain for third-party defendant appellee South Carolina Insurance Company.

Young, Moore & Henderson by Charles H. Young, Jr., and J. C. Moore for defendant appellant Aetna Casualty and Surety Company.

Bryant, Jones, Johnson, Hunter & Greene by C. McFarland Hunter for third-party plaintiff appellants Ruby Moore, Linda Jackson and Colden Spears.

CAMPBELL, Judge.

Core's automobile liability insurance policy insured only two named vehicles, a 1961 Oldmobile and a 1960 Plymouth. That policy did provide, however, that automatic coverage would be extended to a newly-acquired vehicle if it *replaced* an owned automobile covered by the policy.

Judge Canaday made the following pertinent findings of fact:

1. That Core's insurance policy issued by Aetna was in full force and effect on 27 June 1970 on which date Core acquired the 1966 Mercury automobile not owned by him prior thereto.

2. That on 30 September 1970, the date of the accident involving the 1966 Mercury, the Aetna policy was in full force and effect.

3. That on 27 June 1970, while on an emergency trip to Duke Hospital in Durham, North Carolina, the 1961 Oldsmobile emergency vehicle developed mechanical trouble and that Core telephoned his wife and instructed her to purchase the 1966 Mercury.

4. Upon his return from Durham, Core and his wife removed all of the medical supplies and emergency equipment from the 1961 Oldsmobile and transferred that equipment to the newly-acquired 1966 Mercury.

5. That the 1961 Oldsmobile was placed in a shed at the rear of the Core property and was never moved from its position under the shed until after the accident, at which time it was repaired.

6. That Mr. Core occasionally started the engine of the 1961 Oldsmobile, but eventually the battery went dead; that for one period, Mr. Core spread peanuts in the back of the Oldsmobile to dry; that grass grew up around the vehicle.

7. That Core removed the license tag from the 1961 Oldsmobile and placed it on the 1960 Plymouth; at the same time he removed the license tag from the 1960 Plymouth and placed it on the newly-acquired 1966 Mercury.

8. That Core intended ultimately to dispose of the 1960 Plymouth after he repaired the Oldsmobile, which then would be used as a backup ambulance to the 1966 Mercury.

9. That on 4 September 1970 an employee of the North Carolina Department of Health inspected the ambulances of Dunn Ambulance Service and certified as operable and approved for use the 1960 Plymouth and the 1966 Mercury; the 1961 Oldsmobile was indicated "not in service."

Judge Canaday then concluded that the 1966 Mercury was a newly-acquired vehicle which replaced an owned automobile covered by the Aetna insurance policy, and that inasmuch as the 1966 Mercury was acquired to replace an owned automobile covered by the policy, Core was not required by the terms of the policy to notify Aetna of its acquisition.

There is ample evidence of a competent nature to support the findings of fact of the trial court. If the trial judge's findings are supported by competent evidence, such findings are as conclusive as the verdict of a jury. They are binding on this

Court. *Insurance Co. v. Shaffer,* 250 N.C. 45, 108 S.E. 2d 49 (1959). Whether the newly-acquired Mercury was a replacement vehicle within the meaning of the liability insurance policy is a mixed question of law and fact and is to be settled with the interpretation of the insurance policy in light of the facts found.

[1] In the *Shaffer* case our Supreme Court defined a "replacement" vehicle: A replacement vehicle must be (1) acquired after the issuance of the policy on the named vehicle, (2) and during the policy period, and (3) it must replace the vehicle described in the policy (4) which must be disposed of or be incapable of further service at the time of the replacement.

In the instant case the evidence supports the finding that (1) the 1966 Mercury was acquired after the issuance of the Aetna policy; (2) the Mercury was acquired during the policy period; (3) after the Mercury was acquired it was operated to the exclusion of the 1961 Oldsmobile.

[2] The question determinative of this appeal, then, is, what is the meaning of the term "incapable of further service"?

The appellees contend that the term means "out of repair and not fit to be driven at the time"; "not operable at the time." *Insurance Co. v. McGhee,* 292 F. Supp. 176 (W.D. Va. 1968); *Lynam v. Assurance Corporation,* 218 F. Supp. 383 (D. Del. 1963).

The appellants, on the other hand, contend that the term means "not operable at the time *and* for practical purposes cannot be rendered operable." *Nationwide Farmers Union Property and Casualty Co. v. Nyborg,* 290 Minn. 191, 186 N.W. 2d 702 (1971); *Nationwide Insurance Co. v. Ervin,* 87 Ill. App. 2d 432, 231 N.E. 2d 112 (1967).

In formulating its rule that a replacement vehicle must replace one which is "incapable of further service," the *Shaffer* opinion of our Court cited *Casualty Co. v. Lambert,* 11 A. 2d 361 (N.H. 1940). The rule itself as enunciated in *Shaffer,* and upon review of the facts in *Lambert,* clearly indicates that the insured need not dispose of title or control over the replaced vehicle.

In *Lambert* the defendant's automobile was retained by him, parked in a garage, and although never driven, it was licensed for operation in the defendant's name. The court held that the new vehicle was intended to be a replacement, and was

so regardless of whether defendant retained possession of the old automobile.

Core, in his business, never used more than two ambulances and was not equipped to do so. One ambulance was used as a backup vehicle for the other.

The evidence in the instant case clearly indicates that the 1961 Oldsmobile and the 1966 Mercury were not capable of being used simultaneously and were not intended to be. The Mercury was in fact driven exclusively and the Plymouth remained the backup vehicle as it had been before the Oldsmobile was removed from service. Use of the 1961 Oldsmobile was abandoned; and abandonment of use due to inoperative condition of the vehicle, we feel, is sufficient to establish the relationship of replacement vehicle. The possible exposure of Aetna remained the same at all times.

No error.

Judges HEDRICK and BALEY concur.

ELIZA BROWN FOWLER AND HUSBAND, PAUL FOWLER; EARL LYTLE AND FLEATA WOODRUFF; MARCELLE GALLOWAY; LONNIE WOODRUFF AND WIFE, MARRINE WOODRUFF; JAMES WOODRUFF AND WIFE, MAGGIE WOODRUFF; GASTON WOODRUFF; ALBERT WOODRUFF AND WIFE, ALMA WOODRUFF; GEORGIANA W. MOCK; INEZ STEELE AND HUSBAND, ALONZO STEELE, PETITIONERS v. MAJOR BERNARD JOHNSON, ONSLOW JOHNSON, CATHY JOHNSON, DOLLY JOHNSON, MINNIE RUTH JOHNSON, PEGGY JOHNSON AND TERESSA JOHNSON, RESPONDENTS

No. 7322SC336

(Filed 25 July 1973)

1. Pleadings § 33; Rules of Civil Procedure § 15— amendment of pleadings to conform to evidence — change in theory of trial

Where respondents in a partitioning proceeding stipulated that the sole issue was whether their grantor, a cotenant of the property, obtained title to the entire tract by adverse possession for 20 years, and respondents proceeded at trial under the theory that their grandmother, also a cotenant, adversely possessed the property for more than 20 years for their grantor, the trial court did not err in the denial of respondents' motion after judgment to amend the pleadings pursuant to G.S. 1A-1, Rule 15(b) to conform to evidence, introduced

as relevant to the stipulated issue of adverse possession of respondents' grantor, that respondents' grandmother adversely possessed the property for herself, since the proposed amendment would change the theory on which the case was actually tried.

2. **Trial §§ 6, 40— stipulation as to issues**

Respondents in a partitioning proceeding were bound by their stipulation that the only issue was whether their grantor obtained title to the property by adverse possession.

APPEAL by defendant from *Long, Judge*, September 1972 Session of Superior Court held in DAVIE County.

Petitioners instituted this proceeding to have a certain tract of land sold for partition with the net proceeds from such sale distributed among the tenants in common as their interests may appear. Respondents claimed title to this tract by adverse possession.

The parties either stipulated or admitted the following facts. In 1905, Lunn Brown died intestate, seized of a 41-acre tract of land in Davie County which he had purchased in 1884. He had eleven children, three of whom predeceased him without issue. One of his eight surviving children, Cora Brown Connelly (later Cora Brown Johnson), deeded her undivided interest in the land to Lewis Brown, another of his children, in 1905. In 1919, Lewis Brown deeded one acre of the 41-acre tract to the Davie County Board of Education. In 1963, Lewis Brown conveyed the tract to Minnie L. Johnson for life and then to respondents. Minnie L. Johnson was the wife of Major Johnson, son of Cora Brown Johnson and grandson of Lunn Brown. Respondents are all children of Major and Minnie Johnson, and great-grandchildren of Lunn Brown. Petitioners consist of eight grandchildren of Lunn Brown, and heirs of two deceased grandchildren.

The parties stipulated at a final pretrial conference and again at the beginning of the trial itself that the "only issue involved is whether Lewis Brown obtained title to this tract of land described in the petition by adverse possession under the 20-year statute."

At trial petitioners presented evidence which tended to show the following: that Cora Brown Johnson lived on the land in question from 1922 until her death in 1953; that during this time Cora Johnson occupied the house on the farm, farmed the land, cut timber, and paid taxes; that Lewis Brown had never

lived on the farm or exercised any control over it from the time of his father's death in 1905 until he deeded his interest to Minnie Johnson in 1963.

Respondents claim title to the property in question by virtue of a deed from Lewis Brown to Minnie Johnson for life and then to respondents. Respondents presented evidence which tended to show that Major Johnson had lived on the farm with his mother continuously from 1922 until her death in 1953; that in 1950 Major Johnson had brought his wife, Minnie Johnson, to live at the farm; that Minnie Johnson lived with her husband on the farm from 1950 until her death in 1964; that Major Johnson stayed in possession and control of the farm until 1967; and that the general reputation in the community was that the land belonged to Lewis Brown.

Respondents contend that Lewis Brown obtained title to the farm by virtue of the adverse possession of Cora Johnson. In effect, they contend that Cora Johnson adversely possessed as an agent for Lewis Brown, holding the property adversely to other cotenants, but, at the same time, in subordination to Lewis Brown.

The court found that in 1922 Cora Johnson and her family "took full and complete possession of the place, farmed the land, occupied the house, cut timber, paid the taxes and in general exercised dominion of the premises"; that Cora Johnson remained in possession of the premises until her death in 1953; that from the date of his father's death in 1905 until he deeded his interest to Minnie Johnson in 1963, Lewis Brown did not live on the farm, pay taxes, or exercise any control or authority over the premises; and that Lewis Brown did not acquire title and ownership of the property by adverse possession.

After the judgment had been filed, respondents moved to amend the findings of fact and judgment, and, in the alternative, moved to amend the pleadings pursuant to Rule 15 of the Rules of Civil Procedure to allege that Cora Johnson had adversely possessed the land in question for herself. These motions were denied. The court remanded the proceedings to the Clerk of Court, Davie County, to determine the respective interests of the several petitioners and respondents in accordance with the findings of fact and judgment. Respondents appealed.

Martin & Martin, by Lester P. Martin, Jr., and Gilbert T. Davis, Jr., for petitioner-appellees.

White & Crumpler, by Michael J. Lewis and Sally J. Jackson, for respondent-appellants.

BROCK, Judge.

Respondents except to the findings of fact in the judgment and to the entry of the judgment itself. Respondents contend that the greater weight of the evidence is sufficient to show that Cora Johnson held the property adversely to the other cotenants, but, at the same time, in subordination to Lewis Brown. This is not the consideration on appeal. The court's findings of fact are conclusive if supported by any competent evidence, and the judgment supported by such findings will be affirmed, even though there is evidence to the contrary. 1 Strong, N. C. Index 2d, Appeal and Error § 57, p. 223.

[1] Respondents assign as error the trial court's refusal to allow their motion to amend the pleadings pursuant to Rule 15 of the Rules of Civil Procedure. Rule 15(b) allowing for amendments to conform to proof already adduced provides, in pertinent part, as follows: "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues."

Respondents stipulated at pretrial conference that "neither party desires further amendments to the pleadings. . . . " They also stipulated, both at pretrial conference and at the start of the trial itself, that the sole issue involved was "whether Lewis Brown obtained title to this tract of land described in the petition by adverse possession under the 20-year statute." At trial respondents proceeded under the theory that Cora Johnson adversely possessed the land in question *for Lewis Brown,* holding the property adversely to other cotenants, but in subordination to Lewis Brown.

After final judgment was entered, respondents moved to amend their pleadings to allege that Cora Johnson adversely

possessed the property *for herself*. Under this theory, respondents claim through Cora Johnson, their grandmother, whatever testate or intestate share to which they are entitled (record does not indicate whether Cora Johnson died testate, or, if so, the provisions of her will).

"The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue *or changes the theory on which the case was actually tried*, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. This principle is sound, since it cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial." (Emphasis added.) 3 J. Moore, Federal Practice Par. 15.13[2] (2nd ed. 1948), p. 991.

In this case, there is evidence—introduced as relevant to the stipulated issue of Lewis Brown's adverse possession—which would support the proffered amendment alleging that Cora Brown adversely possessed the property *for herself*. However, it cannot be fairly said that there was any implied consent to try this issue. The proposed amendment would completely change the theory on which the case was actually tried. Petitioners may very well have operated on a different tack if they had recognized respondents' post-trial theory as being an issue in the trial.

[2] "Unless and until the court is persuaded to modify its pretrial order, the parties are bound by their admissions and stipulations included in the order, and may not contradict its terms. They are bound by their agreement to limit the issues, and may not introduce at trial issues not among those included in the order." 3 J. Moore, Federal Practice Par. 16.19 (2nd ed. 1948), p. 1130. In this case respondents stipulated to the sole issue involved at both the final pretrial conference and the beginning of the trial. Respondents, after final judgment has been entered, seek to avoid their stipulations which were knowingly made and relied on by both parties. No abuse of discretion or error of law has been shown. This assignment of error is without merit.

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

Affirmed.

Judges VAUGHN and BALEY concur.

TRANSLAND PROPERTIES, INC., AND JOHN H. HIGH AND COMPANY, INC. v. BOARD OF ADJUSTMENT OF THE TOWN OF NAGS HEAD; CHARLES UPCHURCH, BUILDING INSPECTOR OF THE TOWN OF NAGS HEAD AND THE TOWN OF NAGS HEAD

No. 731SC492

(Filed 25 July 1973)

1. **Municipal Corporations § 30— rezoning — retroactivity — building permits**

A change in a zoning law generally applies retroactively to prohibit issuance of a building permit, previously applied for but not issued, for construction of a nonconforming use; however, the change in a zoning law does not revoke a previously issued building permit if prior to the change the permittee has relied upon his permit to his substantial disadvantage.

2. **Municipal Corporations § 30— change in zoning ordinance— expenditures in reliance on building permits**

Where 25 building permits were issued for construction of 25 condominiums on petitioners' land, construction of 12 of the condominiums had begun when the zoning ordinance was amended to prohibit such condominiums, prior to amendment of the ordinance petitioners, in good faith reliance upon the permits, had spent more than $246,000 in acquiring the land, clearing, grading and installing streets for the entire project, constructing curbing, gutters and sidewalks for the entire project, and installing water and sewerage systems for the entire project, and had entered into binding contracts within subcontractors and materialmen totaling $363,088, it was *held* that petitioners acquired a vested legal right to complete construction of the 25 condominiums and that the building permits for the remaining 13 condominiums were improperly revoked.

APPEAL by respondents from *Fountain, Judge,* 9 April 1973 Session of DARE County Superior Court.

This is a civil action heard below by the superior court upon certiorari to the Board of Adjustment of the Town of Nags Head concerning the revocation of petitioners' previously

issued building permits to construct a condominium project in the Town of Nags Head, North Carolina.

On 8 February 1972, after having amended its zoning ordinance to permit condominium buildings on petitioners' land, the Board of Commissioners issued to petitioners 25 building permits for the construction of 25 condominium buildings on a parcel of land within a much larger tract zoned for multi-family dwellings. Prior to 1 May 1972 petitioners had substantially begun the physical erection of 12 condominium buildings, designated as buildings A through L of "The Villas."

On 1 May 1972 the Board of Commissioners held a public hearing to consider the readoption of the amended zoning ordinance and did adopt such ordinance which prohibited condominium dwellings on the tract of land of which petitioners' project was a part.

On 7 December 1972 petitioners' building permits for the remaining 13 buildings, designated buildings M through X of "The Villas," were revoked. Petitioners appealed the revocation to the Board of Adjustment, which Board conducted a hearing on 5 January 1973, and found that the petitioners never began construction of the 13 buildings, M through X, while the building permits were in effect, and that therefore they had no right to proceed with the project with respect to those 13 remaining condominium buildings.

On certiorari the superior court found that the Board of Adjustment erred as a matter of law (1) in refusing to find from the evidence presented that the petitioners had expended large sums of money for land, equipment, and material acquisition for construction of the buildings, and (2) in holding that such substantial expenditure did not give petitioners a vested right to continue the project. The superior court reversed the Board of Adjustment and ordered the issuance of building permits for the 13 buildings.

Battle, Winslow, Scott & Wiley, P.A. by Thomas L. Young for petitioner appellees.

Kellogg, Wheless and White by Thomas L. White, Jr. for respondent appellant.

CAMPBELL, Judge.

[1] As a general rule, the change in a zoning law *does apply* retroactively to prohibit issuance of a building permit, previously applied for but not issued, for construction of a "nonconforming" use. See Annot., 50 A.L.R. 3d 596 (1973).

But, also generally, the change in zoning laws *does not* work to revoke a previously issued building permit if prior to the law change the permittee has relied upon his permit to his substantial disadvantage. See Annot., 49 A.L.R. 3d 13 (1973).

Additionally, change of zoning law does not revoke a previously issued building permit if the zoning ordinance also contains a "saving clause" exempting previously issued, valid building permits. See Annot., 49 A.L.R. 3d 1150 (1973).

It has been held in North Carolina that a permittee acquires a vested right to carry on a nonconforming use of his land under an issued building permit if he has made substantial beginning of construction and has incurred substantial expense. It is not required that he have completed construction prior to the zoning law amendment. *Warner v. W & O, Inc.*, 263 N.C. 37, 138 S.E. 2d 782 (1964); *In re Tadlock*, 261 N.C. 120, 134 S.E. 2d 177 (1964).

Without a saving clause in the local zoning ordinance, the permittee must have "begun construction" under his permit prior to the change of the zoning ordinance which thereafter prohibits the use as originally intended under his building permit. *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E. 2d 904, 49 A.L.R. 3d 1 (1969).

With a saving clause the permittee must "begin construction" within the time allowed by the saving clause *after* the effective date of the zoning ordinance amendment. *In re Appeal of Supply Co.*, 202 N.C. 496, 163 S.E. 462 (1932).

In the instant case the amended zoning ordinance was enacted on 1 May 1972. Section 21 of that amended ordinance provides that the amended law shall not operate to require change of use of any building or plans for which a building permit has been granted prior to the time of passage of the ordinance, provided, however, "that where construction is not begun under such outstanding permit within a period of one hundred and eighty (180) days subsequent to the passage of this ordinance or where it has not been prosecuted to completion

within eighteen (18) months subsequent to passage of this ordinance, any further construction or use shall be in conformity with the provisions of this ordinance."

Under Section 21 of the zoning ordinance petitioners must have "begun construction" within 180 days of the effective date of the zoning ordinance or by 29 October 1972.

Having established *when* the petitioners must have begun construction of the remaining 13 buildings, designated M through X of "The Villas" project, the question determinative of this appeal is what conduct constitutes "beginning construction"?

In *Town of Hillsborough v. Smith, supra,* our Supreme Court wrote:

> "In this respect, we perceive no basis for distinction between the landowner who, with the requisite good faith, and reliance upon the permit, expends money in activity resulting in visible, physical changes in condition of the land and one who, with like good faith and reliance upon the permit, expends a like amount in the acquisition of construction materials or of equipment to be used in the proposed building. Likewise, we find no basis for a distinction between such a landowner and one who, in like good faith and reliance upon the permit, incurs binding contractual obligations requiring him to make such expenditures for such construction or for the acquisition of such materials or equipment. It is not the giving of notice to the town, through a change in the appearance of the land, which creates the vested property right in the holder of the permit. The basis of his right to build and use his land, in accordance with the permit issued to him, is his change of his own position in bona fide reliance upon the permit."

The *Hillsborough* case concluded that one acquires a vested right to build pursant to a permit previously issued him if he (1) expends money in the acquisition of construction materials, (2) expends money in the acquisition of equipment to be used in the proposed building, (3) incurs binding contractual obligations requiring him to make expenditures for construction, or acquisition of materials or equipment, or (4) expends money for acquisition of land under a previously held option in reliance upon the building permit. A vested right arises out of sub-

stantial expenditure for any of the above purposes in reliance upon a building permit issued to him, 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.

[2] Prior to 29 October 1972, when the building permits issued to petitioners expired under the saving clause of the zoning ordinance, the entire Villas project had cost petitioners a considerable amount of money. The land on which the buildings M through X were to be located was acquired on 1 August 1972 for $32,563.00. Petitioners had substantially cleared, graded, and installed all streets for the entire project and constructed curb, gutters and sidewalks for a total expenditure of $77,853.37 prior to 29 October 1972.

Beginning on 15 March 1972 petitioners installed a water system required to serve the entire project upon an expenditure of $33,234.06. On 2 August 1972 they began installation of a sewerage treatment plant required to serve the entire project upon an expenditure of $102,664.24.

In October 1972 petitioners had cleared and graded the lots for buildings M through X.

While it is not clear from the evidence when construction contracts were entered into, prior to the time the building permits were revoked, petitioners had entered into binding contractual obligations with subcontractors and materialmen totaling $363,088.86.

Under the theory of the *Hillsborough* case such expenditures are clearly substantial, are concerned with the acquisition of land, of equipment to be used in, or with respect to, the buildings, and are contractual obligations for the physical erection of the buildings.

Such expenditures, made in good faith reliance upon the previously issued building permits during the period of time within which the petitioners had a legal right to proceed with construction under the permits, create a vested legal right to complete the construction of "The Villas" condominium project unhampered by the amended zoning ordinance. The Board of Adjustment erred as a matter of law in holding that the petitioners had no legal right to continue construction and the

superior court was correct in so finding and directing the reinstatement of the building permits as ordered by Judge Fountain.

Affirmed.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, MRS. PATRICIA K. BYRNE (COMPLAINANT), MRS. MATTIE LEE CLARK (INTERVENOR-PROTESTANT), DUKE POWER COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, CAROLINA POWER & LIGHT COMPANY, NANTAHALA POWER & LIGHT COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, GENERAL TELEPHONE COMPANY OF THE SOUTHEAST, PIEDMONT NATURAL GAS COMPANY, PENNSYLVANIA & SOUTHERN GAS COMPANY, UNITED CITIES GAS COMPANY, PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. (RESPONDENTS) v. NORTH CAROLINA CONSUMERS COUNCIL, INC., (INTERVENOR)

No. 7310UC407

(Filed 25 July 1973)

Utilities Commission §§ 2, 6— late payment charge — authority of Commission

The Utilities Commission had authority to adopt a rule providing that utilities subject to its jurisdiction may charge 1% per month as a late payment charge on amounts owing 25 days or longer after the rendering of the bill.

APPEAL by Intervenor from Order of Utilities Commission of 24 November 1972.

On 26 March 1971, the Utilities Commission entered an Order Instituting Rule-Making Proceeding. The Commission stated in its order that its review of the tariff provisions on file with the Commission "relating to the billing practices of the various public utilities operating within the State of North Carolina indicate a diversity in billing rules and practices having a substantial effect on the public interest." The Commission further noted that any discrimination in public utility billing practices is particularly subject to customer objection and the Commission was of the opinion that it should investigate generally the billing practices of the public utilities within this

State. In the investigation, the Commission proposed to evaluate the "justness and reasonableness" of the "due and payable within ten days" provisions, the "net and gross" billing practices, the "additional charge of 5%" practice, and any "discounts" or "penalties" which may constitute a rate differential established to induce prompt payment.

The Commission entered its Interim Order Proposing Uniform Billing Procedure Rule R12-9 on 25 April 1972. On 15 May 1972, Intervenor filed a petition to intervene and requested a public hearing. On 8 June 1972, an order was entered granting the petition to intervene, setting the matter for further public hearing on 31 July 1972, and staying the effectiveness of the 25 April 1972 order.

After hearing, the Commission entered an order providing that "No utility shall apply a late payment, interest, or finance charge to the balance in arrears at a rate of more than 1% per month." The order further provided that no interest, finance, or service charge shall be imposed on the customer if the account is paid within 25 days from billing date. The utility was required to let the bill clearly show the interest and, if the utility intended to apply an interest, finance, or service charge, tariff provisions to that effect must be filed with the Commission and such charges must be charged on a uniform basis, applicable to all customers and all classes of services.

From this order Intervenor appealed.

Crisp and Bolch, by Thomas J. Bolch, for the North Carolina Consumers Council, appellant.

Edward B. Hipp and William E. Anderson for the North Carolina Utilities Commission, appellee.

MORRIS, Judge.

Intervenor's exceptions and assignments of error bring forward only one question for decision and that is whether the Commission has lawful authority to adopt a rule providing that utilities subject to its jurisdiction may charge no more than 1% per month to their customers in North Carolina as a late payment charge on amounts owing 25 days or longer after the rendering of the bill.

Intervenor argues that the 1% per month permissible charge amounts to interest; that the Utilities Commission has

no authority to set interest rates, a matter for the General Assembly, and that even if the Commission has the authority, the rate set is usurious because it is more than the statutory legal rate of 6% per annum and is not a statutory exception to the legal rate.

We agree with Intervenor that this is a case of first impression in North Carolina.

The Commission heard evidence and received exhibits. Intervenor does not contend that any findings of fact are not supported by the evidence. It, in fact, concedes that if the Commission had the power and authority to fix any amount of interest or service charge, or penalty, the 1% per month is justified by the evidence before the Commission. Nor does Intervenor question the Commission's statement in its order that "the late payment charges heretofore levied in the amounts of 5% or 10% per month are misleading, unreasonable and discriminatory under G.S. 62-140," nor the Commission's authority and jurisdiction to make such a declaration.

Intervenor does, however, strenuously contend that the Commission was without authority to enter an order allowing public utilities to make any late payment charge which, it argues, amounts to setting interest rates. We look to the statutory authority of the Commission.

Public Utilities are regulated by the Utilities Commission pursuant to legislative authority under the provisions of Chapter 62 of the General Statutes of North Carolina. The General Assembly has declared that rates, service, and operations of public utilities are affected with a public interest. In declaring the policy of North Carolina with respect to public utilities, the General Assembly declared that, among other things, it is the policy of the State "to provide just and *reasonable rates and charges* for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices." (Emphasis supplied.) G.S. 62-2.

"Rate" is defined as "every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental, or classification." G.S. 62-3(24).

By G.S. 62-130(a) the Commission is authorized to "make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction," and by G.S. 62-130(d) is authorized "as often as circumstances may require," to "change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility."

G.S. 62-140(a) provides, in part: "No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage."

We think it clear that this is a part of the rate making power of the Commission. In fixing rates to be charged by the public utility, the Commission is directed by G.S. 62-133(b)(3) to ascertain the public utilities reasonable operating expenses, among other things. Obviously the cost of collecting past due accounts is an operating expense. Allowing the penalty or a discount affects the amount of net return to the company, and has a definite influence on the fair rate of return a company should earn. It is certainly a fair assumption that a penalty or discount is considered by a company in establishing its rates. If the company uses the discount plan (i.e., allowing a discount for prompt payment), the base rate will be comparatively higher. On the other hand, if a penalty is charged for late payment, the base rate would not include the cost of collection. See *Dearborn v. Consolidated Gas Co.*, 297 Mich. 388, 297 N.W. 534 (1941). To say that the charge is unrelated to rates is to fail to consider the realities.

We think a recent case decided by the Supreme Court of Arkansas is directly in point and the opinion well reasoned. In *Coffelt v. Ark. Power & Light Co.*, 248 Ark. 313, 451 S.W. 2d 881 (1970), reh. denied 27 April 1970, the suit was brought as a class action for declaratory judgment as to whether imposition by utility company of a late charge against customers violated prohibition against usury. The late charge imposed was 8% of first $15 of net bill and 2% of any amount in excess of $15 against customers who did not pay their monthly bills within 10 business days. In affirming the order of the Commission approving the proposed late charge the Court said:

> "The late charge, as approved by the Public Service Commission, is simply a practical method of preventing dis-

crimination among the utility company's customers. The prohibition against discrimination in utility rates is basic in public utility law. Pond, Public Utilities, § 270 (4th ed., 1932). That prohibition is incorporated in our statute governing public utilities: 'No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage.' Ark. Stat. Ann. § 73.207 (Repl. 1957). Even before the passage of that statute we had held that a public utility must serve its consumers without unjust discrimination, though the utility may make a reasonable classification of its consumers. Ark. Natural Gas Co. v. Norton Co., 165 Ark. 172, 263 S.W. 775 (1924).

The late charge, far from being an exaction of excessive interest for the loan or forbearance of money, is in fact a device by which consumers are automatically classified to avoid discrimination. Its effect is to require delinquent ratepayers to bear, as nearly as can be determined, the exact collection costs that result from their tardiness in paying their bills. The appellant's argument actually means in substance not that the utility company be prevented from collecting excessive interest but that its customers who pay their bills promptly be penalized by sharing the burden of collection costs not of their making." 248 Ark. at 317.

We agree with the Arkansas Court's reasoning. Applying the same principles to the case now before us, we conclude that the order of the Utilities Commission should be and is

Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. LYMAN EUGENE GRANT AND ERNIE M. TOMLINSON

No. 738SC91

(Filed 25 July 1973)

1. **Criminal Law § 43— identification of photographs — admissibility for illustration**

Testimony by a witness that photographs contained an image like the automobile he observed was sufficient to permit introduction of the photographs for the purpose of illustrating the testimony of the witness.

2. **Criminal Law § 66— identification of defendant from photographs — admissibility of corroborative evidence**

Trial court did not err in admitting testimony of an SBI agent that robbery victims identified defendant from photographs, though defendant objected to the testimony, where the agent's testimony was offered only as corroboration to the same testimony already in evidence given by the victims.

3. **Criminal Law § 34; Robbery § 3— robbery prosecution — evidence of payment of fine for prior liquor violation — admissibility to show motive**

Trial court did not err in allowing evidence tending to show that defendant, who had not taken the stand, paid a fine for a liquor violation for himself and a codefendant with several new hundred dollar bills two days after the robbery in question, since the payment of the debt after the commission of the crime was offered as proof of the element of motive for the actual crime itself.

APPEAL by defendants from *Cowper, Judge,* at the 26 June 1972 Session of Superior Court held in GREENE County.

Each defendant was charged in four bills of indictment with: (1) armed robbery, (2) first degree burglary and felonious larceny, (3) armed robbery, and (4) kidnapping. Defendants entered pleas of not guilty to each charge, and the State presented evidence which tended to show the following:

On 20 April 1971, Milton Moye owned and operated a store located seven miles east of Snow Hill, N. C., on Highway 102; that Moye lived in a brick residence located about 150 feet from his store; that Mr. Moye is also engaged in the business of selling used cars, which he displays in his yard between his house and the store; and that on 20 April 1971, he had 10-20 used cars parked in his yard.

On that same date at about 9:15 p.m., Mr. Moye was at home watching television and he observed an automobile stop

in the vicinity of the used cars. Immediately after the car stopped, Mr. Moye saw a man approaching on the walkway to his home; Mr. Moye turned on the porch light and walked out onto the open porch. When the man was 5-6 feet from the porch he spoke to Mr. Moye and Mr. Moye asked him "Are you the man from Farmville?" Mr. Moye thought perhaps this was the man from Farmville who was going to paint a car for him. After he asked this question, two men with pistols stepped out from the side of his house; one of these armed men was wearing a lady's stocking over his face, but Mr. Moye could see the man's features through the stocking. The other man was larger, and was wearing a dark blue mask and gloves. The two armed men ordered him back inside his home, and at this time, the unmasked man, later identified by Mr. Moye as defendant Tomlinson, walked away and got into a red convertible automobile. Once inside the home, the larger of the two armed men held a pistol to Mr. Moye's head while the other, later identified by the Moyes as defendant Grant, taped Mrs. Moye's hands, feet and mouth, and then removed three rings from her fingers. The larger of the two armed men then took two pocketbooks of money that were on the kitchen table, containing approximately $2900 plus a number of checks, and also took Mr. Moye's wallet from his pants pocket. Defendant Grant turned out the lights in the house and ripped the phone off the wall.

The robbers left Mrs. Moye with her hands, feet and mouth taped in the darkened house, and marched Mr. Moye to his store at gun point, where they forced him to unlock the store. As he was unlocking the door, Moye could see defendant Tomlinson waiting in a 1963 Chevrolet convertible. Once inside, Mr. Moye was forced to open the safe and the larger of the two robbers took certain money from the safe, while defendant Grant took approximately $100 from a cash drawer. The robbers then taped Mr. Moye's hands and mouth and fled in the red and black Chevrolet convertible. Mr. Moye got the license number of the automobile and also identified defendant Tomlinson as the driver of the automobile.

A red and black convertible Chevrolet matching Mr. Moye's description was later found abandoned near Ormondsville, N. C., with a lady's stocking inside. It was determined that this car had been stolen. A 1965 cream-colored Comet automobile with a broken out taillight was seen near Mr. Moye's store at the time of the commission of the crime, and defendant Grant was

later seen driving a car of like description. On 22 April 1971, defendant Grant paid off a fine to the Clerk of Court, Lenoir County using five new one hundred dollar bills, and he also at that time paid a fine for defendant Tomlinson. The third robber was never identified or apprehended.

Defendant Grant offered evidence tending to show: that he was elsewhere at the time of the commission of the crimes; that when interviewed shortly after the robbery, Mr. Moye did not know who robbed him or even whether the robbers were black or white; that defendant Grant had borrowed $700 from Branch Bank & Trust Co. to go into the filling station business, that he had borrowed $500 from his mother to pay a fine, and that he had borrowed $600 from another person.

Defendant Tomlinson offered no evidence.

The jury found each defendant guilty of two counts of armed robbery, guilty of the lesser included offense of breaking and entering, and not guilty of kidnapping. Defendant Tomlinson was sentenced to 20 years imprisonment on each of the armed robbery counts and five years on the count of felonious breaking and entering, all to run concurrently. Defendant Grant was sentenced to 30 years on each of the two armed robbery convictions and 10 years on the felonious breaking and entering conviction, all to run concurrently.

Defendants appealed.

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

Owens, Browning & Haigwood, by Mark W. Owens, Jr., for defendant Tomlinson.

Turner & Harrison, by Fred W. Harrison, and Gerrans and Spence, by C. E. Gerrans, for defendant Grant.

BROCK, Judge.

[1] Defendant Grant excepts to the introduction into evidence of photographs for the limited purpose of illustrating the testimony of State's witness Rex Allen Shirley. Defendant Grant contends that the witness never properly identified the photographs as being the automobile he saw, but stated only that it "looked like" the automobile he saw. This evidence was admitted for the sole purpose of illustrating the witness' testimony to

the court and jury. The witness testified that the photographs contained an image like the automobile he observed. This identification is sufficient. Stansbury, N. C. Evidence (Brandis Revision) § 34, p. 93. This assignment of error is without merit.

[2] Defendant Grant excepts to S.B.I. agent Campbell's testimony that Mr. & Mrs. Moye identified defendant Grant from photographs. Defendant's objection to this testimony was overruled at trial. Defendant did not reveal his reasons for his objection, nor did he request a voir dire. Yet, on appeal defendant contends it was the trial court's duty, upon his objection, to conduct a voir dire and making findings of fact. Agent Campbell's testimony was offered only as corroboration to the same testimony, already in evidence, by Mr. & Mrs. Moye to the effect that they had identified defendant Grant from photographs. This assignment of error is without merit.

[3] Defendant Grant assigns as error the allowance of evidence showing that on 22 April 1971 defendant Grant paid a fine for a liquor violation for himself and defendant Tomlinson to the Clerk of Court, Lenoir County. The evidence admitted showed that defendant Grant paid for his fine with several new one hundred dollar bills, corresponding to other State's evidence that several new hundred dollar bills were taken from Mr. Moye. Defendant contends that this evidence is too remote from the commission of the crime—two days afterwards—to be proper proof of the element of motive. Defendant further contends that this testimony allowed the State to impeach defendant's character, in the absence of his taking the stand, by the introduction of evidence of a prior conviction, and that it also deprived defendant of his right not to testify by forcing him to take the stand to explain this evidence. Defendant, in fact, did later testify and admit the transaction that is the subject of this exception.

Evidence of other offenses is admissible, in the absence of the defendant testifying, if it is relevant for some proper purpose other than showing accused's character or disposition. Such other proper purposes include knowledge, intent, motive, and plan or design. *See* Stansbury, N. C. Evidence (Brandis Revision) § 92. In the present case, the payment, after the commission of a crime, of a debt was offered as proof of the element of motive for the actual crime itself. This was a proper purpose and, in our opinion, there is a relevant connection

between this evidence and the commission of the crimes. This assignment of error is overruled.

No useful purpose would be served by a seriatim discussion of all of defendant Grant's and defendant Tomlinson's assignments of error. Suffice it to say that we have carefully examined each and every one of them and find them to be without merit. In our opinion, each defendant had a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

W. M. SIMS AND WIFE, CAROL C. SIMS, PLAINTIFFS v. OAKWOOD TRAILER SALES CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF v. VIRGINIA HOMES MANUFACTURING CORPORATION, THIRD-PARTY DEFENDANT

No. 7310SC497

(Filed 25 July 1973)

1. **Rules of Civil Procedure § 41— voluntary dismissal — institution of new action — failure to pay costs of first action**

The language of Rule 41(d) requiring dismissal of an action upon defendant's motion for failure of plaintiff to pay court costs in a previous action involving the same claim and dismissed without prejudice at plaintiff's request constitutes a mandatory directive to the trial court.

2. **Rules of Civil Procedure §§ 8, 12, 41— failure to pay court costs of prior action — method of raising defense**

Defendant did not waive his right to move for dismissal under Rule 41(d) when he failed to make such motion prior to or as part of his answer, since Rule 12 waiver provisions were not applicable to the defense raised by defendant's motion; nor was the defense relied on by defendant a matter constituting an avoidance or affirmative defense required to be asserted in a responsive pleading.

3. **Rules of Civil Procedure §§ 6, 7, 41— motion to dismiss for failure to pay court costs of prior action — time of making — necessity for written motion**

Defendant's oral announcement and presentation of a motion to dismiss under Rule 41(d) during the session at which the cause was calendared for trial was sufficient to bring the matter before the court, and defendant's failure to serve written motion five days before the hearing was immaterial, since it was not required that his motion be in writing. G.S. 1A-1, Rules 7(b)(1) and 6(d).

APPEAL by plaintiffs from *Hobgood, Judge,* 19 February 1973 Session of WAKE County Superior Court.

The undisputed facts in this case are as follows: On 2 October 1970, plaintiffs instituted a civil action against defendant Oakwood Mobile Homes, Inc. The defendant joined Virginia Homes Manufacturing Corporation as a third party defendant. On 18 November 1971, during the trial of the case and prior to the resting of their case, plaintiffs filed a notice of voluntary dismissal without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, and the costs of such action were taxed against the plaintiffs.

On 16 August 1972, plaintiffs reinstituted the civil action against defendant. As in the former action, defendant joined Virginia Homes Manufacturing Corporation as a third party defendant. At the time plaintiffs reinstituted their action, they neglected and failed to pay the court costs taxed against them in the prior action. Neither action instituted by plaintiffs was brought in forma pauperis.

The reinstituted action was calendared for trial at the 19 February 1973 Session of Wake Superior Court and on 21 February 1973, defendant moved that the action be dismissed for failure of the plaintiffs to pay the court costs taxed against them in the former action. Upon defendant's motion, the trial court made the following conclusion of law:

> "That the provision of Rule 41(d) of the North Carolina Rules of Civil Procedure which states that the court, upon motion of defendant, shall dismiss a civil action 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 payment of the costs of the action previously dismissed is mandatory and leaves the court no discretionary authority to relieve plaintiffs of the obligation imposed by the rule."

The trial court then dismissed plaintiffs' action and plaintiffs appealed.

James M. Kimzey for plaintiff appellants.

Teague, Johnson, Patterson, Dilthey and Clay, by Robert W. Sumner, for defendant and third party plaintiff appellee.

Bailey, Dixon, Wooten and McDonald, by Wright T. Dixon, Jr., and John N. Fountain, for third party defendant appellee.

MORRIS, Judge.

[1] G.S. 1A-1, Rule 41(d) of the North Carolina Rules of Civil Procedure provides as follows:

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

The language of Rule 41(d) constitutes a mandatory directive to the trial court. *Cheshire v. Aircraft Corp.*, 17 N.C. App. 74, 193 S.E. 2d 362 (1972).

[2] Plaintiffs contend, however, that a motion to dismiss under Rule 41(d) is waived by failure of defendant to make such a motion prior to or as part of its answer as required by G.S. 1A-1, Rule 12(b). The pertinent parts of Rule 12 are set out as follows:

> "(b) *How presented.*—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:
>
> (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 materials made pertinent to such a motion by Rule 56.

* * *

(g) *Consolidation of defenses in motion.*—A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h) (2) hereof on any of the grounds there stated.

(h) *Waiver of preservation of certain defenses.*—

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a necessary party, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Plaintiffs argue that Rules 12(b), (g) and (h) should be read in conjunction with one another with the result that all defenses and objections not included in the pleadings, made by pre-pleading motion under 12(b), or excepted by 12(h)(1) are waived under 12(b) and 12(h)(1). In support of their contention they argue that defendant's motion to dismiss under Rule 41(d) is analogous to a motion for insufficiency of process and such defense is waived under Rule 12(h)(1) if it is neither made by pre-pleading motion nor included in the pleadings or on amendment thereto. We do not agree.

It is clear from the language in Rule 12(g); i.e., "which this rule permits to be raised by motion," that the Rule 12 waiver provisions apply only to those motions enumerated under 12(b) and not excepted under 12(h). Plaintiffs' analogy is ingenious but unconvincing.

It is equally clear that payment of costs taxed in the first action is a mandatory condition precedent to the bringing of a second action on the same claim under Rule 41(d). Plaintiffs are in no position to claim surprise or prejudice for failing to comply with a requirement that conditions their right to reinstate their previous action.

The strong language of Rule 41(d) also compels us to reject plaintiffs' contention that the defense relied on by defendant constitutes "any other matter constituting an avoidance or affirmative defense," under Rule 8(c) and must be asserted in a responsive pleading under Rule 12(b). Rule 41(d) succinctly provides that, "the court, *upon motion of the defendant,* shall dismiss the action" (emphasis added), and we hold that defendant did not waive its rights under 41(d) by failing to assert them in a responsive pleading.

[3] Lastly, we examine plaintiffs' contention that defendant's motion was not properly before the court for defendant's failure to comply with Rule 6(d) which provides that a written motion "shall be served not later than five days before the time specified for the hearing." Defendant's motion to dismiss was served on the day the case appeared on the trial calendar, two days after the trial term and a day before the actual date of the trial.

Rule 7(b) (1) provides in pertinent part:

> "An application to the court for an order shall be by motion which, unless made during a hearing or trial *or at a session at which a cause is on the calendar for that session,* shall be made in writing." (Emphasis added.)

Under Rule 7(b) (1) a motion does not have to be made in writing if made during the session at which the cause is calendared for trial. The fact that defendant did file a written motion in this instance does not trigger the notice provision of Rule 6(d) into play. Defendant's oral announcement and presentation of the motion during the session at which the cause was calendared for trial was sufficient properly to bring the matter before the court. Furthermore, we note no objection in the record by plaintiffs' counsel that the motion was not properly before the court.

As held under our old practice and equally applicable to our present Rule 7(b) (1):

> "The law manifests its practicality in determining 'when notice of a motion is necessary.' When a civil action or special proceeding is regularly docketed for hearing at a term of court, notice of a motion need not be given to an adversary party, unless actual notice is required in the particular cause by some statute. This rule is bottomed on the proposition that all parties to a civil action or special proceeding are bound to take notice of all motions made and proceedings had in the action or special proceeding in open court during the term. (Citations omitted.)" *Collins v. Highway Commission,* 237 N.C. 277, 282, 74 S.E. 2d 709 (1953).

Therefore, we conclude that defendant's motion was properly before the court and the trial judge committed no error in

dismissing plaintiffs' action for failure to comply with Rule 41(d).

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS POWELL

No. 7219SC825

(Filed 25 July 1973)

1. **Constitutional Law § 30— two and one-half years between offense and trial — right to speedy trial not abridged**

Defendant in a prosecution for assault upon a law officer was not denied his right to a speedy trial where the evidence tended to show that the alleged offense took place in Randolph County in 1969 while the trial did not begin until 1972, the highway patrol officer who was the victim of the assault was transferred from Randolph County subsequent to the date of the offense and thereafter separated from the highway patrol and became a U. S. Deputy Marshal stationed in Raleigh, defendant was free on a nominal bond most, if not all, of the time between the offense and trial, and there was no showing that defendant was prejudiced in any way by the delay.

2. **Assault and Battery § 13; Criminal Law § 64— assault upon law officer — breathalyzer test results — inadmissible**

Where defendant allegedly assaulted a law officer who had arrested him for driving under the influence of intoxicants, the trial court erred in allowing into evidence testimony as to the results of a breathalyzer test administered to defendant shortly after his arrest, since defendant was not driving or operating a vehicle at the time of the alleged assault; however, the error was not prejudicial to defendant as there was plenary evidence without the breathalyzer test results tending to show defendant's intoxication at the time he was operating a vehicle, thereby establishing probable cause for his arrest.

APPEAL by defendant from *Armstrong, Judge,* 17 July 1972 Session of Superior Court held in RANDOLPH County.

Defendant was tried upon a bill of indictment returned at the June 1972 Session of Randolph Superior Court charging that defendant did, on or about 19 October 1969, "unlawfully, willfully and feloniously assault W. L. Smith, a law enforcement officer, with a firearm, to wit, a pistol, while the said W. K. (sic) Smith was in the performance of his duties as a State

Highway Patrolman, in the act of arresting and conveying to jail the said William Thomas Powell on a charge of operating a motor vehicle on the public highway while under the influence of intoxicating liquor."

A warrant charging defendant with the same offense was issued on 31 March 1971. Following a preliminary hearing in district court on 23 June 1971, probable cause was found and defendant was bound over to superior court under $500 bond.

Evidence presented by the State tended to show: On 19 October 1969 W. L. Smith was a member of the State Highway Patrol, working in Randolph County. Around 10:40 p.m. on that date, he went to the scene of an accident to assist with the investigation of the accident. About the time Tpr. Smith arrived at the scene, defendant drove up in an automobile and stopped in a traffic lane. Tpr. Smith approached defendant's vehicle, engaged defendant in conversation and detected an odor of alcohol on defendant's breath. At Smith's request, defendant got out of his car and walked the white line on the side of the paved road. Observing that defendant staggered in walking the line, Smith concluded that defendant was under the influence of intoxicants and arrested defendant. Smith placed defendant in the patrol car and proceeded toward the jail. While driving to the jail, Smith heard a "click," looked around and defendant was holding a cocked pistol near Smith's head. Defendant told Smith, "Turn right up here you son-of-a-bitch, I am going to kill your G___ d_____ ass." As Smith was turning the patrol car, he mangaged to get hold of defendant's arm, after which the gun went off with a bullet going through the dash and another through the windshield of the patrol car. The car ran into a utility pole, Smith got hold of his service gun and shot defendant in his body. Thereafter, Smith called an ambulance and defendant was carried to a hospital. Later that night, at around 12:15 a.m., Sgt. McClure, who was duly licensed by the State Board of Health to administer breathalyzer tests, administered a test to defendant in the hospital. Over objection he testified that the test showed .13 (percent by weight of alcohol in defendant's blood).

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

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

Ottway Burton for defendant appellant.

PARKER, Judge.

Defendant assigns as error the overruling of his motion to dismiss the action for the reason that he was denied a speedy trial as guaranteed by the Sixth Amendment to the Federal Constitution.

In *State v. Johnson,* 275 N.C. 264, 269, 167 S.E. 2d 274 (1969), opinion by Justice Sharp, we find:

"Decisions of this Court establish:

"1. The fundamental law of the State secures to every person *formally accused* of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution (made applicable to the State by the Fourteenth Amendment, *Klopfer v. North Carolina,* 386 U.S. 213, 18 L.Ed. 1, 87 S.Ct. 988 (1967).

"2. * * *

"3. Undue delay cannot be categorically defined in terms of days, months, or even years; the circumstances of each particular case determine whether a speedy trial has been afforded. Four interrelated factors bear upon the question: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant.

"4. The guarantee of a speedy trial is designed to protect a defendant from the dangers inherent in a prosecution which has been negligently or arbitrarily delayed by the State; prolonged imprisonment, anxiety and public distrust engendered by untried accusations of crime, lost evidence and witnesses, and impaired memories.

"5. The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. (Citations.)"

In *State v. Brown,* 282 N.C. 117, 123, 191 S.E. 2d 659 (1972), opinion by Justice Moore, we find: "The word 'speedy' cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed. (Citations.)"

[1] In the instant case, defendant failed to show that the delay in his trial was due to the neglect or willfulness of the prosecution. To the contrary, the record discloses that subsequent to 19 October 1969 Tpr. Smith was transferred from Randolph County and thereafter separated from the State Highway Patrol and became a U. S. Deputy Marshal; that he was serving as a deputy marshal, stationed in Raleigh, at the time of the trial. The record further indicates that defendant was free on a nominal bond most, if not all, of the time between the date of the alleged offense and the date of his trial. There is no showing that defendant was prejudiced by the delay in any way. The assignment of error is overruled.

[2] Defendant assigns as error the admission of testimony showing the result of the breathalyzer test administered to him in the hospital. In connection with this assignment, defendant argues that the court should not have admitted any evidence tending to show that he was operating a motor vehicle upon a public highway while under the influence of intoxicants. We reject this argument. Evidence of defendant's operating a motor vehicle while under the influence of intoxicants was relevant to show that Tpr. Smith had probable cause to arrest defendant and that defendant was in the lawful custody of Tpr. Smith at the time of the alleged assault.

As to the admission of testimony showing the result of the breathalyzer test, G.S. 20-139.1(a) provides in pertinent part as follows: "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. . . ."

Since defendant in the case at bar was not driving or operating a vehicle at the time of the alleged assault on Tpr. Smith, we hold that the court erred in admitting testimony showing the result of the breathalyzer test; however, we do not think the error was prejudicial to defendant. *State v. Wade*, 14 N.C. App. 414, 188 S.E. 2d 714 (1972); cert. den., 281 N.C. 627, 190 S.E. 2d 470 (1972). Without the evidence disclosing the result of the breathalyzer test, there was plenary evidence tending to show defendant's intoxication at the time he was operating a vehicle, thereby establishing probable cause for his arrest. The jury was not passing upon the question of defendant's guilt of operating a vehicle while under the influence of intoxicants; its inquiry was whether Tpr. Smith had probable cause to believe that defendant was guilty of operating a vehicle while under the influence of intoxicants. The 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 without merit, they too are overruled.

No error.

Judges BRITT and VAUGHN concur.

BOOKER T. POWELL, PLAINTIFF APPELLANT v. DUKE UNIVERSITY INC., DUKE HOSPITAL, DUKE MEDICAL CENTER, DR. FERNANDO RUIZ, DR. P. J. IRIGARAY, DR. GIOTTO MENDEZ, AND JESSE MCNIEL, DEFENDANTS APPELLEES

No. 7314SC332

(Filed 25 July 1973)

1. **Insane Persons § 1; Statutes § 4— commitment for psychiatric examination — statute declared unconstitutional — conduct in reliance on statute protected**

The legal principle that an unconstitutional statute is a complete nullity and cannot justify any acts under it must be construed with respect to the particular factual situation, and while a party may not assert a right arising out of a statute which has been declared unconstitutional, the principle does not strike down all undertakings made in reliance upon said statute; therefore, defendant doctors were entitled to rely on the provisions of G.S. 122-59 authorizing confinement of a patient for psychiatric examination at the time of acts

complained of by plaintiff, though the statute was subsequently held unconstitutional.

2. **Insane Persons § 1— commitment for examination — reasonableness of accepting physicians' actions — qualifications of committing physician**

Defendants who were doctors on the staff of a hospital whose chief purpose was to treat the mentally ill did not act improperly in accepting the committing physician's order with respect to plaintiff at "face value" and in detaining plaintiff as an emergency patient; therefore, it was unnecessary for the court to determine whether the limited license to practice medicine issued the committing physician made him a "qualified physician" to sign the emergency order (as provided by G.S. 122-59) challenged by plaintiff.

APPEAL by plaintiff from *Bailey, Judge,* 5 September 1972 Civil Session of DURHAM Superior Court.

Plaintiff instituted this action against the parties named in the caption and also John Umstead Hospital and its business manager, Leon B. Perkinson. In his complaint, plaintiff seeks to allege three claims for relief: (1) false arrest and imprisonment; (2) violation of his civil rights as guaranteed by the Constitution and laws of the United States; and (3) actionable negligence by defendants. He asks for $100,000 actual damages, $100,000 punitive damages, costs, attorney fees and other relief.

On 1 March 1972 an order was entered dismissing the action as to John Umstead Hospital. On 30 June 1972, by consent, summary judgment was entered as to Perkinson. At the 5 September 1972 civil session of the court, the cause was heard on (1) plaintiff's motion for summary judgment on the ground that there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law against each of the defendants remaining in the action, and (2) defendants' motions for summary judgment on the ground that there is no genuine issue as to any material fact and they are entitled to judgment as a matter of law. Plaintiff and defendants presented affidavits, exhibits, answers to interrogatories, admissions in pleading and other materials in support of their respective motions.

Plaintiff's pleadings and evidence tended to show:

On 23 December 1970 plaintiff went to the emergency room of Duke Hospital. While there he was forcibly restrained by defendant Ruiz, a resident in psychiatry at Duke Hospital, and by

a security guard working for the hospital. Plaintiff was restrained at Duke Hospital for approximately three hours during which time defendant Ruiz, purportedly pursuant to authority granted by G.S. 122-59, filled out a so-called emergency hospital form to commit plaintiff involuntarily to the John Umstead Hospital at Butner, N. C. By virtue of said form, plaintiff was taken to Umstead Hospital by deputies sheriff of Durham County and was admitted to Umstead Hospital. Although plaintiff demanded that he be released, he was kept in the Umstead Hospital until 1 January 1971.

While at Umstead Hospital, plaintiff was detained by defendants Doctors Irigaray, Mendez, and McNiel and was forced by said defendants to undergo medical treatment against his will; plaintiff was subjected to assaults by personnel working for Umstead Hospital under the direction of said defendants.

Defendants' pleadings and evidence tended to show:

On 23 December 1970 plaintiff went to the emergency room at Duke Hospital talking incoherently and "wanting a prescription" but was unable to explain the type of prescription he desired. While being examined by defendant Ruiz, plaintiff, a very large man, became more and more hostile and uncooperative, looked very tense, had an aggressive expression and appeared ready to hurt someone. Plaintiff refused a physical examination and medication offered to calm him down and said, "I am scheduled to be killed." Plaintiff became so hostile and combative that it was necessary to physically restrain him. After observing plaintiff for a period of time, defendant Ruiz formed the professional opinion that plaintiff was dangerous to himself and others. Thereupon, defendant Ruiz, pursuant to G.S. 122-59, committed plaintiff to John Umstead Hospital to which he was carried by Durham County officers and where he was received as an emergency hospitalization patient pursuant to G.S. 122-59.

Following the hearing, summary judgment was rendered in favor of defendants and plaintiff appealed.

Prior to docketing the appeal, plaintiff and defendants Duke University, Inc., and Ruiz entered into a settlement agreement and the appeal was dismissed as to them. The appeal, therefore, relates to plaintiff's alleged causes of action against defendants Irigaray, Mendez and McNiel.

Loflin, Anderson, Loflin & Goldsmith by Thomas F. Loflin III, for plaintiff appellant.

Attorney General Robert Morgan by Parks H. Icenhour, Assistant Attorney General, for defendant appellees Irigaray, Mendez and McNiel.

BRITT, Judge.

We hold that the court did not err in entering summary judgment in favor of defendants Irigaray, Mendez and McNiel.

The admissions in pleadings and materials presented at the hearing disclose that at the time plaintiff was admitted to John Umstead Hospital on 23 December 1970, defendant Irigaray, a medical doctor, was the superintendent of said hospital and defendants Mendez and McNiel, also medical doctors, were on the medical staff of said hospital. Owned and operated by the State of North Carolina, John Umstead Hospital's chief purpose is to treat persons who are mentally ill, it being one of the institutions authorized by and subject to the provisions of Chapter 122 of the General Statutes.

Plaintiff contends appellees acted illegally in accepting and detaining him as an emergency patient. We will discuss the principal arguments advanced in support of this contention.

Plaintiff argues that G.S. 122-59 is unconstitutional for that it purports to authorize the deprivation of a person's liberty without due process of law. On 27 June 1973 (subsequent to oral arguments in the case at bar), by opinion filed in the case of *In Re The Confinement of Gracie Mae Hayes,* No. 7314SC149, this court held that the provisions of G.S. 122-59, G.S. 122-63 and G.S. 122-65 are unconstitutional. However, we do not think the holding in *Hayes* affects the result in this case.

[1] There is a presumption in favor of the constitutionality of a statute. *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768 (1961). The legal principle that an unconstitutional statute is a complete nullity and cannot justify any acts under it, must be construed with respect to the particular factual situation, and while a party may not assert a right arising out of a statute which has been declared unconstitutional, the principle does not strike down all undertakings made in reliance upon said statute. *Roberson v. Penland,* 260 N.C. 502, 133 S.E. 2d 206 (1963).

We hold that appellees were entitled to rely on the provisions of G.S. 122-59 at the time of the acts complained of.

Granting that G.S. 122-59 had not been declared unconstitutional at the time of the acts complained of, plaintiff argues that his acceptance and detention by appellees were illegal for that the paper writing executed by Dr. Ruiz "committing" plaintiff to Umstead Hospital did not meet the requirements of the statute. Among other things, plaintiff argues that Dr. Ruiz was not a *qualified* physician within the purview of the statute.

Affidavits presented at the hearing tended to show: Dr. Ruiz received his medical degree from the University of Chile in 1968 and thereafter interned at the Berkshire Medical Center which is affiliated with the Albany (N. Y.) Medical College. He became a resident in psychiatry at the Duke University Medical Center on 1 July 1970. His credentials were reviewed by the State Board of Medical Examiners whose secretary advised Dr. Ruiz on 7 July 1970 that he had a limited license to practice medicine in connection with his residency training at Duke and on 31 August 1970 said secretary advised Dr. Ruiz that he had been granted a resident's training license to "cover him for his residency" at Duke. The activities and responsibilities under a resident's training license are entirely up to the discretion of the Duke University School of Medicine and part of a resident's training at Duke is to examine persons and commit such persons under G.S. 122-59 if said physician is of the professional opinion that the person is homicidal or suicidal or dangerous to himself or others.

G.S. 122-36(f) provides that a "qualified physician" within the meaning of Chapter 122 is a medical doctor "who is duly licensed by this State to practice medicine." The State of North Carolina has delegated the matter of licensing physicians or medical doctors to The Board of Medical Examiners. G.S. 90-1, et seq. G.S. 90-12 provides for the issuance of a "limited license" to practice medicine within a defined district.

[2] We find it unnecessary to say whether the limited license issued to Dr. Ruiz made him a "qualified physician" to sign the emergency order challenged by plaintiff. Suffice to say, under the facts shown in this case, we do not think appellees acted improperly in accepting Dr. Ruiz's order at "face value."

Since we have held that the trial court did not err in entering summary judgment in favor of appellees, it follows that the

court did not err in refusing to enter summary judgment in favor of plaintiff. We find no merit in plaintiff's contention that the court erred in sustaining objections by defendants to certain of plaintiff's interrogatories as responses to the unanswered interrogatories would not change our decision.

The judgment appealed from is

Affirmed.

Judges CAMPBELL and BALEY concur.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 6. Judgments Appealable

Since defendants had an option whether to appeal from the interim judgment granting plaintiffs an easement by way of necessity across defendants' lands or from the judgment locating the easement, their failure to perfect an appeal from the interim judgment did not vitiate their exceptions thereto and such exceptions could be considered upon appeal from the judgment locating the easement. *Wilson v. Smith,* 414.

§ 16. Jurisdiction and Powers of Lower Court after appeal

Trial court was without jurisdiction to conduct contempt proceedings for violation of conditions of an order from which both parties' appeals were pending. *Collins v. Collins,* 45.

§ 26. Exceptions to Judgment

Exception to entry of judgment was insufficient to attack the validity of a prior order by the trial court upon which the subsequent judgment was entered. *Tingen v. Insurance Co.,* 495.

§ 39. Time of Docketing

Failure to docket record on appeal in time renders defendant's appeal subject to dismissal. *Bensch v. Bensch,* 43; *Newman v. Newman,* 674.

After time for docketing record on appeal has expired, trial court is without authority to enter a valid order extending the time for docketing. *Vincent v. Vincent,* 668.

§ 44. Effect of Failure to File Brief

Appeal may be dismissed where appellant fails to file a brief. *Parker v. Parker,* 144.

§ 53. Error Cured by Verdict

Trial court's instruction on quantum meruit did not amount to prejudicial error where the jury found for plaintiff on the basis of an express contract. *Samples v. Maxson-Betts Co.,* 359.

APPEARANCE

§ 89. Effect of Appearance

By obtaining an enlargement of time within which to file answer, defendant did not make a general appearance and thus waive his defense of insufficiency of service of process. *Williams v. Hartis,* 89; *Simms v. Stores, Inc.,* 188; *Philpott v. Kerns,* 663.

ARREST AND BAIL

§ 3. Right of Officers to Arrest without Warrant

Police officers had probable cause to arrest defendant without a warrant for carrying a concealed weapon in a paper bag on the back seat of his car. *S. v. White,* 31.

ARREST AND BAIL—Continued

Failure to take defendant before a magistrate after he was arrested without a warrant does not require quashal of a warrant for resisting arrest. *S. v. Foust,* 133.

§ 6. Resisting Arrest

Warrant is insufficient to charge the offense of resisting an officer where it fails to allege the duty that the officer was attempting to discharge. *S. v. Mink,* 346.

Evidence was sufficient to be submitted to the jury in a prosecution for public drunkenness and resisting arrest. *S. v. Foust,* 133.

ASSAULT AND BATTERY

§ 5. Assault with Deadly Weapon

Judgment should have been arrested where defendant was charged with armed robbery but found guilty of assault with a deadly weapon. *S. v. Perry,* 141.

§ 8. Defense of Self

Trial court's instructions on self-defense were proper. *S. v. Jones,* 531.

§ 9. Defense of Others

Trial court should have instructed on the right of defendant to go to the defense of a third person to prevent felonious assault. *S. v. Graves,* 177.

§ 11. Indictment and Warrant

Warrant is insufficient to charge offense of assault on an officer where it fails to allege the duty the officer was attempting to discharge. *S. v. Mink,* 346.

§ 13. Competency of Evidence

Trial court erred in excluding competent evidence having a direct bearing upon the reasonableness of defendant's belief that his girl friend was in danger and tending to justify his assault on the prosecuting witness in her defense. *S. v. Graves,* 177.

Breathalyzer test results were erroneously admitted in a prosecution for assault upon an officer. *S. v. Powell,* 732.

§ 14. Sufficiency of Evidence

Evidence was sufficient for jury in prosecution for assault on a police officer where it tended to show that defendant pointed an unloaded shotgun at the officer and pulled the trigger. *S. v. Messer,* 471.

§ 15. Instructions Generally

Trial court should have instructed on the right of defendant to go to the defense of a third person to prevent felonious assault. *S. v. Graves,* 177.

ASSAULT AND BATTERY—Continued

§ 16. Submission of Lesser Degrees of Offense

Trial court did not err in failing to submit lesser degrees of the crime in a prosecution for assault with a deadly weapon with intent to kill. *S. v. Jones*, 531.

§ 17. Verdict

In a prosecution charging defendant with assault with a deadly weapon with intent to kill inflicting serious injury, the verdict of "guilty as charged in the bill of indictment" was sufficiently specific. *S. v. Thacker*, 547.

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

Summary judgment was properly entered in favor of plaintiff attorney in an action to recover upon a contingent fee contract for services rendered in connection with a claim of defendant and her husband for insurance benefits. *Randolph v. Schuyler*, 393.

§ 9. Persons Liable for Compensation of Attorney

Where judgment of $150 was entered upon defendant's offer of judgment in an action to recover for damages to plaintiff's automobile, the presiding judge of district court had authority to award reasonable attorney fees to plaintiff under G.S. 6-21.1. *Hicks v. Albertson*, 599.

AUTOMOBILES

§ 2. Grounds and Procedure for Revocation of Drivers' Licenses

There was no error in revocation of defendant's driver's license for refusal to take a breathalyzer test. *Joyner v. Garrett*, 38.

An out-of-state conviction for drunken driving is a conviction for the purpose of mandatory permanent revocation of a driver's license. *In re Oates*, 320.

Permanent revocation of plaintiff's driver's license was mandatory where plaintiff had twice been convicted of drunken driving and plaintiff's bond was forfeited for failure to appear in superior court upon her appeal after conviction of drunken driving in district court. *Rhyne v. Garrett*, 565.

§ 3. Driving after Revocation or Suspension of License

Evidence was sufficient for the jury in prosecution for driving while license was suspended where it tended to show that defendant was driving in violation of a restrictive driving privilege. *S. v. Hurley*, 285.

Voluntary statements of defendant to police officer were properly admitted in a prosecution for driving after revocation of license. *S. v. Lowery*, 485.

AUTOMOBILES—Continued

There was no error in prosecution charging defendant with driving while his license was revoked. *S. v. McCotter,* 411.

§ 10. Stopping and Parking

Failure to give a signal of intention to stop is not negligence per se. *Harris v. Freeman,* 85.

§ 43. Pleadings and Parties in Action for Negligent Operation of Automobile

Action by plaintiff's husband against defendant was not res judicata to a subsequent action brought by plaintiff wife against defendant. *Wright v. Holt,* 661.

§ 45. Relevancy and Competency of Evidence

Testimony concerning liquor bottle found at accident scene by the investigating officer was relevant in an action for wrongful death of a pedestrian. *Smith v. Kilburn,* 204.

§ 46. Opinion Testimony as to Facts at Scene

Police officer's testimony that his investigation revealed that a fire truck ran through a red light invaded the province of the jury. *Kaczala v. Richardson,* 446.

§ 62. Striking Pedestrian

Plaintiff's evidence was insufficient to show defendant was negligent in striking a pedestrian. *Smith v. Elks,* 138.

§ 63. Striking Children

Trial court properly directed verdict for defendants where evidence was insufficient to show negligence of defendant ice cream truck driver in striking a child. *Wilson v. Gardner,* 650.

Plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendant's negligence in striking a three-year-old child who ran from behind a bridge. *Allen v. Foreman,* 383.

§ 75. Contributory Negligence in Stopping

Trial court erred in submitting issue of plaintiff's contributory negligence in allegedly failing to give a signal indicating he was going to stop where defendant's own evidence established that plaintiff had no time in which to give a signal. *Harris v. Freeman,* 85.

§ 76. Contributory Negligence in Hitting Stopped Vehicle

Summary judgment was properly entered for defendant in a personal injury and property damage action where plaintiff's own deposition showed her to be contributorily negligent as a matter of law in that she drove into a smoke bank where her visibility was zero and collided with a stopped vehicle therein. *Doggett v. Welborn,* 105.

AUTOMOBILES—Continued

§ 79. Contributory Negligence in Intersectional Accident

Plaintiff's evidence in an action to recover for injuries sustained in an intersection collision did not establish her own contributory negligence as a matter of law. *Blake v. Carroll,* 573.

§ 90. Instructions in Accident Cases

Trial court's instruction on yielding right-of-way in an automobile collision case was proper. *Wright v. Holt,* 661.

Instructions were sufficient in an automobile collision case. *Blair v. Honeycutt,* 568.

§ 125. Warrant for Operating Vehicle While under the Influence

Judgment of superior court must be arrested where defendant was tried in district court upon a warrant for permitting a person under the influence to operate his automobile and warrant was amended before trial in superior court to charge defendant with driving under the influence. *S. v. Chappell,* 288.

§ 126. Competency and Relevancy of Evidence in Prosecution under G. S. 20-138

In a prosecution for driving under the influence, second offense, records of the Department of Motor Vehicles were inadmissible to prove defendant's first conviction. *S. v. Mabry,* 492.

Evidence on voir dire supported court's determination that defendant had waived his rights under G.S. 20-16.2(a) prior to the time he consented to take a breathalyzer test. *S. v. Tyndall,* 669.

§ 129. Instructions in Prosecutions Under G.S. 20-138

In a prosecution for driving under the influence, second offense, trial court erred in failing to submit the lesser offense of driving under the influence, first offense. *S. v. Mabry,* 492.

BILLS AND NOTES

§ 20. Presumptions, Burden of Proof and Sufficiency of Evidence

In an action to recover on a promissory note, trial court erred in granting summary judgment for plaintiff where there were genuine issues of fact as to the corporate existence of defendant affecting the validity of the note and a chattel mortgage securing the note. *Stonestreet v. Motors, Inc.,* 527.

§ 22. Prosecutions for Issuing Worthless Check

Ninety day prison sentence given defendant was in excess of the permissible statutory limit for unlawfully making a check to another in an amount less than $50. *S. v. McCotter,* 411.

BROKERS AND FACTORS

§ 4. Duties and Liabilities of Broker or Factor to Principal

Trial court erred in directing a verdict for plaintiff employee on defendant employer's counterclaim for kickbacks received by plaintiff on sales made on behalf of defendant. *Samples v. Maxson-Betts Co.*, 359.

§ 6. Right to Commissions

Evidence was sufficient to be submitted to the jury in an action by employee to recover commissions on sales made on behalf of defendant. *Samples v. Maxson-Betts Co.*, 359.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence and Nonsuit

Unsupported testimony of an accomplice was sufficient to sustain defendant's conviction. *S. v. Bailey*, 313.

Evidence was sufficient in felonious breaking and entering and larceny case where defendant was apprehended while in possession of the stolen articles shortly after the crime and where defendant fled from police officers. *S. v. Snuggs*, 226.

Defendant's confession coupled with evidence of the corpus delicti was sufficient to require submission of felonious breaking and entering and felonious larceny case to the jury. *S. v. Fullerton*, 303.

Fingerprint evidence was sufficient for the jury in a breaking and entering and larceny case. *S. v. Dorsett*, 318.

Evidence of fingerprints on vending machines together with evidence concerning impression of the fingerprints was sufficient to withstand nonsuit in felonious breaking and entering and felonious larceny case. *S. v. Reynolds*, 10.

There was sufficient evidence of a breaking where defendant testified that he "just opened the door and went in." *S. v. Alexander*, 460.

Jury could find defendant intended to commit larceny where evidence showed defendant entered a home that was for sale in the middle of the night when the house was unoccupied but full of household goods. *Ibid.*

There was sufficient evidence of the corpus delicti to permit submission of defendant's alleged confession to the jury. *S. v. Lewis*, 681.

§ 6. Instructions

Trial court's reference to defendant in its jury charge, though erroneous, was not prejudicial. *S. v. Snuggs*, 226.

Trial court did not err in instructing the jury that if it found defendant not guilty of breaking and entering it must also find him not guilty of larceny. *S. v. McIlwain*, 230.

BURGLARY AND UNLAWFUL BREAKINGS—Continued

§ 7. Instructions as to Possible Verdicts

In a prosecution for felonious breaking and entering and assault with intent to commit rape, trial court properly failed to submit lesser included offenses to the jury. *S. v. Jackson,* 234.

§ 8. Sentence

Trial court did not abuse its discretion in sentencing defendant under discretionary sentencing statutes. *S. v. Johnson,* 338.

CARRIERS

§ 8. Loading, Unloading and Shipping Facilities

Evidence was insufficient to show negligence by a railroad in an action to recover for injuries suffered by plaintiff, who was unloading pipe from freight cars for the consignee, when a car plaintiff was attempting to position by controlling its movement down an incline with hand brakes collided with an empty car on the track. *Livengood v. Railway Co.,* 352.

§ 10. Loss of or Injury to Goods in Transit

Insurance carried by shipper of goods destroyed by arson in the carrier's warehouse did not inure to the benefit of the carrier and thus defeat insurer's subrogation rights against the carrier. *Insurance Co. v. Transfer and Storage Co.,* 152.

Goods destroyed by fire in carrier's warehouse were not "stopped or held in transit" within the meaning of provisions in a bill of lading. *Ibid.*

Defendant was acting in the capacity of a freight forwarder, not a warehouseman or freight consolidator, and thus had the liability of a carrier for goods destroyed by arsonist's fire in its warehouse. *Ibid.*

CHATTEL MORTGAGES

§ 19. Deficiency Liability

Trial court erred in directing verdict for plaintiff in an action to recover a deficiency judgment for the balance allegedly due on a purchase money security agreement on an automobile. *Motor Co. v. Daniels,* 442.

COMPROMISE AND SETTLEMENT

§ 1. Nature, Elements, Validity and Effect

Plaintiff's plea of a release from liability obtained by his insurer as a bar to defendant's counterclaim constituted a ratification of the insurer's settlement and barred plaintiff's claim against defendant. *McKinney v. Morrow,* 282.

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions

Constitutionality of the Fair Trade Act cannot be decided in a hearing upon plaintiff's application for a preliminary injunction. *Watch Co. v. Brand Distributors,* 482.

§ 12. Regulation of Trades and Professions

Proviso excluding holders of brown bagging permits from provisions of the statute authorizing municipalities and counties to prohibit beer and wine sales from 1:00 p.m. on Sunday to 7:00 a.m. on Monday is unconstitutional. *Hursey v. Town of Gibsonville,* 581.

§ 18. Rights of Free Press

Statute proscribing dissemination of obscenity in public places is constitutional. *S. v. Horn,* 377.

§ 23. Scope of Protection of Due Process

Defendant appearing pro se by his own choice does not become a ward of the court. *S. v. McDougald,* 407.

§ 30. Due Process in Trial

Failure to take defendant before a magistrate after he was arrested without a warrant does not require quashal of a warrant for resisting arrest. *S. v. Foust,* 133.

Where the record shows a delay of 13 months between indictment and trial, trial court erred in denial of defendant's motion to dismiss the indictment for failure to grant a speedy trial without holding an evidentiary hearing and making findings of fact. *S. v. Roberts,* 388.

Defendant was not denied his right to a speedy trial by two months delay between the offense and issuance of a warrant. *S. v. Rawlings,* 476.

Lapse of 3½ years between the time defendant's conviction was vacated until the time he was declared incompetent to stand trial did not abridge defendant's right to a speedy trial. *S. v. Lewis,* 681.

Delay of 2½ years between the alleged offense and defendant's trial did not abridge defendant's right to a speedy trial. *S. v. Powell,* 732.

§ 31. Right of Confrontation, Time to Prepare Defense, and Access to Evidence

Confessions of codefendants were admissible where all portions of each confession which otherwise would have implicated the defendant other than the declarant were deleted. *S. v. Cannady,* 213.

Defendant was not entitled to disclosure of the name of a confidential informer. *S. v. McDougald,* 407.

Trial court did not err in placing defendant on trial two days after counsel was appointed. *S. v. Greer,* 655.

CONSTITUTIONAL LAW—Continued

§ 32. Right to Counsel

Failure to appoint counsel to represent defendant in his preliminary hearing and trial for felonious larceny was not error where defendant voluntarily waived his right to counsel in writing. *S. v. Williams,* 145.

Trial court did not err in permitting defendant, against the advice of his counsel, to call defendant's sister as a defense witness. *S. v. Fullerton,* 303.

Indigent defendant was entitled to court appointed counsel where the possible punishment for conviction of charges against him exceeded six months. *Lawrence v. State,* 260.

Trial court did not err in refusing to appoint counsel for defendant who was not indigent. *S. v. Carver,* 245.

§ 34. Double Jeopardy

Defendant was not subjected to double jeopardy where he was charged with three offenses — robbery of a store manager and two customers. *S. v. Stitt,* 217.

§ 35. Ex Post Facto Laws

Statute prohibiting possession of a firearm by a felon was not ex post facto with respect to defendant and the charge against him. *S. v. Cobb,* 221.

§ 36. Cruel and Unusual Punishment

Sentence of 20 to 25 years for armed robbery did not constitute cruel and unusual punishment because the two eyewitnesses who testified were doubtful about the pretrial identification of defendant. *S. v. McIlwain,* 335.

Trial court did not abuse its discretion in sentencing defendant under discretionary sentencing statutes. *S. v. Johnson,* 338.

Active sentences of varying length to run consecutively did not constitute cruel and unusual punishment though various sentences were given for like offenses. *S. v. Martin,* 398.

CONTEMPT OF COURT

§ 5. Orders to Show Cause

Defendant was not given sufficient notice of the purpose of the hearing which resulted in his incarceration for failure to make support payments where he was served only with a subpoena which ordered him to appear to testify but did not order him to show cause why he should not be attached for contempt. *Ingle v. Ingle,* 455.

§ 6. Hearings on Orders to Show Cause, Findings and Judgment

Trial court erred in jailing defendant for failure to comply with a support order without making the requisite findings. *Ingle v. Ingle,* 455.

CONTEMPT OF COURT—Continued

§ 7. Punishment for Contempt

In a contempt proceeding for violation of a temporary restraining order, trial judge had no authority to require defendants to compensate plaintiffs for their damages arising from the contemptuous conduct, to award counsel fees to plaintiff, or to tax the costs of the proceeding against defendants. *Records v. Tape Corp.*, 183.

CONTRACTS

§ 7. Contracts in Restraint of Trade

Covenant not to compete contained in an employment contract executed by defendant employee after he had been employed by plaintiff for over three years was unsupported by consideration and was unenforceable. *Mastrom, Inc. v. Warren,* 199.

§ 12. Construction and Operation of Contracts

Interpretation by the court of ambiguous terms of a contract was necessary where dispute arose, and the court could consider extrinsic evidence to clarify the terms. *Windfield Corp. v. Inspection Co.,* 168.

Where defendant prepared the contract in question, ambiguity with respect to its terms must be resolved against defendant. *Ibid.*

§ 14. Contracts for Benefit of Third Person

Where plaintiff loaned money to one Tolley from which Tolley paid defendant $5,000 in partial payment for stock owned by defendant, but the contract for the sale of stock entered between Tolley and defendant was thereafter abandoned, plaintiff was not a third-party beneficiary to such contract and could not recover the $5,000 paid to defendant as money had and received. *Bray v. Wadford,* 102.

§ 17. Term and Duration of Agreement

Agreement signed by defendant at time his stepfather was admitted to a hospital in which he promised to pay the stepfather's hospital expenses from date of admission to discharge was an executory contract which was subject to termination by either party upon reasonable notice. *Hospital v. Whitley,* 595.

§ 25. Pleadings, Burden of Proof, and Issues

Plaintiff's complaint was sufficient to state a claim for relief for breach of contract to purchase a laundry and dry cleaning business. *Miller v. Belk,* 70.

§ 32. Action for Wrongful Interference

Where it was stipulated that a contract for sale of land was not recorded, summary judgment was properly entered in favor of defendants in an action to recover damages allegedly resulting from conspiracy to deprive plaintiff of his rights under the contract. *Henry v. Shore,* 463.

COSTS

§ 1. Recovery of Costs as Matter of Right by Successful Party

In contempt proceeding for violation of a temporary restraining order, trial judge had no authority to require defendants to compensate plaintiffs for their damages arising from the contemptuous conduct, to award counsel fees to plaintiff, or to tax the costs of the proceeding against defendants. *Records v. Tape Corp.*, 183.

Trial court erred in failing to tax the costs of a personal injury action against defendant who lost at the trial. *Brady v. Smith*, 293.

§ 3. Taxing of Costs in Discretion of Court

Allowance of counsel fees pursuant to G.S. 6-21.1 rests in the discretion of the court. *Brady v. Smith*, 293.

Where judgment of $150 was entered upon defendant's offer of judgment in an action to recover for damages to plaintiff's automobile, the presiding judge of district court had authority to award reasonable attorney fees to plaintiff under G.S. 6-21.1. *Hicks v. Albertson*, 599.

COURTS

§ 2. Jurisdiction of Court

Trial court was without jurisdiction to conduct contempt proceedings for violation of conditions of an order from which both parties' appeals were pending. *Collins v. Collins*, 45.

§ 10. Terms of Superior Court

Defendant was entitled to notice of hearing on plaintiff's application for default judgment where the hearing was held at a criminal session. *Miller v. Belk*, 70.

CRIMINAL LAW

§ 6. Mental Capacity as Affected by Intoxicating Liquor

Trial court did not err in giving in substance defendant's requested instructions on intoxication as a defense. *S. v. Carnes*, 19.

§ 9. Principals in First or Second Degree; Aiders and Abettors

Where the principal has been given a new trial, new trial must also be ordered for a defendant convicted of second degree murder as an aider and abettor. *S. v. Spencer*, 499.

§ 15. Venue

Trial court did not abuse its discretion in denying motions for continuance and for change of venue on the ground of undue publicity resulting from newspaper coverage. *S. v. Cobb*, 221.

Trial court did not err in denial of motion for change of venue or for a special venire on ground of unfavorable publicity. *S. v. Campbell*, 586.

CRIMINAL LAW—Continued

§ 18. Jurisdiction on Appeals to Superior Court

Judgment of superior court must be arrested where defendant was tried in district court upon a warrant charging one crime, the warrant was amended before trial in superior court and defendant was tried in superior court upon the amended warrant charging another crime. *S. v. Chappell,* 288.

§ 23. Plea of Guilty

Defendant's guilty plea was entered voluntarily. *S. v. Barnett,* 343; *S. v. Doss,* 344; *S. v. Rice,* 344; *S. v. Orr,* 497.

Trial court erred in failing to determine whether a plea bargain was made for defendant's plea of guilty and whether the solicitor reneged on his promise. *S. v. Martin,* 398.

§ 25. Plea of Nolo Contendere

Defendant's plea of nolo contendere was voluntarily entered. *S. v. Young,* 576.

§ 26. Plea of Double Jeopardy

In a prosecution charging defendant with felonious possession of a firearm by a felon, defendant was not subjected to double jeopardy though he had been tried and acquitted in district court on the charge of carrying a concealed weapon, even though both charges stemmed from the same transaction. *S. v. Cobb,* 221.

Defendant was not subjected to double jeopardy where he was charged with three offenses — robbery of a store manager and two customers. *S. v. Stitt,* 217.

§ 32. Burden of Proof and Presumptions

Statute providing for presumption of possession of controlled substances for sale is constitutional and does not create a presumption of guilt. *S. v. McDougald,* 407; *S. v. McGee,* 449.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Evidence of defendant's guilt of prior offenses, even if error, did not require reversal where the jury was instructed to disregard testimony and the error was harmless beyond a reasonable doubt. *S. v. Gibson,* 305.

Evidence of assault committed immediately prior to murder for which defendant was on trial was admissible to show quo animo. *S. v. Clark,* 621.

Evidence of defendant's payment of a fine for a prior liquor violation two days after the robbery in question was admissible to show motive. *S. v. Grant,* 722.

§ 42. Clothing Connected with the Crime

Trial court properly admitted articles of defendant's clothing seized under a warrant without conducting a voir dire. *S. v. Jackson,* 234.

CRIMINAL LAW—Continued

§ 43. Maps and Photographs

Photographs of the crime scene were admissible in a safecracking case for the purpose of illustration. *S. v. Shelton*, 616.

Where witnesses observed defendant through closed circuit TV, the video tape of the events they observed was admissible for the purpose of illustration. *S. v. Johnson*, 606.

Introduction in evidence of a police mug shot of defendant with prejudicial markings thereon, though erroneous, was harmless beyond a reasonable doubt. *S. v. Cauthen*, 591.

Photographs of automobile were admissible to illustrate witness's testimony. *S. v. Grant*, 722.

§ 46. Flight of Defendant as Implied Admission

Testimony with respect to the flight of an alleged accomplice was not prejudicial to defendant. *S. v. Carnes*, 98.

§ 53. Medical Expert Testimony

Trial court in murder case erred in allowing expert witness's opinion that deceased could not have committed suicide. *S. v. Metcalf*, 28.

§ 60. Fingerprint Evidence

Evidence is sufficient to withstand nonsuit where it indicates that fingerprints found at the crime scene correspond with those of accused and when there is evidence from which the jury can find that such fingerprints could have been impressed only at the time the offense was committed. *S. v. Reynolds*, 10.

Fingerprint evidence was sufficient for the jury in a breaking and entering and larceny case. *S. v. Dorsett*, 318.

§ 64. Evidence as to Intoxication

Breathalyzer test results were erroneously admitted in a prosecution for assault upon an officer. *S. v. Powell*, 732.

§ 66. Evidence of Identity by Sight

In-court identifications based on the witness's observations of defendant at crime scene were proper. *S. v. Brown*, 35; *S. v. Cauthen*, 591; *S. v. Parker*, 626.

Evidence as to the identity of defendant, though not positive, was competent and properly admitted. *S. v. Stitt*, 217.

Trial court properly admitted evidence as to the procedure for an out-of-court identification of defendant. *S. v. Jackson*, 234.

Finding of trial court on voir dire concerning identification of defendant was insufficient. *S. v. Battle*, 256.

Robbery victim's in-court identification of defendant was not tainted by a previous illegal show-up at the county jail. *S. v. Odom*, 478.

CRIMINAL LAW—Continued

Identification of defendant in a hospital emergency room and in-court identification of defendant were of independent origins. *S. v. Thacker*, 547.

Where defendant failed to object to a lineup at trial, he could not raise the issue for the first time on appeal. *S. v. Phelps*, 603.

Trial court did not err in admitting testimony of an SBI agent that robbery victims identified defendant from photographs, where the agent's testimony was offered only for corroboration. *S. v. Grant*, 722.

§ 75. Voluntariness of Confession and Admissibility

Information volunteered by defendant upon his arrest was admissible without voir dire. *S. v. Cobb*, 221.

Trial court properly admitted statement volunteered by defendant while in custody. *S. v. Messer*, 471.

Voluntary statements of defendant to police officer were properly admitted in a prosecution for driving after revocation of license. *S. v. Lowery*, 485.

Miranda warnings were not required when highway patrolman stopped defendant and asked him whether he had been drinking. *S. v. Tyndall*, 669.

§ 76. Determination and Effect of Admissibility of Confession

Trial court did not err in the admission of defendant's confession without making specific findings that defendant waived his right to counsel where the court found that defendant signed a waiver of his rights. *S. v. McIlwain*, 230.

Admission of codefendant's confession did not prejudice defendant. *S. v. Clark*, 621.

§ 78. Stipulations

Stipulation signed by defendant was improperly admitted where the State showed only that defendant signed the stipulation on some previous occasion before another judge but made no further showing as to the circumstances under which it was signed. *S. v. Murchinson*, 194.

§ 84. Evidence Obtained by Unlawful Means

There was no "search" when a nurse undressed the unconscious defendant at a physician's direction in a hospital emergency room and discovered heroin on defendant's person. *S. v. Wooten*, 269.

Ten glassine bags found on defendant's person at her arrest were admissible though the contents of only one bag were analyzed. *S. v. Steele*, 126.

Trial court properly admitted articles of defendant's clothing seized under a warrant without conducting a voir dire. *S. v. Jackson*, 234.

Search of defendant's vehicle and coat with defendant's consent was not unlawful and amphetamine capsules found during the search were properly admitted. *S. v. Brandon*, 483.

CRIMINAL LAW—Continued

Failure to furnish defendant with a copy of the search warrant did not invalidate the search. *S. v. McDougald*, 407.

No search warrant was required for seizure of plastic bags containing narcotics from defendant's car where the seized articles were in plain view on the front seat of the car. *S. v. Campbell*, 586.

Evidence of items in plain view in the trunk of defendant's car was properly admitted. *S. v. Phelps*, 603.

Trench coat defendant placed on poolroom bar prior to his arrest in the poolroom was in his "immediate control" so as to permit officer to search the coat without a warrant as an incident of defendant's arrest. *S. v. Gibbs*, 638.

§ 86. Credibility of Defendant

Cross-examination of defendant as to prior crime committed by him was proper. *S. v. Shelton*, 616.

§ 88. Cross-examination

Defendant could not complain of prejudice in the State's cross-examination of codefendants. *S. v. Stitt*, 217.

§ 89. Credibility of Witness; Corroboration

Prior statement made by the witness to a deputy sheriff was admissible for the purpose of corroboration. *S. v. Parker*, 626.

§ 91. Continuance of Trial

Trial court did not abuse its discretion in denying motions for continuance and for change of venue on the ground of undue publicity resulting from newspaper coverage. *S. v. Cobb*, 221.

Motion for continuance unsupported by affidavits is properly denied. *S. v. Lowery*, 485.

Defendant's motion for continuance was properly denied where defendant did not state the basis for his motion. *S. v. Shelton*, 616.

§ 92. Severance of Counts

Conviction of one defendant only when the evidence was sufficient to convict all three defendants was not error. *S. v. Stitt*, 217.

§ 95. Admission of Evidence Competent for Restricted Purpose

Confessions of codefendants were admissible where all portions of each confession which otherwise would have implicated the defendant other than the declarant were deleted. *S. v. Cannady*, 213.

§ 96. Withdrawal of Evidence

Where the trial court instructed the jury to disregard incompetent testimony immediately after it was given, the error in allowing such testimony was cured. *S. v. Carnes*, 19.

CRIMINAL LAW—Continued

§ 113. Statement of Evidence and Application of Law Thereto

Jury instructions with respect to circumstantial evidence were adequate in second degree murder case. *S. v. Griffin*, 14.

Trial court overemphasized contentions of the State to the prejudice of defendant. *S. v. Battle*, 256.

Failure of the court to instruct that evidence was competent for a restricted purpose was not error. *S. v. Lassiter*, 208.

Inaccuracy in recitation of a witness's testimony did not constitute prejudicial error. *S. v. Tilley*, 291.

Trial court's instructions as to a fact not in evidence constituted prejudicial error. *S. v. Logan*, 557.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court did not express an opinion on the evidence in charging on defendant's contention as contained in his confession that he acted only as a watchman during a breaking and entering and larceny. *S. v. McIlwain*, 230.

§ 118. Charge on Contentions of the Parties

Defendant is entitled to a new trial where the trial court stated the contentions of the State but failed to give those of defendant. *S. v. Lane*, 316.

§ 119. Requests for Instructions

Trial court did not err in giving in substance defendant's requested instructions on intoxication as a defense. *S. v. Carnes*, 19.

§ 122. Additional Instructions after Initial Retirement of Jury

Where the jury was separated for one night, trial court's refusal to review the evidence on the following morning before deliberation began was not error. *S. v. Horn*, 377.

§ 128. Discretionary Power of Trial Court to Order Mistrial

Defendant was not entitled to a new trial where the court ordered the jury to disregard improper argument by the solicitor. *S. v. Brown*, 35.

§ 138. Severity of Sentence and Determination Thereof

Where cases are consolidated for judgment, the punishment may not exceed that permitted for the crime carrying the greatest punishment. *S. v. Brady*, 325.

Defendant was not entitled to have time already credited to a previously imposed sentence for secret assault credited to a subsequently imposed sentence for breaking and entering. *S. v. Lewis*, 681.

§ 140. Concurrent and Cumulative Sentences

Trial court was within its authority in imposing three consecutive sentences upon defendant's conviction of common law robbery on three indictments for armed robbery. *S. v. Stitt*, 217.

CRIMINAL LAW—Continued

Active sentences of varying length to run consecutively did not constitute cruel and unusual punishment though various sentences were given for like offenses. *S. v. Martin*, 398.

Ninety day prison sentence given defendant was in excess of the permissible statutory limit for unlawfully making a check to another in an amount less than $50, and defendant was prejudiced since sentences imposed in other cases were to run consecutively to that sentence. *S. v. McCotter*, 411.

§ 143. Revocation of Suspension of Sentence

Upon appeal to superior court from judgments revoking suspended sentences, superior court was without authority to try defendant anew. *S. v. Riddle*, 490.

§ 154. Case on Appeal

Appeal is subject to dismissal where the record on appeal is not served within the time allowed by the trial court. *S. v. Bryant*, 340.

Extension of time granted defendant for serving case on appeal was invalid where it was entered by a judge other than the judge who tried the case. *S. v. McCotter*, 411.

§ 155.5. Docketing of Transcript of Record in Court of Appeals

Trial judge was without authority to enter a second order extending the time to docket the record on appeal where the 90 day period of the first extension order had already expired. *S. v. Lassiter*, 208.

Appeal is subject to dismissal where the record on appeal is not docketed within 90 days after judgment appealed from. *S. v. Bryant*, 340; *S. v. Tilley*, 341.

§ 161. Necessity for Exceptions

Exceptions not duly noted in the record will not be considered. *S. v. Barnes*, 263.

§ 163. Exceptions and Assignments of Error to Charge

Where defendant failed to except to an earlier instruction, he could not later complain that the instruction was inadequate when the trial judge subsequently incorporated the earlier instruction by reference. *S. v. Snuggs*, 226.

An assignment of error to the charge should quote the portion of the charge objected to and set out contentions as to what the court should have charged. *S. v. Barnes*, 263.

§ 168. Harmless and Prejudicial Error in Instructions

Defendant failed to show that error, if any, in instructions to the jury that they could take photographs into the jury room with them was prejudicial. *S. v. Burges*, 328.

Slight misstatement by trial judge in recapitulation of the evidence was not reversible error. *S. v. Curtis*, 116.

CRIMINAL LAW—Continued

§ 169. Harmless and Prejudicial Error in Exclusion of Evidence

Exclusion of testimony was not prejudicial where the record did not show what the testimony would have been. *S. v. Carnes*, 19; *S. v. Carnes*, 98.

§ 171. Error Relating to One Count

Error relating to one charge was rendered nonprejudicial where sentence imposed upon conviction on that charge ran concurrently with a sentence imposed in a case in which the verdict was regular. *S. v. Avery*, 321.

§ 174. Questions Necessary to Determination of Appeal

Where defendant failed to object to evidence obtained from an alleged illegal search, he cannot make objection for the first time on appeal. *S. v. Phelps*, 603.

DAMAGES

§ 12. Necessity for and Sufficiency of Pleading of Damages

Failure of plaintiff to plead special damages requires that judgment awarding such damages be vacated. *Windfield Corp. v. Inspection Co.*, 168.

DEATH

§ 1. Proof of Cause of Death

Trial court in a wrongful death action did not err in allowing portions of the death certificate to be read to the jury. *Smith v. Kilburn*, 204.

§ 9. Distribution of Recovery

An administrator had a right to compromise a claim for wrongful death. *Forsyth County v. Barneycastle*, 513.

Funds obtained by a compromise settlement of a wrongful death action are not assets of the estate liable for debts of the decedent and are therefore not liable for payment of a county's lien for public welfare assistance rendered to the decedent. *Ibid.*

DEDICATION

§ 3. Withdrawal and Revocation of Dedication

Real estate developer's dedication of a park in a residential subdivision was a conveyance within the meaning of the statute prohibiting the withdrawal from dedication of land dedicated for a street which is necessary to afford convenient ingress or egress to any lot or parcel of land sold or conveyed by the dedicator. *Andrews v. Country Club Hills*, 6.

Action to enjoin the withdrawal of an unopened street bordering a dedicated park in a subdivision is remanded for determination of whether the continued right to use the street is necessary to afford convenient ingress and egress to the park. *Ibid.*

DEEDS

§ 12. Estates Created by Construction of the Instrument

Grantor's deed conveying to his stepdaughter and son a one-half undivided interest in property as tenants in common did not convey the grantor's life estate in equal shares to each of the two grantees and his one-half interest in the remainder only to his stepdaughter to the exclusion of the son since the deed treats the two grantees equally. *Parker v. Pittman*, 500.

Conveyance of "Second Tract consisting of a right-of-way to the above tract, said right-of-way more specifically described as follows" conveyed an easement and not fee title. *Pearson v. Chambers*, 403.

§ 20. Restrictive Covenants as Applied to Subdivision Developments

A restrictive covenant limiting subdivision lots to residential use precludes a construction company from building a roadway across a lot in the subdivision that would connect a street in the subdivision with a street in an adjoining subdivision. *Franzle v. Waters*, 371.

DISORDERLY CONDUCT AND PUBLIC DRUNKENNESS

§ 2. Prosecutions

Trial court did not err in failing to define "drunk" and "intoxicated." *S. v. Patton*, 266.

Evidence was sufficient to be submitted to the jury in a prosecution for public drunkenness and resisting arrest. *S. v. Foust*, 133.

DIVORCE AND ALIMONY

§ 11. Indignities to the Person

In an action for alimony based on indignities offered to plaintiff's person, trial court erred in failing to instruct the jury it was necessary for plaintiff to prove that such acts by her husband were not the result of adequate provocation on her part. *Campbell v. Campbell*, 665.

§ 18. Alimony and Subsistence Pendente Lite

Trial court erred where it found facts sufficient to support award of alimony pendente lite but denied the award for the reason that another court in a previous action had found that plaintiff was not the dependent spouse. *Collins v. Collins*, 45.

Trial court's finding that defendant was a dependent spouse was supported by the evidence. *Little v. Little*, 311.

§ 22. Jurisdiction and Procedure in Custody and Support Actions

Trial court erred in modifying custody and support order without making findings of changed circumstances. *Register v. Register*, 333.

Where plaintiff brought a custody proceeding in district court in the county in which her children and defendant lived and defendant did not

HABEAS CORPUS

§ 2. Determination of Legality of Restraint

Statutes providing for temporary detention of insane persons and for commitment by the clerk of superior court of such persons for observation and treatment are unconstitutional. *In re Confinement of Hayes*, 560.

HOMICIDE

§ 6. Manslaughter

Evidence was sufficient to submit issue of involuntary manslaughter to the jury where it tended to show that defendants' child died of starvation. *S. v. Mason*, 433.

§ 12. Indictment

Murder indictment meeting requirements of G.S. 15-144 was sufficient to support plea of nolo contendere to voluntary manslaughter. *S. v. Young*, 576.

§ 15. Relevancy and Competency of Evidence

Trial court in murder case erred in allowing expert witness's opinion that deceased could not have committed suicide. *S. v. Metcalf*, 28.

§ 21. Sufficiency of Evidence and Nonsuit

In second degree murder case, evidence was sufficient to overrule motion for nonsuit where defendant allegedly shot deceased. *S. v. Griffin*, 14.

Evidence was sufficient to be submitted to the jury where it tended to show that defendant killed her victim by shooting him in the back. *S. v. Burges*, 328.

Evidence was sufficient to support verdict of guilty of voluntary manslaughter. *S. v. Davis*, 436.

§ 23. Instructions in General

Charge in second degree murder case was proper, and instruction on involuntary manslaughter was not error. *S. v. Lash*, 496.

§ 24. Instructions on Presumptions and Burden of Proof

Trial court erred in instructing jury to presume existence of malice if they found that the victim's death was intentionally caused where there was no evidence of the use of a deadly weapon. *S. v. Tilley*, 300.

§ 28. Instructions on Defenses

Trial court erred in failing to instruct on defense of others. *S. v. Spencer*, 323.

Trial court erred in instructing the jury that a person does not have the same right to protect his place of business as he does his home. *S. v. Sharpe*, 136.

Trial court's instruction on self-defense was proper. *S. v. Davis*, 436.

HOMICIDE—Continued

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Trial court did not err in failing to instruct the jury on involuntary manslaughter where there was no evidence suggesting that defendant fired the shots that killed the victim involuntarily or by reason of culpable negligence. *S. v. Credle,* 142.

Charge in second degree murder case was proper, and instruction on involuntary manslaughter was not error. *S. v. Lash,* 496.

Where defendant killed his victim by shooting her, trial court did not err in failing to submit involuntary manslaughter to the jury. *S. v. Fox,* 523.

§ 31. Verdict and Sentence

Maximum prison sentence for involuntary manslaughter is 10 years. *S. v. Murrell,* 327.

HUSBAND AND WIFE

§ 13. Enforcement of Separation Agreements

Trial court erred in entering summary judgment for defendant in an action to recover a sum allegedly due plaintiff under terms of a separation agreement wherein defendant counterclaimed for alleged overpayments. *Henry v. Henry,* 60.

INDEMNITY

§ 3. Actions

Plaintiff insurer's action for contribution or indemnity against manufacturer, distributor and retailer of an allegedly defective master brake cylinder sold to insured more than three years earlier was not barred by the three year statute of limitations. *Insurance Co. v. Motor Co.,* 689.

Allegations that insured was passively negligent in driving an automobile when there existed in the brake cylinder a latent defect not discoverable by him was insufficient to support a basis for primary-secondary liability since such conduct on the part of insured would not constitute negligence at all. *Ibid.*

INDICTMENT AND WARRANT

§ 17. Variance Between Averment and Proof

Variance between the charge and the proof with respect to the date on which the alleged rape took place was immaterial. *S. v. Rice,* 575.

INFANTS

§ 1. Protection and Supervision of Infants by Courts Generally

Neither consent of a child's stepfather nor a finding of abandonment by the stepfather is necessary in a petition by the natural mother to have the child's name changed to that of the stepfather. *In re Dunston,* 647.

INFANTS—Continued

§ 9. Hearing and Grounds for Awarding Custody of Minor

Trial court erred in refusing to grant full custody of minor to the surviving parent. *Thomas v. Pickard,* 1.

Finding that the mother had allowed a male friend to spend numerous nights in her home was insufficient to support modification of a child custody order transferring custody from the mother to the father. *Todd v. Todd,* 458.

§ 10. Commitment of Minor for Delinquency

Juvenile is entitled to a new hearing where his request for a court reporter was denied, where the electronic device for recording the proceedings failed, and where the trial judge did not summarize the evidence and make findings of fact. *In re Edwards,* 469.

Order requiring that indigent, unemployed fifteen-year-old pay the complainant $1500 within 30 days or face confinement is vacated. *Ibid.*

INJUNCTIONS

§ 2. Inadequacy of Legal Remedy and Irreparable Injury

In an action to enjoin the construction of a roadway in violation of a subdivision restrictive covenant, trial court properly concluded that plaintiffs' remedy at law was inadequate and that irreparable injury would be sustained by plaintiffs. *Franzle v. Waters,* 371.

§ 12. Issuance of Temporary Orders

Constitutionality of the Fair Trade Act cannot be decided in a hearing upon plaintiff's application for a preliminary injunction. *Watch Co. v. Brand Distributors,* 482.

INSANE PERSONS

§ 1. Commitment of Insane Persons to Hospitals

Statutes providing for temporary detention of insane persons and for commitment by the clerk of superior court of such persons for observation and treatment are unconstitutional. *In re Confinement of Hayes,* 560.

Defendant doctors were entitled to rely on the provisions of G.S. 122-59 in receiving and detaining plaintiff for psychiatric examination though the statute under which they acted was subsequently held unconstitutional. *Powell v. Duke University,* 736.

Defendants who were doctors on the staff of a hospital for the mentally ill did not act improperly in accepting the committing physician's order with respect to plaintiff at face value and in detaining plaintiff as an emergency patient. *Ibid.*

INSURANCE

§ 69. Protection Against Injury by Uninsured or Unknown Motorists

Summary judgment was proper in an action under the hit-and-run automobile provision of plaintiff's policy where no physical contact with an alleged hit-and-run automobile was established. *East v. Insurance Co.*, 452.

§ 78. Motor Cargo Insurance

Insurance carried by shipper on goods destroyed by arson in the carrier's warehouse did not inure to the benefit of the carrier and thus defeat the insurer's subrogation rights against the carrier. *Insurance Co. v. Transfer and Storage Co.*, 152.

§ 79.1. Automobile Liability Insurance Rates

Order of the Commissioner of Insurance increasing private passenger automobile liability rates by 8.9% is affirmed although more current information may have been available to the Commissioner than that he used in making his findings. *Comr. of Insurance v. Attorney General*, 23.

§ 84. Coverage of "Substitution" Vehicle

An ambulance involved in an accident was a "replacement vehicle" within the terms of a motor vehicle liability policy. *Young v. Insurance Co.*, 702.

§ 112. Subrogation of Liability Insurer

Plaintiff automobile liability insurer was not subrogated to the rights of its insured where plaintiff settled all claims against insured without an adjudication of liability. *Insurance Co. v. Motor Co.*, 689.

§ 128. Waiver of Conditions of Fire Policy

Evidence was sufficient to show a waiver by defendant of the condition of occupancy required of the premises covered in a fire insurance policy. *Stuart v. Insurance Co.*, 518.

§ 130. Notice and Proof of Loss

There was a genuine triable issue as to whether defendant insurer waived requirements of a fire policy relating to filing formal proof of loss and institution of an action within 12 months. *Pennell v. Insurance Co.*, 465.

§ 137. Time Limitations in Action on Fire Policy

There was a genuine triable issue as to whether defendant insurer waived requirements of a fire policy relating to filing formal proof of loss and institution of an action within 12 months. *Pennell v. Insurance Co.*, 465.

INTOXICATING LIQUOR

§ 1. Validity and Construction of Control Statutes

Proviso excluding holders of brown bagging permits from provisions of the statute authorizing municipalities and counties to prohibit beer and wine sales from 1:00 p.m. on Sunday to 7:00 a.m. on Monday is unconstitutional. *Hursey v. Town of Gibsonville*, 581.

JUDGMENTS

§ 13. Judgments by Default

Actions of defendant were sufficient to constitute an appearance, and entry of default against him without notice was improper. *Miller v. Belk*, 70.

§ 14. Jurisdiction to Enter Default Judgment

An Ohio Court had personal jurisdiction over the nonappearing N. C. defendant, and default judgment entered by the Ohio court was valid. *Bimac Corp. v. Henry*, 539.

§ 36. Parties Concluded by Judgment

Action by plaintiff's husband against defendant was not res judicata to a subsequent action brought by plaintiff wife against defendant. *Wright v. Holt*, 661.

JURY

§ 7. Challenges

Trial of defendant for murder was a noncapital case and defendant was entitled to six peremptory challenges. *S. v. Clark*, 621.

KIDNAPPING

§ 1. Prosecutions

State's evidence was sufficient for the jury where it tended to show defendant grabbed an eight-year-old girl in a nursery playground and dragged her 75 to 100 feet to the steps of a nursery building. *S. v. Roberts*, 388.

LANDLORD AND TENANT

§ 8. Liability for Injury to Persons and Duty to Repair

Violation of a municipal housing code is not negligence per se, and lessor was not liable for injuries to children of lessee when they were bitten by rats. *Floyd v. Jarrell*, 418.

§ 14. Holding Over Tenancy

Evidence was sufficient to support court's determination that defendant city did not hold over at the termination of its ten-year lease of property used for a parking lot. *Gurtis v. City of Sanford*, 543.

LARCENY

§ 7. Sufficiency of Evidence and Nonsuit

Evidence of fingerprints on vending machines together with evidence concerning impression of the fingerprints was sufficient to withstand nonsuit in felonious breaking and entering and felonious larceny case. *S. v. Reynolds,* 10.

Evidence was sufficient in felonious breaking and entering and larceny case where defendant was apprehended while in possession of the stolen articles shortly after the crime and where defendant fled from police officers. *S. v. Snuggs,* 226.

Fingerprint evidence was sufficient for the jury in a breaking and entering and larceny case. *S. v. Dorsett,* 318.

Defendant's confession coupled with evidence of the corpus delicti was sufficient to require submission of felonious breaking and entering and felonious larceny case to the jury. *S. v. Fullerton,* 303.

Evidence was sufficient to be submitted to the jury in a prosecution for larceny from the person. *S. v. Rankin,* 252.

Unsupported testimony of an accomplice was sufficient to sustain defendant's conviction. *S. v. Bailey,* 313.

Evidence was sufficient to withstand motion for nonsuit in a prosecution for larceny of an automobbile. *S. v. Murchison,* 673.

§ 8. Instructions

In its jury charge in felonious breaking and entering case trial court could incorporate by reference an instruction as to possession of recently stolen property given in its charge on larceny. *S. v. Snuggs,* 226.

Trial court did not err in instructing the jury that if it found defendant not guilty of breaking and entering it must also find him not guilty of larceny. *S. v. McIlwain,* 230.

§ 10. Judgment and Sentence

Trial court did not abuse its discretion in sentencing defendant under discretionary sentencing statutes. *S. v. Johnson,* 338.

LIMITATION OF ACTIONS

§ 4. Accrual of Rights of Action and Time from Which Statute Begins to Run

In absence of findings of fact by the trial court as to when plaintiff's cause of action accrued, there was no basis on which to conclude as a matter of law that plaintiff's cause of action was barred by the three-year statute of limitations. *Hodges v. Johnson,* 40.

LIMITATION OF ACTIONS—Continued

Plaintiff insurer's action for contribution or indemnity against manufacturer, distributor and retailer of an allegedly defective master brake cylinder sold to insured more than three years earlier was not barred by the three year statute of limitations. *Insurance Co. v. Motor Co.*, 689.

§ 7. Fraud and Ignorance of Cause of Action

Defendant's claim of alleged fraud in execution of a deed of separation was barred by the three-year statute of limitations. *Calhoun v. Calhoun*, 429.

MASTER AND SERVANT

§ 11. Agreement not to Engage in Like Employment after Termination of Employment

Covenant not to compete contained in an employment contract executed by defendant employee after he had been employed by plaintiff for over three years was unsupported by consideration and was unenforceable. *Mastrom, Inc. v. Warren*, 199.

§ 65. Back Injuries

There was competent evidence to support Industrial Commission's order denying workmen's compensation where it tended to show that plaintiff was performing her regular duty in the usual manner when she suffered back injury. *Russell v. Yarns, Inc.* 249.

Plaintiff was not injured by accident when he felt a pain in his back while keeping logs straight on a conveyor. *Vassor v. Paper Co.*, 570.

§ 96. Review of Award in Superior Court

There was competent evidence to support Industrial Commission's order denying workmen's compensation where it tended to show that plaintiff was performing her regular duty in the usual manner when she suffered back injury. *Russell v. Yarns, Inc.*, 249.

MUNICIPAL CORPORATIONS

§ 30. Zoning Ordinances and Building Permits

Where petitioners had begun construction of 12 of 25 condominiums when a zoning ordinance was changed to prevent condominiums, and petitioners had made substantial expenditures in preparing land for the entire project, petitioners acquired a vested right to construct all 25 condominiums. *Properties, Inc. v. Board of Adjustment*, 712.

NARCOTICS

§ 2. Indictment

Indictment for possession of controlled substances with intent to distribute need not set out to whom defendant intended to distribute the substances. *S. v. Campbell*, 586.

NARCOTICS—Continued

§ 3. Competency and Relevancy of Evidence

Chemist was properly allowed to give opinion testimony that all vegetable matter contained in four plastic bags was marijuana where only a sample was tested. *S. v. Clark,* 473.

Statute providing for presumption of possession of controlled substances for sale is constitutional and does not create a presumption of guilt. *S. v. McDougald,* 407; *S. v. McGee,* 449.

§ 4. Sufficiency of Evidence

Evidence was sufficient for jury on the issue of defendant's guilt of felonious possession of heroin found in a paper bag on the back seat of defendant's car. *S. v. White,* 31.

State's evidence was sufficient for the jury in a prosecution for possession of marijuana found in a box defendant was seen carrying into the woods. *S. v. Barnes,* 263.

Evidence was sufficient to withstand motion for nonsuit in a prosecution for unlawful possession of amphetamines. *S. v. Brandon,* 483.

§ 4.5. Instructions

Where defendant stipulated that substance bought from him was heroin, the trial court's instruction that no further proof was required on the facts contained in the stipulation was proper. *S. v. Gibson,* 305.

Possession of more than five grams of marijuana does not constitute a separate offense, and an instruction thereon was so prejudicial as to require a new trial. *S. v. McGee,* 449.

§ 5. Verdict and Punishment

Possession and distribution of marijuana are two distinct crimes. *S. v. Yelverton,* 337.

NEGLIGENCE

§ 31. Res Ipsa Loquitur

Res ipsa loquitur was not applicable in an action to recover for injuries sustained during a fall from a stool in a business establishment. *Fearing v. Westcott,* 422.

§ 57. Sufficiency of Evidence in Action by Invitee

There was insufficient evidence of negligence to submit the case to the jury where it tended to show that plaintiff fell from a stool in a business establishment. *Fearing v. Westcott,* 422.

§ 59. Duties and Liabilities to Licensees

Plaintiff failed to show actionable negligence on the part of defendant when plaintiff fell off defendant's porch and sustained injury. *Hilker v. Knox,* 628.

OBSCENITY

Evidence was sufficient to be submitted to the jury in prosecution for disseminating obscenity in a public place where it tended to show that defendant operated a book store dealing in obscene material. *S. v. Horn*, 377.

PARENT AND CHILD

§ 1. The Relationship Generally

Provision of G.S. 7A-283 permitting service by publication when "the court finds it impractical to obtain personal service" is not applicable in proceedings to terminate parental rights unler G.S. 7A-288. *In re Phillips*, 65.

§ 9. Prosecutions for Nonsupport

Prosecution for wilful refusal to provide adequate child support should have been dismissed where the evidence tended to show that defendant was in compliance with a child support order of a court of competent jurisdiction. *S. v. Smith*, 308.

PARTITION

§ 7. Actual Partition

Trial court's findings were supported by sufficient competent evidence in a partition proceeding instituted by tenants in common. *Couch v. Couch*, 108.

PLEADINGS

§ 33. Scope of Amendment to Pleadings

Trial court did not err in permitting plaintiff in contract action to amend his complaint to seek recovery in quantum meruit. *Forbes v. Pillmon*, 439.

Respondents were not entitled to amend their pleading to conform to the evidence where the proposed amendment would change the theory on which the case was actually tried. *Fowler v. Johnson*, 707.

PROCESS

§ 9. Personal Service on Nonresident Individual in Another State

Promise by nonresident defendant by his endorsement of a note to repay a loan made in this State to a corporation is a promise to pay for a service rendered in this State within the purview of G.S. 1-75.4 and constitutes sufficient minimal contact whereby the courts of this State may assert personal jurisdiction over the nonresident defendant. *Trust Co. v. McDaniel*, 644.

§ 10. Service by Publication

Purported service by publication on respondent in a proceeding to terminate parental rights was invalid. *In re Phillips*, 65.

PROCESS—Continued

§ 12. Service on Domestic Corporation

Delivery of a summons and complaint to a security officer in defendant's place of business was insufficient to give the trial court jurisdiction over the person of defendant. *Simms v. Stores, Inc.*, 188.

§ 16. Service on Nonresident in Action to Recover for Negligent Operation of Automobile in This State

Purported service of process on nonresident motorist through Commissioner of Motor Vehicles was invalid where the summons failed to designate the defendants as parties to be served and failed to command the process officer to summon them. *Philpott v. Kerns*, 663.

PROPERTY

§ 4. Criminal Prosecution for Malicious or Wilful Destruction of Property

"Feloniously" and "maliciously" are not synonymous terms under G.S. 14-49(b) making damage to real property of another by use of an explosive a crime. *S. v. Cannady*, 213.

Failure of indictments to allege malicious damage to property rendered the indictments fatally defective. *Ibid.*

PUBLIC WELFARE

A county's general claim against the estate of a recipient of old age assistance to recover for such assistance is governed by the statute of limitations of G.S. 1-22, not by the three year statute of limitations providing for the enforcement of an old age assistance lien against the real property of the recipient. *Mecklenburg County v. Lee*, 239.

Determination that a county's action to enforce an old age assistance lien against the recipient's real property was barred by the statute of limitations does not constitute res judicata to the county's subsequent action to enforce its general claim against the recipient's estate. *Ibid.*

QUASI CONTRACTS

§ 2. Actions to Recover on Implied Contracts

Judgment awarding plaintiff an amount allegedly remaining due for labor and materials furnished defendant was not supported by the court's findings. *Forbes v. Pillmon*, 439.

RAPE

§ 1. Nature and Elements of the Offense

Trial court's definition of rape was proper. *S. v. Jackson*, 234.

§ 6. Instructions and Submission of Guilt of Lesser Degrees of the Crime

In a prosecution for assault with intent to commit rape, trial court's instructions on lesser included offense of assault with a deadly weapon were proper. *S. v. Lassiter*, 208.

RAPE—Continued

In a prosecution for felonious breaking and entering and assault with intent to commit rape, trial court properly failed to submit lesser included offenses to the jury. *S. v. Jackson*, 234.

In its instructions to the jury in a rape case, the trial judge did not express an opinion or intimate that the defendant was guilty of some offense, or that he wanted to be found guilty of some lesser included offense. *S. v. Grissom*, 332.

§ 17. Assault with Intent to Commit Rape Generally

In a prosecution for assault with intent to commit rape, failure to accomplish the rape does not change the nature of the assault. *S. v. Rice*, 575.

§ 18. Prosecution for Assault with Intent to Commit Rape

Evidence was sufficient to be submitted to the jury where it tended to show that defendant accosted a college co-ed, held a knife at her throat, and threatened to have intercourse with her. *S. v. Lassiter*, 208.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence and Nonsuit

Evidence was insufficient to submit the issue of receiving stolen goods to the jury where it tended to show only that defendant was in possession of recently stolen goods. *S. v. Miller*, 489.

REFERENCE

§ 1. Nature and Elements of Remedy

Trial court had no authority to enter a judgment of nonsuit for failure to prosecute while an order of reference in the case remained in effect. *Hardware, Inc. v. Howard*, 80.

REFORMATION OF INSTRUMENTS

§ 7. Sufficiency of Evidence

Plaintiff's evidence was insufficient to support reformation of a deed on ground of mistake of the draftsman. *Parker v. Pittman*, 500.

REGISTRATION

§ 1. Necessity for Registration and Instruments Within Purview of Statute

Where it was stipulated that a contract for sale of land was not recorded, summary judgment was properly entered in favor of defendants in an action to recover damages allegedly resulting from conspiracy to deprive plaintiff of his rights under the contract. *Henry v. Shore*, 463.

ROBBERY

§ 1. Nature and Elements of the Offense

Judgment should have been arrested where defendant was charged with armed robbery but found guilty of assault with a deadly weapon. *S. v. Perry*, 141.

§ 3. Competency of Evidence

Evidence as to the identity of defendant, though not positive, was competent and properly admitted. *S. v. Stitt*, 217.

Pistol and holster of a robbery victim were sufficiently connected with defendant to be admissible in evidence. *S. v. Cauthen*, 591.

Evidence of defendant's payment of a fine for a prior liquor violation two days after the robbery in question was admissible to show motive. *S. v. Grant*, 722.

§ 4. Sufficiency of Evidence and Nonsuit

There was sufficient evidence to support the jury's verdict finding all five defendants guilty of an armed robbery although only one defendant used a firearm. *S. v. Wright*, 76.

There was sufficient evidence that defendant aided and abetted in armed robbery to take the case to the jury where it tended to show that defendant was present at the crime scene and participated in a beating given the victim. *S. v. Curtis*, 116.

Evidence was sufficient for the jury where it tended to show that defendant at gunpoint demanded money at the ticket window of a movie house. *S. v. Lassiter*, 208.

State's evidence was sufficient for jury on issue of defendant's guilt of aiding and abetting in armed robbery. *S. v. Gibbs*, 638.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Slight misstatement by trial judge in recapitulation of the evidence was not reversible error. *S. v. Curtis*, 116.

Trial court properly failed to submit the lesser included offense of common law robbery in an armed robbery prosecution. *Ibid.*

Trial court properly failed to instruct on lesser included offense of assault in robbery prosecution. *S. v. Lane*, 316.

Trial court properly failed to submit lesser included offenses in a common law robbery case. *S. v. Scales*, 562.

§ 6. Verdict and Sentence

Sentence of 20 to 25 years for armed robbery did not constitute cruel and unusual punishment because the two eyewitnesses were doubtful about the pretrial identification of defendant. *S. v. McIlwain*, 335.

RULES OF CIVIL PROCEDURE

§ 4. Service of Process

Purported service by publication on respondent in a proceeding to terminate parental rights was invalid. *In re Phillips*, 65.

Service of process on male defendant was invalid where summons and complaint were handed to defendant's mother at a place other than defendant's residence. *Williams v. Hartis*, 89.

Delivery of a summons and complaint to a security officer in defendant's place of business was insufficient to give the trial court jurisdiction over the person of defendant. *Simms v. Stores, Inc.*, 188.

§ 7. Pleadings Allowed; Form of Motions

Failure of defendant to state rule under which he was proceeding did not constitute waiver of his defense of invalid service of process. *Williams v. Hartis*, 89.

§ 13. Counterclaim and Crossclaim

Trial court properly denied defendants' motions to amend their answers in order to assert counterclaims where those counterclaims were permissive and not compulsory. *Faggart v. Biggers*, 366.

Where defendant instituted a cross claim and a third party action, trial court should have looked to the times of filing such cross claim and action to determine whether at those times there was pending an action whose claim involved the same subject matter as that of defendants' proposed counterclaims to determine if those counterclaims were compulsory. *Ibid.*

§ 15. Amended Pleadings

Respondents were not entitled to amend their pleading to conform to the evidence where the proposed amendment would change the theory on which the case was actually tried *Fowler v. Johnson*, 707.

§ 41. Dismissal of Actions

There was no adjudication on the merits in an alimony and child support case where that action ended with plaintiff's voluntary dismissal. *Collins v. Collins*, 45.

Trial court erred in adjudging defendant in contempt for violation of an order entered in an action which had been terminated by plaintiff's voluntary dismissal. *Ibid.*

Court in a nonjury trial erred in dismissing plaintiff's claim on the basis of the statute of limitations without making findings of fact. *Hospital Corp. v. Manning*, 298.

Where trial court dismissed with prejudice plaintiff's action for alimony and child custody and support because the parties had executed a deed of separation, court had no authority to consider a motion in the cause thereafter filed by plaintiff. *Sutton v. Sutton*, 480.

SALES—Continued

§ 22. Actions for Defective Goods

Retailer of a master brake cyclinder was not liable for injuries sustained in an automobile accident allegedly caused by a defect in the cylinder. *Insurance Co. v. Motor Co.*, 689.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Where police officers lawfully arrested defendant for carrying a concealed weapon in a paper bag in his car, seizure of the bag at the arrest scene and search of the bag at the police station without a warrant were incident to the arrest. *S. v. White*, 31.

No search warrant was required for seizure of plastic bags containing narcotics from defendant's car where the seized articles were in plain view on the front seat of the car. *S. v. Campbell*, 586.

Trench coat defendant placed on poolroom bar prior to his arrest in the poolroom was in his "immediate control" so as to permit officers to search the coat without a warrant as an incident of defendant's arrest. *S. v. Gibbs*, 638.

There was no "search" when a nurse undressed the unconscious defendant at a physician's direction in a hospital emergency room and discovered heroin on defendant's person. *S. v. Wooten*, 269.

§ 2. Consent to Search Without Warrant

Search of defendant's vehicle and coat with defendant's consent was not unlawful and amphetamine capsules found during the search were properly admitted. *S. v. Brandon*, 483.

§ 3. Requisites and Validity of Search Warrant

Error in affidavit was immaterial where the affidavit was otherwise sufficient to support a finding of probable cause. *S. v. Steele*, 126.

An affidavit alleging an informer's tip, the reliability of the informer and detailed corroborating facts was sufficient to show probable cause. *S. v. Ellington*, 273.

An affidavit which is insufficient standing alone, together with oral information given the issuing magistrate, are sufficient to support issuance of a search warrant. *S. v. Howell*, 610.

Slight variance between the affidavit and affiant's testimony at trial did not affect the validity of the search warrant. *S. v. Logan*, 557.

§ 4. Search Under the Warrant

There was competent evidence to support trial court's finding that police legally entered defendant's residence after knocking and identifying themselves. *S. v. Steele*, 126.

SHOPLIFTING

Warrant in shoplifting case need not allege ownership of the stolen property in a natural person or a corporation. *S. v. Wooten*, 652.

STATE

§ 8. Negligence of State Employee

Evidence was sufficient to support Industrial Commission's findings and conclusions that defendant was negligent in operating a Highway Commission truck at an excessive rate of speed at the time of the accident. *Bullman v. Highway Comm.*, 94.

STATUTES

§ 4. Construction in Regard to Constitutionality

Defendant doctors were entitled to rely on the provisions of G.S. 122-59 in receiving and detaining plaintiff for psychiatric examination though the statute under which they acted was subsequently held unconstitutional. *Powell v. Duke University*, 736.

SUBROGATION

Plaintiff automobile liability insurer was not subrogated to the rights of its insured where plaintiff settled all claims against insured without an adjudication of liability. *Insurance Co. v. Motor Co.*, 689.

TAXATION

§ 25. Ad Valorem Taxes

Where lessee of land sold a building and all personal property on the land in 1968, lessee had no statutory duty to list that property for taxation or to pay ad valorem taxes thereon for the years 1969-71. *Service Co. v. Dunford*, 641.

Lessee's obligation under a lease to pay ad valorem taxes on improvements to the land for the years 1969-71 was extinguished when lessor released and cancelled the lease in 1971. *Ibid.*

TORTS

§ 4. Right to Contribution

No right to contribution exists where the person seeking contribution contends he was free of negligence. *Insurance Co. v. Motor Co.*, 689.

§ 7. Release from Liability

Plaintiff's plea of a release from liability obtained by his insurer as a bar to defendant's counterclaim constituted a ratification of the insurer's settlement and barred plaintiff's claim against defendant. *McKinney v. Morrow*, 282.

TRIAL

§ 4. Nonsuit for Failure of Plaintiff to Prosecute his Action

Trial court had no authority to enter a judgment of nonsuit for failure to prosecute while an order of reference in the case remained in effect. *Hardware, Inc. v. Howard,* 80.

§ 6. Stipulations

Award of entirety property to husband was beyond the scope of a stipulation submitting the question of division of the property to the trial court. *Noble v. Noble,* 111.

Respondents in a partitioning proceeding were bound by their stipulation as to the only issue involved in the proceeding. *Fowler v. Johnson,* 707.

§ 10. Expression of Opinion on Evidence by Court During Trial

Where the clerk read the jury's answer to the first two of four issues in a caveat proceeding in absence of the judge, trial judge expressed an opinion on the evidence when he thereafter instructed the jury that they still had the right to change their answers to the first of two issues. *In re York,* 425.

§ 14. Reopening Case for Additional Evidence

Trial court did not err in denial of plaintiff's motion made at the close of all the evidence to reopen his case in order to offer additional evidence. *Castle v. Yates Co.,* 632.

§ 30. Effect of Judgment as of Nonsuit and of Refusal of Motion to Nonsuit

Trial court erred in adjudging defendant in contempt for violation of an order entered in an action which had been terminated by plaintiff's voluntary dismissal. *Collins v. Collins,* 45.

There was no adjudication on the merits in an alimony and child support case where that action ended with plaintiff's voluntary dismissal. *Ibid.*

Where trial court dismissed with prejudice plaintiff's action for alimony and child custody and support because the parties had executed a deed of separation, court had no authority to consider a motion in the cause thereafter filed by plaintiff. *Sutton v. Sutton,* 480.

§ 33. Statement of Evidence and Application of Law Thereto

Trial court did not err in failing to include in its recapitulation of the evidence certain facts brought out on cross-examination of plaintiff's witness which reflected on the witness's credibility. *Smith v. Kilburn,* 204.

Trial court erred in failing to instruct the jury as to what facts would constitute negligence on the part of defendant. *Brady v. Smith,* 293.

TRIAL—Continued

§ 48. Power of Court to Set Aside Verdict in General

Although trial court erred in its instructions as to damages, new trial will not be awarded where the jury disregarded such instructions and reached the proper result. *Hospital v. Whitley,* 595.

§ 50. New Trial for Misconduct of or Affecting the Jury

Trial court properly refused to set aside verdict where it concluded after investigation that a statement overheard outside the courtroom by a juror did not affect the verdict. *Wright v. Holt,* 661.

TRUSTS

§ 13. Creation of Resulting Trust

Summary judgment was improper in an action to partition lands where the pleadings of the parties raised an issue as to the creation of a resulting trust with respect to the property in question. *Lasater v. Lasater,* 551.

§ 18. Competency and Relevancy of Evidence

In an action to establish a parol trust on land where defendant's evidence consisted of two written instruments, the parol evidence rule applied to exclude plaintiff's oral testimony in conflict with the instruments. *Tomlinson v. Brewer,* 696.

USURY

§ 1. Contracts and Transactions Usurious

Whether a third person was a broker for borrower and received a commission therefor or whether the third person acted as agent for lender and lender received the commission determined whether the transaction in question was usurious, and failure of the trial court to make a finding with respect to the third person's relationship was error. *Argo Air, Inc. v. Scott,* 506.

§ 5. Forfeiture of Interest

Trial court erred in adjudging that the note and deed of trust in question were null and void as a usurious transaction and in permanently enjoining the foreclosure of the deed of trust. *Argo Air, Inc. v. Scott,* 506.

UTILITIES COMMISSION

§ 2. Jurisdiction and Authority of Commission

Utilities Commission had authority to adopt a rule providing that utilities may charge 1% per month as a late payment charge on amounts owing 25 days or longer after rendering of the bill. *Utilities Comm. v. Consumers Council,* 717.

VENDOR AND PURCHASER

§ 10. Actions Involving and Interests of Third Persons

Where it was stipulated that a contract for sale of land was not recorded, summary judgment was properly entered in favor of defendants in an action to recover damages allegedly resulting from conspiracy to deprive plaintiff of his rights under the contract. *Henry v. Shore,* 463.

VENUE

§ 2. Residence of Parties

County where defendant, a domestic corporation, had its principal and registered office was the proper venue in an action for money damages. *Bank v. Bank,* 113.

WILLS

§ 13. Nature of Caveat Proceedings

Acceptance of estate funds by caveator did not estop him from instituting a caveat proceeding. *In re Will of Peacock,* 554.

§ 23. Instructions in Caveat Proceedings

Where the clerk read the jury's answer to the first two of four issues in a caveat proceeding in absence of the judge, trial judge expressed an opinion on the evidence when he thereafter instructed the jury that they still had the right to change their answers to the first two issues. *In re York,* 425.

§ 29. Construction of Codicil

A codicil which cancelled a devise to testator's son and in lieu thereof devised the property to the son and his wife as tenants by the entirety did not eliminate a charge upon the land in favor of two of testator's other children. *Hollowell v. Hollowell,* 279.

§ 72. Property Out of Which Estate Taxes Should be Paid

An item devising "all real estate which remains at my death, which was willed to me by my wife and formerly in T. B. Crowder Estate" is a specific devise, not a residuary devise, and should not be charged with federal estate taxes. *Park v. Carroll,* 53.

Doctrine of equitable contribution does not apply to require the apportionment of federal estate taxes between residuary legacies and specific devises. *Ibid.*

WITNESSES

§ 1. Competency of Witness

Trial court did not abuse its discretion in permitting an eight-year-old assault and kidnapping victim to testify without hearing testimony of others as to the child's competency. *S. v. Roberts,* 388.

WITNESSES—Continued

Trial court in a murder prosecution did not err in allowing a 9-year-old to testify. *S. v. Fox*, 523.

§ 7. Direct Examination

Trial court did not err in allowing a police officer in the course of his testimony to refer to notes made by another officer. *S. v. White*, 31.

§ 8. Cross-examination

Trial court did not err in limiting defendant's cross-examination of the adverse witness. *S. v. Carnes*, 98.

§ 10. Attendance and Compensation

Award of expert witness fees was improper where the witnesses did not testify in obedience to a subpoena. *Couch v. Couch*, 108.

WORD AND PHRASE INDEX

PRINTED BY
COMMERCIAL PRINTING COMPANY, INC.
RALEIGH, NORTH CAROLINA