NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 19

SPRING SESSION 1973
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RALEIGH
1974

CITE THIS VOLUME

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[1]Deceased 27 December 1973.
[2]Appointed Chief Judge effective 7 January 1974.
[3]Appointed effective 11 January 1974.
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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1973

WILLIAMS AND ASSOCIATES, ARCHITECTS AND ENGINEERS, A PARTNERSHIP CONSISTING OF J. L. WILLIAMS, R. L. WILLIAMS, J. ANDREW WILLIAMS AND FRANK M. WILLIAMS v. RAMSEY PRODUCTS CORPORATION

No. 7326SC35

(Filed 25 July 1973)

Evidence § 32— contract for architectural services — parol evidence as to size, cost, time of completion

In an action to recover for architects' services rendered pursuant to a written contact, the parol evidence rule was not violated by the admission of testimony as to negotiations held prior to the execution of the contract concerning the size, cost and time of completion of the manufacturing plant and offices that plaintiff architects were to design.

APPEAL by plaintiffs from *Clarkson, Judge,* 8 May 1972 Session of Superior Court held in MECKLENBURG County.

Plaintiffs seek to recover $18,667.32, with interest from 30 December 1969, for architectural services rendered under a "Standard Form of Agreement Between Owner and Architect" executed by plaintiffs and defendant on or about 24 January 1969.

Plaintiffs' evidence tended to show that MacArthur, the president of defendant corporation, sought plaintiffs' services in the design of a new manufacturing plant. Plaintiffs' employee, Rash, a licensed engineer and architect, met with MacArthur and discussed the proposed plant and the services

available from plaintiffs. The agreement was signed after a second meeting. Frank Williams, a partner in plaintiffs' firm, and Rash were placed in charge of the project. Drawings for the "Schematic Design Phase," the "Design Development Phase" and the "Construction Documents Phase" were completed and an estimate of the probable construction costs was generated. This cost estimate was in the amount of $328,650.00 and was presented to defendant along with an invoice for architectural services rendered to date. Rash and MacArthur discussed the estimate and the bill and, at Rash's suggestion, action on the invoice and construction cost was deferred in order to obtain a cost estimate from a contractor. The first estimate was received from McDevitt and Street Construction Company (McDevitt) and was, according to Rash, "so high that [plaintiffs] would not recommend necessarily that a person enter into a negotiated contract based on this proposal." Plaintiffs then sought, and obtained, permission to submit the plans to another contractor. The Laxton Construction Company (Laxton) returned an estimate of $411,300.00 which reflected certain revisions of the plans, including lower ceiling heights. Defendant abandoned the project at this point and has refused to pay plaintiffs' fee. Plaintiffs' evidence also indicated that the written agreement contains no reference to the cost of the project, or its size, location, appearance, type of construction or function other than indicating that the project is to be a new manufacturing plant and offices. The written agreement also states, "The Architect shall consult with the Owner to ascertain the requirements of the Project and shall confirm such requirements to the Owner." Rash testified that the cost of a project is normally "a requirement of the Owner."

Defendant offered evidence, admitted over plaintiffs' objections that the evidence violated the parol evidence rule, to the effect that, prior to the execution of the written agreement, defendant informed plaintiffs that defendant required a new manufacturing plant containing 25,000 square feet and costing $250,000.00. Rash indicated at that time his understanding of this requirement by circling the fee percentage of 6.3 on the standard fee schedule opposite $250,000 and under category "D," "Simple Manufacturing Plants." Rash told MacArthur that the judicious use of materials and workmanship could accomplish striking results for about $10.00 to $11.00 per square foot. After the probable cost estimate of $328,650.00 was submitted, MacArthur met with Rash and reminded him that a

price of $250,000.00 had been agreed upon. Rash indicated that by submitting the construction plans to a contractor, there was an excellent opportunity of obtaining a true cost figure of less than $328,650.00 and MacArthur followed that suggestion. McDevitt's estimate was for $494,000.00. Possible revisions of the plans were discussed and a second contractor, Laxton, estimated construction costs of $468,000.00 under the original plans and $411,300.00 under revised plans. In a letter to defendant, Rash stated that the second of these figures represented a base minimum building for the area enclosed and reduction of price beyond $411,300.00 could only be achieved by reduction of the building size. MacArthur notified plaintiffs in a letter dated 1 December 1969 that he was terminating their arrangement. That letter indicated the project "was to have cost in the neighborhood of $300,000.00, preferably under that. . . ."

The case was tried without a jury and, after making findings of fact and conclusions of law, Judge Clarkson entered an order denying recovery to plaintiffs.

R. Mayne Albright for plaintiff appellants.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Gaston H. Gage and James Y. Preston for defendant appellee.

VAUGHN, Judge.

Plaintiffs challenge the admission and consideration of parol evidence of negotiations held prior to the execution of the written agreement concerning size, cost and time of completion of the project. Generally, parol evidence may not be considered if its purpose is to vary, add to or contradict a written agreement on matters intended to be covered by the written agreement. As stated in *Neal v. Marrone,* 239 N.C. 73, 77, 79 S.E. 2d 239:

> "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."

There has been considerable appellate deliberation on whether parol evidence can be considered in order to prove that the parties to a written contract for an architect's services had agreed that the structure to be designed should be such that it could be erected within a maximum cost limitation. "In the great majority of the cases where the question has been raised the evidence has been held admissible, usually on the ground that the written contract failed to disclose the parties' intention as to the cost of the structure contemplated, and that such contemplated cost was an element which must have entered into the negotiations." Annot., 49 A.L.R., 2d 679, 680 (1956).

The written agreement executed by the parties in this case provides that the architect shall consult with the owner to ascertain the requirements of the project, confirm these requirements to the owner and that the owner shall provide full information regarding his requirements for the project. An examination of the written agreement shows that, other than the statement that it is the intention of the owner to construct a new manufacturing plant and offices referred to as the project, there is no indication of the size, location, style, material, time of completion or cost requirements of the project. We hold, therefore, that the court properly considered parol evidence to determine what the agreement was with respect to these matters. In *Hite v. Aydlett,* 192 N.C. 166, 134 S.E. 419, the Supreme Court held that when an architect agreed to furnish plans and specifications for the project which would not exceed a fixed sum, defendant could show the agreement by parol evidence, not to contradict, vary or add to the terms contained in the written contract, but to make certain what plans the architect agreed to furnish so that the jury could determine whether those furnished were in compliance with the contract. In *Hite* the court held that if the architect agreed to furnish plans for a project not to cost more than $17,000.00 and the cost of doing the work according to the plans proposed by him exceeded $22,000.00, the architect could not recover, for

he failed to perform his contract. *See also* Annot., 20 A.L.R. 3rd 778 (1968), for decisions as to the effect on the compensation of architects where construction costs exceed the agreed maximum cost.

Plaintiffs' able counsel has brought forward numerous assignments of error based on the court's findings of fact. We hold, however, after determining that the court did not err when it considered the parol evidence, that the crucial facts found by the court find support in the evidence and that those facts support the judgment denying both plaintiffs recovery on the express contract and on the theory of *quantum meruit.*

When, as here, parties waive jury trial, the credibility of the witnesses, the probative value of the evidence and the inferences to be drawn therefrom are matters for determination by the judge and have the effect of a jury verdict. If there is some evidence to support the judge's findings they are conclusive on appeal, even though the evidence might support a contrary finding.

Affirmed.

Judges BROCK and MORRIS concur.

CHARLIE LEE HELMS, EDNA B. HELMS, HAROLD BURRIS AND RHODA H. BURRIS v. B & L INVESTMENT CO., INC., A NORTH CAROLINA CORPORATION, AND DAVID R. LANTER

No. 7326SC507

(Filed 25 July 1973)

Contracts § 20— impossibility of performance — assumption of risk — liability for nonperformance

Defendants under the terms of their guaranty to plaintiffs assumed the risk that the governing authorities of the city and county might interpose objections to the extension of water and sewer lines to property sold by them to the plaintiffs; therefore, defendants are liable to plaintiffs for any damages sustained by their failure to provide the property with water and sewer connections within six months of the date of sale as required by the contract.

APPEAL by defendants from *Clarkson, Emergency Judge,* Special 12 March 1973 Session of Superior Court held in MECKLENBURG County.

This is a civil action instituted by the plaintiffs on 6 June 1972 to recover damages for breach of contract. The facts out of which the action arose are substantially as follows:

The plaintiffs on 12 February 1969 purchased from the defendant-corporation a 2.15 acre tract of land on Idlewild Road in Mecklenburg County. Simultaneously with the execution of the deed, the defendant-corporation and its president, David R. Lanter, individually, executed a "Representation and Guaranty" which is set out in full as follows:

"STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

REPRESENTATION AND GUARANTY

For and in consideration of the sum of $10.00 and other valuable considerations, the receipt whereof is hereby acknowledged, and for the purpose of inducing Charlie Lee Helms and wife Edna B. Helms, and Harold Burris and wife, Rhoda H. Burris, (hereinafter referred to as 'Purchasers') to purchase from B & L Investment Co., Inc., that certain parcel of land on Idlewild Road in Mecklenburg County, North Carolina, as shown on a physicial survey thereof made by David R. Lanter dated February 3, 1969, a copy of which is attached hereto marked 'Exhibit A', the undersigned B & L Investment Co., Inc., and David R. Lanter do hereby represent and guarantee to said Purchasers that within six months immediately following the date hereof, water and sewer lines will be extended to the property line of the above described premises, without any cost or expense therefor to said Purchasers, so as to render such water and sewer facilities available to said premises. It is understood and agreed that the purchase price being paid by the Purchasers for said premises is based upon this representation and guaranty.

IN TESTIMONY WHEREOF the undersigned have hereunto set their hands and seals this the 12th day of February, 1969.

B & L INVESTMENT CO., INC.
By: David R. Lanter
President
DAVID R. LANTER. (SEAL)"

As of 15 March 1973 the defendant had not provided the water and sewer facilities as agreed. In their answer to the

complaint, they admit the execution of the guaranty but assert that they were unable to comply with their contract because they were prohibited from so doing by the governmental authorities of the city of Charlotte and Mecklenburg County on account of potential pollution problems in the area.

The plaintiffs moved for summary judgment on the issue of liability on the ground that there was no genuine issue as to any material fact concerning such liability and that they were entitled to judgment upon that issue as a matter of law.

The court granted summary judgment on the issue of liability. Defendants appealed.

Parker Whedon for plaintiff appellees.

Bradley, Guthery & Turner, by Paul B. Guthery, Jr., for defendant appellants.

BALEY, Judge.

The sole issue for determination in this case is whether the supervening action of the governmental authorities of the city of Charlotte and Mecklenburg County in prohibiting the defendants from extending water and sewer lines to the land sold to plaintiffs will excuse the defendants from the performance of their obligations to plaintiffs under the guaranty or from the payment of damages for their failure to so perform.

The material facts concerning the issue of liability are uncontradicted. As an inducement to plaintiffs to purchase the property, the defendants made an unqualified guaranty that water and sewer lines would be extended to the property line within six months after 12 February 1969. The defendants admit that the water and sewer lines were not extended to plaintiffs' property but contend that it was impossible to make such extension because they were prohibited by governmental authorities. It is a question of law for the court to determine whether the action of governmental authorities will excuse the defendants from liability for the failure to perform their contract.

> "As a general principle, nonperformance of a contract is excused where performance is rendered impossible by the law, provided the promisor is not at fault and has not assumed the risk of performing, whether impossible or not. . . ." 17 Am. Jur. 2d, Contracts, § 418, p. 872.

" . . . [T]he terms of a contract may be such that, expressly or by construction, one of the parties assumes the risk of subsequent governmental interference preventing his performance of his undertaking." 17 Am. Jur. 2d, Contracts, § 419, p. 875.

"Undoubtedly, a competent party may, by an absolute contract, bind himself to perform things which subsequently become impossible or to pay damages for the nonperformance. . . . " 17 Am. Jur. 2d, Contracts, § 423, p. 878.

"Where a party enters into a contract knowing that permission of government officers will be required during the course of performance, the fact that such permission is not forthcoming when required does not constitute an excuse for nonperformance." 17A C.J.S., Contracts, § 463(1), p. 611.

" . . . [T]he general rule is that performance of antecedent obligations may not be excused by subsequent inability to perform on account of unexpected difficulties or unforeseen impediments, short of prevention by wrongful act or conduct of the other party to the contract." *Goldston Brothers v. Newkirk*, 233 N.C. 428, 431, 64 S.E. 2d 424, 427.

See also Annot., 84 A.L.R. 2d 12 (1962).

In applying these principles of law to the present case, it seems clear that before the plaintiffs would agree to purchase the tract of land involved, they demanded assurance that water and sewer facilities would be made available within a six-month period. To induce the plaintiffs to make the purchase, the defendants, both corporate and individual, executed a separate and unconditional guaranty that the water and sewer facilities would be provided within six months.

This guaranty was clear and unequivocal in its terms and placed on the defendants the absolute responsibility for performance regardless of any contingency. The defendants by every reasonable interpretation assumed the risk of subsequent governmental interference which might prevent performance of their obligation. In view of the current emphasis upon pollution problems in metropolitan areas, the parties may or in the exercise of reasonable care should have anticipated that they might encounter some difficulty in providing the necessary

water and sewer facilities for this particular tract of land. The insistence upon the guaranty by plaintiffs and that it be signed by the individual defendant is some indication that this likelihood was within the contemplation of the parties.

We hold that the defendants under the terms of their guaranty to plaintiffs have assumed the risk that the governing authorities of the city of Charlotte and Mecklenburg County might interpose objections to the extension of water and sewer lines to property sold by them to the plaintiffs and are liable to the plaintiffs for any damages sustained by their failure to perform their contract.

The action of the court below in granting summary judgment upon the issue of liability is sustained, and the cause is remanded for a determination of damages.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

THE CITY OF KINGS MOUNTAIN, A MUNICIPAL CORPORATION, PETITIONER v. BUFORD D. CLINE AND W. K. MAUNEY, JR., TRADING AS THE DOUBLE B. RANCH, A PARTNERSHIP, AND PATRICIA C. GOLD AND HUSBAND, HARRY G. GOLD, EDWIN H. CLINE AND WIFE, JEAN R. CLINE, C. R. GOLD AND WIFE, OCIE GOLD, JOSEPH C. WHISNANT, TRUSTEE, FIRST CITIZENS BANK AND TRUST COMPANY OF KINGS MOUNTAIN, N. C., AND COUNTY OF CLEVELAND, DEFENDANTS

No. 7327SC390

(Filed 25 July 1973)

1. **Eminent Domain § 5— taking of part of land for water reservoir — measure of damages**

Where the defendant's land is taken for the impoundment of water, he may recover damages caused to his remaining land from the impoundment of that water on the land taken, and the measure of damages for the part remaining is the difference in market value of that part taken before and after water was impounded on the land taken, which was part of the entire tract.

2. **Eminent Domain §§ 6, 7— condemnation of dairy farm — evidence of damage to business inadmissible — charge on special damage improper**

In North Carolina the taking of land does not contemplate compensation for loss of business maintained on that land, or for cost in

moving a business and its attendant personal property to another location; therefore, in a proceeding to condemn land owned by defendants for a water reservoir, the trial court erred in instructing on the special use made of the land by defendants and in admitting evidence with respect to the past profitability of defendants' dairy business conducted on the land, the cost of moving the dairy herd and milking operation to another location, and the loss in gross receipts of the dairy operation after the herd was moved.

APPEAL by Petitioner from *Falls, Judge,* 27 November 1972 Civil Session of CLEVELAND County Superior Court.

The City of Kings Mountain instituted this proceeding to condemn land owned by the defendants for a water reservoir. Petitioner's right to condemn land for such purpose was established on a prior appeal, reported in *City of Kings Mountain v. Cline,* 281 N.C. 269, 188 S.E. 2d 284 (1972). This appeal is from a judgment entered upon the jury's determination of damages in the amount of $175,000.00.

Verne E. Shive, Jack H. White, and Henry L. Fowler, Jr. for petitioner appellant.

Whisnant & Lackey by N. Dixon Lackey, Jr. for defendant appellees.

CAMPBELL, Judge.

Compensation for the taking of land by the exercise of the power of eminent domain is the fair market value of the land taken at the time of the taking. In this case it was 5 November 1969.

Fair market value is the price the property would bring when offered for sale by one who desires, but is not compelled to sell, and is bought by one desiring to buy, but not under the necessity of purchasing. *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219 (1959).

Where only a portion of the owner's tract of land is taken, the measure of compensation is the difference between the fair market value of the entire tract of land just prior to the taking and the fair market value of the part remaining just after the taking. *In re Land of Alley,* 252 N.C. 765, 114 S.E. 2d 635 (1960); *Pemberton v. Greensboro,* 208 N.C. 466, 181 S.E. 258 (1935).

If the statute under which the condemnor has taken land authorizes the deduction of benefits to the land remaining, the total compensation to the landowner must be diminished by any such benefit to his remaining land arising out of the use to which the condemned land is put. *In re Land of Alley, supra.*

In the instant case the City of Kings Mountain proceeded under the authority of G.S. 160-204, *et seq.*, now repealed but applicable to this action, which sections authorize deduction of benefits to the landowner.

Additionally, however, under some circumstances the landowner may recover compensation for damage to the land remaining in his hands. Damage to the part remaining which arises from the use of the land taken is compensable only if such damage is caused by the use of the specific land taken, which land had before been a unity with the part remaining. A use of lands of another which causes annoyance, inconvenience, or damage to the land of the defendant is not compensable. *Light Company v. Creasman,* 262 N.C. 390, 137 S.E. 2d 497 (1964). If the defendant were to claim damage from conduct of the condemnor, which conduct did not arise out of use of the defendant's land taken, such damage is suffered by all in the neighborhood generally, and is not the proper subject of compensation.

[1] Where the defendant's land is taken for the impoundment of water, he may recover damages caused to his remaining land from the impoundment of that water on the land taken. *Power Co. v. Hayes,* 193 N.C. 104, 136 S.E. 353 (1927). The measure of damages for the part remaining is the difference in market value of that part before and after water was impounded on the land taken, which was part of the entire tract. *Power Co. v. Hayes, supra.*

The above principles of law were adequately covered by the trial court in its charge to the jury, and were supported by evidence. Generally, there was evidence on the part of the defendants that the highest and best use of the land was for the purpose of dairy farming; the land was large enough to support a dairy herd of reasonable economic size, and the land contained a large tract of bottom land fertile enough to grow most of the feed required by the herd. There was competent evidence by real estate appraisers as to the fair market value

of the entire tract of land prior to the date of taking, and of the fair market value of the remaining land after the taking.

Further, there was evidence presented by defendants that after the City completes its water reservoir defendants will be left with 132 acres of land divided by the water into two tracts. The witnesses testified that these two tracts, even if joined together, would be insufficient for a successful dairy operation because of size and because all the fertile bottom land was taken. Additionally, the two tracts were each surrounded by land belonging to others so that the defendants had no access to the remaining land.

The defense witnesses also testified that the remaining land would be unsuitable for recreational or residential use due to the lack of access and the fact that the reservoir was not designated as a recreational area. The evidence also tended to show that the City of Kings Mountain condemned enough land around the proposed reservoir to allow for an eight-foot vertical rise in water level, which land space placed the defendants' remaining land some 200 feet from the normal water line of the lake.

The petitioner's witnesses, on the other hand, testified that the value of the remaining land had greatly risen in value due to its suitability for use as recreational and residential property.

All the above matters could properly be considered by the jury in awarding compensation for the taking of defendants' land and damage to the remaining land.

[2] There was much testimony, however, concerning the past profitability of defendants' dairy business, the cost of moving the dairy herd and milking operation to another location, and the loss in gross receipts of the dairy operation after the herd was moved. All of the above items are improper, should not have been received in evidence, and should not have been considered by the jury in determining the amount of compensation.

In North Carolina the taking of land does not contemplate compensation for loss of business maintained on that land, or for cost in moving a business and its attendant personal property to another location. *Williams v. Highway Commission,* 252 N.C. 141, 113 S.E. 2d 263 (1960). It is error, therefore, to compensate a landowner for the loss of his dairy business occasioned by the taking of his land. *Pemberton v. Greensboro, supra.*

Error in admission of evidence of business profits, cost of relocation, and damage to the dairy business after relocation was compounded by the court's charge. At one point in the charge the trial court stated: "If a tract of land to which the whole or part is taken for a public use, possess a special value to the owner which may be measured by money, he is entitled to have that value considered in the estimate of compensation and damages, . . . " This very charge was held as error in *In re Land of Alley, supra,* as being an abstract statement of law not supported by competent evidence, for special business value, or sentimental value, is not such value as will support a monetary compensation.

As in *Alley* we feel that the charge taken together with the incompetent evidence is calculated to mislead the jury in its award and hence erroneous.

Reversed and remanded for new trial.

Judges MORRIS and PARKER concur.

J. L. O'BRIANT, DOING BUSINESS AS J. L. O'BRIANT CONSTRUCTION COMPANY v. LEE'S WELDING & STEEL SERVICE, INC., GARLAND C. LEE, JR., AND RICHARD POOLE

No. 7314SC294

(Filed 25 July 1973)

1. **Master and Servant §§ 3, 18— specialist overhauling machinery on owner's land — independent contractor — duty of owner**

A specialist employed to overhaul and repair machinery on the owner's premises in the owner's absence and free of any supervision by the owner is an independent contractor to whom the owner owes the duty to warn of hidden dangers known to the owner and not known to the specialist; however, the owner is not under a duty to exercise care to provide a reasonably safe place for the specialist to work, the specialist being more cognizant of the dangers incident to the machinery than the owner himself.

2. **Master and Servant § 20.5; Negligence § 34— liability of independent contractor to owner — insufficiency of evidence of contributory negligence of owner**

In an action to recover for damages to a tractor with a front end loader allegedly resulting from fire caused by defendant where the evidence tended to show that defendant was an independent contractor hired by plaintiff as a specialist to repair the loader by

welding it in the field, that plaintiff had no knowledge of any hidden or dangerous conditions of which he failed to warn defendant, and that defendant had as much, if not more, opportunity than plaintiff to inspect the loader and correct any potentially dangerous conditions prior to commencement of the welding, evidence tending to show only that plaintiff failed to clean and inspect the loader prior to the commencement of welding and to maintain a fire watch during the repair operation was insufficient to require the submission of an issue of contributory negligence to the jury.

APPEAL by defendants from *Bailey, Judge,* 6 November 1972 Session of Superior Court held in DURHAM County.

Plaintiff, J. L. O'Briant, doing business as J. L. O'Briant Construction Company, instituted this action to recover of defendants, Lee's Welding & Steel Service, Inc., Garland C. Lee, Jr., and Richard Poole, $12,423.25 for damages to an International Crawler Tractor with a front end loader (loader) allegedly resulting from a fire negligently caused by defendants when repairing the loader by welding. The material evidence offered by plaintiff tended to show the following:

Plaintiff contacted defendant Lee about repairing a minor crack in the arm of the loader and on 3 June 1970, defendants Lee and Poole went to the construction site where the loader was located to make the repair. Lee left prior to the commencement of the welding operation.

Defendant Poole asked the operator of the loader to raise its arms but made no other preparations before he began to weld. Within one or two minutes after Poole began to weld, the loader caught on fire. Poole testified: "Immediately when the fire started I jumped down and got the fire extinguisher out of the truck and turned it towards the fire and blew the chemicals down in the belly pan towards the fire. It didn't do any good." Two employees of plaintiff, present at the construction site, testified that Poole had no fire extinguisher and merely attempted to contain the fire by throwing dirt upon it. The Durham Fire Department was called and finally extinguished the fire.

Ernest H. Andrews, a certified welder experienced in welding front end loaders and other heavy equipment, testified that before welding on a front end loader, he inspects the "belly pan" to ascertain if there is any flammable substance therein, maintains a fire extinguisher nearby, and uses "asbestos cloth or a sheet of metal to direct the fire . . . away from

the tractor . . . . " Andrews stated that he considers it his responsibility "to prepare a tractor for welding as far as cleaning it" and "to take whatever precautions necessary to keep fire away from any inflammable areas."

As a result of the fire, plaintiff incurred expenses of $5,223.25 for the repair of the loader and $6,180.00 for the rental of another loader while the repairs were being made.

At the close of plaintiff's evidence, defendants' motion for a directed verdict was allowed as to defendant Lee in his individual capacity but denied as to defendant Poole and the corporate defendant.

Defendants offered evidence tending to show that it is not customary to use asbestos or steel shields or have buckets of sand nearby when welding heavy equipment in the field and that no request was made of defendants to employ such safety devices or to make a "detailed inspection" of the loader before beginning to weld. Defendant Lee stated that it is customary for the owner or operator of heavy equipment to serve as a fire watch while it is being welded and that none of plaintiff's employees did so. Defendants offered additional evidence tending to show that "as a general rule" the hydraulic lines on a front end loader leak fluid which "would build up on the dirt underneath the vehicle and on the arms" and that "none of Mr. O'Briant's employees had cleaned the particular piece of equipment prior to when it was welded."

The following issues were submitted to the jury and answered as indicated:

"1. Was the plaintiff damaged by the negligence of the defendants as alleged in the Complaint?

Yes.

2. What amount of damages, if any, is plaintiff entitled to recover of the defendants?

$10,500.00."

From a judgment entered on the verdict, defendants appealed.

Charles Darsie for plaintiff appellee.

Powe, Porter, Alphin & Whichard, P.A., by J. G. Billings for defendant appellants.

HEDRICK, Judge.

Defendants assign as error the failure of the trial court to submit an issue of contributory negligence to the jury based on "(1) . . . Plaintiff's failure to inspect and clean the equipment in question prior to the beginning of the welding operation and (2) . . . failure of Plaintiff's employee to stand as a fire-watch while the welding was being conducted."

[1] A specialist employed to overhaul and repair machinery on the owner's premises in the owner's absence and free of any supervision by the owner is an independent contractor. *Henry v. White,* 259 N.C. 283, 130 S.E. 2d 412 (1963). The owner employing a specialist to repair machinery on the owner's premises, free from control of the owner in the performance of the work, owes such specialist the duty to warn him of hidden dangers known to the owner and not known to the specialist, but the owner is not under duty to exercise care to provide a reasonably safe place for the specialist to work, the specialist being more cognizant of the dangers incident to the machinery than the owner himself. *Henry v. White, supra; Deaton v. Elon College,* 226 N.C. 433, 38 S.E. 2d 561 (1946).

Clearly the defendant in the instant case was an independent contractor hired by the plaintiff as a specialist to repair the loader by welding it in the field. While the evidence tends to show that employees of the plaintiff were present and at the request of Poole one of the employees raised the arms of the loader, there is no evidence in the record tending to show that the plaintiff exercised any supervision whatsoever over the work the defendant was hired to do.

Although there is testimony that "as a general rule" hydraulic lines on front end loaders leak and that the "belly pan" on front end loaders can become clogged with debris, there is no evidence in this record from which the jury could find that either of these conditions existed when defendant undertook to repair the loader nor is there any evidence that plaintiff had knowledge of any hidden or dangerous conditions of which he failed to warn defendant.

[2] The record is replete with evidence tending to show that the defendant Poole's opportunity to inspect the loader and correct any potentially dangerous conditions prior to the commencement of welding was equal to, if not greater than, that of plaintiff. Plaintiff testified: "[I]f there was a hydraulic leak

on the surface he could certainly see it. If it was down in the belly pan you could see it." Plaintiff stated that when the arms of the loader are in a raised position, it is possible to see a portion of the belly pan, but by removing two "side panels," the entire belly pan can be seen. Defendant Poole testified: "So far as I was concerned, he had hired me to weld and anything to do with welding was my responsibility so far as the welding of the arm." Thus, it cannot be said that evidence tending to show only that plaintiff failed to clean and inspect the loader prior to the commencement of welding and to maintain a fire watch during the repair operation was sufficient to require the submission of an issue of contributory negligence. This assignment of error is overruled.

Defendants assign as error the denial of their motions for directed verdict and for judgment notwithstanding the verdict. These assignments of error are premised solely on the contention that the evidence disclosed contributory negligence as a matter of law, and for the reasons stated above, have no merit.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. THOMAS CURIE

No. 7312SC539

(Filed 25 July 1973)

Criminal Law §§ 2, 5— evidence of previous psychiatric problems — exclusion as harmless error

In a prosecution for secret assault, assault with a firearm with intent to kill and first degree burglary, defendant was not prejudiced by error, if any, in the exclusion of defendant's testimony as to prior psychiatric problems offered for the purpose of showing absence of specific intent to commit the crimes charged where the jury returned verdicts of guilty of the lesser crimes of assault with a deadly weapon inflicting serious injury, assault with a deadly weapon and wrongful breaking and entering, since intent is not an element of either of the offenses of which defendant was found guilty.

APPEAL by defendant from *Braswell, Judge,* 5 March 1973 Session of CUMBERLAND Superior Court.

Upon pleas of not guilty defendant was tried on bills of indictment, proper in form, charging the following: (1) secret assault on Deputy Sheriff Frank Goggio; (2) first-degree burglary; (3) assault with a firearm with intent to kill Daniel Daly; and (4) assault with a firearm with intent to kill Richard McKee. All offenses allegedly occurred on 9 October 1972.

Evidence for the State, briefly summarized, tended to show:

On 9 October 1972 Mrs. Wilma McKee and four of her children—three sons, ages 17, 13 and 10, and a daughter, age 12—resided at 606 Farrington Street in Cumberland County. On that afternoon Mrs. McKee left her home to go to work at approximately 4:30, leaving the children under the care of her friend, Sgt. Daniel Daly. Defendant and his wife lived across the street from the McKees and the two families were on friendly terms.

Around 9:00 p.m., as Daly (who did not know defendant) and two of the McKee children were watching television, defendant, dressed only in his underwear and armed with a .22 rifle, went to the front door of the McKee home and began smashing the screen door. Daly rushed to the door, slammed the main door shut, and placed his body against it. Defendant then smashed a window adjacent to the door, stuck the rifle through the opening and fired at Daly, telling Daly to back away from the door. Daly did as ordered, telling the children to go to the back part of the house. Defendant smashed the main door, entered the house, and ordered Daly and one of the McKee boys to lie on the floor; during that time defendant was saying something about "cops" being after him.

For several minutes defendant terrorized occupants of the McKee home, firing the rifle at or near Daly and Richard McKee twice. Defendant's wife came to the front door and begged defendant to go home. Finally, Daly "jumped" defendant and wrestled him while the McKee children escaped from the house; eventually Daly escaped, went to a nearby house and called police. Defendant removed a shotgun from the McKee home, concealed himself in the yard and when police arrived fired the gun at Deputy Sheriff Goggio. Four gunshot pellets struck Goggio in his head, knocking him down. Thereafter, by the use of tear gas and other means police succeeded in arresting defendant. Defendant stated later, "I shot a pig."

Testifying in his own behalf, defendant stated: The McKees were his friends but on the day in question he began drinking beer around 11:00 a.m. and proceeded to consume large quantities of beer throughout the day and early evening. He did not intend to go to the McKee home, had no intent to hurt anyone, and has only a vague recollection of the occurrences at the McKee home. "All these events seemed to me not to be reality but more like a dream."

For their verdicts, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury on Goggio, nonfelonious breaking and entering, assault with a deadly weapon on Daly, and assault with a deadly weapon on Richard McKee. From judgments imposing active prison sentences, defendant appealed.

Attorney General Robert Morgan by Emerson D. Wall, Associate Attorney, for the State.

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

BRITT, Judge.

The only assignment of error brought forward and argued by defendant relates to the failure of the court to allow defendant to testify with respect to his mental and psychiatric problems. After hearing the proffered testimony on voir dire in the absence of the jury, the court ruled it inadmissible.

Pertinent portions of the excluded testimony are summarized as follows: Following his arrest, defendant was sent to Dorothea Dix Hospital for observation but he would not cooperate with the doctors there because they had long hair, were "weirdos," and he had no confidence in them. Efforts by defendant and his counsel to get the psychiatrist at Ft. Bragg to examine and evaluate defendant failed. In 1964 defendant was treated by a psychiatrist in Michigan and some two or three years prior to the trial, defendant received a head injury. When committing the acts complained of, defendant was aware of where he was and vaguely aware of what he was doing, but it did not seem real.

Defendant's counsel advised the trial court that defendant was not pleading temporary insanity as he had no evidence to support that plea. Counsel argued to the trial court, and argues

here, that the issue is not one of insanity but whether "evidence of prior psychiatric problems, which may have been caused in part by a blow to the head of the defendant-witness, [is] competent for the purpose of showing lack of specific intent to commit the offenses of which this defendant was convicted." Under the facts in this case we hold that the court did not commit prejudicial error in excluding the testimony.

In 2 Strong, N. C. Index 2d, Criminal Law, § 2, p. 482, we find: "Where a statute specifically forbids a particular act, the commission of the forbidden act is the offense, regardless of intent."

In *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768, 90 A.L.R. 2d 804 (1961), in an opinion by Justice (later Chief Justice) Parker, we find: "It is within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. The doing of the act expressly inhibited by the statute constitutes the crime. Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design. (Citations.)"

In *State v. Lattimore,* 201 N.C. 32, 158 S.E. 741 (1931), the court said: "It is true that an act may become criminal only by reason of the intent with which it is done, but the performance of an act which is expressly forbidden by statute may constitute an offense in itself without regard to the question of intent."

Intent is a prescribed element of the four offenses with which defendant was charged, namely, secret assault (G.S. 14-31), two cases of assault with firearm with intent to kill (G.S. 14-32[c]), and first-degree burglary *(State v. Gaston,* 4 N.C. App. 575, 167 S.E. 2d 510 [1969]). Intent is not an element of either of the statutory offenses of which defendant was found guilty, namely, assault with a deadly weapon inflicting serious injury (G.S. 14-32[b]), two cases of assault with a deadly weapon (G.S. 14-33[c][2]), and wrongful breaking and entering (G.S. 14-54[b]). Assuming, *arguendo,* that defendant was entitled to the benefit of any part of the excluded testimony on the four offenses with which he was charged, in view of the verdicts returned, we perceive no prejudice.

We hold that defendant received a fair trial, free from prejudicial error, and the sentences imposed are within the limits prescribed by statute.

No error.

Judges CAMPBELL and BALEY concur.

CARL G. McCRAW, SR. v. FIRST UNION NATIONAL BANCORP, INC., AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA

No. 7326SC291

(Filed 25 July 1973)

1. **Master and Servant § 9— compensation upon early retirement — deduction of payments made under group disability plan**

Payments to plaintiff under defendant bank's group disability plan were "amounts received" by plaintiff from the "insurer of the Bank's salary continuation plan" and "other payments direct or indirect . . . and other fringe benefits" which could properly be deducted from the $70,000 per year the bank agreed to pay plaintiff from the date of his early retirement until his 65th birthday.

2. **Master and Servant § 1— early retirement — employer's contributions to profit sharing plan**

Where plaintiff was granted an early retirement as chairman of the board and chief executive officer of defendant bank, the bank properly stopped making contributions for plaintiff to its profit sharing plan as of the date of his early retirement since (1) the terms of retirement provided that plaintiff's participation in the bank's contribution would be based on plaintiff's compensation through the date of his early retirement and (2) after his early retirement plaintiff was no longer an employee of defendant bank within the meaning of the bank's profit sharing plan.

3. **Master and Servant § 1— early retirement — stock option plan — employee**

Plaintiff was no longer an "employee" of defendant bank within the meaning of the bank's stock option plan after the bank imposed early retirement on plaintiff as of 31 July 1966, although the bank agreed to pay plaintiff certain compensation until his 65th birthday, and plaintiff was required by the terms of the stock option plan to exercise his option within three months after his retirement.

APPEAL by plaintiff from *Froneberger, Emergency Judge,* 25 September 1972 Session of Superior Court held in MECKLENBURG County.

On 25 July 1966 plaintiff was Chairman of the Board and Chief Executive Officer of what was then First Union National Bank of North Carolina (Bank). Although there have since been changes in the corporate entity of the Bank, it and its successor in interest, First Union National Bancorp, Inc., will be referred to as "defendant." On that date the Executive Committee of defendant recommended to its Board of Directors that plaintiff be granted early retirement and that he be granted specific financial benefits. The next day, the board met and voted to adopt the report of the Exceutive Committee. Plaintiff, a member of the Executive Committee and the board, voted against the measures at both meetings. On 23 August 1966 the Executive Committee wrote plaintiff as follows:

"Dear Mr. McCraw:

[1] To implement the resolutions concerning your retirement which were adopted by the Board of Directors on July 26, 1966, there is set forth below a detailed interpretation of said resolutions which has been approved by the Executive Committee.

[2] You are to accept early retirement effective August 31, 1966, and are relieved of all duties and responsibilities other than those hereinafter set forth as of July 26, 1966.

[3] Effective July 26, 1966, you have relinquished the title of Chairman of the Board and Chief Executive Officer, membership on all Bank committees, and the position of trustee, officer, and director of all Bank related companies.

[4] The Bank is to pay you in monthly installments the sum of Seventy Thousand Dollars ($70,000.00) per annum, payments to commence September 30, 1966, and to continue thereafter each month through August 31, 1970; or until the last day of the month in which occurs the date of your death, should such date be prior to August 31, 1970. This payment of Seventy Thousand Dollars ($70,000.00) per annum by the Bank shall be reduced by amounts, if any, received by you from the insurer of the Bank's salary continuation plan and by all other payments direct or indirect in relation to expenses and other fringe benefits payable to or for you except payments in connection with your continued participation in the Profit Sharing Plan,

premiums on group life insurance, the acquisition costs of certain automobiles and payments of certain expenses in connection with a house in Blowing Rock, North Carolina, all of which is more fully set forth hereinafter.

[5] For the above period ending on August 31, 1970, you agree to be on call to give advice and counsel to the Bank and to cooperate with management of Bank and its policies.

[6] On or before July 31, 1970, you shall have the right to elect retirement benefits in the form of a single life annuity or in the form of a joint and survivor annuity for the lives of yourself and your wife. Commencing August 1, 1970, Bank will supplement payments from the Bank's Pension Fund to the extent necessary to provide retirement benefits equal to those which would have been obtainable by you from Bank's Pension Plan, under the provisions now in effect, under the option elected by you, had you remained in the active employment of the Bank at an annual salary of Seventy Thousand Dollars ($70,000.00) through August 31, 1970.

[7] You shall participate in the Bank's contribution for 1966 based on your compensation through August 31, 1966, as provided for in the Bank's Profit Sharing Plan; and thereafter your participation and/or non-participation in future contributions, forfeitures and net adjustments (net income, realized profits and losses, and unrealized profits and losses in the investments in the fund) shall be governed according to the terms of the Profit Sharing Plan. On August 31, 1970, you may elect to receive your benefits under any option permitted by the Plan.

[8] Bank will continue to keep in effect existing life insurance on your life under the Bank's Group Life Insurance Plan, presently with Pilot Life Insurance Company, through August 31, 1970. Thereafter Bank will keep in effect and pay the premiums on only so much of said life insurance as the Bank's present insurance plan provides in the case of a retired employee.

[9] Your wife is to receive in monthly installments the sum of Ten Thousand Dollars ($10,000.00) per year. Payments are to commence with the first day of the month following the month in which your death occurs or on

January 1, of the following year at the option of Mrs. McCraw and continuing for a period of ten (10) years or the date of her death, should she die prior to the expiration of such ten (10) year period.

[10] Bank will transfer title to the 1965 Cadillac now being used by you into your name. On May 1, 1967, Bank will purchase a comparable car to be titled in your name and shall make a similar purchase on May 1, 1969. In the case of both purchases, the older car shall be used as a trade-in on the next car being purchased, and the transactions shall be handled by the Bank. All expenses in connection with the said cars, other than their net acquisition cost, shall be paid by you. You are to furnish Bank with a certificate of comprehensive insurance on said cars including One Hundred Dollars ($100.00) deductible collision coverage with a loss payable clause providing for payments to be made jointly to Bank and you. Any car so furnished to you shall be reassigned by you to the Bank on August 31, 1970, at which time you shall have no further right to or interest in said car. Should you die prior to August 31, 1970, your estate shall forthwith assign such car then in your name to the Bank, and no other person or entity other than Bank shall have any right to or interest in such car.

[11] You are to be permitted to continue the use of the furnished house in Blowing Rock, North Carolina, through August 31, 1970, or until the date of your death whichever occurs first. Bank is to pay ad valorem property taxes and fire and casualty insurance premiums and is to make all major repairs and replacements. You are to pay all other costs including cost of maintenance, decorating, utilities, lawn care, and shall make minor repairs. You are to be liable for all damage not insurable and not insured by the Bank, reasonable wear and tear excepted.

[12] You will at no time act as an officer, employee, or member of a board of directors for any other commercial bank in the state of North Carolina, or engage in any other activity that might in any way compete with the Bank or with any of its related business ventures.

[13] The benefits payable to you under the terms of this interpretation are all of the benefits and privileges you will receive from the Bank or any of its officers and

directors and does hereby relieve each of its officers and directors from all claims and demands of any kind known or unknown with the exception only of the rights accruing to you hereunder.

[14] You will use your best efforts to safeguard the business or trade secrets of the Bank and will not reveal the existence of any relation with any other business venture or the nature of such relationship.

[15] You will cooperate with Bank and endeavor to promote the best interests of Bank; and to that end, you will refrain from any criticism of the Bank, its present, future, or former officers or directors. You will not do or say anything that would in any way interfere with the growth of the Bank or prevent it from acquiring or maintaining any business, or to in any way discourage any possible merger, consolidation or any type of acquisition, with any other bank or banks. You will not do or say anything that might tend to reflect unfavorably on the Bank or on any of its personnel.

[16] Any breach by you of any part of the above conditions shall cause an immediate termination of this arrangement and you shall have no further rights to any benefits payable hereunder. The Executive Committee of the Bank shall have complete and sole authority to determine whether the above conditions have been breached, and its decision will be final and binding. Nothing herein contained shall be construed in any way to jeopardize the benefits to which you are now entitled under the Bank's Pension Plan, Profit Sharing Plan, and Group Insurance Plans."

This Court has numbered the paragraphs of the letter for convenience in reference.

On 31 March 1971, plaintiff instituted this action seeking a recovery which we summarize as follows:

First Claim. (1) The amount paid plaintiff by the carrier of defendant's group disability insurance plan, which sum defendant had deducted from the $70,000 per year paid plaintiff by the defendant from 30 September 1966 through 31 August 1970.

(2) Defendant stopped making contributions to its profit sharing plan for plaintiff on 31 August 1966. Plaintiff

seeks judgment for the difference between the amount received from the profit sharing plan and what he would have received if he had been employed at an annual salary of $70,000 per year until 19 August 1970 when he reached his 65th birthday.

(3) A declaratory judgment that defendant is required to pay him full pension benefits and, beginning at his death, pay his widow $10,000 for ten years or for such time for such part of ten years that his widow lives after plaintiff's death.

Second Claim. Plaintiff claims that on 15 December 1969 defendant denied him the right to purchase corporate stock under a stock option plan created by the defendant in 1963. He seeks recovery for: (a) the amount of dividends, and interest thereon, on the stock he could have purchased under that plan; (b) the difference between the option price of $25.00 per share for 5,000 shares and the highest market value of those shares; and (c) the difference between the taxes that will be payable by him upon receipt of item (b) and the taxes that would have been payable had he been able to exercise his options instead of receiving a money judgment.

At the close of plaintiff's evidence the court granted defendant's motion for a directed verdict and rendered judgment on the merits in favor of defendant.

Fleming, Robinson & Bradshaw, P. A., by Russell M. Robinson II for plaintiff appellant.

Warren C. Stack for defendant appellees.

VAUGHN, Judge.

We have not set out the minutes of and resolutions adopted in the meetings of the Executive Committee on 25 July 1966 or the board meeting held the following day for we are of the opinion, and so hold, that plaintiff's rights are limited to those set out in the letter to him dated 23 August 1966. We will refer to a portion of the minutes to explain plaintiff's claim. The minutes specify that plaintiff be granted early retirement and "receive total compensation from *bank sources* in the sum of $70,000 per annum until the date of his 65th birthday." [Emphasis added.] The letter to plaintiff dated 23 August 1966 provides

that the $70,000 shall be reduced by amounts "received by you from the insurer of the Bank's salary continuation plan and by all other payments direct or indirect in relation to expenses and other fringe benefits payable to or for you except payments in connection with your continued participation in the Profit Sharing Plan, premiums on group life insurance, the acquisition costs of certain automobiles and payments of certain expenses in connection with a house in Blowing Rock, North Carolina, all of which is more fully set forth hereinafter."

[1] Payment to plaintiff under defendant's group disability insurance plan are "amounts received" by plaintiff from the "insurer of the Bank's salary continuation plan" and "other payments direct or indirect . . . and other fringe benefits." Plaintiff's evidence is that defendant has paid plaintiff $70,000 each year, less the sum received under that plan. Plaintiff, therefore, has shown no right to recover under part (1) of his first claim.

[2] Part (2) of plaintiff's first claim concerns the fact that defendant stopped making contributions to the profit sharing plan after 31 August 1966. We hold that this action was authorized by the express terms of paragraph 7 of the defendant's letter to plaintiff which provides that plaintiff's participation in the bank's contributions would be based on plaintiff's compensation through 31 August 1966. Furthermore, plaintiff's evidence discloses that, after 31 August 1966, he was not an employee of defendant within the meaning of defendant's profit sharing plan. The plan defines the term employee to mean "any person regularly employed by the bank whose customary employ (sic) is for thirty hours or more a week and who receives a regular stated salary from the bank other than a pension, wage, severance pay, retainer or fee under contract." After 31 August 1966 defendant credited plaintiff's profit sharing account with all earnings and other sums to which he claims he is entitled except for making additional contributions based on his alleged "earnings" as an "employee" after 31 August 1966. Each year plaintiff received a letter showing the balance in his account and, at his request, the entire sum was paid to him in April of 1971. Plaintiff's evidence, therefore, fails to show that he is entitled to recover under part (2) of his first claim.

As to part (3) of the first claim, plaintiff admits that the evidence falls short of his allegations and we hold that he has shown no present right to relief under that part of his claim.

[3] Plaintiff's second claim concerns his right to exercise an option to buy a total of 5,000 shares of stock under a stock option agreement given him in 1963. The plan provides, in part: ". . . that if any termination of employment is due to retirement with the consent of the Bank, the optionee shall have the right . . . to exercise his option, at any time within three months after such retirement. . . ." Plaintiff testified that he did not exercise his option within three months after 31 August 1966. He attempted to exercise the option so as to buy 1,000 shares on 11 December 1969. Plaintiff argues that he did not retire until 31 August 1970 and thus, until that time he was still an "employee" within the meaning of the plan. This argument is refuted by the plain language in paragraph 2 of defendant's letter: "You are to accept early retirement effective 31 August 1966. . . ." Plaintiff's evidence also tends to show that the terms "employee" and "employment" as used in defendant's stock option plan are intended to have the meaning given them in Treasury Regulations defining restricted stock option plans if such plans are to qualify for the favorable tax consequences applicable to transfers of stock as provided therein. Plaintiff, after 31 August 1966, was not an employee within the meaning of the Internal Revenue Code and Treasury Regulations dealing with restricted stock options. See 26 U.S.C.A. (I.R.C. 1954) §§ 424(a) (2) (A), 424(a) (2) (B), 3401(c); Treas. Reg. §§ 1.421-3(a) (2) (1961), 1.424(a) (11) (b) (1964), 31-3401(c)-1. Plaintiff failed to exercise his option within three months of his retirement on 31 August 1966. He has, therefore, shown no right to recover on his second claim.

We have held that plaintiff's rights in this case are limited to those set out in defendant's letter of 23 August 1966, including the profit sharing and stock option plans to which the letter refers; that the meaning of those documents raises questions of law and not of fact; and that plaintiff's evidence shows that defendant has complied with its obligations, as we understand and interpret them to be. Having placed the case in this posture we are of the opinion that it is unnecessary to discuss questions relating to admission and exclusion of evidence, statutes of limitation, accord and satisfaction, election of remedies and other matters raised in the briefs.

Affirmed.

Judges BRITT and MORRIS concur.

BENNY RAY CROSS, EMPLOYEE v. FIELDCREST MILLS, INC., EMPLOYER

No. 7319IC195

(Filed 25 July 1973)

1. **Master and Servant § 91— workmen's compensation — filing claim — letter from plaintiff's attorney**

Letter from plaintiff's counsel to the Industrial Commission which specifically requested a hearing upon plaintiff's alleged injury and which was written within two years after the alleged accident and injury sufficiently complied with the requirement of G.S. 97-24 that a claim be filed with the Industrial Commission within two years after the accident.

2. **Master and Servant § 90— workmen's compensation — absence of notice to employer — reasonable excuse — prejudice**

The Industrial Commission did not err in deferring a decision as to whether plaintiff's claim for workmen's compensation was barred because of plaintiff's failure to give written notice of the accident within 30 days thereafter to his employer as required by G.S. 97-22 where there was no evidence upon which the Commission could determine whether plaintiff had a reasonable excuse for failing to give such notice or whether defendant employer had been prejudiced by the absence of such notice.

APPEAL by defendant-employer from an order of the Industrial Commission holding that claim for an alleged injury had been timely filed.

On 14 September 1971, plaintiff filed a request with the North Carolina Industrial Commission that his claim be assigned for hearing. On 4 October 1971, plaintiff gave notice of his accident to defendant-employer. Deputy Commissioner C. A. Dandelake presided at a hearing on 29 June 1972, in Carthage, Moore County, for the purpose of taking the testimony of Dr. C. H. Neville, who treated plaintiff's back.

At the conclusion of that hearing defendant filed a written motion for dismissal of the claim due to the fact that plaintiff had failed to give written notice of his accident to defendant-employer within thirty days after the alleged occurrence as required by G.S. 97-22, and that plaintiff also had failed to file a claim with the Industrial Commission within the two-year time period specified in G.S. 97-24. Defendant's motion for dismissal for failure to file claim under G.S. 97-24 was denied and the case was ordered reset for hearing. No finding was made as to defendant's contention concerning G.S. 97-22.

Defendant appealed the ruling of the Deputy Commissioner to the full Commission. The full Commission affirmed the Deputy Commissioner's order, finding that a 30 April 1970 letter from plaintiff's counsel to the Industrial Commission "stopped the running of the statute as regards G.S. 97-24." The full Commission noted that the Deputy Commissioner's order made no finding as to the application of G.S. 97-22, and stated its opinion that failure to give notice as provided in G.S. 97-22 is not fatal to an employee's claim. It stated that such failure operates only to deprive plaintiff of benefits which may have accrued from the date of the accident to the date such notice was actually given, "if the employer had not been prejudiced by the failure to give notice within 30 days." The full Commission concluded that no evidence has been presented to support a determination of the application of G.S. 97-22, and that such a determination could only be made after a hearing at which such evidence was offered.

From the order of the full Commission affirming the Deputy Commissioner's order, defendant appealed.

Thomas W. Earnhardt, and Poyner, Geraghty, Hartsfield and Townsend, by David W. Long, for defendant appellant.

No appearance contra.

BROCK, Judge.

The Commission's file contains a letter dated 30 April 1970 written to it by plaintiff's attorney which reads as follows:

> "Reference your letter to me dated 20 March 1970, I call to your attention Dr. Neville's report which was forwarded to me in your letter. Dr. Neville refers to seeing Mr. Cross on October 30, 1969 for his previous injury. This is the previous injury that occurred at Fieldcrest Mills. Also attached hereto is another report from Dr. Neville from Moore Memorial Hospital in which he refers to this injury of Mr. Cross at Fieldcrest Mills in the second week of December 1968. This is as close as we can pinpoint it as to time at this late date."
>
> "A hearing has been set to hear this matter against J. P. Stevens on 26 May 1970. We do not wish to go into this hearing until the files are located in regard to the Fieldcrest Mills case and at that time we wish both of

these cases to be heard at the same time. There may be some question about aggravation of the pre-existing injury from Fieldcrest during the J. P. Stevens fall. However, there may be some concern on the part of the Hearing Commissioner that all of the injury the Plaintiff is now complaining of did not come out of the J. P. Stevens fall. At any rate, we want both of these cases heard together so that there will be no problem about it."

"Please check your records immediately and advise if you have a record of the Fieldcrest injury in December 1968."

"Until your reply, I remain . . . . "

[1] The foregoing letter was written within two years of the alleged December 1968 accident and injury to plaintiff while employed by defendant. The Commission, in effect, held that the letter constituted sufficient claim and compliance with G.S. 97-24 to vest jurisdiction of the 1968 accident in the Commission. Although the letter constitutes a rather minimal compliance with the statute with respect to filing a claim with the Commission, it nevertheless specifically requests a hearing upon the alleged 1968 injury. We hold that the Commission did not commit error in considering the letter as a sufficient claim under G.S. 97-24.

[2] Defendant next assigns as error the failure of the full Commission to consider the prejudice which resulted to defendant due to plaintiff's failure to notify defendant of the alleged accident until almost 3 years had passed from the date of the occurrence. This assignment of error relates to the application of G.S. 97-22 which requires written notice and provides in part: "[B]ut no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, *unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.*" (Emphasis added). The Commission noted in its order that failure to comply with the notice requirement of G.S. 97-22 operates only to deprive plaintiff of benefits which may have accrued from the date of the accident to the date such notice was actually given, "if the employer has not been prejudiced by failure to give notice within thirty days." *See Eller v. Leather Co.*, 222 N.C. 604, 24 S.E. 2d 244.

The Commission did not decide whether a reasonable excuse for not giving such notice existed, or whether the defendant-employer had been prejudiced by the absence of such notice. Instead, the Commission specifically found that no evidence had been presented regarding these issues that would support such a determination. It concluded that a determination of the application of G.S. 97-22 could not be made until a hearing was held at which such evidence was presented.

Neither the Deputy Commissioner nor the Commission reached a determination of the presence or absence of a reasonable excuse for plaintiff's failure to give notice, or the presence or absence of any prejudice resulting to defendant as a result of plaintiff's failure to give the 30 day notice required by G.S. 97-22. It was not error for the Commission to defer a decision on this issue in the absence of evidence upon which it could base its determination. This assignment of error is overruled.

The Commission's order holding that the letter of 30 April 1970 was a sufficient filing of claim under G.S. 97-24 is

Affirmed.

Judges HEDRICK and VAUGHN concur.

THOMAS G. LANE, JR., ADMINISTRATOR D.B.N. OF THE ESTATE OF TOMMY CURTIS COLEE, DECEASED v. BETTY COLEE SCARBOROUGH, THOMAS W. COLEE AND LYNN WOOD COLEE

No. 7326SC328

(Filed 25 July 1973)

Descent and Distribution § 13; Husband and Wife § 11— separation agreement — no release of intestate succession rights

In a declaratory judgment action to determine rights of the surviving wife and parents in distribution of the estate of intestate, the trial court properly held that no express provision for surrender of intestate rights was included in a written separation agreement made between the intestate and his wife approximately one year before the death of intestate, nor was such a waiver provision necessarily implied from the express language which was contained in the agreement; therefore, the wife had the right to inherit from the estate as a surviving spouse.

Judge BROCK dissents.

Lane v. Scarborough

APPEAL by defendants, Betty Colee Scarborough and Thomas W. Colee, from *Snepp, Judge,* 1 January 1973 Schedule "C" Session of Superior Court held in MECKLENBURG County.

Action for declaratory judgment to determine rights of the parties in distribution of the estate of Thomas Curtis Colee, who died intestate on 15 July 1971. Defendant, Lynn Wood Colee, is the surviving wife and defendants, Betty Colee Scarborough and Thomas W. Colee, are the surviving parents of the intestate. Jury trial was waived and the matter was heard on an agreed statement of facts.

Lynn Wood Colee and Thomas Curtis Colee were lawfully married to each other on 12 October 1968. In June 1970 they entered into a separation agreement and were living separate and apart at the time of Thomas's death. The sole issue before the Court is whether Lynn released her right to intestate succession provided by G.S. 29-13 and G.S. 29-14 by executing the separation agreement. By the first three paragraphs of the agreement the parties (1) agreed to live separate and apart, (2) stipulated that no children were born of their marriage, and (3) agreed to divide their household furnishings. The remaining paragraphs of the agreement are as follows:

> "4. That from and after the date of this Agreement the said party of the second part does hereby agree that she will make no demands upon the said party of the first part for support and further will incur no obligations, debts or otherwise which will be or become the responsibility of the said party of the first part.
>
> "5. It is agreed that each of the parties may from this date, and at all times hereafter purchase, acquire, own, hold, possess, dispose of, and convey any and all classes and kinds of property, both real and personal, as though free and unmarried, without the consent or joinder of the other party, and each party does hereby release the right to administer upon the estate of the other.
>
> "6. Both parties hereunto agree that henceforth neither of them, in any manner will molest or interfere with the personal rights, liberties, privileges or affairs of the other, and each shall henceforth live his and her own personal life as though unmarried, and unrestricted in any manner by the marriage that has heretofore existed."

The trial court entered judgment reciting the agreed statement of facts and finding as a fact from examination of the separation agreement "that Lynn Wood Colee and Thomas Curtis Colee did not intend to mutually release their right of intestate succession" provided by G.S. 29-13 and G.S. 29-14 and that Lynn Wood Colee did not release her right of intestate succession by executing the separation agreement. The court concluded as a matter of law that Lynn Wood Colee has the right to inherit from the estate as a surviving spouse and ordered the administrator to make distribution to her as surviving spouse and to such other persons as may qualify by law as heirs of the decedent.

From this judgment, defendants Betty Colee Scarborough and Thomas W. Colee appealed.

Sanders, Walker & London by Robert G. Sanders and Robert C. Stephens for plaintiff appellants.

Thomas D. Windsor for defendant appellee.

PARKER, Judge.

The marriage relationship vests in the respective spouses a number of distinct legal rights. Among these are the rights to consortium, to support (in the case of the dependent spouse, G.S. 50-16.1 et seq.), to administer the estate of the deceased spouse in case of intestacy as provided by G.S. 28-6(a)(1), to take an elective life estate as provided by G.S. 29-30, to dissent from the will of the deceased spouse as provided by G.S. 30-1, to receive a year's allowance under G.S. 30-15, and to intestate succession under G.S. 29-13 and G.S. 29-14. Any or all of these rights may be surrendered by a properly drawn separation agreement complying with the requirements of G.S. 52-6. The question presented by the present appeal is whether one of these rights, the right to intestate succession under G.S. 29-13 and G.S. 29-14, was surrendered by the separation agreement here involved. We agree with the trial judge that it was not.

By express language in the agreement each party gave up the right to consortium, to support, to administer upon the estate of the other, and agreed that each might thereafter "purchase, acquire, own, hold, possess, dispose of, and convey" real and personal property without the consent or joinder of the other. Nowhere is there any express language releasing the

right of intestate succession nor is the language of the agreement so all encompassing that such a release must necessarily be implied. To read such a release into the agreement would require insertion of language which the parties themselves failed to include.

It is, of course, possible that express provision for surrender of intestate rights was omitted from the contract in this case solely by inadvertence, and that had the attention of the parties been directed to this matter, such a provision would have been included. It would be pure speculation to conjecture that such was actually the case. The fact remains that no express provision for such surrender was included in the written contract signed by the parties, nor is such a provision necessarily implied from the express language which was contained therein. We must construe the contract as written and signed by the parties, but we have no power to write a new contract binding them to provisions which, for whatever reasons, they failed to include.

Judgment affirmed.

Judge MORRIS concurs.

Judge BROCK dissents.

STATE OF NORTH CAROLINA v. LARRY STACY

No. 7326SC533

(Filed 25 July 1973)

1. **Criminal Law § 51— failure to make specific finding that witness expert — opinion testimony admissible**

In a prosecution for felonious distribution of heroin where defendant did not request a finding as to the witness's expertise but there was evidence that the witness was an expert in his field, the trial court did not err in permitting the witness to give his opinion that bags delivered by defendant to a police officer contained heroin.

2. **Narcotics §§ 1, 4.5— distribution of heroin — defendant's knowledge that substance was heroin in issue — failure to instruct erroneous**

In a prosecution for distribution of heroin where defendant's evidence tended to show that he agreed with a third person to hand a package to a police officer "to beat him out of $60" and that

defendant did not know what was in the package, the trial court should have instructed the jury that defendant was guilty only in the event he knew the package contained heroin and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty.

APPEAL by defendant from *Lanier, Judge,* 26 February 1973 Session of Superior Court held in MECKLENBURG County.

Defendant was indicted for feloniously distributing the controlled substance, heroin, by handing the same to one D. P. Stockett for the sum of $60.00. Stockett, an undercover officer employed by the Charlotte Police Department, whose "duties were to seek out those persons dealing in drug traffic," testified that on the night of 27 April 1972 he was in his automobile with three other persons, whom he had not told he was a police officer. One of these persons was Mickey Armean. One of the persons in the car knew the defendant and introduced him to Stockett. Defendant told Stockett that "it was $60.00 for a half load of heroin, which is 15 bags." At defendant's direction Stockett drove his car to Billingsly Road, where he parked. Defendant left the car and was gone in the dark for about ten minutes. On returning to the car defendant handed Stockett a small brown envelope which had 15 bags in it. Stockett opened one of these and saw a white substance in it. He gave defendant $60.00, and defendant left the car and went in the same direction from which he had come, returning to the car two or three minutes later. Stockett then drove defendant to some apartments in Griertown, where defendant got out.

William S. Best, a chemist employed by the Crime Laboratory of the Charlotte Police Department, testified that he ran an analysis of the contents of the bags and based on the tests which he ran he was of the opinion that the bags contained heroin.

In defense, defendant testified that Mickey Armean had come to him and asked him to do a favor, which was "to beat this man out of $60.00"; that Armean had a package and all defendant had to do was to drive off somewhere and act like he was going to somebody's house and then come back and give the package to the man, who would give him $60.00; that he got into the car with Stockett, Armean, and the other persons; that at that time he already had the package which Armean gave him; that they drove to Billingsly Road, where he got out and went

out into the darkness for eight or ten minutes, after which he returned to the car; that the package was there passed to Stockett, who handed him the money; that he gave the package to Stockett "to beat him out of $60.00," and that he did not know what was in the bags; that he gave the $60.00 to Armean, who got all of the money.

The jury found defendant guilty as charged, and from judgment imposing a prison sentence, defendant appealed.

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

Mraz, Aycock, Casstevens & Davis by Frank B. Aycock III for defendant appellant.

PARKER, Judge.

[1] Appellant assigns error to the action of the trial court in permitting the State's witness, Best, to testify over defendant's objection that in his opinion the contents of the bags was heroin. Prior to this the witness had testified without objection to his extensive academic and practical training in chemistry, including testimony that he had "run thousands of analyses on heroin." This testimony furnished ample support for admission of the witness's opinion as an expert. "In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness." *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839. Here, appellant made no request for a finding by the trial court as to the qualification of the witness as an expert, and under the circumstances disclosed in this record there was no error in permitting the witness to state his opinion.

[2] In apt time the defendant filed with the trial judge written request that the jury be instructed as follows:

> "If you find that the defendant distributed heroin to Donald P. Stockett, but if you further find that he did not know or had no reasonable ground to believe the substance was a controlled substance, then it would be your duty to find for the defendant."

The trial judge denied this request, and instead charged the jury that if they should find from the evidence beyond a reasonable doubt that defendant had passed a packet containing heroin to Donald Stockett, it would be their duty to return a verdict of guilty as charged.

Under the evidence in this case the court should have instructed the jury that the defendant is guilty only in the event he knew the package contained heroin and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty. *State v. Elliott,* 232 N.C. 377, 61 S.E. 2d 93. For failure to so charge, defendant is entitled to a

New trial.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. JERRY ELLISON AND CHARLES ELLISON

No. 7324SC425

(Filed 25 July 1973)

Criminal Law § 75— admission of incriminating statement — insufficiency of findings — harmless error

Even if the trial court in an armed robbery prosecution erred in the admission of an incriminating statement made by defendant to a deputy sheriff for the reason that the record does not show any relation between such statement and the court's finding that "any statement" made by defendant to the officer was freely, understandingly and voluntarily given, such error was harmless beyond a reasonable doubt where a different result would not likely have ensued had such evidence been excluded.

APPEAL by defendants from *Falls, Judge,* 15 January 1973 Session of Superior Court held in WATAUGA County.

Defendants, Jerry Ellison and Charles Ellison, were charged in separate bills of indictment, proper in form, with the armed robbery of Steve Gurley and Dennis Clawson. Upon their pleas of not guilty, the State offered evidence tending to show the following:

At approximately 12:30 a.m., 2 July 1972, Steve Gurley and his brother-in-law Dennis Clawson, who were camping at

Tater Hill, heard "some people screaming and . . . a girl crying and begging someone not to shoot her" at a campsite 30 to 40 yards from their own campsite. Within a few minutes, three men approached Gurley's and Clawson's campsite on foot and two more men followed in a truck. The campfire illuminated the area and made "anyone distinctly visible within a radius of 8 to 10 feet." Three of the men were armed with shotguns and Charles Ellison had a knife. Dennis Clawson, who had attended school with both defendants, testified that Charles Ellison asked him " 'Dennis Clawson, what in the hell are you doing here?' and then he started talking to Steve Gurley and he told Steve he was going to burn his mustache off." Charles Ellison attempted to burn Gurley's mustache with a match, then pulled Gurley into the tent and began hitting him in the face. Gurley testified: "After I got up, Jerry Ellison began hitting me on and about the face with his fists." Walter Isenhour fired his shotgun over Gurley's shoulder twice during the altercation. Dennis Clawson testified:

> "The men then began to talk among themselves what they were going to do with us and what they were going to take, and then one of the men to the right of me came toward me with a shotgun and he told me he was going to kill me. I do not know who this man was. He was pointing the gun at me. It was a shotgun. He first pointed the gun at me and then he swung the butt of it at me and missed because he was drunk."

Gurley and Clawson then fled into the woods where they hid for approximately 45 minutes. As Gurley ran from the campsite, he "saw them distinctly pulling the tent toward their truck. The tent with all its contents." When Gurley and Clawson returned to their campsite, they found the following items of personal property had been taken with the tent:

> ". . . one billfold, containing approximately $22 or $23, one set of eyeglasses, one pair of shoes, one shirt, one jacket, one pocket knife, one set of switch keys, one sleeping bag . . . two pillows and three quilts . . . . "

The rear window of Clawson's automobile had been shot out, and the following items of personal property were stolen from the automobile:

> ". . . one tape player . . . ten tapes, one tape case, one 22-calibre rifle, one box of 22 shells, one pellet rifle, two

boxes of pellets, one pair of shoes, one battery charger, one pocket knife, one billfold, containing $5.00 and some important papers. One cigarette lighter and $3.00 worth of food and soft drinks and one hatchet . . . . "

Defendants offered no evidence and were found guilty as charged. From judgments imposing a prison sentence of 18 to 20 years as to each defendant, they appealed.

Attorney General Robert Morgan and Assistant Attorney General Dale P. Johnson for the State.

Charles C. Lamm, Jr., for defendant appellants.

HEDRICK, Judge.

Defendant, Jerry Ellison, contends the trial court erred:

" . . in allowing one of the State witnesses, to-wit, Johnnie Carroll, Chief Deputy of Watauga County, to testify as to what the defendant, Jerry Ellison, told him on July 17, 1972, about taking a 22 pellet gun from the campground, without first making a finding that the statement was voluntarily made."

Prior to the admission of the challenged testimony, the trial court conducted a *voir dire* hearing in the absence of the jury and, after hearing testimony of Deputy Sheriff Carroll, found and concluded that both defendants were fully advised of their constitutional rights and "that any statement which either Jerry Ellison or Charles Ellison made to the officer was freely, understandingly and voluntarily given, without any threat or without any promise and may be received by this jury."

There was plenary competent evidence to support these findings and conclusions of the trial court. "When the trial judge's findings are based on competent evidence in the record, they are conclusive, and the reviewing court cannot properly set aside or modify such findings." (Citations omitted.) *State v. McRae,* 276 N.C. 308, 314, 172 S.E. 2d 37, 41 (1970).

The record does not show clearly that the statement of Jerry Ellison challenged by this exception related to the finding that "any statement which either Jerry Ellison or Charles Ellison made to the officer was freely, understandingly and voluntarily given . . . . " The record shows, however, that when Jerry Ellison told Deputy Carroll that he took the pellet gun he had

been advised of his constitutional rights. Moreover, Deputy Sheriff Carroll had already testified that the defendants admitted "they were there" (referring to the site of the robbery). Assuming, *arguendo*, the court erred in admitting the challenged statement, it has not been made to appear that defendant was prejudiced thereby and that a different result likely would have ensued had this evidence been excluded. *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970). Therefore, any error committed was harmless beyond a reasonable doubt. *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972); *State v. Barrow, supra.*

Defendants assign as error the trial court's instructions on the law of aiding and abetting.

We find and hold that when considered contextually, the court properly declared and explained the law of aiding and abetting arising on the evidence in the case.

Defendants contend the trial court erred in failing to instruct the jury that felonious intent is an essential element of armed robbery.

In various portions of the charge before and after the challenged instructions, the trial court properly charged the jury that felonious intent is a constituent element of the offenses of armed and common law robbery. Therefore, when considered contextually, the instructions of the trial court are free from prejudicial error.

Defendants assign as error the denial of their motions for judgment as of nonsuit.

There was plenary competent evidence to require submission of the case to the jury and to support the verdict.

Defendants had a fair trial free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

CLARENCE R. HILL, ADMINISTRATOR OF THE ESTATE OF LILLIE L. HILL, AND INDIVIDUALLY v. CURTIS L. HILL AND WIFE, MARY E. HILL

No. 7329DC337

(Filed 25 July 1973)

1. **Wills § 40— devise of life estate with power to convey — estate created**

A general devise or bequest to a named person with a power of disposition transfers the property in fee, and a subsequent limitation over of the "remainder" is void as repugnant to the absolute gift; but a devise or bequest of a life estate, with remainder over, including the power to convey a fee by the life tenant creates only a life estate, not a fee simple.

2. **Wills § 40— devise of life estate with power to convey — exercise of discretion by devisee not reviewable**

Where the wife was devised by her husband a life estate in all his property together with authorization " . . . in her sole discretion to sell and dispose of any of this property whenever it shall appear necessary or desirable to provide her with additional funds for her care, comfort, happiness, maintenance or support," the wife's exercise of her discretion with respect to conveyance of the property was subject to the review of no one; therefore, the trial court properly refused to set aside the wife's deed made three years before her death which conveyed in fee part of the realty devised to her for life to her son.

APPEAL by plaintiff from *Gash, Judge,* 22 January 1973 Session of HENDERSON County District Court.

Plaintiff and defendant are the sons and heirs of Lillie L. Hill, she having died intestate. On 16 June 1965 the father of plaintiff and defendant and husband of Lillie Hill, died testate, leaving his property to Lillie Hill for life, with power to convey a fee, remainder to their children equally.

On 7 July 1967 Lillie Hill executed a deed by which she conveyed in fee part of the realty, devised to her for life, to her son, the defendant, Curtis L. Hill and his wife. Lillie Hill died intestate on 19 September 1970; and plaintiff, individually, and as her administrator, brought suit to have the above deed to defendants set aside. Plaintiff contended that Lillie Hill had the power to convey a fee only if necessary for her support, and that during her life tenancy she was never in need of funds which would justify her sale of the property.

Upon motion and hearing, summary judgment was entered for defendants.

Prince, Youngblood and Massagee for plaintiff appellant.

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

CAMPBELL, Judge.

[1] A general devise or bequest to a named person with a power of disposition transfers the property in fee, and a subsequent limitation over of the "remainder" is void as repugnant to the absolute gift. But a devise or bequest of a life estate, with remainder over, including the power to convey a fee by the life tenant creates only a life estate, not a fee simple. *Rudisill v. Hoyle,* 254 N.C. 33, 118 S.E. 2d 145 (1961); *Darden v. Boyette,* 247 N.C. 26, 100 S.E. 2d 359 (1957); *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888 (1944).

[2] In the instant case Lillie Hill was devised by her husband a life estate in all his property together with authorization " . . . in her sole discretion to sell and dispose of any of this property whenever it shall appear necessary or desirable to provide her with additional funds for her care, comfort, happiness, maintenance or support."

The question arising on this appeal is when and under what conditions the life tenant may properly convey in fee part of the life estate.

As is to be expected, the many jurisdictions are unevenly divided on this point, some holding that the power to convey must be strictly construed, and that the conveyance by the life tenant must reasonably be related to the purposes enumerated. See, for example, *Bell v. Killian,* 266 Ala. 12, 93 So. 2d 769 (1957); *McMillan v. Cox,* 109 Ga. 42, 34 S.E. 341 (1899); *Brunton v. Easthampton Savings Bank,* 336 Mass. 345, 145 N.E. 2d 696 (1957); *Parker v. Lloyd,* 321 Mass. 126, 71 N.E. 2d 889 (1947); *Lincoln v. Willard,* 296 Mass. 549, 6 N.E. 2d 774 (1937); *Parsons v. Smith,* 190 Kan. 569, 376 P. 2d 899 (1962); and *Kern v. Kern,* 100 Ohio App. 327, 136 N.E. 2d 675 (1955).

One court has held that a discretionary power to convey a fee for the life tenant's support is an absolute power to convey; only the use of the funds is limited. *Johnson v. Johnson,* 203 Okla. 676, 225 P. 2d 805 (1950).

On the other hand, it has been held that a life estate created in a wife, with power to convey a fee if necessary for her support, maintenance, or benefit, creates in her an absolute power to sell not subject to review. See *Richards v. West,* 110 So. 2d 698 (Fla. App. 1959) (life tenant must exercise good faith); *Wiglesworth v. Smith,* 311 Ky. 366, 224 S.W. 2d 177 (1949); *Pyne v. O'Donnell,* 77 R.I. 240, 75 A. 2d 21 (1950); and *Holmes v. Holmes,* 65 Wash. 2d 230, 396 P. 2d 633 (1964). Cases of each view are collected in 26 A.L.R. 2d 1207; and for an extensive collection of cases, see 31 A.L.R. 3d 169.

The question is not whether a power to convey a fee is or is not limited to fulfill a specified purpose. Rather, it is a question of the testator's intent at the time he created the life estate with the power to convey, which intent is to be derived from the will as a whole.

If the testator's primary purpose was to benefit the remaindermen, with a momentary consolation to the life tenant prior thereto, then the life tenant's power to convey must be strictly construed so as not to unjustly compromise the rights of the remaindermen.

But, if the testator's primary purpose was to benefit the life tenant, with merely a provision for the orderly disposition of anything that might remain so as not to pass intestate with respect thereto, then the life tenant's discretion and judgment as to the conveyance of the estate is not subject to review.

Item Two of the will in the instant case provides in its entirety:

> "I give, devise and bequeath all of my property of whatever kind and nature, whether the same be real, personal or mixed, and wheresoever the same shall be located or situated, to my wife, Lillie L. Hill, for the term of her life, and to pay over the income therefrom to herself. My wife and I have worked for more than fifty years together to accumulate this property and it is my desire that she be supported in comfort for the remainder of her life and I direct that this property be used to serve that purpose. In order to accomplish the purpose set out I specifically authorize her in her sole discretion to sell and dispose of any of this property whenever it shall appear necessary or desirable to provide her with additional funds for her care, comfort, happiness, maintenance or support."

In Item Four of the will the testator appointed Lillie Hill his executrix, giving her full power to rent, encumber, sell and convey any of the property as in her sole discretion would be to the best interest of the estate.

The language of this will is inconsistent with a purported intent of the testator that Lillie Hill's discretion with respect to the conveyance of that property was subject to the review of anyone. Whether the conveyance involved here was necessary for her comfort or support was entirely within her discretion, not subject to review.

No error.

Judges BRITT and BALEY concur.

COUNTY OF CURRITUCK v. CHARLIE J. UPTON AND WIFE, ZELMA H. UPTON

No. 731DC499

(Filed 25 July 1973)

1. **Appeal and Error § 26— assignment of error to entry of judgment**
   An assignment of error to the signing and entry of judgment presents the face of the record proper for review, including whether the facts found or admitted support the judgment; it does not present for review the findings of fact or the sufficiency of the evidence to support them.

2. **Counties § 5— zoning — order requiring removal of mobile home**
   The trial court's findings of fact supported its order that defendants remove their free standing mobile home from a district which is zoned for low density residential and agricultural use and in which such mobile homes are not a permitted use.

APPEAL by defendants from *Horner, Chief District Judge,* 18 December 1972 Session of District Court held in CURRITUCK County.

This is an action by Currituck County to enforce its zoning ordinance. The ordinance in pertinent part provides:

"(A) RA-20 DISTRICT

This district is established as a district in which the principal use of land is for low density residential and

agricultural purposes. The RA-20 District is intended to insure a healthful residential environment at a sufficiently low density in areas not having access to public water supplies and that are dependent on septic tanks for sewage disposal. (Free standing mobile homes are not a permitted use in the RA-20 district; mobile home parks are a conditional use)."

Defendants have located a mobile home for permanent occupancy within the RA-20 district in which such mobile homes are not a permitted use. Currituck County seeks to restrain defendants from taking any action to convert their mobile home into a permanent home and to require removal of the mobile home from the restricted area.

The case was heard by the court without a jury. Both plaintiff and defendants submitted evidence and the court entered the following judgment:

"JUDGMENT

This cause coming on to be heard upon the complaint of the plaintiff for an injunction requiring the defendants to remove their mobile home from a zoned area of Currituck County and to comply with the zoning regulations of said County, and whereas the parties having appeared in open court, with the County of Currituck being represented by its attorney, William Brumsey, III, and Charlie J. Upton and wife, Zelma H. Upton, being represented by their attorney, Frank B. Aycock, Jr., and evidence having been adduced, and the Court having heard the arguments of counsel and having considered the pleading and the evidence, and being fully advised in the premises finds:

FIRST: That the plaintiff, Currituck County, is a body politic incorporate in the State of North Carolina.

SECOND: That the defendants are not citizens and residents of Currituck County, but are property owners in said County.

THIRD: That on October 7, 1971, a zoning ordinance became effective in plaintiff County and that said zoning ordinance was adopted and passed pursuant to the laws of the State of North Carolina. That since October 7, 1971, said ordinance has been in full force and effect.

FOURTH: That the defendants hold title to the parcel of land consisting of approximately 20,000 square feet, said parcel of land being more fully described in the plaintiff's complaint and said land being located in an area designated as an RA-20 District.

FIFTH: That by the terms of the zoning ordinance of Currituck County, an RA-20 District is established as a district in which the principal use of the land is for low density residential areas and agricultural purposes. The RA-20 District prohibits the use of a free standing mobile home within its boundaries.

SIXTH: The defendants have caused to be located a free standing mobile home on their property located within said RA-20 District in violation of the zoning ordinance of plaintiff County.

SEVENTH: That the defendants have refused to remove said house trailer or mobile home from their parcel of land and have refused to comply with the terms of the plaintiff's zoning ordinance.

EIGHTH: That the plaintiff has no complete, plain or adequate remedy at law.

NOW, THEREFORE, based on the foregoing findings of fact, it is ORDERED, ADJUDGED and DECREED:

1. That the defendants remove their mobile home from the premises described in the complaint of the plaintiff County within thirty (30) days.

2. That the defendants, their agents, servants, or employees are hereby enjoined from moving said mobile home to other lands governed by the plaintiff County zoning ordinance on which the use of mobile homes is prohibited.

This the 14th day of February, 1973.

s/FENTRESS HORNER
Judge Fentress T. Horner"

To the signing and entry of judgment, defendants appealed.

William Brumsey III for plaintiff appellee.

Frank B. Aycock, Jr. for defendant appellants.

BALEY, Judge.

[1] The sole assignment of error is to the signing and entry of judgment. This presents the face of the record proper for review which includes whether the facts found or admitted support the judgment. It does not present for review the findings of fact or the sufficiency of the evidence to support them. *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363; *Prince v. Prince,* 7 N.C. App. 638, 173 S.E. 2d 567; 1 Strong, N. C. Index 2d, Appeal and Error, § 26.

[2] It appears of record that the facts found show the zoning ordinance applicable to Currituck County, effective since 7 October 1971, established an RA-20 District in which the property of defendants was located. The use of a free standing mobile home within this RA-20 District was prohibited under the terms of the zoning ordinance. Defendants had placed their mobile home on their property within this district in violation of the ordinance and refused to remove it.

The findings of fact support the judgment entered.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. MOFFETT ANTWON TONY HARRIS

No. 733SC501

(Filed 25 July 1973)

1. **Criminal Law § 23— instruction as to maximum sentence — guilty plea entered understandingly**

Trial court did not err in finding that defendant's plea of guilty was entered understandingly where it informed defendant as to the maximum punishment to which he could be subjected upon his plea of guilty and then, before imposition of the sentence and after questioning defendant under oath, found as a fact that the defendant had informed the court that he had been fully advised of the maximum punishment for the offense charged and that he was guilty.

2. **Narcotics § 5— possession of marijuana with intent to distribute — sentence of three years imprisonment and two years probation proper**

It was the intent of the legislature in the enactment of G.S. 90-95(b) providing the punishment for possession, manufacture or dis-

tribution of controlled substances to permit the court to include a special probation term within the sentence imposed under G.S. 90-95(b) so long as the special probation term and the active term of imprisonment did not exceed the maximum of five years; therefore, judgment in this case for possession of marijuana with intent to distribute, though not couched in strict conformity with the statute, was within statutory limits in imposing an active prison term of three years with an additional term of two years which was suspended with defendant being placed on probation under certain specified conditions.

APPEAL by defendant from *Blount, Special Judge,* 5 February 1973 Session of Superior Court held in PITT County.

Defendant was charged with possession of more than 5 grams of marijuana with intent to distribute, in violation of G.S. 90-95(a)(1). Through his privately employed attorney, he entered a plea of guilty. Before accepting this plea the court conducted an examination and found that the plea was freely, understandingly and voluntarily made without undue influence, compulsion or duress and without any promise of leniency. The factual basis for the defendant's plea was shown by evidence of the search of his premises which disclosed 16 packs of marijuana and by the admission made by defendant to the officers that he had been selling marijuana for about three weeks.

The court entered judgment imposing a three-year active prison term and a probationary term of two years suspended for two years under certain probationary conditions including the payment of a fine of $2,500.00.

Defendant appealed.

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

Owens, Browning & Haigwood, by Thomas D. Haigwood, for defendant appellant.

BALEY, Judge.

Defendant makes two assignments of error: (1) That his plea was not understandingly made as he was not fully advised by the court of the maximum punishment to which he could be subjected upon his plea. (2) That the judgment imposed was not authorized by the statute.

[1] When the defendant, represented by privately employed counsel, tendered his guilty plea, he was informed by the court

that he could be imprisoned for a maximum period of five years. The sentence which he received does not exceed the maximum of five years. If he chooses to accept the probationary term, he would have an active prison term of three years and a probationary term of two years which was suspended under certain conditions including the imposition of fine. If he desires, he may accept the additional two-year prison term rather than probation.

The record shows that before the imposition of the sentence and after questioning the defendant under oath, the court found as a fact that the defendant had informed the court that he had been fully advised of the maximum punishment for the offense charged and that he was guilty. The court further found that the plea was entered freely, understandingly, and voluntarily. It will not be disturbed on appeal. *State v. Barnes,* 15 N.C. App. 280, 189 S.E. 2d 796; *State v. Crocker,* 14 N.C. App. 654, 188 S.E. 2d 548; *State v. Harris,* 12 N.C. App. 576, 183 S.E. 2d 864.

[2] Defendant next contends that the judgment imposed upon him was not authorized by the statute and constitutes two sentences for one offense.

G.S. 90-95(b) provides in pertinent part:

> "Any person who violates G.S. 90-95(a)(1) . . . shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court. In addition to any term of imprisonment, any sentence imposed may include a special probation term of not more than the difference between the time required to be actively served and five years. . . ."

It is the general rule that penal statutes which impose punishment for the commission of a crime are to be strictly construed against the State and in favor of the accused. *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329; *State v. Heath,* 199 N.C. 135, 153 S.E. 855, 87 A.L.R. 37; 50 Am. Jur., Statutes, § 407. However, the courts need not construe the criminal statutes so narrowly as to exclude cases which are fairly covered by its terms. *State v. Whitehurst,* 212 N.C. 300, 193 S.E. 2d 657; 50 Am. Jur., Statutes, § 410.

It seems clear that it was the intent of the legislature in the enactment of G.S. 90-95(b) to permit the court to include a

special probation term within the sentence imposed under G.S. 90-95(b) so long as the special probation term and the active term of imprisonment did not exceed the maximum of five years.

The judgment entered in this case, while not couched in strict conformity to the statute, imposed an active prison term of three years with an additional term of two years which was suspended with defendant being placed on probation under certain specified conditions. It was within statutory limits, and there is no prejudicial error. Mere technical error, if any there be, does not entitle defendant to a new trial unless such error be material and denied to him some substantial right. *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406; *State v. Rainey*, 236 N.C. 738, 74 S.E. 2d 39.

The 1973 General Assembly enacted Chapter 654 revising G.S. 90-95 and other statutes relating to controlled substances, but this legislation specifically provides that it shall not apply to cases which occur prior to its effective date of 1 January 1974.

No error.

Judges BROCK and VAUGHN concur.

RICHARD L. DUNTON, SR., EMPLOYEE v. DANIEL CONSTRUCTION CO., EMPLOYER; AMERICAN MOTORISTS INSURANCE CO., CARRIER

No. 735IC480

(Filed 25 July 1973)

Master and Servant § 65— disc injury — whether result of accident

The evidence was sufficient to support the Industrial Commission's determination that plaintiff suffered a disc injury by "accident" where it tended to show that plaintiff was installing a stand on a steel beam some 70 feet above the ground, that plaintiff was seated on the beam and was using a hammer and bull pin to align the holes in the stand with holes in the beam, that plaintiff had to lean under the beam and drive the bull pin upward through holes in the beam, that plaintiff felt a pain in his back when he attempted to bring his body to an upright position, that the normal bolting up operation requires driving bolts from the side, and that plaintiff had driven a pin from a position under a beam only on rare occasions in the past.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission filed 13 February 1973.

Plaintiff claims benefits under the Workmen's Compensation Act for injuries sustained on 6 March 1972 while he was employed by defendant, Daniel Construction Company. The appropriate jurisdictional facts were stipulated by the parties including the average weekly wage of plaintiff. Commissioner Stephenson denied plaintiff's claim on 21 July 1972. Review before the full Commission on 9 November 1972 resulted in reversal of the ruling of Commissioner Stephenson and awarded plaintiff compensation for temporary total disabiltiy as provided by statute.

Plaintiff's evidence tended to show the following. On 6 March 1972 he was employed by defendant construction company as an "iron worker" and was performing a "bolting up" operation. This job required plaintiff to drive a "bull pin" into four holes of a horizontal steel beam in order to align the bolt holes with those of a vertical beam. The work was being performed approximately 70 or 75 feet from the ground. It was necessary for plaintiff to place his feet in the flange of the horizontal beam and to lean out and drive the pin upwards into the vertical beam from underneath the horizontal beam. Plaintiff testified. " . . . I was sitting on the beam with my feet up leaning down underneath the beam and driving the bolt pin up with a hammer into the holes to force the holes to line up. I was leaning down at the waist, down under the beam, and twisted so that I could see up where I was driving the bull pin. When I completed driving the bull pin I pulled myself back in order to get up to go get some more bolts when I felt the pain. I felt the pain as I was coming in from underneath the beam from the bent position to a straight position. That is, as I was drawing back up." The normal bolting up operation requires driving from the side. On cross-examination, plaintiff testified that what he was doing on that particular date was " . . . unusual to the extent that normally you drive the bull pin vertical or horizontal, and where the stand was going to sit on the beam, I had to go extremely down under to beat it up." Plaintiff indicated that he had driven a pin in this position on rare occasions prior to the date in question. Expert medical testimony showed plaintiff suffered from a bulging lumbar intervertebral disc which could have been caused by the straining position described by plaintiff. The disc has been surgically removed and plaintiff

was under the care of a doctor and had not reached maximum improvement as of the date of the hearing.

Defendants offered no evidence.

Parker, Mazzoli, Rice and Myles by Charles E. Rice III for plaintiff appellee.

Cockman, Alvis, Akins & Aldridge by John E. Aldridge, Jr., for defendant appellants.

VAUGHN, Judge.

The sole question presented is whether the evidence supports the finding that plaintiff sustained an injury by "accident" within the meaning of the Workmen's Compensation Statute, G.S. 97-2(6), and as defined by the North Carolina Supreme Court. "To sustain an award of compensation in ruptured or slipped disc cases the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way. . . . Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109.

In *Edwards v. Publishing Co.*, 227 N.C. 184, 41 S.E. 2d 592, plaintiff suffered a ruptured disc when he was required to lift a plate weighing between 40 and 50 pounds from the floor and, twisting to his right, hand it to a pressman. The Court held that, "[t]he evidence of the sudden and unexpected displacement of the plaintiff's intervertebral disc under the strain of lifting and turning as described lends support to the conclusion that the injury complained of should be regarded as falling within the category of accident, rather than as the result of inherent weakness, or as being one of the ordinary and expected incidents of the employment." In *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342, claimant suffered a ruptured disc when he removed a rock from a ditch he was digging. Removal of the rock required a twisting movement which increased the intensity of the stress on the vertebrae. The Court approved a finding of the Commission that claimant had sustained an injury by accident.

In the present case the evidence indicated that plaintiff was sitting on the beam and "leaning down underneath the beam

and driving the bolt pin up with a hammer. . . " to force the bolt holes into alignment. Plaintiff's testimony was that this particular activity was an unusual one to the extent that he "had to go extremely down under to beat it up" and that it was a rare occasion that demanded that a pin be driven in this position. There was no evidence suggesting plaintiff suffered from inherent back weakness.

The findings of fact made by the Commission include the following.

> "2. On March 6, 1972, plaintiff was working on a steel beam seventy to seventy-five feet above the ground, installing a stand on the beam. He was using a hammer and a 'bull pin' to align up the holes in the stand with the holes in the beam. Plaintiff was seated on the beam facing the stand with one foot on the flange on each side of the beam. The four holes which had to be aligned were under the beam on which he was seated, so that he had to lean over and drive the bull pin upward through the holes under the beam. It was only on rare occasions in the course of plaintiff's work that he had to lean over and align holes from underneath as he was doing on this date. At approximately 10:00 a.m. on this date, after plaintiff had his body in the position above described and after he had aligned the four holes with the hammer and bull pin, he attempted to bring his body to an upright position, and when he attempted to rise up, he felt a pain in his back. He immediately went to his foreman, reported the incident and was sent to the First Aid Department. His back pain became so great that he had to stop work completely at noon on that date. He has done no work and earned no wages since March 6, 1972, by reason of his back problem.
>
> * * *
>
> 4. Plaintiff did, at the time complained of, sustain an injury by accident."

The Commission concluded that plaintiff did "sustain an injury by accident arising out of and in the course of his employment."

We hold that the evidence was sufficient to support the findings and conclusions of the Commission and to support its award.

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. EARL BRYANT

No. 737SC494

(Filed 25 July 1973)

1. **Criminal Law § 91— motion for continuance denied — no error**

Where defendant argued in support of his motion for continuance that some of the witnesses to be called on his behalf were in Central Prison, but he did not name those witnesses or state what facts were expected to be testified to by them or that the evidence would be procured at or before some named subsequent term, the trial court did not err in denying the motion.

2. **Criminal Law § 15— motion for change of venue — denial proper**

Defendant's assignment of error to denial of his motion for change of venue is overruled where defendant's argument was based upon matters not in the record and no argument on behalf of the motion was presented to the trial court.

3. **Criminal Law § 169— failure to make motion to strike — waiver of objection**

Defendant waived his objection to a witness's statement where defendant did not move to strike the statement and where the statement was made while the witness was being cross-examined by defendant but defendant failed to bring forward his question to which the witness was presumably responding.

4. **Burglary and Unlawful Breakings § 4; Larceny § 6— evidence of possession of property not listed in warrant or indictment — no error**

In a prosecution for felonious breaking and entering and felonious larceny, defendant was not prejudiced by testimony that he had possession of personal property not listed in the indictment or warrant where the State did not contend at trial that possession of the items was illegal or the result of illegal activity.

5. **Criminal Law § 95— evidence competent for restricted purpose — instruction sufficient**

Where, immediately prior to testimony by a witness relating to a conversation with another witness, the court instructed the jury concerning the purpose for which they could consider such evidence,

it was not necessary for the court to repeat the instruction each time defendant objected to a question relating to the conversation.

6. Burglary and Unlawful Breakings § 6; Larceny § 8— possession of recently stolen goods — sufficiency of instructions

In a breaking and entering and larceny case the trial court did not commit prejudicial error in instructing the jury that the State was relying on the doctrine of "recent possession" where the court thereafter correctly instructed the jury on the presumption arising from the possession of "recently stolen goods."

APPEAL by defendant from *Webb, Special Judge,* 4 December 1972 Session of Superior Court held in WILSON County.

Defendant was convicted of felonious breaking and entering and felonious larceny.

The State's evidence tended to show, in pertinent part, the following. When Janet Tomlinson returned to her home in Black Creek late on Monday, 21 February 1972, having been away since the preceding Thursday, 17 February 1972, she discovered that her home had been broken into and that two television sets and a stereo system, totaling in value approximately nine hundred dollars, had been taken without her permission. On the 19th of February, at Bobby Deans' house, defendant sold a small portable color television set and a tape recorder to Earl Johnson for $150.00. Johnson was also given a large color television set which didn't work and a twenty-two caliber rifle. Deans obtained a stereo system from defendant along with an electric skill saw, an electric drill and a portable welder for which he paid defendant $75.00. These sales were witnessed by Deans' wife and by defendant's niece, Annette Bryant. Defendant told Annette that the goods had come from Black Creek. The next morning Johnson loaded the goods into his automobile, with the large television set projecting above the dashboard in the front seat. Defendant told Johnson that he would leave ahead of Johnson and "if he saw any kind of law [defendant] would come back and meet [Johnson] and blink his lights or something. . ." to let Johnson know it was unsafe to proceed. When Johnson reached the highway, he met a State Highway Patrolman who followed him back to Deans' house and took him into custody. Deans later went to the Sheriff's Office, confessed his part in the transaction and aided in the recovery of the stolen property. The two television sets and the stereo system purchased from defendant were identified as belonging to Tomlinson.

Defendant's evidence tended to show that on 19 February 1972, while he was on a weekend pass from prison, defendant was with his wife and two others and that he did not see Deans or Johnson. Dennis Bryant and Michael Bryant, both of whom had been convicted of the breaking, entering and larceny at Tomlinson's, testified that defendant did not participate in the break-in. Defendant testified in his own behalf and denied having broken into any house on 19 February. Defendant admitted having pleaded guilty to four previous charges of breaking and entering and larceny and denied threatening or trying to bribe any witnesses in this case.

The State's rebuttal evidence tended to contradict details of defendant's evidence and to show that defendant promised to pay $500.00 to Michael Bryant "to go along with" defendant's story. Michael was called by defendant in rebuttal and denied having said that defendant offered him money of any kind.

Defendant was sentenced to serve eight to ten years in prison.

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

John L. Whitley for defendant appellant.

VAUGHN, Judge.

[1] Defendant first challenges the denial of his motion for continuance. The record indicates that defendant's court-appointed counsel argued in support of his motion that some of the witnesses to be called on defendant's behalf were in Central Prison, but counsel failed to name those witnesses or state what facts were expected to be testified to by them or that the evidence would be procured at or before some named subsequent term. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844. At trial, defendant, his wife, two witnesses housed in the Umstead Youth Center and a witness who allegedly acted as a babysitter for defendant's children on 19 February all testified on behalf of defendant and their evidence tended to support defendant's denial of participation in the offenses charged and to support his defense of alibi. "Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice." *State v. Moses,* 272 N.C. 509, 512, 158 S.E. 2d 617; *State*

v. Roberts, 15 N.C. App. 237, 189 S.E. 2d 637. Defendant has failed to show either error or prejudice and his first assignment of error is overruled.

[2] Defendant next argues that he was prejudiced by denial of his motion for a change in venue. His argument is based upon matters not in the record and no argument on behalf of defendant's motion was presented to the trial court. Defendant's second assignment of error is overruled.

[3] In his third assignment of error defendant challenges the court's failure to strike testimony to the effect that the witness was told by another that defendant had admitted stealing the goods. This assignment of error is overruled. The statement was made while the witness was being cross-examined by defendant and defendant does not bring forward his question to which the witness was presumably responding. Moreover, defendant did not move to strike the answer and has, consequently, waived his objection.

[4] Assignment of error number four challenges the overruling of defendant's objections to testimony that defendant had possession of personal property not listed in the indictment or warrant. Defendant argues that the State offered no evidence to show that defendant had been convicted of stealing the items mentioned and that he was prejudiced in that the jury may have considered possession of these items to have been evidence that defendant was guilty of other crimes. We disagree. The items complained of were not introduced as substantive evidence and the State did not contend at this trial that possession of these items was illegal or the result of illegal activity. Defendant has failed to demonstrate how he was prejudiced by this evidence and this assignment of error is overruled. *See State v. Salem*, 17 N.C. App. 269, 273, 193 S.E. 2d 755, cert. denied, 283 N.C. 259, 195 S.E. 2d 692.

[5] In his seventh assignment of error defendant challenges the failure of the trial court to instruct the jury that certain testimony by Annette relating a conversation with another witness could only be considered as corroborative. Immediately prior to the evidence objected to, and without request from defendant, the court instructed the jury concerning the purposes for which they could consider such evidence. It was not necessary for the court to repeat this instruction each time defendant objected to a question relating to the conversation.

[6] Defendant's next assignment of error is based upon the fact that the trial court charged the jury that ". . . the State is relying on what is sometimes known as the doctrine of recent possession." Defendant argues that use of the term "recent possession" was apt to confuse the jury by indicating that the presumption raised by the doctrine may be applied against anyone who had the property in his possession regardless of the time of its theft. As is pointed out in *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369, it is the possession of recently stolen goods which gives rise to the presumption, so that if possession is recent but the theft occurred long before such possession, no inference of guilt arises. In the present case the court instructed the jury in pertinent part that if they found beyond a reasonable doubt that defendant ". . . had possession of the two television sets and the stereo set, so soon after they were stolen and under such circumstances as to make it unlikely that he obtained possession honestly you may consider this together with all the facts and circumstances in deciding whether or not the defendant is guilty of breaking and entering and larceny." In addition, the jury was instructed that they must be satisfied beyond a reasonable doubt that the property in defendant's possession was the same property taken from the Tomlinson home before considering the time lapse between the theft and defendant's possession. The evidence indicated that Tomlinson was absent from her home from 17 February to 21 February 1972 and that on 19 February 1972 defendant had possession of goods identified as having come from Tomlinson's home. This assignment of error is overruled.

We have carefully examined defendant's remaining assignments of error. We find no prejudicial error in the trial.

No error.

Judges BROCK and BALEY concur.

STATE OF NORTH CAROLINA v. ARNOLD RAY KELLY AND CARSON LEE McKINNEY

No. 7329SC483

(Filed 25 July 1973)

1. **Criminal Law § 95— evidence competent as to one defendant only — failure to give limiting instruction — error**

Where there was sufficient evidence to show that one defendant was in hearing distance of his brother and the witness at the time the conversation in question took place, but there was no evidence whatsoever of a second defendant's presence at the scene, it was error for the trial court to admit the witness's account of the conversation without a limiting instruction.

2. **Criminal Law § 95— evidence admissible against one defendant only — general objection sufficient**

Where evidence is admissible against one party and not for any purpose against another, a general objection by the latter is sufficient; therefore, the trial court should have given a limiting instruction, though defense counsel failed specifically to request one, where counsel did interpose a timely objection and did move to strike the testimony.

3. **Criminal Law §§ 95, 169— failure to give limiting instruction — error cured by subsequent instruction**

Though the trial court failed to give a limiting instruction following defense counsel's objection, that error was cured where the court, before formally charging the jury, did instruct that the evidence in question could be considered in deliberation only as against one defendant and not as against the other.

APPEAL by defendants from *Thornburg, Judge*, January 1973 Session of McDOWELL County, Superior Court.

Defendants were charged in separate bills of indictment with felonious breaking and entering and felonious larceny. Upon motion of the State, the cases were consolidated for trial at which time the State presented evidence which tended to show the following:

On Sunday afternoon, 9 April 1972, Harold Dysart returned to his home located at Route 4, Marion, N. C., from a trip to Myrtle Beach, S. C. He found that his house had been entered through a bedroom window and that the inside of the house had been ransacked. Dysart took inventory and found that a TV, two tape players, a couple of walkie talkie radios, a Kodak camera, his coin collection, and several other items were missing.

Bobby Fowler, defendant Kelly's first cousin, testified that at approximately 7:00 or 8:00 a.m. on 9 April 1972, the defendants came to his house and defendant Kelly asked him in the presence of defendant McKinney if he would keep a few items for him for two or three days until he found a place to put them. Fowler agreed, and the defendants brought in a TV, a Kodak camera, two tape players, and two walkie talkie radios from a Chevrolet dump truck. The defendants left in separate vehicles, with Kelly driving the dump truck and McKinney in another vehicle.

Earlier on the morning of 9 April 1972, defendant McKinney was seen in a parked automobile parked approximately 1,000 feet west of Dysart's house.

On Thursday of the following week, Dysart was taken by officers of the sheriff's department to Bobby Fowler's home where he identified the items brought there by defendants as the items taken from his house. On recall by the State, Dysart testified that on the day before he left for Myrtle Beach, defendant Kelly and Kelly's brother Alton came by his house in order to purchase a part for Alton's Chevrolet dump truck. Dysart testified over defense counsel's objection that while defendant Kelly was in their immediate presence, the following conversation took place between himself and Alton.

Alton: "Looks like you are busy getting ready to go somewhere."

Dysart: "Yes, I'm getting ready to go to Myrtle Beach, if you had come tomorrow, I wouldn't have been here."

The State then rested its case, and both defendants took the stand and testified that they had never broken into Dysart's house nor taken any goods therefrom. Defendant Kelly did testify that he had been by Dysart's house with his brother, but that he did not hear any conversation about Dysart going to Myrtle Beach.

The case was then submitted to the jury which returned a verdict as to each defendant. From judgments imposing active sentences, both defendants appealed.

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

I. C. Crawford, for defendant appellants.

MORRIS, Judge.

The sole question presented on appeal is whether the trial court erred in allowing State's witness Dysart to testify as to the conversation between himself and defendant Kelly's brother in which Dysart expressed his intention to go to Myrtle Beach.

[1] As to defendant Kelly, there was sufficient evidence to show that he was in hearing distance of his brother and Dysart at the time the statement was made, and the evidence was clearly admissible against him. As to defendant McKinney, there was no evidence whatsoever of his presence at the scene and it was error for the evidence to be admitted without a limiting instruction.

> "In such cases, as a general rule, the incompetency of the evidence for one purpose will not affect its admissibility for other and proper purposes. The evidence will be admitted, and the party against whom it is offered will be entitled, *on request,* to have the jury instructed to consider it only for the purposes for which it is competent." 1 Stansbury's North Carolina Evidence, Brandis Revision, § 79, pp. 240-241. (Emphasis added.)

[2] Defense counsel interposed a timely objection and moved to strike the testimony but failed to request a limiting instruction. Yet it was held in *State v. Franklin,* 248 N.C. 695, 104 S.E. 2d 837 (1958), that where evidence is admissible against one party and *not for any purpose against another,* a general objection by the latter is sufficient.

[3] No limiting instruction was given by the trial court following defense counsel's objection. However, before formally charging the jury the trial judge did instruct as follows:

> "Members of the Jury, during the course of the evidence, the Court permitted Mr. Dysart to testify as to conversations had between him and one Alton Kelly at his home, at which time Arnold Kelly was present. The Court instructs you, Members of the Jury, if you find that such conversations occurred and you find it to be true beyond a reasonable doubt that you may consider it in your deliberations only as against the defendant, Arnold Kelly and you may not at any point in your deliberation and may not consider any conversation in the presence of Arnold Kelly as against the defendant, Carson Lee McKinney, there

being absolutely no evidence he at any time was present at any time any such conversation occurred, if you find, in fact, it did occur."

This instruction was sufficient to cure the error. His prior ruling was "subsequently and specifically reversed and the jurors instructed to disabuse their minds of any and all prejudicial impressions lodged by the incompetent evidence." *State v. Franklin, supra,* p. 699. In our opinion defendants received a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. EDWARD EARL STEPPE

No. 7326SC509

(Filed 25 July 1973)

1. **Criminal Law § 66— identification of defendant — in-court identification proper despite improper conclusion on voir dire**

Though the trial court's conclusions based on a *voir dire* examination were not entirely proper as the findings of fact were not based exclusively on *voir dire* testimony, still there was no prejudicial error in allowing a witness's in-court identification of defendant, since there was evidence that the witness had ample opportunity to observe defendant at the crime scene and there was no evidence showing a possibility of misidentification through suggestiveness of pretrial photographic identification.

2. **Criminal Law § 66— identification of defendant — witness standing in front of defendant**

Trial court in a breaking and entering case did not err in allowing a witness to stand in front of defendant to show how far from defendant he was at the scene of the crime.

3. **Criminal Law § 89— prior inconsistent statement of witness — admissibility**

Trial court properly admitted, with limiting instructions, evidence of a prior inconsistent statement of a witness relating to a matter pertinent and material to the inquiry, the defendant's alibi.

ON *certiorari* to review the order of *Wood, Special Judge,* 13 November 1972 Session of MECKLENBURG County Superior Court.

Defendant was tried on a proper bill of indictment charging him with felonious breaking and entering and larceny. The jury found him to be guilty of both offenses, and he was sentenced to two concurrent terms of imprisonment for 7 to 10 years.

The State presented evidence to the effect that on the morning of 25 January 1972 at about 8:30 a.m. Mr. Ben Kirkland locked his home in Charlotte, North Carolina, and drove to his place of employment. Upon returning to his home at about 10:45 he noticed something move inside his garage, the doors to which were closed. Through a window in the garage door Kirkland saw a face looking at him; inside the garage was a tan-colored Cadillac which was not Kirkland's automobile.

When the person inside the garage attempted to open the garage door, Kirkland, from the outside, attempted to hold the door closed. Kirkland was overpowered, the door opened, and a second man started the Cadillac backing out of the garage. The man at the door of the garage made some threatening gestures toward Kirkland, jumped into the Cadillac, which then backed down the driveway, and left.

A window on the back door of the house had been broken, drawers inside the house were in disarray, and Kirkland discovered missing two cameras.

Kirkland had an opportunity to view the man at the garage door, but not the driver of the automobile. He also recorded the license number of the automobile. On the afternoon of 25 January Kirkland was shown by police officers photographs of 15 to 20 individuals whose physical descriptions generally were similar to that of the person he saw at his home. The police made no suggestion with respect to any of the photographs, and Kirkland picked out the defendant's picture. Additionally, the license number of the automobile in Kirkland's garage was registered to defendant's tan Cadillac.

Attorney General Robert Morgan by Associate Attorney Emerson D. Wall for the State.

Whitfield and McNeely by Richard P. McNeely for defendant appellant.

CAMPBELL, Judge.

[1] Defendant assigns as error the in-court identification by Kirkland and contends particularly that the trial court's conclusions of law on *voir dire* are improper as the findings of fact are not based entirely on *voir dire* testimony. The record does indicate that the only witness to testify on *voir dire* was Kirkland, but that the court's findings of fact include facts testified to by police officers, whose testimony was taken before the jury *after* the *voir dire* examination had been concluded. While the court's findings based on the *voir dire* are not entirely proper, still there has been committed no prejudicial error.

Early in his testimony, after having described the events taking place in his driveway and garage, Kirkland testified without objection that: "The man that I saw in the window and the man that was tugging on the other side of the door from me raising and lowering it is in the Courtroom at this time. The defendant, the man in the blue shirt to the left is that man." As Kirkland was about to relate some conversation that he heard, defendant's counsel objected on the ground that it had not been established whether the speaker was the defendant, or the other man still unidentified. In response to questioning by the court, Kirkland again testified without objection that the defendant was the man he saw at the garage door.

Absent a timely objection to the identification testimony and request for a *voir dire* hearing thereon, it is not error for the trial court to receive such testimony and proceed with the trial. *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104 (1972). Nevertheless, there is evidence that the witness had ample opportunity to observe the defendant, and there is no evidence showing a possibility of misidentification through suggestiveness of pretrial photographic identification. The evidence is proper and quite sufficient to warrant submission of the case to the jury.

[2] There was no error in the court's allowing the witness to stand in front of the defendant to show how far from the defendant he was at the time of the garage door scuffle. See *State v. Cook, supra,* in which the prosecuting witness was allowed to identify the defendant by placing her hand on his shoulder.

[3] Defendant's wife testified on his behalf to the effect that on the morning of 25 January he had not driven the Cadillac. The State was allowed to put into evidence rebuttal testimony

of a police officer who had spoken to defendant's wife on the morning of the 25th of January that she had stated that her husband had driven the Cadillac on that morning.

This rebuttal testimony was properly admitted with limiting instructions. The testimony related to matter pertinent and material to the inquiry, the defendant's alibi. *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972).

With respect to defendant's other assignments of error, we find no merit. Defendant has had a fair trial free of prejudicial error.

No error.

Judges HEDRICK and BALEY concur.

STEPHEN G. BENNETT v. UNITED STATES FIDELITY AND GUARANTY COMPANY

No. 7310DC462

(Filed 25 July 1973)

1. **Uniform Commercial Code § 27— holder in due course — taking draft for value — antecedent debt**

Where an automobile used by plaintiff was wrecked by a person in possession of the car with plaintiff's permission, the car was registered in the name of plaintiff's mother, the driver's insurer issued a draft to plaintiff's mother and the driver in settlement of damages to the car, the joint payees endorsed the draft to plaintiff, who deposited it in his bank account, and the draft was not paid by the bank because the insurer had issued a stop payment order when it discovered it did not afford its insured collision coverage for a non-owned vehicle, plaintiff's evidence failed to show that he took the draft in payment for an antecedent claim against the driver and, therefore, that he took the check for value, where (1) plaintiff had no claim for damages to the car because it was registered in his mother's name, and (2) plaintiff failed to show he had any personal property in the car which was damaged in the wreck; consequently, plaintiff was not a holder in due course entitled to the amount of the draft. G.S. 25-3-303(b).

2. **Uniform Commercial Code § 27— draft endorsed to plaintiff — post-dated check given in reliance on draft — payment stopped on draft — taking for value — commitment to third person**

Where plaintiff was the beneficial owner of a car registered in his mother's name which was wrecked by a third person, a draft from

the driver's insurer to the driver and plaintiff's mother was endorsed by the payees to plaintiff, who deposited it in his bank account, and the insurer stopped payment on the draft, plaintiff's evidence that he gave a postdated check in payment for another car in reliance on the draft is insufficient to show that plaintiff received the draft for value by making an irrevocable commitment to a third person within the meaning of G.S. 25-3-303(c), since that statute contemplates a commitment to a third person made when the holder takes the instrument and does not include a commitment made subsequent to the taking of the instrument.

APPEAL by plaintiff from *Bason, Judge,* 5 February 1973 Session, District Court, WAKE County.

Plaintiff instituted this action to recover the sum of $4,400, the amount of a draft dated 11 August 1972, issued by defendant, and payable to Wilbur Lee Prince and Mabel Sauls Bennett as joint payees. Mabel Sauls Bennett, plaintiff's mother, was the record titleholder to a 1971 Datsun. Plaintiff had possession of the car and had allowed Wilbur Prince to borrow it. While Prince was driving the car, it was wrecked. The accident was reported by Prince to defendant, his insurer, within apt time. A settlement was negotiated by defendant with Prince and Mabel Sauls Bennett. Plaintiff was active in the negotiations. The car was used by plaintiff and acquired for his use by gifts from his grandparents, Veta M. Bennett and her husband. The joint payees endorsed the draft to plaintiff, who deposited it in his bank account. The draft was not paid by the bank, however, because defendant had issued a stop payment order when it discovered that it did not afford its insured collision coverage for non-owned vehicles. These facts are undisputed and disclosed by the pleading, deposition and affidavit of plaintiff, and affidavit of defendant's superintendent of claims, upon which defendant's motion for summary judgment was heard. The court entered an "order and judgment" finding that "no genuine issue of fact exists for submission to a trial court and that defendant is entitled to judgment as a matter of law." Defendant's motion was granted and the action dismissed. Plaintiff appealed.

Bennett and McConkey, P.A., by John P. Simpson, for plaintiff appellant.

Maupin, Taylor and Ellis, by Richard C. Titus, for defendant appellee.

MORRIS, Judge.

Plaintiff contends that he is entitled, under G.S. 25-3-302, to the amount of the draft. G.S. 25-3-302 defines a holder in due course as one who takes an instrument for value, and in good faith, and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

The undisputed evidence discloses that plaintiff was without notice of the defense of the insurer and that he took the instrument in good faith and for the purpose of purchasing an automobile to replace the one wrecked by defendant's insured. The only question about which the parties disagree is whether plaintiff took the check for value.

G.S. 25-3-303 defines taking for value as follows:

"A holder takes the instrument for value

(a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

(b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

(c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person."

Plaintiff earnestly contends that he comes within the purview of the definition for two reasons.

[1] He first contends that the evidence discloses that he took the check in payment of an antecedent claim against Wilbur Lee Prince and, therefore, he took the check for value. There is no dispute about the fact that the car was registered in the name of plaintiff's mother. Plaintiff, therefore, had no claim against Prince for the damage to the car. See G.S. 20-38(19) for definition of "owner" as person holding legal title to a motor vehicle, and 61 C.J.S., Motor Vehicles, § 500, pp. 253-254. On appeal he says, however, that he had a claim against Prince for damage to personal property in the car at the time of the wreck. A close examination of the record, and particularly the deposition and affidavit of plaintiff, reveals absolutely no evidence of whether plaintiff had any property in the car and if

so, what it was. In his affidavit, plaintiff said: "The value given by him to Wilbur Lee Prince was full settlement of any claim that he might have against Wilbur Lee Prince for the loss of any personal property Wilbur Lee Prince was responsible for when the Datsun automobile was damaged," but nowhere does he contend that he did in fact have any personal property in the car. Plaintiff has failed to present any evidence which would tend to show any legal claim against either payee, which plaintiff had and relinquished.

[2] He also contends that he gave value by virtue of the provisions of G.S. 25-3-303(c) in that he made an irrevocable commitment to a third person. Plaintiff contends and the evidence reveals that he intended to use the amount of the check for the purchase of a new car. He stated in his deposition that the insurance draft was delivered to him; that he carried it to his mother and to Prince for endorsement and then deposited it in his checking account at Wachovia Bank and Trust Company; that he was told at the time he made the deposit that it would take "a couple of days to clear"; that he then called the insurance agent who suggested that he postdate the check he was to give in payment for the car he was buying; that he then went to the dealer and followed this suggestion.

The official comment to G.S. 25-3-303(c) is as follows:

> "Paragraph (c) is new, but states generally recognized exceptions to the rule that an executory promise is not value. A negotiable instrument is value because it carries the possibility of negotiation to a holder in due course, after which the party who gives it cannot refuse to pay. The same reasoning applies to any irrevocable commitment to a third person, such as a letter of credit issued when an instrument is taken."

We are of the opinion that the wording of the statute contemplates a simultaneous transaction—a commitment to a third person made when the holder takes the instrument. We do not construe it to include a commitment made subsequent to the taking of the instrument. We hold, therefore, that plaintiff's subsequent reliance on the payment of the draft does not constitute a taking for value necessary to put plaintiff in the position of holder in due course.

The undisputed facts establish that plaintiff is not a holder in due course. The court properly granted defendant's motion for summary judgment.

Affirmed.

Judges CAMPBELL and PARKER concur.

EDWIN L. VAN POOLE AND LAURA D. VAN POOLE, AND ROBERT L. HUDSON AND WIFE, LINDA HUDSON v. VIOLET D. MESSER AND RUTH E. DULL

No. 7319SC449

(Filed 25 July 1973)

Deeds § 20— violation of restrictive covenant as to trailers on subdivision lot — defense of estoppel

In an action to restrain and enjoin defendants from using a subdivision lot as a site for a mobile home in violation of a restrictive covenant on the lot prohibiting the use of a trailer for a residence thereon, the trial court erred in entering summary judgment for plaintiffs, not on the issue of whether a mobile home was a trailer within the meaning of the restrictive covenant, but on the issue of whether, due to the existence of other trailers in the subdivision, the plaintiffs were estopped from enforcing the restriction in issue.

APPEAL by defendants from *Seay, Judge,* 22 January 1973 Session of Superior Court, ROWAN County.

This is an appeal from Judge Seay's order allowing summary judgment against the defendants upon plaintiffs' motion therefor. At the hearing on the motion, the trial judge considered the amended complaint, the answers of the defendants, and the answers to interrogatories of the plaintiffs and the defendants. In their answers to the amended complaint, defendants demanded a jury trial.

The amended complaint alleged that plaintiffs and defendant Dull were lot owners in East Jackson Park Subdivision in China Grove Township, Rowan County, and that all lots in the subdivision were subject to the following restriction, duly recorded in the Rowan County Register of Deeds office:

"6. No structure of a temporary character, trailer, basement, tent, shack, garage, barn or other outbuilding shall

be used on any lot at any time as a residence either temporarily or permanently."

Plaintiffs alleged, and the defendants admitted, that the defendants had placed on lot 39 in East Jackson Park, owned by defendant Dull, a "mobile home." A permanent house was also located on lot 39.

The answers of the defendants and the answers to interrogatories by the plaintiff Robert Hudson tended to show that there was at least one other "trailer" in the East Jackson Park Subdivision at the time the lawsuit was commenced. The defendants alleged by way of defense, that if there was any violation of the restrictive covenant set forth above, then that violation was waived and acquiesced in by the plaintiffs, in that plaintiffs and others in the subdivision have allowed similar violations of restrictive covenant number six in the past and have abandoned that restriction and are estopped from enforcing it by their actions in having acquiesced in past violations.

From summary judgment entered in favor of the plaintiffs, the defendants appealed, assigning error.

Rutledge and Friday, by Clinton S. Forbis, Jr., for plaintiff appellees.

Grant and Grant, by Adam C. Grant, Jr., for defendant appellants.

MORRIS, Judge.

Summary judgment is proper only where there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Kiser v. Snyder,* 17 N.C. App. 445, 194 S.E. 2d 638 (1973), cert. denied, 283 N.C. 257. The party moving for summary judgment has the burden of establishing the lack of a genuine issue of material fact, and in that regard, the papers of the opposing party are indulgently regarded. *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972).

We are of the opinion that the trial judge committed error in entering summary judgment in favor of the plaintiffs in this case. The defendants contend that there is a material issue of fact as to whether a modern "mobile home" is a "trailer" within the meaning of the restrictive covenant placed on lot 39 of East

Jackson Park Subdivision in 1955. It seems to us, however, that that issue is more properly one of interpretation of the restrictive covenant, and within the province of the trial judge to decide as a matter of law. Judge Seay concluded as a matter of law that a "mobile home" is a "trailer" within the intendment of the restrictive covenant. With this conclusion we take no issue. That the term "trailer" includes a "mobile home" within its meaning is the accepted rule in every authority we have found dealing with that issue. See *Timmerman v. Gabriel,* 155 Mont. 294, 470 P. 2d 528 (1970); *Harriman v. Kabinoff,* 40 Misc. 2d 387, 243 N.Y.S. 2d 210 (1963). In Annot. 96 A.L.R. 2d 232 (1964), at page 234, it is stated that "[t]he term 'trailer' is understood in its usual meaning regardless of whether it is referred to or described as house trailer, mobile home, trailer coach, or some such term."

Although it appears that the case of *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971), would preclude the trial judge from entering summary judgment in favor of the party with the burden of proof when his right to recover depends upon the credibility of his evidence, in the case before us, the fact that the defendants had placed a mobile home upon lot 39 of the East Jackson Subdivision was admitted in the pleadings and interrogatories of the defendants, and the credibility of the plaintiffs' assertions is, therefore, not a "genuine issue of fact." *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726 (1961); *Wyche v. Alexander,* 15 N.C. App. 130, 189 S.E. 2d 608 (1972), cert. denied, 281 N.C. 764. Summary judgment would not, therefore, be precluded by the issue of whether a "mobile home" is a "trailer" within the meaning of the restrictive covenant placed on lot 39.

However, the defendants contend, and we agree, that a material issue of fact arises on the documents included in the record on appeal and considered by the trial judge, as to whether, due to the existence of other trailers in the East Jackson Park Subdivision, the plaintiffs are estopped from enforcing the restriction in issue. See *Tull v. Doctors Building, Inc.,* 255 N.C. 23, 120 S.E. 2d 817 (1961). This issue of fact alone is sufficient to preclude the entry of summary judgment.

The case of *Hullett v. Grayson,* 265 N.C. 453, 144 S.E. 2d 206 (1965), is inapposite to the case at bar, the restrictive covenant in that case having been declared ambiguous and unenforceable because the word "temporary" in that restrictive

covenant rendered a sensible and uniform interpretation of the restrictive covenant impossible. In this case, the determinative issue in interpreting the restrictive covenant is merely whether a "mobile home" is a "trailer" within its meaning.

For the reasons stated, the entry of summary judgment is

Reversed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. OLIVER WENDELL LITTLEJOHN

No. 7327SC535

(Filed 25 July 1973)

1. **Criminal Law § 118— instructions on contentions**

The trial court in an armed robbery case did not elaborate too greatly on the State's contentions or fail to charge properly on the contentions of defendant.

2. **Criminal Law § 112— alibi — burden of proof — instructions**

The trial court did not commit prejudicial error in instructing the jury that "The burden of proving an alibi does not rest upon the defendant to establish defendant's guilt" where the court thereafter correctly charged that defendant contended he was someplace else and that the State had the burden of proving his presence.

3. **Criminal Law § 126— belated motion to poll jury**

The trial court did not err in the denial of defendant's motion to poll the jury where the motion was first made after the jury had been discharged, some of the jurors had been selected for the trial of another case and other jurors had left the courtroom.

APPEAL by defendant from *McLean, Judge,* 22 January 1973 Session of Superior Court held in CLEVELAND County.

The defendant, Oliver Wendell Littlejohn, was charged in a bill of indictment, proper in form, with the armed robbery of $400.00 from Mr. and Mrs. Albert McGinnis on 10 November 1972. Upon defendant's plea of not guilty, the State offered evidence tending to show the following:

At about 10:30 a.m., 10 November 1972, the defendant parked a Chevrolet automobile at a store operated by Mr. and Mrs. Albert McGinnis on Highway 74 approximately four miles

west of Shelby. The defendant purchased an ice cream sandwich from Mrs. McGinnis and left. At about 11:45 a.m. he returned to the store and parked the same automobile at the gasoline pump and asked Mr. McGinnis to put in three dollars worth of gas. While Mr. McGinnis was doing as requested, defendant entered the store, closed the door behind him, and gave Mrs. McGinnis a five dollar bill to pay for the gasoline. He asked for and received a "poke" which he opened when Mrs. McGinnis gave him the two dollars change. The defendant pointed a "nickel-plated small caliber pistol" at Mrs. McGinnis and said, "Now, Lady, put the one dollar bills in here." The defendant got the twenty dollar bills and ordered Mrs. McGinnis to get the five and ten dollar bills. The total amount taken was about $400.00.

Mr. McGinnis met the defendant "coming out of the store between the car and the door, and he said, 'I paid the lady in the store.' " Mr. McGinnis went into the store and learned that the defendant had robbed Mrs. McGinnis. Mr. McGinnis got the "car tag number" of the automobile defendant was driving.

Defendant testified denying the crime and offered evidence of an alibi.

Defendant was found guilty as charged and from a judgment imposing a prison sentence of not less than twenty nor more than thirty years, he appealed.

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

Robert G. Summey for defendant appellant.

HEDRICK, Judge.

[1] By his fourth and seventh assignments of error, defendant contends the court erred in "elaborating too greatly" the contentions of the State and "failing to properly charge the contentions of the defendant." We do not agree.

> "If defendant desired fuller instructions as to the evidence or contentions, he should have so requested. His failure to do so now precludes him from assigning this as error." (Citations omitted.) *State v. Sanders,* 276 N.C. 598, 617, 174 S.E. 2d 487, 500 (1970); reversed on other grounds, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971).

A misstatement of the evidence or contentions of the defendant, not called to the court's attention, may not be the basis of a proper assignment of error. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970). Nevertheless, a careful examination of the charge as a whole leads us to the conclusion that the court fully and fairly instructed the jury as to the evidence and the contentions of the parties and declared the law applicable thereto.

By his fifth assignment of error, defendant contends the trial court did not properly charge that the use of a firearm is a necessary element of the crime of armed robbery.

The charge is replete with instructions that the use of a firearm is a necessary element of the crime of armed robbery. This assignment of error has no merit.

[2] Defendant next contends the court erred to his prejudice in charging the jury as follows: "The burden of proving an alibi does not rest upon the defendant to establish the defendant's guilt."

Thereafter, the trial court properly charged the jury as to the burden of proof as to the defense of alibi. The specific sentence complained of by appellant was simply *lapsus linquae* and not prejudicial. *State v. Sanders,* 280 N.C. 81, 185 S.E. 2d 158 (1971). The court charged in several places that appellant contended he was someplace else, and that the State had the burden of proving his presence. This is a correct instruction on alibi. *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104 (1972).

[3] Defendant assigns as error the denial of his motion to poll the jury.

> "In order to determine whether the verdict of the jury is unanimous, it is the right of every defendant to have the jury polled. *S. v. Young,* 77 N.C. 498; *S. v. Boger,* 202 N.C. 702, 163 S.E. 877. However, this right must be exercised at the time the jury returns its verdict or before the jury is discharged, otherwise the right is deemed to have been waived. *S. v. Toole,* 106 N.C. 736, 11 S.E. 168." *State v. Cephus,* 241 N.C. 562, 564, 86 S.E. 2d 70, 71 (1955).

This assignment of error is not sustained since the record clearly shows the defendant's motion to poll the jury was first made after the jury had been discharged and some of the jurors had been selected for the trial of a "first degree case" and others had left the courtroom.

Defendant has other 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 BALEY concur.

STATE OF NORTH CAROLINA v. SARAH MARIE BULLARD, ALIAS ZELMA BULLARD

No. 7312SC532

(Filed 25 July 1973)

1. **Criminal Law § 89— witness's statement to sheriff — admission for corroboration**

In this homicide prosecution, testimony by a sheriff as to the contents of a written statement given to him by a witness some five hours after the homicide occurred was properly admitted for the purpose of corroborating the witness's testimony.

2. **Homicide § 28— instructions on self-defense**

The trial court in a homicide prosecution properly declared and explained the law arising on the evidence relating to self-defense.

APPEAL by defendant from *Brewer, Judge,* 26 February 1973 Session of Superior Court held in HOKE County.

Defendant, Sarah Marie Bullard, alias Zelma Bullard, was charged in a bill of indictment proper in form with the first degree murder of Robert Bullard. The material evidence offered by the State tends to show the following:

In the late afternoon of 24 June 1972, the defendant asked Willie Campbell and Peggy Locklear to take her to see a doctor for treatment of injuries she had received from having been beaten by her husband, Robert Bullard. Campbell accompanied the defendant but she was not treated at Red Springs or Lumberton. They returned to the Bullard home at about 6:30 p.m. Campbell left the defendant in the house and returned to the service station-grocery store operated by defendant and her husband where he worked with Robert Bullard until about 12:00 o'clock midnight. Campbell lived in a small house (the barn) approximately 100 yards from the Bullard residence. At

about 5:30 a.m., 25 June (Sunday morning), defendant went to the barn, woke Campbell, and asked how to "get the safety off" of a shotgun she was carrying. Defendant left the barn and returned in 10 to 12 minutes and told Campbell, "Willie, I shot Robert. If I ain't killed him get him a doctor and ambulance and help him."

Campbell went to the house, saw Robert Bullard lying on the bed with a wound in the side of his face, and went with the defendant to the service station-grocery store to telephone the police.

At about 6:05 a.m., 25 June 1972, Sheriff Barrington received a telephone call from the defendant who stated, "I have just killed Robert, come down here."

The defendant testified, describing how her husband had abused her for many years and particularly how he had beaten her on 24 June 1972. She stated that her husband came in at about 5:30 a.m., 25 June 1972, and

> "When I asked him where he had been, he grabbed me in the top of my head and snatched out a handful of my hair and knocked me down in the kitchen. This was about five-thirty in the morning. He hit me with his fist.
>
> He kicked me up against the wall and told me that he was going to get the gun and finish killing me. * * *
>
> [H]e went to his bedroom * * *
>
> * * * When I came out of the bathroom, Robert was standing at the dresser with a handful of shotgun shells. * * * I turned around and got the other gun. I got this gun from a gun rack in the den because I was scared he was going to kill me. * * * I went back to the bedroom and Robert was laying on one side and he wheeled over and stuck his hand under the pillow, and when he did I throwed up the gun. * * * He stuck one of his hands under the pillow where he kept a pistol. * * *
>
> When he stuck his hand under the pillow, I fired the gun."

Defendant went to the barn and told Campbell that she had shot her husband. She telephoned the Sheriff and told him that she had shot Robert.

The defendant was found guilty of voluntary manslaughter and from a judgment imposing a prison sentence of seven to ten years, she appealed.

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

Barrington, Smith & Jones, P.A., by Carl A. Barrington, Jr., and Henry W. Witcover for defendant appellant.

HEDRICK, Judge.

[1] Defendant contends the court erred in allowing Sheriff Barrington to testify as to the contents of a written statement given to him by the witness Campbell at 10:35 a.m. on 25 June 1972.

Statements made by a witness shortly after a crime, substantially in accord with his testimony at the trial, are competent for the purpose of corroboration and slight variations in the statements go to their weight and not their competency. *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965). The trial judge instructed the jury that the testimony of Sheriff Barrington was offered and received for the purpose of corroborating the testimony of William Campbell, if the jury found that it did corroborate him, and not as substantive evidence. The written statement given by the witness to Sheriff Barrington varied only slightly from the testimony of the witness at trial. This assignment of error has no merit.

[2] Defendant contends the court erred in its instructions to the jury on self-defense. We have carefully reviewed the charge to the jury in the light of this contention and find that the able judge thoroughly and fairly declared and explained the law arising on the evidence relating to self-defense.

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

Defendant's trial in the superior court was free from prejudicial error.

No error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. BOBBY ALLEN BAUGESS, DEWEY LEE DUNCAN, AND CARLTON HARLOW OWENS

No. 7317SC470

(Filed 25 July 1973)

Burglary and Unlawful Breakings § 5; Larceny § 7— break-in of dress shop — larceny of merchandise — sufficiency of evidence

In a breaking and entering and larceny case evidence was sufficient to submit the case to the jury where it tended to show that a dress shop had been broken into and merchandise taken therefrom, defendant and two others were apprehended on the night of the break-in with the stolen merchandise in their possession, and a search of defendant's pockets at the time of his arrest yielded the keys to the "drink box" of the dress shop and the knife of one of the shop's co-owners.

ON *certiorari* to review the trial of defendants before *Godwin, Judge,* 25 September 1972 Session of Superior Court held in STOKES County.

Defendants, Bobby Allen Baugess, Dewey Lee Duncan and Carlton Harlow Owens, were charged in separate bills of indictment, proper in form, with breaking or entering and larceny of ladies' clothing from Inez's Dress Shop in Walnut Cove. Defendants pleaded not guilty but were found guilty as charged. From judgments imposing an 8 to 10 year prison sentence as to each defendant, they appealed.

Attorney General Robert Morgan and Assistant Attorney General Howard P. Satisky for the State.

Clarence W. Carter for defendant appellants.

HEDRICK, Judge.

Only defendants' assignment of error relating to the denial of their motions for judgment as of nonsuit requires discussion.

When the evidence is considered in the light most favorable to the State, it tends to show the following:

At about 3:00 a.m., 5 May 1972, Officers Fred Harless and C. S. Gentry of the Winston-Salem Police, saw a 1962 Ford with no taillights approaching the city from the north. The officers stopped the Ford, which was driven by defendant Baugess, to inform him of the condition of the taillights. Defendants Duncan and Owens were seated on the front seat with defendant

Baugess and the back seat of the automobile "was stacked full of clothes." Officer Harless testified: "When I observed the clothing, I issued to Mr. Baugess a citation for driving with no taillights and advised Mr. Baugess of his constitutional rights." Baugess told the officers that the clothing belonged to his wife. Officer Gentry testified: "I noticed that the clothes had different sizes marked on them and asked Mr. Baugess just what size dress his wife wore. To this he answered a size ten. The sizes of the dresses in the car range [sic] from a size six to a size sixteen. All of the clothing had tags on it to mean that the clothing was new." Defendants were driven to police headquarters where the search of the automobile was continued with the permission of defendant Baugess. Additional ladies' clothing was found in the trunk of the automobile. A list of the items of clothing found in the Baugess automobile included one hundred eight pairs of ladies' slacks, one hundred thirty-four ladies' blouses, fifty-four ladies' dresses, three ladies' handbags, twenty-seven slips, five ladies' nightgowns and sixty-nine ladies' hot pants. Keys, a knife, postage stamps and several pennies were found in Baugess' pockets. Defendant Duncan was observed to have a "fresh cut" on his arm.

Inez Brown, co-owner of Inez's Dress Shop in Walnut Cove, was awakened by the Walnut Cove police at about 6:00 a.m., 5 May 1972, and informed that her store had been broken into. The break-in occurred between 7:30 and 8:00 p.m., 4 May 1972, when Mrs. Brown closed the shop, and 6:00 a.m., 5 May 1972, when she was notified by the police. She testified:

> "When I arrived at the store, I noticed that the padlock was busted off the door and the glass was broken."
>
> "The glass was not fully broken out for there were fragments left. There were pointed edges of the glass still there. When I entered the store, I observed that much of the merchandise was gone and some of it was on the floor."

L. G. Brown, husband of Inez Brown and co-owner of the store, noticed blood on the jagged glass remaining in the door.

In addition to the clothing, keys to the "drink box," pennies, postage stamps and L. G. Brown's knife were also taken from the store.

The Walnut Cove police were advised by a police dispatcher that the Winston-Salem police had apprehended three men, and

Mr. and Mrs. Brown accompanied Police Chief Jenkins of Walnut Cove to Winston-Salem where they identified the clothing found in the automobile occupied by defendants as that which had been taken from their store.

Defendants Duncan and Owens offered no evidence. Defendant Baugess testified that he purchased the clothing sometime before midnight from a man named "Joe" at Scotty's Tavern in Stanleyville.

> "If and when it is established that a store has been broken into and entered and that merchandise has been stolen therefrom, the recent possession of such stolen merchandise raises presumptions of fact that the possessor is guilty of the larceny and of the breaking and entering." (Citations omitted.) *State v. Allison,* 265 N.C. 512, 516, 144 S.E. 2d 578, 580 (1965).

We hold that the evidence recited above is sufficient to require the submission of this case to the jury as to all the defendants.

Defendants' additional assignments of error have been carefully considered and found to be without merit.

The defendants had a fair trial free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

VIRGINIA HADDOCK AND CATHERINE LEE v. HERMAN L. WATERS AND WIFE, EVELYN WATERS

No. 733SC429

(Filed 25 July 1973)

Judgments § 8— judgment based on tender by defendant — valid as consent judgment

Where defendant's counsel tendered judgment on behalf of male defendant in open court with all parties to the action present, the court and the attorneys of both parties discussed the feasibility of the tender, the court stated that its judgment would be based on the tender and directed that such judgment be prepared, and the judgment was prepared and entered, the judgment based on the tender was valid as a consent judgment absent a showing that defendant's attorney of record at the trial was without authority to make the tender.

Haddock v. Waters

APPEAL by defendants from *Tillery, Judge,* 29 January 1973 Session of CRAVEN Superior Court.

Plaintiffs brought this suit to have a deed adjudged invalid and to recover damages for the alleged wrongful appropriation of proceeds from timber cut and removed from the land in question.

In a complaint filed 15 March 1972, plaintiffs alleged in pertinent part: For many years prior to October 1949, one Hollie S. Waters (Miss Waters) owned the 75-acre tract of land in question. On 17 October 1947 defendants, knowing that Miss Waters was mentally and physically ill and incapable of signing her name to an instrument, forged or caused her signature to be affixed to a paper writing purporting to be a deed to defendants for the land in question. Miss Waters died intestate in October 1949 and defendants recorded their purported deed on 17 December 1970. Plaintiffs and others as heirs-at-law of Miss Waters own the land as tenants in common. Defendants have gone on the land, wrongfully cut timber, and appropriated the proceeds to their own use.

Defendants filed answer denying all material allegations of the complaint; they also pleaded a counterclaim alleging that plaintiffs had wrongfully interfered with defendants' right to sell the property in question and asked for actual and punitive damages.

During the course of the trial, heard before the judge without a jury, defendants' attorney announced that defendant Herman Waters "would tender to the plaintiffs a judgment directing the signing, sealing and delivery of a deed to the two named plaintiffs—a quit-claim deed to the two named plaintiffs, for a 1/24th undivided interest each, or a 1/12th undivided interest together, in the land described in the complaint."

Thereafter, in open court, following discussion between the judge and attorneys with respect to the heirs-at-law of Miss Waters, the judge announced that judgment based upon the tender would be entered and directed that judgment embracing the tender be prepared. The following judgment was prepared and entered:

> "This cause coming on to be heard before the Honorable Bradford Tillery, Judge Presiding at the January 29, 1973 Term of Superior Court of Craven County, and all

parties being present in Court and being represented by counsel, and the Court finding as a fact that the plaintiff and the defendant are properly before the Court and that the Court has jurisdiction and after hearing the matters and things presented by the plaintiff and defendant it is the judgment of the Court that the defendant, Herman Waters, prepare, execute and deliver to the plaintiffs, and each of them, a quitclaim deed conveying the property which is the subject of this action to the extent of a one-twenty-fourth (1/24) undivided interest to each of them and that the unpaid costs be taxed to the defendant."

Following the entry of the judgment, defendants employed other counsel and appealed.

David S. Henderson and Benjamin H. Baxter, Jr., for plaintiff appellees.

LeRoy Scott and Sam O. Worthington for defendant apellants.

BRITT, Judge.

In their sole assignment of error, defendants contend the judgment appealed from is invalid for the reason that the court did not make findings of fact as required by G.S. 1A-1, Rule 52. Plaintiffs contend that the judgment was based upon the consent of the parties, therefore, Rule 52 is not applicable.

The record discloses that defense counsel's tender of judgment on behalf of the male defendant was made in open court with all parties to the action present. After discussing the feasibility of the tender with the attorneys representing plaintiffs and defendants, the court stated that its judgment would be based on the tender.

While better practice dictates that parties and their attorneys sign a consent judgment, signatures of parties or their attorneys are not necessary if consent is made to appear. *Stanley v. Cox*, 253 N.C. 620, 117 S.E. 2d 826 (1961). In *Gardiner v. May*, 172 N.C. 192, 196, 89 S.E. 955 (1916), the court said: "A judgment entered of record, whether *in invitum* or by consent, is presumed to be regular, and an attorney who consented to it is presumed to have acted in good faith and to have had the necessary authority from his client and not to have betrayed his confidence or to have sacrificed his right." The authority of

a party's attorney is presumed when he professes to represent the party and the fact that the attorney of record fails to sign the judgment does not affect its validity. *In re Johnson,* 9 N.C. App. 102, 176 S.E. 2d 31 (1970), aff'd, 277 N.C. 688, 178 S.E. 2d 470 (1971). 5 Strong's N. C. Index 2d, Judgments, § 8, p. 20. Nevertheless, a party may rebut the presumption by showing want of authority. *In re Johnson, supra.*

Absent a showing that defendants' attorney of record at the trial was without authority to make the tender of judgment, we hold that the judgment based on the tender is valid as a consent judgment. However, we point out that the tender was made solely on behalf of the male defendant and the judgment applies only to him. The judgment in no way binds the feme defendant.

For the reasons stated, the judgment is

Affirmed.

Judges MORRIS and PARKER concur.

N. C. REAL ESTATE LICENSING BOARD v. EARL F. COE

No. 7324SC335

(Filed 25 July 1973)

Brokers and Factors § 8— plea of nolo contendere to filing fraudulent income tax return — suspension of real estate license

A real estate broker's plea of *nolo contendere* to a charge of wilfully filing a fraudulent joint income tax return did not constitute a plea of *nolo contendere* to "any similar offense or offenses involving moral turpitude" within the meaning of G.S. 93A-6, and the N. C. Real Estate Licensing Board erred in suspending the broker's real estate license on the basis of such plea.

APPEAL by defendant from *Ervin, Judge,* 18 December 1972 Session of Superior Court held in WATAUGA County.

On 26 May 1972 the North Carolina Real Estate Licensing Board (Board), through its secretary-treasurer, entered an order summarized in pertinent part as follows:

On 21 April 1972, in the Watauga County Courthouse, the Board conducted a hearing regarding Earl F. Coe (defendant).

The Board found as a fact that defendant holds real estate broker's license No. 334 and that on or about 22 October 1971, in the U. S. District Court for the Western Division (sic) of North Carolina, defendant pled nolo contendere "to the charge of willfully filing fraudulent federal income tax returns." The Board concluded that defendant "is guilty of violating G.S. 93A-6(a) in that he has pled nolo contendere to the violation of a criminal offense involving moral turpitude." Pursuant to said findings and conclusion, the Board ordered that defendant's real estate broker's license No. 334 be suspended for a period of one year, effective 1 June 1972, said suspension to be suspended on condition that defendant violate no provision of Chapter 93A of the General Statutes of North Carolina and that he pay to the Board the cost of the transcript of the proceeding.

Defendant excepted to the order and appealed to superior court. Following a review of the record, including a transcript of the hearing conducted by the Board, the court entered judgment affirming the Board's order. Defendant appealed to the Court of Appeals.

Attorney General Robert Morgan by Millard R. Rich, Jr., Assistant Attorney General, Attorneys for N. C. Real Estate Licensing Board.

W. G. Mitchell for defendant appellant.

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

BRITT, Judge.

G.S. 93A-6 empowers the Board, following specified procedures, to revoke or suspend the license of a real estate broker found guilty of either of the unlawful offenses or unethical acts set forth in the statute. Among other things, the statute authorizes the revocation or suspension of the license of a broker who "has been convicted or has entered a plea of nolo contendere upon which a finding of guilty and final judgment has been entered in a court of competent jurisdiction in this State or in any other state of the criminal offense of embezzlement, obtaining money under false pretenses, forgery, conspiracy to defraud or any similar offense or offenses involving moral turpitude . . . . "

The Board based its suspension of defendant's license on the conclusion that he pled nolo contendere to the violation of

a criminal offense involving moral turpitude. We disagree with the Board's action and hold that the superior court erred in affirming the order suspending defendant's license.

It is well settled that statutes in derogation of the common law must be strictly construed. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925 (1955); *McKinney v. Deneen,* 231 N.C. 540, 58 S.E. 2d 107 (1950). Suffice to say, governmental regulation of real estate brokers was unknown to the common law.

Admittedly, defendant was not convicted of, nor did he plead nolo contendere to, the criminal offense of embezzlement, obtaining money under false pretenses, forgery, or conspiracy to defraud. The question then arises, did he plead nolo contendere to "any similar offense or offenses involving moral turpitude?" The record sets forth a copy of the judgment and commitment of the U. S. District Court which contains the following: "[D]efendant upon his plea of nolo contendere has been convicted of the offense of wilfully and knowingly filing a false and fraudulent joint income tax return as charged in Count 3 of the indictment . . . . " Clearly the offense that defendant pled nolo contendere to and was convicted of was not similar to embezzlement, obtaining money under false pretenses, or forgery, but the Board insists that the offense is similar to conspiracy to defraud. We disagree.

In 2 Strong, N. C. Index 2d, Conspiracy, § 3, pp. 170-171, we find: "A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means. The unlawful agreement and not the execution of the agreement is the offense."

Applying the strict construction rule as we are required to do, we do not think filing a false and fraudulent income tax return, either individually or jointly, is an offense similar to conspiracy to defraud in which latter offense the *unlawful agreement* is the gist of the offense.

The judgment appealed from is

Reversed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES WILLIAM HINES

No. 7329SC548

(Filed 25 July 1973)

1. **Criminal Law § 164— sufficiency of evidence reviewed on appeal**

The sufficiency of the evidence to support a conviction is reviewable on appeal under G.S. 15-173.1 without exception.

2. **Robbery § 4— armed robbery of grill — sufficiency of evidence**

Where State's evidence tended to show that defendant, with a gun in his hand, demanded and received money from the operator of a grill, such evidence was sufficient to support his conviction for armed robbery.

3. **Criminal Law § 66— identification of defendant — personal knowledge as basis**

Where a witness testified that she had known defendant for about 4 years by sight and name, that he lived close to her grill, that he had come by frequently to make purchases, and that she recognized him during the perpetration of the robbery, her identification was based on personal knowledge and could not relate to any impermissible suggestion from lineup procedures.

ON *certiorari* to review defendant's trial before *Beal, Judge,* at the March 1971 Session of Superior Court held in RUTHERFORD County.

Defendant Hines and one Jerry Logan were charged in a proper bill of indictment with the armed robbery of Mary Jones at Mary's Grill near Rutherfordton on 15 December 1970. Both defendants entered "not guilty" pleas and were convicted by a jury.

The evidence for the State tended to show that the defendants armed with pistols entered Mary's Grill about 2:00 to 3:00 p.m. on 15 December 1970 and robbed the owner, Mary Jones, and two other persons who were present in the grill. Mary Jones testified that "[a]bout 2 to 3 p.m. on the afternoon of the 15th of December, 1970, Charles Hines and Jerry Logan came to the door of the grill and pushed the door open and came in and so Jerry came in and said, 'throw up your hands, we're going to rob you. . . . '" She stated that Logan was threatening her and the two other people in the grill at this time and that he took some paper money from the cash box and from the two other people. She further testified that Logan said "'get the silver out [of the cash box] and give it to the boy at the door.'"

"It was Charles Hines and he [Logan] said, 'don't give it to me, give it to him.' Charles Hines was standing at the door with the gun and he was holding the gun on me. The door was around eight feet from where I was standing and he said, 'give it to me.' So I gave it to him. . . . I started back in the kitchen and Charles said, 'don't you go back in there.' He said 'come back and stand right here. If you don't you wish you had of.'" Mrs. Jones' account of the robbery was corroborated by one of the other people who was in the grill at the time of the robbery.

Mrs. Jones stated that she knew both defendants. "I had known Charles Hines around four years. Charles used to come by my cafe a lot and get cookies and stuff like that." She said that she did not know exactly where Hines lived but it was close to her grill. On cross-examination Mrs. Jones said she knew Charles Hines by sight and name and Logan by sight.

Logan and Hines both denied having robbed Mary's Grill on 15 December 1970 and presented evidence in the effort to establish an alibi.

From judgment of imprisonment for 12 to 14 years, defendant Hines entered notice of appeal. The appeal was not perfected, and upon post-conviction hearing, counsel was appointed by the court to represent the defendant and present his case for appellate review.

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

Hamrick & Bowen, by James M. Bowen, for defendant appellant.

BALEY, Judge.

The record discloses that no objections were made or exceptions entered at the trial by the attorneys privately employed by the defendant who are not now his court-appointed counsel for this appeal. Ordinarily assignments of error not based on exceptions are deemed to be abandoned, Rule 19(c), however, under the unusual circumstances here involved we have considered all of the contentions of the defendant upon their merit.

[1, 2] The sufficiency of the evidence to support a conviction is reviewable on appeal under G.S. 15-173.1 without exception. In this case the State's evidence shows the defendant with a gun

in his hand demanding and receiving money from his victim. Clearly such evidence supports his conviction.

[3] Defendant also challenges the evidence of his identification. The witness, Mary Jones, testified that she had known defendant for about 4 years by sight and name, that he lived close to her grill, that he had come by frequently to make purchases, and that she recognized him during the perpetration of the robbery. Her identification was based on personal knowledge and could not relate to any impermissible suggestion from lineup procedures.

We have carefully reviewed the charge of the court which places upon the State the burden of proving beyond a reasonable doubt every essential element of the offense charged. The broadside assignment of error to the charge is without merit.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. LARRY HAIRE

No. 7313SC526

(Filed 25 July 1973)

Constitutional Law § 32— insufficient evidence of non-indigency — denial of counsel erroneous

Finding by the trial court that defendant was a painter capable of earning $60 per week when he was able to obtain work and that he had made little, if any, effort to secure counsel either privately or by court appointment was insufficient to sustain a finding that defendant was not indigent at the time of trial; therefore, the trial court erred in denying defendant's specific request for a lawyer prior to the selection of the jury at his trial in superior court.

APPEAL by defendant from *Clark, Judge,* February 1973 Session of Superior Court held in BLADEN County.

Defendant was convicted by a jury of committing a crime against nature and sentenced to not less than eight nor more than ten years in prison.

The State's evidence showed the commission of the unnatural sex act to have occurred on 24 May 1972. The prelimi-

nary hearing was held on 12 June 1972 at which time the defendant signed a waiver of right to have assigned counsel. Indictment was returned at the 14 August 1972 Session of Superior Court, and the case was tried on 12 February 1973. When the case was called for trial the defendant entered a plea of "not guilty." When the selection of the jury began, defendant requested the appointment of a lawyer to represent him. The court denied his request at that time and later made inquiry after the jury was selected. Upon such inquiry it appeared that defendant had previously employed one lawyer to have the case continued at a prior term, that he was a painter making $60.00 per week when able to obtain work, and that he had neither employed an attorney nor advised the court of his lack of funds with which to employ an attorney during the pendency of his case until it was called for trial.

The court made the following order:

> "Let the record show that the Court finds as a fact that the defendant is not indigent; that he has made no effort to take care of his court business; that he has appeared in the Superior Court of Bladen County on two prior sessions and at no time requested the court to appoint counsel for him. The court finds as a fact he has made no right to have counsel present to represent him in the trial of this case, and the court orders that the case proceed to trial."

The defendant was not represented by counsel at the trial.

After verdict of the jury and judgment of the court, defendant entered notice of appeal. The court by order dated 16 February 1973 appointed counsel to represent defendant in his appeal and ordered that a transcript of the trial be prepared for defense counsel and the costs of appellate review be paid by the State.

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

Moore & Melvin, by Reuben L. Moore, Jr., for defendant appellant.

BALEY, Judge.

Defendant assigns as error the failure of the court to appoint an attorney to represent him in his trial upon a felony

charge of committing a crime against nature. The assignment is well taken, and there must be a new trial.

G.S. 15-4 provides:

> "Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense."

While defendant had waived his right to have assigned counsel at the preliminary hearing, he made a specific request for a lawyer prior to the selection of the jury at his trial in the superior court. The finding of the court below that the defendant was not indigent was not supported by the evidence. The fact that the defendant was a painter capable of earning $60.00 per week when he was able to obtain work and that he had made little, if any, effort to secure counsel, either privately or by court appointment, is not sufficient to sustain a finding that he was not indigent at the time of trial, and, therefore, not entitled to a court-appointed attorney when it was requested at the trial.

G.S. 7A-450(c) provides:

> "The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation."

Proof of defendant's guilt in this case was dependent in large measure upon the credibility of the prosecuting witness, and it was crucial that he have the assistance of an attorney for cross-examination and possible impeachment. U. S. Const., amend. VI; N. C. Const., art. 1, § 23; *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792, 93 A.L.R. 2d 733; *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245.

Denial of counsel without evidence to support a finding of non-indigency entitles defendant to a new trial. It is so ordered.

New trial.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. CURTIS MOSES INGRAM

No. 7321SC452

(Filed 25 July 1973)

1. **Criminal Law § 155.5— failure to docket on time**

Appeal is subject to dismissal for failure to docket the record on appeal within apt time.

2. **Criminal Law § 84; Searches and Seizures § 1— heroin discarded by defendant — seizure of package in plain view**

Where officers went to defendant's home for the purpose of arresting a third person reportedly staying there, and defendant ran as the officers approached, discarding a package of heroin in his flight, the officers were justified in placing defendant under arrest for possession of heroin and in seizing the package found in plain view.

APPEAL by defendant from *Wood, Judge,* 3 January 1973 Criminal Session of FORSYTH County Superior Court.

Defendant Ingram was charged in an indictment proper in form with the possession of heroin to which charge he pled not guilty. At trial the State presented evidence which in brief summary tended to show the following:

Officers of the Winston-Salem Police Department went to the residence of defendant Ingram at approximately 1:00 a.m. on 5 August 1973 for the purpose of arresting Dianne Jones on the charge of felonious larceny. Officer R. D. Lambert was the first to arrive, and as he got out of his vehicle and started walking to the house, he heard someone inside start hollering, "Get up, get up, run, police are here." Officer Lambert ran toward the backyard and observed defendant Ingram run out the back door. After being ordered to stop, the defendant kept running and Officer Lambert fired a shot from his revolver into the ground. At that time the defendant dropped a bag he was holding and threw a package held in his right hand into the backyard. It landed in the grass where it could be seen by Officer Lambert. Lambert picked up the package and found 10 aluminum packets inside containing a white powder. Defendant Ingram was then placed under arrest for possession of heroin and advised of his constitutional rights. A lab test revealed that the packets did indeed contain heroin. Dianne Jones was also found on the premises and placed under arrest.

Defendant did not offer any evidence and the case was submitted to the jury which returned a verdict of guilty. From

judgment entered thereon imposing an active sentence of five years, defendant appealed.

Attorney General Morgan, by Assistant Attorneys General Ricks and Hensey, for the State.

G. Ray Motsinger for defendant appellant.

MORRIS, Judge.

[1] The judgment appealed from was dated 12 January 1973. The record on appeal was not docketed until 20 April 1973, which is more than 90 days after the date of the judgment appealed from. No order extending the time for docketing the record on appeal appears in the record. For failure of appellant to docket the record on appeal within the time permitted by the rules of this Court, this appeal is subject to dismissal. Rule 5, Rules of Practice in the Court of Appeals. *State v. Isley*, 8 N.C App. 599, 174 S.E. 2d 623 (1970), cert. denied, 277 N.C. 115 (1970).

[2] Nevertheless, we have examined and rejected defendant's contention that the trial court erred in denying his motion to suppress the heroin from evidence on grounds that it was obtained as a result of an illegal search and seizure in that the officers had no lawful basis for coming to defendant's house initially.

Prior to the presentation of any evidence at trial a voir dire was held and the State presented evidence which tended to show that earlier on the night in question, Leroy Carlton informed the officers that a woman fitting the description of Dianne Jones had taken over $800 from his pocket while he was at a house on the north side of Winston-Salem. Carlton told the officers that the woman had told him that she was from Greensboro. The officers contacted a reliable informant who reported that a woman fitting Dianne Jones' description was staying with defendant Ingram at his home on the 1100 block of Rich Avenue and that the officers had better hurry because she was getting ready to leave for Greensboro. Clearly the officers had a reasonable ground to believe that Dianne Jones had committed a felony and would evade arrest if not immediately taken into custody. G.S. 15-41(2). Similarly, the officers were justified in placing defendant Ingram under arrest for the commission of a felony in their presence, G.S. 15-41(1), (pos-

session of heroin), and in seizing the package found in "plain view." *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968).

Defendant's other assignments of error have been carefully examined and are equally without merit.

No error.

Judges BROCK and VAUGHN concur.

PEARL D. CAMPBELL v. DEBORAH KAY DOBY, CLAUDE WILLIAM DOBY, AND GARLAND WAGONER, INDIVIDUALLY AND JOINTLY

No. 7315SC508

(Filed 25 July 1973)

Automobiles §§ 62, 83— striking of pedestrian — failure of pedestrian to keep lookout

In an action to recover for personal injuries received by plaintiff when she was struck by a truck driven by defendant, the trial court properly directed verdict for defendant where the evidence disclosed no negligence on the part of defendant, but did disclose a failure on the part of plaintiff to keep a proper lookout for her own safety while crossing a street at a place other than a marked or unmarked crosswalk.

APPEAL by plaintiff from *Bailey, Judge,* 29 January 1973 Civil Session Superior Court, ALAMANCE County.

Plaintiff seeks to recover damages for personal injuries received when she was struck by a truck driven by defendant Deborah Kay Doby. The 1960 Ford truck was owned by defendant Garland Wagoner. The following facts were the subject of a stipulation and were given to the jury as agreed facts:

> "[O]n Saturday, May 15, 1971, at about 2:10 p.m., the plaintiff Pearl D. Campbell, a pedestrian, was traveling south across South Church Street in the City of Burlington. She was walking south across the street. At that time the defendant Deborah Kay Doby was operating a 1960 Ford truck which was owned by Garland Wagoner, and she was traveling west on South Church Street. The Ford truck, operated by Deborah Kay Doby, collided with the plaintiff, Mrs. Campbell as she was crossing South Church Street.

Deborah Kay Doby is the daughter of Claude William Doby and at the time of this accident Claude William Doby was employed by the defendant Garland Wagoner. At the time of the accident in question, the posted speed limit at this place was thirty-five miles per hour. It was in a business district, the pavement was dry, the accident occurred in the daylight hours, and it was cloudy at the time of the accident. There is no traffic control at the scene of the accident, that is to say, no stop sign, or stoplight. The texture of the road at the scene of the accident was asphalt. There were no defects in the road at the accident location. It is further stipulated by the parties that this collision occurred at a time when the plaintiff was crossing Church Street at a point other than a marked or unmarked crosswalk."

At the end of the plaintiff's evidence, the court granted motion of defendants for a directed verdict and entered judgment dismissing the action. In apt time, plaintiff filed written motion for a new trial, and the court entered its order denying the motion. Plaintiff appealed from the entry of the judgment and the order.

Vernon and Vernon, P.A., by Wiley P. Wooten, for plaintiff appellant.

Henson, Donahue and Elrod, by Daniel W. Donahue, for defendant appellees.

MORRIS, Judge.

The court noted in its judgment that the motion for directed verdict was allowed because plaintiff's evidence taken in the light most favorable to her failed to disclose any actionable negligence on the part of defendants and did disclose that plaintiff was guilty of contributory negligence as a matter of law. We agree.

Plaintiff testified that she had ridden a bus from her home to the Grove Park Church and from there had gone to Alamance Road which she crossed. She stopped on the curb of Church Street, waited for the cars that "were coming down Church Street toward town to come to a stop" and proceeded across to the median. She had raised her left foot to step up on the median when she was hit. She crossed at an angle. She testified that when she stopped at a phone booth prior to cross-

ing the street, she looked both ways and waited until the cars came to a stop at the stoplight down the street and then started across the street away from the direction in which defendant Doby was traveling. She didn't remember whether she looked to her left again after stepping into the street and before she was hit. She didn't see the truck at all until just before it struck her. When she was crossing the street her attention was first directed to the Doby truck when she saw the left front fender. She never heard a horn blow. Plaintiff had a view in the direction from which the Doby truck was coming for a quarter of a mile.

The investigating officer testified that the maximum posted speed limit was 35 miles per hour; that he found the plaintiff lying about 15 feet from the front of the truck; that the truck stopped approximately at the point of impact; that the truck left 53 feet of skid marks; that defendant Doby told him she didn't see plaintiff until just before the accident. Plaintiff was hit about 6 feet north of the median. This physical evidence is in conflict with and belies plaintiff's evidence that she was stepping up on the median.

There is no evidence of agency as to Claude William Doby and motion as to him was properly allowed.

Plaintiff's evidence discloses no negligence on the part of defendants but it clearly discloses a failure on her part to keep a lookout for her own safety in crossing the street. The motion for directed verdict was properly allowed and the motion for new trial properly denied.

Affirmed.

Judges BRITT and PARKER concur.

JOHN R. JORDAN, JR., SUCCESSOR TRUSTEE OF THE ESTATE OF MOSES W. WOODARD, DECEASED v. BESS WOODARD CAMPBELL, MOSES W. WOODARD III, NANCY ELIZABETH WOODARD AND MARY WHITE WOODARD McDONALD

No. 7310SC489

(Filed 25 July 1973)

Trusts § 6— invasion of corpus — conveyance of corpus to beneficiary — sale of real estate — use of proceeds

Where the income of a trust was insufficient to meet the reasonable needs of the beneficiary and the trustee intended to exercise his discretion to invade the corpus of the trust to meet such needs, the trustee could not terminate the trust by delivering to the beneficiary deeds to the real estate constituting the corpus, as requested by the beneficiary, or by delivering all of the proceeds of sale of the real estate to the beneficiary, but the trustee could sell real estate of the corpus and advance to the beneficiary such sums from the proceeds as the trustee, from time to time, should determine necessary to meet the reasonable requirements of the beneficiary, or the trustee, under rare circumstances, could make a direct conveyance of a portion of the realty to the beneficiary if he determined that the beneficiary's needs would best be served by real estate rather than cash.

APPEAL from *Hobgood, Judge,* 12 March 1973 Civil Session of Superior Court held in WAKE County.

This is an action for a declaratory judgment brought by the trustee under the will of Moses W. Woodard. Bess Woodard Campbell (defendant), one of the beneficiaries under the trust, appealed from the judgment entered.

Jordan, Morris and Hoke by William R. Hoke for plaintiff appellee.

Haywood, Denny & Miller by Egbert L. Haywood and George W. Miller, Jr., for defendant appellant, Bess Woodard Campbell.

Joslin, Culbertson & Sedberry by Charles H. Sedberry for defendant appellee Moses W. Woodard III, Nancy Elizabeth Woodard and Mary White Woodard McDonald.

VAUGHN, Judge.

The will in question has been the subject of two opinions by the Supreme Court: *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639, and *Campbell v. Jordan,* 274 N.C. 233, 162 S.E. 2d 545. The essential facts and pertinent provisions of the will

are set out in those opinions and will not be repeated here. In each of the earlier actions defendant has unsuccessfully sought to have what she contended to be her share of the trust property conveyed to her, free of the trust. In this action the plaintiff trustee alleged that the income from the trust was insufficient to meet the needs of defendant and that he intends to exercise his discretion to invade the corpus of the trust to meet the needs. The trustee asked the court for instructions as to whether he could terminate the trust and deliver defendant a deed conveying to her a one-half undivided interest in the trust corpus, as requested by defendant, as opposed to liquidating the realty in the corpus, or a portion thereof, so as to provide defendant with the necessary funds to meet her needs. The court entered judgment instructing the trustee that: he could not terminate the trust by delivering deeds to defendant; he could, in his discretion, sell the real estate of the corpus; absent a finding by the trustee that defendant has a genuine necessity therefor, the trustee could not terminate the trust by delivering all of the proceeds of the sale to defendant but that the trustee should hold the proceeds and advance defendant such sums as the trustee, from time to time, determines necessary to meet the reasonable requirements of defendant.

We can understand that the trustee instituted this action because of the continued insistence by defendant that she be allowed to hold the property free of the trust. It is clear, however, that the questions raised were answered by the Supreme Court, speaking through Justice Sharp, in *Campbell v. Jordan, supra:*

> "The beneficiary's necessity or welfare does not include the personal satisfaction she might derive from owning the property in fee and being able to devise it to persons of her choice.
>
> * * *
>
> . . . [I]t is apparent that testator contemplated only advancements and conveyances which were necessary to meet specific and reasonable requirements. The will does not authorize a conveyance for the mere purpose of terminating the trust or making a division of the estate which—53 years after testator's death—the trustee might think more equitable than the one testator had made."

Except as it might be taken to mean that under no circumstances could the trustee make a direct conveyance of a portion

of the realty, as opposed to a transfer of cash, in order to meet defendant's reasonable requirements, the judgment of the superior court is in accord with *Jordan v. Campbell, supra.* We hold that the manner in which the trustee provides for the current reasonable requirements of defendant is within the sound discretion of the trustee. Defendant, however, is now more than 87 years old. The circumstances under which the trustee could determine that defendant's needs would be best served by real estate than by cash would be rare, especially when consideration is given to Justice Sharp's admonition that the beneficiary's welfare does not include the personal satisfaction that might derive from owning the property in fee.

In making his determination as to what sums defendant reasonably requires, the trustee will, of course, take into consideration the status, comforts and manner in which defendant has been accustomed to live, and may, if reasonably necessary for that purpose, exhaust the corpus of the trust. He will not, however, otherwise terminate the trust or make transfers to defendant for the sole purpose of allowing her to accumulate a larger personal estate. Except as modified in this opinion, the judgment from which defendant appealed is affirmed.

Modified and affirmed.

Judges BROCK and BALEY concur.

STATE OF NORTH CAROLINA v. GARY CARSON HENDRIX

No. 7325SC440

(Filed 25 July 1973)

1. **Narcotics § 3— identification of bag of marijuana — sufficiency for admission**

In a prosecution for distribution of marijuana the trial court did not err in admitting into evidence a bag of marijuana allegedly bought from defendant where there was sufficient evidence identifying the marijuana as the very same item sold by defendant.

2. **Criminal Law § 7— defense of entrapment — insufficient evidence**

Where the evidence indicated that an undercover agent for the police went to defendant's residence and asked him if he had any marijuana for sale and defendant produced a bag which he represented to contain marijuana and which bag defendant sold to the agent for

$10, the defense of entrapment could not prevail, since the agent did nothing more than afford defendant an opportunity to commit the offense.

APPEAL by defendant from *Falls, Judge,* 1 January 1973 Session of Superior Court held in CALDWELL County.

Defendant was convicted of distributing a controlled substance, marijuana, in violation of G.S. 90-95(a)(1) and was sentenced to five years imprisonment.

The State's evidence tended to show that on 5 June 1972 defendant sold one ounce of marijuana to an undercover agent of the City of Lenoir Police Department. The purchase was made at defendant's home and the marijuana was obtained by defendant from a gutter on defendant's house. The agent labeled the package of marijuana by noting the contents of the bag, the time, place, and date of the purchase and by placing his initials on a tag which he taped to the bag. The labeled bag was delivered to Police Captain Triplett who added his personal identifying code to the bag, conducted a "field test" of the contents and sent it to the State Bureau of Investigation Laboratory for identification. Upon its arrival at the laboratory, the bag was given a file number and the initials of the examining chemist were added to the package. The contents of the bag were identified as marijuana. The chemist resealed the bag and returned it to Triplett.

Defendant did not offer any evidence.

Attorney General Robert Morgan by Russell G. Sherrill III, Associate Attorney, for the State.

Carpenter & Bost, P.A., by John F. Bost III, for defendant appellant.

VAUGHN, Judge.

[1] The only assignment of error is that State's Exhibit No. 1, the bag of marijuana purchased from defendant by the undercover agent, was admitted into evidence over the general objection of defendant. Defendant now argues that it was inadmissible because there was insufficient evidence identifying the exhibit as the same item sold by defendant. Defendant asserts that the manner of handling the bag by both the undercover agent and Triplett raises the possibility that the exhibit was improperly identified.

The agent testified without objection that he purchased marijuana from defendant and placed it in his pocket. A few minutes later the agent purchased mescaline from another individual at the defendant's residence. The second purchase was placed in a pocket different from the pocket containing the marijuana and, approximately twenty minutes after the two purchases were made, the agent placed identifying tags on each purchase. On cross-examination the agent testified that he did not remember in which pocket the respective purchases had been placed but that they had not been put together into the same pocket. The identification of the packages as containing, on the one hand, marijuana, a green vegetable material, and, on the other, mescaline, a crystalline alkaloid, is sufficient to distinguish the packages and support the agent's identification of the bag sold by defendant. The agent then delivered the package of marijuana to Captain Triplett. Triplett testified that he placed his initials on the back of the white tag which was taped to the bag when he received it. He later placed the bag and this tag inside an outer plastic bag which he sealed with the use of a heat-sealing apparatus. Then the officer testified, "[a]fter having sealed it up, I put a white label with my identifying numbers on it . . ." and he stated the code used. The evidence is sufficient to support admissibility of the exhibit. Discrepancies and contradictions in the evidence are for the jury to resolve.

[2] Defendant also argues that the evidence was illegally obtained by means of entrapment. The record fails to show that the police's agent procured, induced or incited defendant to commit a crime which defendant would otherwise not commit but for the persuasion, encouragement, inducement and importunity of the agent. *State v. Caldwell,* 249 N.C. 56, 105 S.E. 2d 189. Where the evidence indicates that an undercover agent for the police went to defendant's residence and asked him if he had any marijuana for sale and defendant produced a bag which he represented to contain marijuana and which was later analyzed as marijuana and which bag defendant sold to the agent for $10.00, the defense of entrapment will not prevail since the agent did nothing more than afford defendant an opportunity to commit the offense.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES LEE HARRIS (ALIAS RED CAP)

No. 7322SC500

(Filed 25 July 1973)

Larceny § 7— sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of larceny of money belonging to a store proprietor where it tended to show that a State's witness and defendant were looking for the opportunity "to pull a job," that they entered a store and the witness distracted the clerk therein while defendant went behind the counter and got the money bag, that defendant put the money in the witness's coat in their car, and that when officers stopped the car shortly thereafter $800.00 was found in the witness's coat lying on the floorboard of the car.

APPEAL by defendant from *Rousseau, Judge,* 8 January 1973 Session of Superior Court held in IREDELL County.

Defendant was convicted of the larceny of $800.00 belonging to C. B. Owens, doing business as Owens Grocery. Defendant was sentenced to imprisonment for not less than four nor more than seven years, the sentence to commence at the expiration of a sentence then being served.

Attorney General Robert Morgan by George W. Boylan, Associate Attorney, for the State.

Porter, Conner & Winslow by Douglas L. Winslow for defendant appellant.

VAUGHN, Judge.

The sole question presented is the sufficiency of the evidence to withstand defendant's motion for judgment as of nonsuit. In making this evaluation we are to consider the evidence in the light most favorable to the State, which is entitled to the benefit of every reasonable inference to be drawn from the evidence with all contradictions and discrepancies resolved in favor of the State. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755; *State v. Washington,* 17 N.C. App. 569, 195 S.E. 2d 1.

Viewed in light of this standard, the State's evidence tended to show the following. Samuel Lee Wilson testified that on 2 March 1971 he and defendant were awaiting the appropriate time and opportunity to present itself "to pull a job. . . ." They

stopped at Owens Grocery, went inside, purchased some sodas from Mrs. Owens and Wilson was then informed that this was to be a "pouch job." Wilson testified, "I took the lady to the corner and occupied her while Harris went and got the money bag. . . . When he came out from behind the counter, we just naturally turned the lady loose after I had purchased what I had and at this time she didn't seem to be disturbed or anything and we thought everything was cool and we split." Wilson said defendant put the money in Wilson's coat which was lying in the car and they never got a chance to count the money or to split it between them. They proceeded towards Charlotte in defendant's automobile but were stopped by the police about five or six miles "back from the Mecklenburg line." The officers found approximately $800.00 in Wilson's jacket taken out of the back of the floorboard of defendant's automobile. Wilson had pleaded guilty to the larceny which occurred at Mr. Owens' store prior to testifying in this case. Defendant offered no evidence.

Defendant argues that there is no evidence that he actually took the money and that was no evidence of ownership of the money. The evidence gives rise to a reasonable inference that defendant went behind the counter and took the money while his confederate distracted the person whose job it was to serve customers. In addition, a reasonable inference to be drawn from the evidence is that the money taken from behind the counter of C. B. Owens' Grocery was that of C. B. Owens and was in the custody of Mrs. Owens, the lady from whom Wilson made his purchase.

Giving the State the benefit of every reasonable inference to be drawn from the evidence, we hold that the evidence was sufficient to go to the jury on the question of defendant's guilt.

No error.

Judges BRITT and HEDRICK concur.

D. D. COBURN AND WIFE, EULA W. COBURN, LUCIAN J. PEELE, SR., AND WIFE, MILDRED W. PEELE, ROBBIE L. WATERS AND WIFE, HILDA H. WATERS, MARION G. WATERS, AND WIFE, VIVIAN S. WATERS, LULA B. GAYLORD, WIDOW, LEONA S. GAYLORD, WIDOW, S. ROSCOE GAYLORD AND WIFE, ETHEL C. GAYLORD, DALLAS G. WATERS AND WIFE, MARGARET B. WATERS, FENNER T. WATERS AND WIFE, GRACE N. WATERS, SURRY D. WRIGHT AND WIFE, DOROTHY N. WRIGHT, JOSEPH E. DILLION AND WIFE, MERCEDES W. DILLION

— v. —

BILLY G. GAYLORD AND WIFE, SARAH R. GAYLORD, LELA GAYLORD, WIDOW, W. H. (BILL) GAYLORD AND WIFE, BETTY LOU GAYLORD

No. 732SC505

(Filed 25 July 1973)

Wills § 34— life estate in son — remainder to "all of my children"

Where testator devised a life estate in all his property to a named son and the remainder "to all my children," the testator intended that the son who was given the life estate would also share in the remainder with testator's other children.

APPEAL by plaintiffs from *Cowper, Judge,* 5 March 1973 Session of Superior Court held in MARTIN County.

Plaintiffs seek a declaratory judgment interpreting specific portions of the will of W. G. Gaylord who died on 15 June 1920. The parties stipulated that no issue of fact exists and that all parties were properly before the court.

The will of W. G. Gaylord provides, in pertinent part:

> "2nd, I give and bequeath to my son, E. H. Gaylord, all of my property, both real and personal of every kind and description, for and during his natural life, provided he takes care of and maintains my beloved wife, Nannie E. Gaylord, so long as she shall live.
>
> 3d, At the death of my said son, E. H. Gaylord, I give and bequeath all of my property, both real and personal, of every kind and description, to all of my children, to be divided equally in fee simple for every."

The testator was the father of four living children at the time his will was written and at the time of his death. Nannie E. Gaylord, widow of the testator, died on 26 August 1929.

E. H. Gaylord, who died in 1972, survived the other three children of testator. The heirs of the other three children are plaintiffs. Defendants are the heirs at law and assignees of E. H. Gaylord.

Judge Cowper held, ". . . that Items II and III of the will of W. G. Gaylord give unto Eli Herbert Gaylord [E. H. Gaylord] a vested remainder in one-fourth undivided interest in and to all real and personal property of the estate of W. G. Gaylord."

Edgar J. Gurganus for plaintiff appellants.

Bailey & Cockrell by Arthur E. Cockrell; Spruill, Trotter & Lane by Robert K. Smith, attorneys for defendant appellees.

VAUGHN, Judge.

Plaintiffs argue that testator intended to give a life estate to one of his children, E. H. Gaylord, and the remainder to his *other* three children, thereby *excluding* E. H. Gaylord. Judge Cowper held, in effect, that testator devised a life estate to E. H. Gaylord and the remainder to *all* of his children, including E. H. Gaylord. Judge Cowper was correct. Testator devised the remainder after the life estate to "all of my children." E. H. Gaylord, one of his children, was clearly included.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. MORRIS LORENZO EDMONDS

No. 737SC503

(Filed 25 July 1973)

1. Criminal Law § 144— modification of sentence at same session

During a session of court a judgment is *in fieri* and the court has authority in its sound discretion, prior to expiration of the session, to modify, amend or set aside the judgment.

2. Criminal Law § 144— entry of second judgment for same crime at same session — failure to strike first judgment

The trial court did not err in entering a second judgment imposing an active sentence without specifically vacating or striking a judgment entered earlier in the session imposing a suspended sen-

tence for the same crime since the court did not enter the second judgment to stand with the first judgment, thereby creating a conflict, nor did the court activate the suspended sentence; rather, the court, in its discretion, modified the first judgment.

APPEAL by defendant from *James, Judge*, 19 February 1973 Criminal Session of EDGECOMBE Superior Court.

Defendant was charged in a properly drawn warrant with the misdemeanor of willfully having and possessing a hypodermic needle and syringe for the purpose of administering a controlled substance in violation of G.S. 90-113.4. In district court defendant entered a plea of not guilty and from a verdict of guilty and judgment ordering that he be imprisoned for a term of 18 months, he appealed to superior court.

On 19 February 1973, in superior court, defendant pleaded guilty to the offense charged in the warrant. On the same date, judgment was signed and entered that defendant be imprisoned for a term of not less than 18 months nor more than two years, the prison sentence suspended upon defendant's compliance with certain specified conditions. Subsequently, on 21 February 1973, judgment was signed and entered that defendant be imprisoned for a term of not less than 12 months nor more than 18 months with credit given for 15 days spent in jail awaiting trial. From the latter judgment, defendant appealed.

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

Ezzell and Henson by Thomas W. Henson for defendant appellant.

BRITT, Judge.

Defendant's only assignment of error is that the trial court erred in signing and entering the second judgment and commitment without specifically vacating or striking the prior judgment duly signed and entered at the same session (term). We hold that the court did not err.

[1] Defendant recognizes, and authorities support, the principle that during a session of the court a judgment is *in fieri* and the court has authority in its sound discretion, prior to expiration of the session, to modify, amend or set aside the judgment. 5 Strong's N. C. Index 2d, Judgments, § 6, pp. 14-15; *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971);

Chriscoe v. Chriscoe, 268 N.C. 554, 151 S.E. 2d 33 (1966); *In re Moses,* 17 N.C. App. 104, 193 S.E. 2d 375 (1972).

[2] While recognizing the principle stated, defendant contends the court may not enter two conflicting judgments. The record indicates that two days after the entry of a judgment imposing a prison sentence suspended upon compliance with certain conditions, but during the same session, the court entered the second judgment imposing an active sentence. By its latter action the court did not enter a second judgment to stand *with* the first judgment, thereby creating a conflict, nor did the court activate the suspended sentence; rather, the court, in its discretion, modified the first judgment. *State v. Godwin,* 210 N.C. 447, 187 S.E. 560 (1936).

The judgment appealed from is

Affirmed.

Judges MORRIS and PARKER concur.

JOSEPH BURROUGHS T/A QUALITY HEATING AND AIR CONDITIONING v. TARHEEL HOMES & REALTY, INC., UNIVERSITY TOWNHOUSES AND M. K. BRANCH

No. 733DC495

(Filed 25 July 1973)

Appeal and Error § 26— implied exception to signing and entry of judgment

Where defendant made no exception to any finding of fact, the court on appeal assumes an implied exception to the signing and entry of the judgment.

APPEAL by defendant University Townhouses, Inc., from *Whedbee, Judge,* at the 5 March 1973 Session of District Court held in PITT County.

Plaintiff instituted this action against the three defendants named in the caption to recover $1,401.87 (plus interest and costs) for installation of duct work in connection with, and repair services performed on, certain heating and air conditioning equipment belonging to defendant University Townhouses, Inc. (Townhouses). Defendants filed answers denying

any indebtedness to plaintiff and defendant Townhouses asserted a counterclaim and setoff for $2,000.

Jury trial was waived. After hearing evidence presented by all parties, the court entered an order dismissing the action as to defendants Tarheel Homes & Realty, Inc., and Branch, and entered judgment finding facts and adjudging that plaintiff recover $700 and costs from defendant Townhouses.

Defendant Townhouses appealed.

Laurence S. Graham for plaintiff appellee.

Gaylord and Singleton by A. Louis Singleton for defendant appellant.

BRITT, Judge.

The sole purported assignment of error brought forward and argued in appellant's brief is that the court erred "in finding that the plaintiff should recover a sum of money from University Townhouses, Inc."

The record on appeal discloses no exceptions by appellant to the "proceedings, ruling, or judgment of the court" as required by Rules 19(c) and 21 of the Rules of Practice in the Court of Appeals. Inasmuch as there is no exception to any finding of fact, we assume that "implied" exception is to the signing and entry of the judgment.

In *Fishing Pier v. Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968), our Supreme Court, speaking through Chief Justice Parker, said:

> "This sole assignment of error to the signing of the judgment presents the face of the record proper for review, but review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form."

See also *Morris v. Perkins,* 11 N.C. App. 152, 180 S.E. 2d 402 (1971); cert. den., 278 N.C. 702, 181 S.E. 2d 602.

In the instant case we hold that the facts found by the trial court, or admitted, support the judgment, that the judgment is regular in form, and that error does not appear on the face of the record.

The judgment appealed from is

Affirmed.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. JOHN GARFIELD RUSH, JR.

No. 7320SC536

(Filed 25 July 1973)

Indictment and Warrant § 17; Narcotics § 2— distribution and possession with intent to distribute marijuana — fatal variance between indictment and proof

Where the bill of indictment charged defendant with the unlawful distribution of marijuana, but the instructions of the judge to the jury related to, and the verdict of the jury found the defendant guilty of, the offense of possession with intent to distribute a controlled substance, defendant was found guilty of an offense for which he was not charged, and judgment is therefore arrested.

APPEAL by defendant from *Falls, Judge,* 19 March 1973 Session of Stanly County Superior Court.

Defendant was tried on a proper bill of indictment charging him with the unlawful distribution of marijuana, a controlled substance, the offense having occurred on 30 December 1972.

He entered a plea of not guilty; and the jury, after having been charged by the court as to the crime of possession of marijuana with intent to distribute, found defendant guilty of possession with intent to distribute.

Defendant was sentenced to imprisonment for three to five years.

Attorney General Robert Morgan by Associate Attorney Henry E. Poole for the State.

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

CAMPBELL, Judge.

The defendant was charged in the bill of indictment with a statutory offense. G.S. 90-95(a)(1) makes it unlawful "[t]o manufacture, distribute or dispense or possess with intent to distribute a controlled substance listed in any schedule of this Article." The offense charged in the bill of indictment was the unlawful distribution of a controlled subtance and it specifically set forth the person to whom the unlawful distribution was made. The instructions of the judge to the jury related to, and the verdict of the jury found the defendant guilty of, the offense of possession with intent to distribute a controlled substance. This was not the offense with which the defendant was charged in the bill of indictment. The two offenses, (1) the distribution, and (2) the possession with intent to distribute, are separate offenses. *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973).

The defendant has not been found guilty of the offense with which he was charged, and he was found guilty of an offense for which he was not charged. It therefore follows that the judgment imposed was incorrect.

Judgment arrested.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. ROBERT E. MORRIS, JR.

No. 735SC409

(Filed 25 July 1973)

Larceny § 4— failure to allege ownership of property — information fatally defective

Information upon which defendant was brought to trial for larceny was fatally defective because it did not charge a crime under the laws of this State in that there was no allegation that the property allegedly stolen was the property of any person or institution, and judgment is therefore arrested.

APPEAL by defendant from *Wells, Judge,* 13 November 1972 Session Superior Court, NEW HANOVER County.

Defendant was charged in a warrant with the larceny of two described guns, the property of Douglas Gaskins. In the District Court he waived counsel and preliminary hearing. In the Superior Court he waived, in writing, the indictment and was brought to trial on an Information charging that he "unlawfully, wilfully did take, steal and carry away a 12 gauge shotgun #33057 and a 35 caliber rifle #72068252 of the value of less than $200.00, against the form of the statute in such case made and provided and against the peace and dignity of the State." He entered a guilty plea, was questioned at length as to the voluntariness of his plea, signed a transcript of the questions and answers, and the adjudication thereon appears in the record. After his testimony, the court sentenced him to two years in jail and from judgment entered, he appealed.

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

Jeffrey T. Myles for defendant appellant.

MORRIS, Judge.

Defendant's only assignment of error on his appeal is that the court erred in sentencing defendant to a two-year term. This assignment is, of course, without merit. Since the sentence is within the statutory limit, it does not constitute cruel and unusual punishment.

On the same day that defendant filed his brief he filed a motion in arrest of judgment. In this motion he takes the position that the Information upon which defendant was brought to trial is fatally defective because it does not charge a crime under the laws of this State for that there is no allegation that the property stolen was the property of any person or institution. The defendant's position is sound.

In *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46 (1965), the indictment alleged the larceny of $60 in money, but it failed to designate in any manner the owner of the money or the person in possession of it at the time of the taking. The indictment was, therefore, fatally defective. The Court held that because of this fatal defect the indictment was insufficient to confer jurisdiction.

For the same reason the Information here is not sufficient to confer jurisdiction.

Judgment arrested.

Judges BROCK and PARKER concur.

STATE OF NORTH CAROLINA v. WILSON L. STEWART

No. 736SC510

(Filed 25 July 1973)

Escape § 1— escape from State prison — sufficiency of evidence

Evidence in an escape case was sufficient to require submission of the case to the jury and to support the verdict of guilty where such evidence tended to show that while serving lawfully imposed sentences defendant sawed through the bars of his cell and on the date in question left the extended limits of the situs of his confinement at a State institution, only to be apprehended approximately 15 hours later at a place nine miles from the prison unit.

ON *certiorari* to review the trial of defendant before *James, Judge,* 7 August 1972 Session of Superior Court held in HALIFAX County.

Defendant, Wilson L. Stewart, was charged in a bill of indictment, proper in form, with felonious escape. He pleaded not guilty but was found guilty as charged. From a judgment imposing a prison sentence of eighteen months to two years, defendant appealed.

Attorney General Robert Morgan and Associate Attorney Emerson D. Wall for the State.

Hux & Livermon by James S. Livermon, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant contends "no evidence was presented by the State which showed that he willfully and unlawfully escaped from confinement in the North Carolina Department of Corrections" and therefore the trial court erred in denying his timely motions for judgment as of nonsuit.

The willful failure of a prisoner to remain within the extended limits of his confinement constitutes escape. G.S. 148-4. G.S. 148-45 in pertinent part provides:

> "Any prisoner convicted of escaping or attempting to escape from the State prison system who at any time subsequent to such conviction escapes or attempts to escape therefrom shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than three years."

The material evidence offered by the State tended to show that while serving concurrent two year sentences for the offense of nonfelonious breaking or entering and larceny, imposed at the 8 December 1970 Session of Superior Court held in Johnston County, and a consecutive six months sentence for misdemeanor escape imposed at the 27 July 1971 Session of District Court held in Vance County, defendant, between midnight and 12:30 a.m., 25 April 1972, left the extended limits of the situs of his confinement at State Institution 4030 in Halifax County. The bars of his cell were sawed in two and musical instruments were arranged on defendant's bed "to look like somebody was in there." Defendant was apprehended approximately 15 hours later on the river at Weldon nine miles from the prison unit.

We find and hold that this evidence, when considered in the light most favorable to the State, is sufficient to require submission of the case to the jury and to support the verdict. These assignments of error are overruled.

By his third, fourth, fifth, sixth and seventh assignments of error, defendant contends (1) that the verdict was "defective," (2) that the court erred in its instructions to the jury and (3) that the court erred in denying his motion for a "mistrial." These assignments of error are not supported by exceptions duly noted in the record. Nevertheless, we have carefully examined the record in the light of defendant's contentions and find that he had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. WILLIAM OWEN HYMAN, JR.

No. 738SC460

(Filed 25 July 1973)

Criminal Law § 23— guilty plea

Defendant's plea of guilty was made freely, understandingly and voluntarily.

APPEAL by defendant, William Owen Hyman, Jr., from *Martin (Perry), Judge,* 19 March 1973 Session of Superior Court held in LENOIR County.

Attorney General Robert Morgan and Assistant Attorney General Myron C. Banks for the State.

Wallace, Langley, Barwick & Llewellyn by James D. Llewellyn for defendant appellant.

HEDRICK, Judge.

The record discloses that the defendant, represented by court-appointed counsel, freely, understandingly and voluntarily pleaded guilty to a bill of indictment, proper in form, charging him with uttering a forged instrument. The judgment imposing a prison sentence of not less than two nor more than three 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. GARY BANKS

No. 7329SC517

(Filed 25 July 1973)

APPEAL by defendant from *Thornburg, Judge,* 12 February 1973 Session of Superior Court held in HENDERSON County.

Defendant Banks had been tried and convicted of his first escape in the 28 March 1972 term of the District Court of Hen-

derson County. In this action he was charged in a proper bill of indictment with a second offense of escape. He entered a plea of not guilty to this charge. The jury returned a verdict of guilty of felonious escape and defendant was sentenced to two years imprisonment.

The State's evidence tended to show that on 10 June 1972 Banks was duly serving a term in the Henderson County Prison Unit 6045 for non-felonious breaking and entering and non-felonious larceny. Prison guard Hugh McLean testified that he had seen Banks in the prison around 5:00 p.m. on the day in question but another guard, Sam Reed, stated that a check at 10:00 p.m. revealed that defendant was not in the prison. Both guards testified that Banks did not have permission to leave the unit. Banks was apprehended in an Asheville apartment on 24 September 1972.

Banks did not offer any evidence.

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

Howe & Waters, by R. Charles Waters, for defendant appellant.

BALEY, Judge.

We have carefully examined the record and we are unable to find any defect in the proceedings in the trial below. Defendant received a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. BERNADETTE PATRICIA MEANS

No. 7318SC464

(Filed 25 July 1973)

APPEAL by defendant from *Lupton, Judge,* 29 January 1973 Regular Criminal Session of Superior Court held in GUILFORD County, Greensboro Division.

Defendant was charged in a bill of indictment proper in form with (1) forgery and (2) uttering a forged bank check. When the cases were called for trial, the State took a nol pros with leave as to the forgery count and defendant tendered a plea of guilty to the uttering count. After an examination of defendant and determining that the plea of guilty was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, the court accepted the plea. Following the hearing of evidence, the court entered judgment sentencing defendant to prison for a period of six months with an order to the Department of Correction that defendant be given treatment for drug addiction.

Defendant appealed.

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

Vaiden P. Kendrick, Assistant Public Defender, attorney for defendant appellant.

BRITT, Judge.

Defendant's counsel candidly admits that he can find no error to assign but asks this court to review the record. This we have done and find the record to be free from prejudicial error.

The judgment appealed from is

Affirmed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHNNIE LEROY PARKS AND THOMAS CRAVEN WILSON

No. 7326SC418

(Filed 25 July 1973)

APPEAL by defendants from *Grist, Judge,* 27 November 1972 Schedule "C" Criminal Session of MECKLENBURG County Superior Court.

Each defendant was tried on indictment and convicted of the armed robbery of Herbert J. Sample, owner of a grocery store in Charlotte, North Carolina, which robbery took place on 29 May 1972. Parks was sentenced to imprisonment for 25 to 28 years; Wilson was sentenced to imprisonment for 20 to 30 years.

There were four persons in the grocery who witnessed some or all of the events at the time of the robbery. Two of the witnesses saw clearly defendant Parks and were able to identify him: two others saw clearly defendant Wilson and identified him.

Attorney General Robert Morgan by Associate Attorney Charles R. Hassell, Jr. for the State.

John G. Plumides for defendant appellant Parks.

James H. Carson, Jr. for defendant appellant Wilson.

CAMPBELL, Judge.

This case presents only the record proper for review.

Each defendant was tried on a valid bill of indictment. There is competent evidence both of the commission of the crime and the identity of the defendants as the perpetrators of the crime. The verdict of the jury is proper, and the sentences each are within that allowed by statute.

No error.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. GARY BANKS

No. 7329SC518

(Filed 25 July 1973)

APPEAL by defendant from *Thornburg, Judge*, 5 February 1973 Session of HENDERSON County Superior Court.

Defendant was charged in a valid warrant with escape from lawful custody of the Henderson County Prison Unit 6045,

and on 29 March 1972 he entered a plea of guilty in the District Court of Henderson County. He was sentenced to two months' imprisonment, suspended for two years on condition that, among others, he not escape or attempt to escape.

Defendant again escaped from Unit 6045, and upon motion by the Solicitor on 18 October 1972, his suspended sentence was put into effect by the district court judge.

On appeal to the superior court, the order of the district court was affirmed.

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

Howe & Waters by R. Charles Waters for defendant appellant.

CAMPBELL, Judge.

We have reviewed the record in this case and find

No error.

Judges HEDRICK and BALEY concur.

MARY ELLEN MURPHY v. JAMES WILLIAM HARDISON

No. 738SC421

(Filed 25 July 1973)

APPEAL by plaintiff from *Copeland, Judge,* 6 November 1972 Civil Term of Superior Court held in LENOIR County.

This action is to recover damages for injuries sustained in an automobile accident. The jury found that plaintiff was injured by defendant, who is plaintiff's father, and that plaintiff was entitled to recover $1250.00 for her injuries.

Turner and Harrison by Fred W. Harrison for plaintiff appellant.

Whitaker, Jeffress & Morris by A. H. Jeffress for defendant appellee.

VAUGHN, Judge.

Plaintiff's only assignment of error relate to the judge's instructions on the measure of damages. We hold that the judge correctly explained the law arising on the evidence given in the case being tried.

No error.

Judges BROCK and BALEY concur.

R. E. ATKINS, TRUSTEE OF LITTLE MOUNTAIN BAPTIST CHURCH, AND GLADYS CUMMINGS, MAJOR F. CUMMINGS, LARRY ATKINS, ROBIN ATKINS, JOAN ATKINS, GARRY ATKINS, PAULINE ATKINS, MOIR ATKINS, DWIGHT ATKINS, BARBARA HICKS, RICKY HICKS, HERMAN HICKS, ETHEL ATKINS, MAYE ATKINS, MICIE WATSON, LEOLA KEY, KATHY KEY, POSEY SAWYERS, MAMIE SAWYERS, MYRTLE KEY, PAUL KEY, ALMA C. JOHNSON, BOBBY JOHNSON, GERTRUDE JOHNSON, TOMMY JOHNSON AND J. C. JOHNSON v. C. L. WALKER, RAYTON PUCKETT, HARVEY JOHNSON, LONNIE JOHNSON, BOBBY BRUNER, ELBERT WATSON, GRAHAM TILLEY, FRANK HOLIFIELD, CLAY GIBSON, WORTH BASS, MABLE CREED, ROSCOE CREED, FRANKIE LAWSON, CLYDE LAWSON, DAVID BUSSICK AND FRANCES VENABLE

No. 7317SC14

(Filed 1 August 1973)

1. **Appeal and Error § 12; Rules of Civil Procedure § 41— motion to dismiss for failure to pay court costs — made for first time on appeal**

Defendants' motion to dismiss under Rule 41(d) for failure of plaintiffs to pay court costs in an earlier action in which they took a voluntary dismissal without prejudice comes too late when made for the first time on appeal.

2. **Appeal and Error § 26— appeal itself as exception to judgment and matters on face of record**

Plaintiffs' motion to dismiss defendants' appeal for failure of defendants to set forth assignments of error in the record as required by Rules of the Court of Appeals is denied since the appeal itself is an exception to the judgment and to any matter appearing on the face of the record proper.

3. **Constitutional Law § 22; Religious Societies and Corporations § 3— church disputes — jurisdiction of State courts**

The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and con-

troversies, for there is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state, but the courts do have jurisdiction, as to civil, contract and property rights which are involved in, or arise from, a church controversy.

4. **Constitutional Law § 22; Religious Societies and Corporations § 3— church property dispute — jurisdiction of State courts**

The U. S. Supreme Court has held that by virtue of the Fourteenth Amendment the First Amendment guarantee of religious liberty precludes the intrusion into ecclesiastical matters by the states, either in their legislative or judicial capacities; specifically, a state court, in deciding a church property dispute, may not base its decision upon the interpretation and significance that the court assigns to aspects of church doctrine.

5. **Constitutional Law § 22; Religious Societies and Corporations § 3— church property dispute — departure-from-doctrine issues considered — error**

Since courts must decide church property disputes without inquiring into underlying controversies over religious doctrines and without in any way basing decision upon any determination made upon such an inquiry, the trial court in this action to determine the right to possession and control of church property erred in submitting to the jury issues as to departure-from-doctrine by one group or the other and in entering judgment for plaintiffs based on the jury's verdict that plaintiffs had remained faithful to and defendants had radically and fundamentally departed from the doctrines and practices of the church prior to its division.

Judge BRITT dissents.

APPEAL by defendants from *Crissman, Judge,* 29 May 1972 Session of Superior Court held in SURRY County.

This civil action was instituted on 15 March 1971 to determine the right to possession and control of the parsonage, sanctuary and buildings of The Little Mountain Baptist Church in Surry County and to enjoin the defendant Walker from continuing to act as pastor thereof. The action arises out of a schism among the church members. Plaintiffs in substance alleged: That The Little Mountain Baptist Church is a Missionary Baptist Church which is affiliated with the Surry Baptist Association and which has existed for many years; that since its organization it has been a congregational church governed by the vote of its members; that plaintiffs and other members of long standing in the church, who in fact constitute a majority of the members, still hold to "the fundamental faiths, usages, customs and practices of the church" which were held by all members prior to the schism; that the defendants, who are now in con-

trol of the church property, "have departed radically and fundamentally from the characteristic usages, customs, doctrines and practices of The Little Mountain Baptist Church accepted by all members prior to the division" by, among other things, "teaching and imposing doctrines, customs, practices and usages contrary to those characteristic of the whole church prior to the division." Plaintiffs prayed that they and those whom they represent "be declared the true congregation of The Little Mountain Baptist Church," that defendants be required to surrender the church buildings to the plaintiffs, and that the defendant Walker be restrained from continuing to act as pastor.

Defendants moved to dismiss the action for lack of jurisdiction over the subject matter in that the action involved "only an interpretation of ecclesiastical matters over which the court has no jurisdiction," "the legal tribunals of North Carolina have no right to hire or fire a preacher," and the action "is in violation of Article One, Section 13 of the North Carolina Constitution and the First Amendment to the United States Constitution." This motion was overruled.

Defendants then filed answer in which they denied the material allegations of the complaint and alleged that "the plaintiffs have not remained true to the faith of The Little Mountain Baptist Church," but "became at odds with the pastor" and have abandoned the church, and that "no doctrines, customs, practices and usages have been changed since the formation of the church." In their answer defendants again moved that the action be dismissed on the grounds that it involved purely ecclesiastical matters over which the court had no jurisdiction and that it was contrary to the Federal and State Constitutions.

Following trial at which both plaintiffs and defendants presented testimony of a large number of witnesses, issues were presented to the jury and answered as follows:

"1. Did the Plaintiffs remain faithful to the doctrines and practices of the Little Mountain Baptist Church recognized and accepted by the Plaintiffs and Defendants prior to the division?

"ANSWER: Yes.

"2. Have the Defendants departed radically and fundamentally from the characteristic usages, customs, doctrines and practices of The Little Mountain Baptist Church ac-

cepted by all members prior to the division as alleged in the Complaint?

"ANSWER: Yes."

Judgment was entered on the verdict adjudging that plaintiffs have remained faithful to and defendants have radically and fundamentally departed from the doctrines and practices of the church accepted by all members prior to the division and that "the true congregation of the Little Mountain Baptist Church consists of the plaintiff (sic) and all other members of the congregation who adhere to and submit to the characteristic doctrines, usages, customs and practices of the Little Mountain Baptist Church recognized and accepted by both factions of the congregation before the dissention between them arose." The judgment ordered defendants "to forthwith vacate and surrender to the plaintiffs" the church building and property, and restrained the defendant Walker from acting as pastor of the church.

From this judgment, defendants appealed.

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

Seawell, Pollock, Fullenwider, Van Camp & Robbins by H. F. Seawell, Jr., for defendant appellants.

PARKER, Judge.

[1] After the record on appeal in this case was docketed in this Court, defendants filed a motion in this Court to dismiss plaintiffs' action under Rule 41(d) of the Rules of Civil Procedure on the grounds that at the time this action was commenced on 15 March 1971 the costs had not been paid in a prior action in which judgment of voluntary dismissal without prejudice had been entered on 18 February 1971. The record does not disclose that this question was raised in the trial court at any time by motion or otherwise. Defendants' motion, made for the first time in this Court, comes too late and is denied.

[2] Plaintiffs also filed a motion in this Court, their motion being to dismiss defendants' appeal on the grounds that appellants' assignments of error as set forth in the record on appeal do not comply with requirements of the Rules of this Court. This motion is also denied. The appeal is itself an excep-

tion to the judgment and to any matter appearing on the face of the record proper, Strong, N. C. Index 2d, Appeal and Error, § 26, and, as hereinafter noted, our decision on this appeal is rendered upon matters thus appearing. Accordingly, we now consider the substantial constitutional question presented by the appeal in this case.

[3] "The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies, for there is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state, but the courts do have jurisdiction, as to civil, contract and property rights which are involved in, or arise from, a church controversy." *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114. As that case illustrates, in resolving conflicts as to property rights over which the courts do have jurisdiction, particularly in cases such as the present one involving a controversy as to property rights between two factions of an independent or congregational church, the courts of this and of other states have on occasion felt it necessary and have recognized the judicial power to inquire into and to make determination as to whether one group or the other had departed radically and fundamentally from the characteristic usages, customs, doctrines and practices which prevailed within the church before the controversy arose. See: Annotation, 15 A.L.R. 3d 297. However, the view that civil courts may properly enter upon such an inquiry has not been universally accepted as correct. More than one hundred years ago Justice Miller of the United States Supreme Court expressed a contrary view. In a dictum statement in *Watson v. Jones,* 80 U.S. 679, 20 L.Ed. 666, he said:

> "The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society.
>
> "In such cases, where there is a schism which leads to a separation into distinct and conflicting bodies, the rights

of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. *This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization;* for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth." (Emphasis added.)

Watson v. Jones, supra, was a pre-*Erie R. Co. v. Tompkins* diversity decision reflecting federal general law and was decided before the First Amendment was made applicable to the States. Referring to the above-quoted portion of the opinion in the *Watson* case, and quoting from an Annotation in 8 A.L.R. at p. 112, the opinion in *Reid v. Johnston, supra,* expressed the view that the principles set forth in *Watson* appear " 'to have been stated too broadly and without proper qualification, in that they do not make proper allowance for the possibility that the action of the majority—assuming that by the law of the society the majority rule prevails—may involve so wide a departure from the fundamental and characteristic beliefs or polity of the society that to give it effect as to property rights would involve a perversion of the property from the implied trust to which it is subject, and because they fail to recognize that in such case the real identity of the society is no longer lodged with the majority faction, but resides with the minority faction, which re-

mains faithful to the fundamental and distinctive beliefs and polity of the society.' "

[4] In the years since *Watson* was decided, the United States Supreme Court has held that by virtue of the Fourteenth Amendment the First Amendment guarantee of religious liberty precludes the intrusion into ecclesiastical matters by the states, either in their legislative or judicial capacities. *Cantwell v. Connecticut,* 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900, 128 A.L.R. 1352 (1940); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 97 L.Ed. 120, 73 S.Ct. 143 (1952); *Kreshik v. St. Nicholas Cathedral,* 363 U.S. 190, 4 L.Ed. 2d 1140, 80 S.Ct. 1037 (1960). More recently, in *Presbyterian Church v. Hull Church,* 393 U.S. 440, 21 L.Ed. 2d 658, 89 S.Ct. 601 (1969), the United States Supreme Court dealt again with the question of whether a state civil court, in deciding a church property dispute, may base its decision upon the interpretation and significance that the civil court assigns to aspects of church doctrine. The Supreme Court held that the First Amendment, as applied to the states by the Fourteenth Amendment, prohibits decision upon such a basis.

In that case, two local Georgia churches, after voting to withdraw from the general church because of its alleged departure from original fundamental faiths and practices, sued in the Georgia state courts to enjoin the general church from trespassing on their property. Georgia law implied a trust upon local church property for the benefit of the general church, conditioned upon the general church's adherence to its tenets of faith and practice existing when the local and general churches affiliated with one another. The Georgia Supreme Court, affirming the judgment rendered for plaintiffs in the trial court, stated that the evidence presented an issue for the jury to decide, "whether the totality of actions of the general church amounted to a substantial abandonment of, or departure from, the original tenets of faith and practice by the general church." *Presbyterian Church v. Eastern Hts. Presbyterian Church,* 224 Ga. 61, 159 S.E. 2d 690 (1968). The United States Supreme Court granted certiorari to consider the First Amendment questions raised. In holding that the Georgia courts had violated the First Amendment, the Supreme Court said:

> "The departure-from-doctrine element of the implied trust theory which they applied requires the civil judiciary to determine whether actions of the general church constitute such a 'substantial departure' from the tenets of

> faith and practice existing at the time of the local churches' affiliation that the trust in favor of the general church must be declared to have terminated. This determination has two parts. The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role."

In reversing the judgment of the Georgia Supreme Court and remanding the case for further proceedings, the United States Supreme Court cautioned that the departure-from-doctrine element can play *no* role in any future judicial proceedings.

[5] The principles announced in *Hull* control disposition of the case presently before us. The fact that the controversy in the present case is between factions within a local church while in *Hull* the controversy was between local churches and the general church, is without significance insofar as the constitutional question presented by the record on this appeal is concerned. In neither case may decision be made to turn upon any determination by the civil courts as to departure-from-doctrine by one group or the other. That was precisely the issue submitted to the jury in the present case. The judgment appealed from, having been based upon determination of an issue which may not constitutionally be inquired into by a civil tribunal, must be reversed.

Disputes over church property may still be resolved, and occasionally regrettably must be resolved, in civil courts. As stated in *Hull*, "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church

property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." Since the decision in *Hull,* however, it is clear that civil courts must decide church property disputes without inquiring into underlying controversies over religious doctrines and without in any way basing decision upon any determination made upon such an inquiry.

The judgment appealed from is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judge VAUGHN concurs.

Judge BRITT dissents.

LINCOLN COUNTY, A MUNICIPAL CORPORATION, PLAINTIFF v. B. ATWOOD SKINNER, JR., JAMES H. BENTON, DICKERSON, INCORCORPORATED, AND SEABOARD SURETY COMPANY, DEFENDANTS

— AND —

WINSTON TILE COMPANY, ADDITIONAL PARTY DEFENDANT

No. 7327SC344

(Filed 1 August 1973)

1. **Appeal and Error § 26— exception to judgment — matters reviewable**

Plaintiff's exception to the judgment presented the face of the record for review, which included whether the facts found or admitted supported the conclusions of law and whether the judgment was proper in form.

2. **Appeal and Error § 57; Contracts § 27— breach of contract — sufficiency of trial court's findings**

Evidence supported the trial court's findings and conclusions that defendants furnished and installed conductive terrazzo floors in certain operating and obstetrical rooms in a hospital in accordance with the terms and specifications of their contract with plaintiff, and defendants were entitled to recover on their counterclaim for the final payment of fees for architectural services rendered plaintiff.

APPEAL by plaintiff from *Martin (Harry C.), Judge,* 12 October 1972 Session of Superior Court held in LINCOLN County.

This is a civil action instituted by plaintiff, Lincoln County, against B. Atwood Skinner, Jr., and James H. Benton, Architects; Dickerson, Inc., General Contractor; Seaboard Surety Company, Bonding Company; and Additional Defendant, T. F. Poteat T/A Winston Tile Company, Sub-contractor, to recover damages for an alleged breach of contract in the installation of conductive terrazzo flooring in the Lincoln County Hospital.

After a trial without a jury, Judge Martin made findings of fact which, except where quoted, are summarized as follows:

1. By agreement dated 11 May 1966, plaintiff entered into a contract with defendant architects to provide professional services in connection with the construction of a hospital in Lincolnton, North Carolina.

2. By agreement dated 5 July 1967, plaintiff entered into a contract with defendant general contractor to construct the hospital building.

3. By agreement dated 19 October 1967, the general contractor entered into a contract with defendant sub-contractor for tile work for the hospital, including the furnishing and installation of conductive terrazzo floors in certain operating rooms and obstetrical rooms.

4. The specifications prepared by the architects were proper specifications, and among other provisions called for the conductive floors to contain materials and to be installed in accordance with the recommendations of National Terrazzo Manufacturers Association and Bulletin 56 of The National Fire Protection Association.

5. The sub-contractor under supervision of the general contractor constructed and installed the conductive terrazzo floors in accordance with the plans and specifications.

6. As required by the specifications, the conductive terrazzo floors were tested by an independent testing laboratory, Chem-Bac Laboratory, Inc., of Charlotte, North Carolina, on 24 July 1969, after they had been completed, and were found to be satisfactory and within the requirements of National Terrazzo Manufacturers Association and Bulletin 56 of the National Fire Protection Association.

7. Subsequent to the completion of the conductive terrazzo floors, the hospital building was placed in charge of Lincoln County Hospital, Inc., and employees of Lincoln County Hospital, Inc., undertook the cleaning and maintenance of the floors.

8. Upon taking charge of the building and floors, personnel of Lincoln County Hospital, Inc., used a product with the trade name "AMPHYL" to clean the floors, such product being used on the conductive floors several times a day following use of the rooms having such floors.

9. The conductivity of the conductive terrazzo floors, and the floors involved in this action, was destroyed by the use of the product "AMPHYL" by personnel employed by Lincoln County Hospital, Inc., which was then in charge of and operating the hospital building.

10. At the present time, the terrazzo floors involved in this action are nonconductive.

11. Plaintiff's evidence failed to show any breach of duty by any defendant.

12. Plaintiff has withheld final payment of fees due the architects in the amount of $4,794.78, which balance was billed by the architects to the plaintiff on 21 November 1969. The architects have performed their contract, and the plaintiff is indebted to them in the amount of $4,794.78 with interest from 1 January 1970 until paid.

Based on these findings of fact the trial court concluded: The plaintiff had failed to carry its burden of proof "as to any failure on the part of any of the defendants to properly perform their contracts and agreements," and that "plaintiff failed to carry the burden of proof so as to show what damages, if any, were sustained by the plaintiff," and that "plaintiff is indebted to B. Atwood Skinner, Jr., and James H. Benton for the balance of their architectural fees in the amount of $4,794.78 with interest from 1 January 1970 until paid."

From a judgment declaring that plaintiff have and recover nothing from defendants or any of them; and that the defendants Skinner and Benton have and recover of plaintiff the sum of $4,794.78 together with interest thereon from 1 January 1970 on their counterclaim, the plaintiff appealed.

W. H. Childs and W. M. Nicholson for the plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman by Wayne Paul Huckel and Hugh L. Lobdell for defendant appellees, B. Atwood Skinner, Jr., and James H. Benton.

Koy E. Dawkins for defendant appellee, Dickerson, Incorporated.

Don M. Pendleton for additional party defendant appellee, Winston Tile Company.

HEDRICK, Judge.

Plaintiff's claim for damages is based on its contention that the defendants failed to furnish and install conductive terrazzo floors in certain operating and obstetrical rooms in the hospital in accordance with the terms and specifications of the contract.

The burden was on plaintiff to satisfy the finder of facts by the greater weight of the evidence that the defendants, or one of them, breached their agreement and that plaintiff was damaged thereby.

Twenty-five of the twenty-six exceptions noted in the record relate to the admission and exclusion of evidence. Plaintiff has not argued or cited any authority in support of these exceptions, and the same are deemed abandoned. Rule 28 of the Rules of Practice in the North Carolina Court of Appeals.

No exception is noted in the record to any of the facts found by Judge Martin. Thus, the question of the sufficiency of the evidence to support the findings of fact is not raised. Nevertheless, a careful review of the record discloses that there is plenary competent evidence to support all of the material facts found.

[1] The exception to the judgment (number twenty-six) presents the face of the record for review, which includes whether the facts found or admitted support the conclusions of law and whether the judgment is proper in form. *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968).

[2] Clearly the facts found by Judge Martin supports the conclusion that the plaintiff has failed to carry the burden of proof on its asserted claim, and the defendants, Skinner and

Benton, are entitled to recover on their counterclaim. The judgment is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA EX REL., THOMAS F. MOORE, JR. v. JOHN DOE, RICHARD ROE, AND ALL OTHERS OF LIKE CLASS AND SITUATION

Nos. 7326SC353 and 7326SC445

(Filed 1 August 1973)

1. **Appeal and Error § 7— appeal by John Doe and Richard Roe — necessity for appeal by natural or legal person**

Purported appeal by defendants should be dismissed for lack of a showing that any party, aggrieved or otherwise, has sought review by the appellate court where it was stipulated that the defendants are "John Doe, Richard Roe and all others of like class and situation" and the record on appeal does not show an appeal by a natural or other legal person.

2. **Appeal and Error § 14— failure to give notice of appeal**

Appeal should be dismissed where the record on appeal does not show that notice of appeal was given either in open court or by filing notice with the clerk. G.S. 1-279; G.S. 1-280.

3. **Appeal and Error § 9— appeal from dissolved preliminary injunction — mootness**

Appeal from preliminary injunction should be dismissed for mootness where the appeal was not docketed until approximately a month after the preliminary injunction was dissolved.

4. **Appeal and Error § 7— appeal from dissolved preliminary injunction — no aggrieved party**

Appeal from dissolved preliminary injunction should be dismissed where there is no showing that the legal or constitutional rights of any known individual were restricted or denied, there is no showing that a natural or other legal person has been punished for violating the injunction, and no natural or other legal person appears in the appeal as aggrieved by the injunction.

5. **Appeal and Error § 9—appeal from terminated temporary restraining order — dismissal**

Appeal from temporary restraining order should be dismissed where the order was terminated over 30 days before the appeal was docketed.

6. Appeal and Error § 7— appeal from temporary restraining order— absence of aggrieved party

Appeal from temporary restraining order prohibiting the general public from threatening or intimidating students in a public school system, from interfering with the operation of school buses and from going upon school property should be dismissed where the record fails to show any effort by appellants which was restrained by the order, since appellants have failed to show in what way they were aggrieved by the order.

7. Schools § 15— injunctions restraining actions relating to schools — no showing of bad faith

Record fails to show that the superior court, a superintendent of schools or the district attorney acted in bad faith or for the purpose of harassment in the issuance of a preliminary injunction prohibiting by the public a broad scope of activities relating to the schools or in the subsequent issuance of a temporary restraining order prohibiting the general public from threatening or intimidating students, from interfering with operation of the school buses, and from going upon school property.

Judge VAUGHN concurs in the result.

APPEAL from orders entered by *Snepp, Judge,* in the Superior Court in MECKLENBURG County; one entered 31 October 1972, and one entered 6 March 1973.

Separate appeals from the two above identified orders were docketed in this Court. The two orders were entered in what purports to be the same proceeding. The two appeals were consolidated for argument in this Court but will be discussed separately in the following opinion.

BROCK, Judge.

— The 31 October 1972 Order —

[1] Mr. George S. Daly, Jr., of the Mecklenburg County Bar prepared and docketed the record on appeal, made an assignment of error, and filed a brief. However, neither the record on appeal nor the brief indicates the person or persons whom he represents. The following stipulation appears at the end of the record on appeal: "That the name of the Defendants are: John Doe, Richard Roe and all others of like class and situation." G.S. 1-271 provides that the *aggrieved party* may appeal. So far as this record discloses no natural or other legal person appears as a party defendant, whether aggrieved or not aggrieved. We said in the case of *In re Coleman,* 11 N.C. App. 124, 180 S.E. 2d 439:

> "In this state, a legal proceeding must be prosecuted by a legal person, whether it be a natural person, *sui juris*, or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association, or governmental body or agency. Even a class action must be prosecuted or defended by one or more named members of the class. G.S. 1A-1, Rule 23. A legal proceeding prosecuted by an aggregation of anonymous individuals, known only to their counsel, is a phenomenon unknown to the law of this jurisdiction."

This appeal should be dismissed for lack of a showing that any party, aggrieved or otherwise, has sought a review by this Court.

Nevertheless, we will briefly review the nature of the proceedings set out in the record on appeal, because there appear to be additional reasons which require dismissal of this appeal.

On 27 October 1972, Thomas F. Moore, Jr., District Attorney, Twenty-sixth Judicial District, filed a verified petition before Superior Court Judge Frank W. Snepp in Mecklenburg County. The petition alleged numerous boisterous, unruly and disorderly activities which were disrupting the educational processes of the East Mecklenburg High School. The petition alleged on information and belief that similar conduct was imminent at other high schools in the county. It alleged that a state of emergency exists or is imminent within the several schools in the county, and that the names of the person or persons responsible for the disruptions are not known. On 27 October 1972, Judge Snepp found the facts to be substantially as al'eged in the petition and issued a temporary restraining order. The temporary restraining order sought to prohibit a broad scope of activities by the general public upon or near the premises of any high school or junior high school in Mecklenburg County. The temporary restraining order further provided that "the defendants" appear on 30 October 1972 and show cause why the order should not be continued until final determination of "this action." At this point the record on appeal does not indicate who the defendants are or in what action the temporary restraining order was issued.

Nevertheless, there was an evidentiary hearing before Judge Snepp on 30 October 1972. The record on appeal states: "Kelly Alexander, Robert Steele, and Phyllis Lynch appeared

before Judge Snepp on October 30, 1972, and challenged the constitutionality of the foregoing Injunction and the jurisdiction of the Court over the subject matter." In issuing the preliminary injunction following the 30 October 1972 evidentiary hearing, Judge Snepp found that Kelly Alexander, Jr., Robert Steele and Phyllis Lynch are citizens and residents of Mecklenburg County and are within the class designated as defendants in the caption of the order. However, as pointed out above, the record on appeal does not show what party or parties undertook this appeal.

In the preliminary injunction which was filed 31 October 1972, Judge Snepp made numerous findings of fact, which are not challenged on appeal. These findings of fact disclose confrontations between large groups of students; numerous fights and threats of fights; inability of school officials to control unruly students; arrests of students by police; unusual absenteeism of students; serious disruptions of the educational processes; suspension of classes by school officials; and the fear of parents for the safety of students. Based upon the findings of fact Judge Snepp entered the 31 October 1972 preliminary injunction prohibiting a broad scope of activities by the general public.

There was no exception taken to the entry of the 31 October 1972 preliminary injunction, and there was no notice of appeal entered.

On 14 February 1973 the District Attorney filed a motion alleging that the matters alleged in his former petition had subsided and the necessity for the injunction appears to have ceased. Based upon this motion Judge Snepp entered an order on 14 February 1973 dissolving the previously issued injunction. The order by Judge Snepp recites that the injunction issued on 27 October 1972 is stricken. However, the only injunction in existence was the one issued 31 October 1972. Therefore, we hold that the 14 February 1973 order dissolved the injunction issued 31 October 1972.

[2] The record on appeal does not show that notice of appeal has been entered in this proceeding, either in open court or by filing notice with the clerk. It is provided by G.S. 1-279 that an appeal from a judgment rendered out of session must be taken within 10 days after notice thereof, and from a judgment rendered in session within 10 days after its rendition, unless the record shows an appeal taken at trial, which is sufficient. It

is provided by G.S. 1-280 that within the time prescribed in G.S. 1-279, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at trial, which is sufficient. The provisions of these two statutes are jurisdictional and if not complied with the appellate division acquires no jurisdiction of the appeal. *Aycock v. Richardson,* 247 N.C. 233, 100 S.E. 2d 379. For this reason the appeal should be dismissed.

[3] This appeal presents an additional situation. The question sought to be reviewed appears to be moot. This appeal was not docketed until approximately one month after the preliminary injunction was dissolved. As noted above, the injunction was dissolved on 14 February 1973 upon motion of the District Attorney alleging that the emergency had subsided. It appears, therefore, that no existing order or judgment is presented for review. For this reason this appeal should be dismissed.

[4] The only assignment of error on this appeal reads as follows: "The Trial Court had no jurisdiction in the above proceedings." Under the facts as shown by the record on appeal, the existence of equity jurisdiction to authorize Judge Snepp to issue either the temporary restraining order (27 October 1972) or the prelminary injunction (31 October 1972) is not without doubt. Nevertheless, there is no showing by this record that the legal or constitutional rights of any known individual were restricted or denied. There is no showing by this record that a natural or other legal person has been punished for violating the prohibitions of the preliminary injunction, and no natural or other legal person appears in this appeal as aggrieved by the 31 October 1972 injunction. For this reason this appeal should be dismissed.

— The 6 March 1973 Order —

On 6 March 1973 the Superintendent of the Charlotte-Mecklenburg Schools filed a verified petition before Superior Court Judge Frank W. Snepp in Mecklenburg County alleging in detail numerous acts of violence, vandalism, widespread fighting, unruly and insubordinate behavior in the face of appeals for order, and in general detailing a completely disrupted school system. The allegations detailed conduct at five high schools and three junior high schools. The petition further alleged that a state of emergency existed and that injunctive relief was

needed to protect the lives and property of students and faculty members, and the property of the school system.

Based upon the petition of the Superintendent, Judge Snepp issued a temporary restraining order. This order undertook to restrain the general public from threatening or intimidating students, from interfering with the operation of the school buses, and from going upon school property.

The Superintendent states that he brings his action under the authority of G.S. 14-288.18; however, his petition asks that he be made a party in the above entitled "action." The above entitled "action," if such exists, is a proceeding instituted by the District Attorney which did not purport to proceed under a statute. The statute (G.S. 14-288.18) envisions an action in the nature of a civil action for a permanent injunction in which the parties to be enjoined are named or described with at least a modicum of particularity. From the petition it appears that sufficient grounds existed to justify the Superintendent's seeking relief under the statute but it is not clear that he undertook that route.

[5] It is noted that on 16 March 1973 Judge Snepp found that the state of emergency no longer existed and dissolved the temporary restraining order and dismissed the "action." The temporary restraining order would have expired on 16 March 1973 by virtue of the provisions of G.S. 1A-1, Rule 65(b). Nevertheless, by virtue of the statute and by express order of the Court, the temporary restraining order was terminated slightly over thirty days before this appeal was docketed. It appears, therefore, that no existing order is presented for review and that this appeal should be dismissed.

In the appeal from the 6 March 1973 order the appellants are identified as Kelly Alexander, Jr., and Robert Steele; Mr. George S. Daly, Jr., identifies himself as representing these two appellants.

Appellants sole assignment of error reads as follows: "The March 6, 1973, Order of the Superior Court was unconstitutional and in violation of the First and Fourteenth Amendments to the United States Constitution."

[6] There is no showing on this record that the 6 March 1973 order restrained the appellants in any way, or in any way chilled the exercise of their rights under the First or Fourteenth

Amendments. Appellants argue in their brief that the 6 March 1973 order constituted a prior restraint upon their First Amendment rights to seek to form a NAACP club at East Mecklenburg High School. The record simply does not support such an argument. The record is completely silent upon the question of any effort on the part of appellants which was restrained by the order of which they now complain. Appellants have failed to show in what way they are aggrieved by the order complained of. For this reason this appeal should be dismissed.

[7] Appellants argue that the 31 October 1972 and the 6 March 1973 orders show a pattern of harassment. Clearly, there is no showing on this record that the Superior Court has acted in bad faith or has been utilized in bad faith by the District Attorney or the Superintendent. On the contrary, the record clearly shows that the District Attorney and the Superintendent were acting to restore order within the school system. That they may have been misadvised on how to proceed does not change their motives.

The appeals from the 31 October 1972 order and from the 6 March 1973 order are

Dismissed.

Judge HEDRICK concurs.

Judge VAUGHN concurs in the result.

FRANCES C. MOSELEY v. BRANCH BANKING AND TRUST COMPANY AS EXECUTOR AND TRUSTEE UNDER THE WILL OF MAYNARD N. MOSELEY, DECEASED, BETTY ROSE M. PEEBLES, BARBARA M. HOLSHOUSER, FRANCES M. BENTON, MARY A. MOSELEY, MAYNARD N. MOSELEY, JR., MARY HELEN CARRAWAY, LIVING AND UNBORN ISSUE OF CHILDREN OF MAYNARD N. MOSELEY

No. 733SC136

(Filed 1 August 1973)

1. **Rules of Civil Procedure § 55— setting aside entry of default**

Trial court did not err in setting aside entry of default and permitting defendant to file answer without first ruling on plaintiff's motion for default judgment since the court tacitly denied plaintiff's motion by setting aside entry of default.

2. **Appeal and Error § 42; Rules of Civil Procedure § 55— setting aside entry of default — evidence not in record on appeal — presumption**

Where appellant failed to include in the record on appeal the evidence heard by the trial judge upon defendant's motion to vacate entry of default, the court on appeal presumes that the trial judge acted within his discretion on evidence showing good cause to vacate the entry of default.

3. **Rules of Civil Procedure §§ 12, 55— erroneous entry of default — 20 days to answer after denial of change of venue motion**

Where defendant filed a motion for change of venue on 26 January 1972, plaintiff moved for default judgment on 28 February 1972, entry of default was made against defendant on 28 February 1972, and defendant's motion for change of venue was denied on 20 March 1972, entry of default against defendant was erroneous since defendant was entitled to 20 days after notice of denial of his change of venue motion to file answer, and the trial court's order setting aside entry of default and giving defendant 20 days to answer gave defendant no more than that to which he was already entitled by statute.

4. **Rules of Civil Procedure §§ 6, 12— extension of time to answer — no waiver of improper venue defense**

Defendant's motion for an extension of time in which to file answer or other responsive pleading in no way constituted a waiver of his right subsequently to raise the defense of improper venue.

5. **Husband and Wife § 4— conveyance of entirety property to corporation — no privy examination of wife — summary judgment proper**

In an action to have certain deeds declared null and void and to have plaintiff declared owner in fee of the subject realty as surviving tenant by the entireties, the trial court properly entered summary judgment for defendant where plaintiff failed to allege a purpose or intent to circumvent G.S. 52-6 in the conveyance of entirety property by husband and wife to a corporation and subsequent conveyance back to the husband, and where the undisputed facts did not reveal that the conveyances in question were void as a matter of law for noncompliance with G.S. 52-6.

APPEAL by plaintiff from *Cohoon, Judge,* 9 October 1972 Session of Superior Court held in CARTERET County.

Plaintiff instituted this action to have certain deeds to a tract of land known as Moseley's Amusement Triangle at Atlantic Beach, N. C. declared void, and to have plaintiff declared owner in fee of this realty as surviving tenant by the entireties.

On 15 May 1959, the property in question was conveyed to M. N. Moseley and wife, Frances C. Moseley, as tenants by the entireties, by deed from L. T. White and wife, Mary C. White. On 21 May 1968, M. N. Moseley and wife conveyed this property to Moseley's Triangle, Inc. M. N. Moseley was president of this

corporation and plaintiff, Frances C. Moseley, was its secretary. On 17 February 1970 Moseley's Triangle, Inc., conveyed the tract to M. N. Moseley, individually. This deed from Moseley's Triangle, Inc., was signed by both M. N. Moseley as president, and plaintiff as secretary of that corporation.

M. N. Moseley died testate on 10 October 1970 leaving a will that appointed Branch Banking & Trust Company as executor and trustee. At the time this action was instituted, the land in question was valued at approximately $152,000.

In her complaint, plaintiff contends that Moseley's Triangle, Inc., was an empty corporate shell, the alter ego of M. N. Moseley, created for the sole purpose of taking title to the real estate in controversy. She argues that the corporation was solely owned and controlled by M. N. Moseley, that no stock was ever issued nor was any consideration given by the corporation in exchange for the realty, and that the articles of incorporation for Moseley's Triangle were suspended some two years after it was incorporated for failure to report or pay taxes as required by the Revenue Act. Plaintiff contends that the transfer on 21 May 1968 by M. N. Moseley and wife to Moseley's Triangle, Inc., was in actuality a transfer to M. N. Moseley, individually; and, therefore, void for noncompliance with G.S. 52-6 requiring a privy examination of the wife and certification by a judicial officer that such conveyance is not unreasonable or injurious to the wife. Plaintiff makes a similar argument concerning the 17 February 1970 deed from Moseley's Triangle, Inc., to M. N. Moseley. She contends that these two deeds are void and that she is the owner of the property in question as surviving tenant by the entireties.

Defendant Branch Banking & Trust Co., in its answer, and supported by the affidavit of the attorney who negotiated the loan and these property transactions, contends that Moseley's Triangle, Inc., was organized for the primary purpose of obtaining a development loan for the property in question from Durham Life Insurance Company; that the interest rates for individuals was below the going rate of interest; that the land in question was placed into a corporation, for which interest rates are higher, and a loan was obtained using the property as security; that no stock was issued by the corporation in order to avoid gift taxes (wife had not paid any part of the consideration for the purchase of the property); that after the loan was secured the objective of the corporation had been ful-

filled; and that the property was conveyed back to M. N. Moseley individually—again to avoid gift taxes on a gift to the wife. Plaintiff acknowledged and knowingly participated in all of these transactions.

This action was brought on 22 December 1971. On 24 January 1972, defendant got an extension of time in which to answer. On 26 January 1972, defendant filed a motion seeking a change of venue, and on 28 February 1972 plaintiff moved for default judgment. On 28 February 1972 entry of default was entered against all defendants. On 20 March 1972, defendant's motion for change of venue was denied, and an order was entered vacating the entry of default and allowing defendant 20 days in which to file an answer or otherwise plead. Defendant filed answer and plaintiff's motion to strike the answer was denied.

In July and August 1972 both parties moved for summary judgment. The court allowed defendant's motion for summary judgment and denied plaintiff's motion. Plaintiff appealed.

Daniel R. Dixon for plaintiff.

Basil L. Sherrill for defendant.

BROCK, Judge.

Plaintiff assigns as error the order of the trial court vacating the entry of default and allowing defendant Branch Banking and Trust Company 20 days in which to answer. Plaintiff also assigns as error the trial court's denial of her motion to strike the answer of defendant Branch Banking & Trust Co.

[1] Plaintiff first contends that the order setting aside the entry of default and permitting defendant to file answer was issued "out of time." She argues that this order was premature because the court did not first rule on her motion for default judgment. We find this argument without merit, the court tacitly denied plaintiff's motion for default judgment by setting aside the entry of default.

[2] Plaintiff also contends that the court failed to find "good cause" for the setting aside of the entry of default, the standard required by G.S. 1A-1, Rule 55(d). Appellant has not included in the record on appeal the evidence heard by the trial judge upon defendant's motion to vacate the entry of default.

"Where appellant fails to bring the evidence up for review, we presume the trial judge acted within his discretion on evidence showing good cause to vacate the entry of default." *Crotts v. Pawn Shop,* 16 N.C. App. 392, 192 S.E. 2d 55. In addition to this presumption, we find that good cause existed on the face of the record for reasons discussed below.

[3] Plaintiff further challenges the court's allowing defendant 20 days in which to answer from the time of its vacating the entry of default, and the actual acceptance of defendant's answer within that 20 day period. We find the portion of the court's order allowing defendant 20 days in which to answer surplusage and not prejudicial error for the following reasons. The entry of default filed on 28 February 1972 was improperly entered. Rule 12(a)(1) of our Rules of Civil Procedure provides in pertinent part:

> (a) (1) When Presented.—A defendant shall serve his answer within 30 days after service of the summons and complaint upon him. * * * Service of a *motion permitted under this rule* alters these periods of time as follows, unless a different time is fixed by order of the court:
>
> a. *If the court denies the motion* or postpones its disposition until the trial on the merits, *the responsive pleading shall be served within 20 days after notice of the court's action . . . .* " (Emphasis added.)

Rule 12(b)(3) allows a defense of improper venue to be raised by motion.

In the present case, defendant aptly raised the defense of improper venue in its 26 January 1972 motion for change of venue. That motion constituted an objection to improper venue on the basis of G.S. 1-78, regarding venue in actions brought against executors. This motion altered the period of time in which defendant could answer until 20 days after notice of a ruling on its motion. "Although the motions provided for by Rule 12(b) . . . are not pleadings under Rule 7(a), Rule 12(a) provides that the service of such a motion results in a postponement of the time for serving an answer, and, consequently, no default results pending disposition of these motions. 6 J. Moore's, Federal Practice Par. 55.02[3] (2nd ed. 1948), p. 55-16.

[4] Defendant's motion for an extension of time filed on 24 January 1972, provided for by Rule 6 of our rules, in no way

waived defendant's right to make any of the Rule 12(b) defenses allowed by motion. While Rule 12(h) does provide for waiver of the defense of improper venue when not joined in a motion made "under this rule," this waiver is not applicable to a motion for enlargement of time made under Rule 6.

[3] Under Rule 12(a)(1)(a) defendant had 20 days to answer from the time of notice of the court's 20 March 1972 denial of his motion to remove because of improper venue. The court's order—also made on 20 March 1972—setting aside the entry of default and allowing defendant 20 days to answer merely vacated an erroneous entry of default and allowed the same length of time to answer which defendant already had by statute. These assignments of error are overruled.

[5] Plaintiff assigns as error the denial of her motion for summary judgment and the allowance of defendant's motion for summary judgment. Plaintiff does not contend that disposition of this action by summary judgment was improper or that any disputed material issues of fact exist; rather she argues that summary judgment should have been granted in her favor.

In its judgment the court made findings of fact and conclusions of law. Plaintiff excepts to each of the conclusions of law. "[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.*, 18 N.C. App. 527, 197 S.E. 2d 579. The conclusions of law (if that's what they are) to which plaintiff excepts are mere surplusage. The sole questions presented on appeal from this summary judgment are whether a genuine issue as to any material fact exists, and whether the trial judge was correct in ruling that defendant was entitled to judgment as a matter of law.

Plaintiff has not contended that a material issue of fact exists. Therefore, our single consideration is whether summary judgment was properly granted for defendant. We think it was. In *Stokes v. Smith*, 246 N.C. 694, 100 S.E. 2d 85, it was held that a mere conveyance by the husband and wife of wife's lands to a third person and the subsequent reconveyance by such third person to the husband does not establish *as a matter of law* an attempt to circumvent the statute requiring a privy examination of the wife. The burden is on the party asserting the invalidity

of the deed to prove that it is not in fact what it purports to be. Plaintiff does not allege a purpose or intent to circumvent G.S. 52-6 and there is no issue of fact present on this point. She contends that on the undisputed facts in this case the conveyances in question *as a matter of law* should be void for noncompliance with G.S. 52-6. Plaintiff has failed to meet the *Stokes* burden. Her attempt to distinguish the alleged "strawman" in the *Stokes* situation from the alleged corporate alter ego in the present case is unconvincing. Summary judgment was properly entered for defendant. These assignments of error are overruled.

Affirmed.

Judges BRITT and HEDRICK concur.

EDWARD C. SHANAHAN v. SHELBY MUTUAL INSURANCE CO.

No. 7326SC524

(Filed 1 August 1973)

1. **Insurance § 38— total disability — inability to perform every duty pertaining to occupation**

Under a provision of an insurance policy providing benefits for total disability if, for a period of 52 weeks from the commencement of disability, "it shall continuously prevent the insured from performing every duty pertaining to his occupation," the test of total disability is whether the insured is disabled to such extent that he cannot perform *any important* duty of his profession.

2. **Insurance § 38— total disability — inability to perform any important duty of occupation — sufficiency of evidence**

Plaintiff's evidence was sufficient to require submission to the jury of an issue as to whether plaintiff was totally disabled during the 52-week period after an automobile accident from performing any important duty of his occupation as a sales representative of a sportswear manufacturer where it tended to show that plaintiff's duties included unpacking, tagging, hanging and pressing each garment before showing it to a prospective customer, that plaintiff suffered spinal injuries in the accident which made him physically unable to carry the bags containing the samples or to prepare and display the merchandise, and that pain made it impossible for him to concentrate so as to make the sales and write the orders; evidence that plaintiff on one occasion visited his showroom where sportswear was being shown, that he attended a sales meeting in Las Vegas, and that he commenced traveling in his sales territory with a junior salesman but was in severe pain and performed no duties on such trips

would support the inference that plaintiff indulged the false hope that he would recover sufficiently to resume his occupation but that he found he was incapable of doing so and would not preclude submission of the case to the jury.

3. **Insurance § 38— total disability — inability to engage in any occupation**

Under a provision of an insurance policy providing benefits for total disability if, after a period of 52 weeks from commencement of the disability, "it shall continuously prevent the insured from engaging in any occupation or employment for wage or profit," the test of total disability is whether the disability renders the insured unable to work with reasonable continuity in his usual occupation or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto.

4. **Insurance § 38— total disability — inability to engage in any occupation — sufficiency of evidence**

Plaintiff's evidence was sufficient to require submission of an issue to the jury as to whether plaintiff was totally disabled from engaging in any occupation or employment for wage and profit from and after the passage of 52 weeks from commencement of the disability suffered in an automobile accident where it tended to show that plaintiff, who had been a sales representative for a sportswear manufacturer, suffered injuries which caused a 40% permanent disability in his right arm, a 60% permanent disability in his left arm, a 20% permanent disability in his neck and some permanent disability in his lower back, that pain resulting from plaintiff's injuries would limit his tolerance for standing, sitting and walking and would necessitate that he take frequent rest periods, and that plaintiff could engage only in an occupation requiring minimal physical or mental exertion.

APPEAL by plaintiff from *Snepp, Judge*, 19 February 1973 Session of Superior Court held in MECKLENBURG County.

Plaintiff, Edward C. Shanahan, instituted this action to recover total disability benefits under the terms of an automobile insurance policy issued by defendant, Shelby Mutual Insurance Co. Plaintiff alleged that on 29 July 1970, he was injured in an automobile accident and that as a result of injuries sustained therein, he has been totally disabled within the meaning of the terms of the policy of insurance issued by defendant. Plaintiff contends that he:

> " . . . is entitled to receive disability payments at the rate of $50.00 per week from July 29, 1970; that the Defendant has paid to the Plaintiff the $50.00 per week payments provided in the policy for only nineteen (19) weeks and that the Defendant is indebted to the Plaintiff for the payment of $50.00 per week from December 8, 1970, to the

date of filing of this action, together with $50.00 per week during the life of the Plaintiff or so long as his disability shall continue and that the Defendant is indebted to the Plaintiff in the sum of at least $2,600.00 plus $50.00 per week hereafter."

Defendant filed answer admitting that (1) plaintiff was involved in an automobile accident on 29 July 1970 and "received injuries that disabled him for a period of time" and (2) on or about 3 March 1964 defendant issued to plaintiff its policy number AF 5202-853 containing a section entitled "Automobile Death and Specific Disability Benefits" which provides:

"COVERAGE C—TOTAL DISABILITY: To pay weekly indemnity at the rate stated in the schedule for the period of continuous total disability of the insured which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while in or upon or while entering into or alighting from, or through being struck by, an automobile, provided (1) such disability shall commence within twenty days after the date of the accident, and (2) any disability during the period of fifty-two weeks from its commencement shall be deemed total disability only if it shall continuously prevent the insured from performing every duty pertaining to his occupation and (3) any disability after said fifty-two weeks shall be deemed total disability only if it shall continuously prevent the insured from engaging in any occupation or employment for wage or profit."

The record discloses that on 2 February 1973, pursuant to Rule 68 of the North Carolina Rules of Civil Procedure, defendant made an offer "to allow judgment to be taken against the defendant in the sum of One Thousand Dollars ($1,000.00)." Plaintiff apparently refused this offer of judgment.

On 27 February 1973, the court entered judgment, which, except where quoted, is summarized as follows:

At the close of plaintiff's evidence, defendant moved, pursuant to G.S. 1A-1, Rule 50, for a directed verdict, and prayed in the alternative (1) that plaintiff recover nothing of defendant; (2) that plaintiff recover nothing of defendant after 20 February 1971; or (3) that plaintiff recover nothing of defendant after 15 March 1971. Defendant premised this motion upon its allegation that plaintiff's own evidence demonstrated that

he was not totally disabled, according to the terms of the insurance policy, after those respective dates. The trial court was of the opinion that an issue of fact existed as to whether "plaintiff was continuously prevented by reason of his disability from performing every duty pertaining to his occupation between the dates of December 8, 1970, and March 15, 1971." Thereupon defendant:

> " . . . offered in open court to submit to judgment for the amount, with interest at six percent (6%) per annum under the terms of the policy of insurance in question, due the plaintiff if the plaintiff were continuously and totally disabled as defined in the policy through March 15, 1971, a period of time fourteen (14) weeks longer than the period for which the plaintiff had previously been paid by the defendant . . . . "

The trial court then ordered, adjudged and decreed that plaintiff recover of defendant $786.75 "being fourteen (14) weeks at Fifty Dollars ($50.00) per week, with interest at six percent (6%) per annum through February 28, 1973, calculated under the terms of the payment provisions of the insurance policy in question" and dismissed the remainder of plaintiff's claim for relief. Plaintiff appealed.

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

Carpenter, Golding, Crews & Meekins by James P. Crews for defendant appellee.

HEDRICK, Judge.

This appeal presents the question of whether the evidence, when considered in the light most favorable to plaintiff, is sufficient to require submission to the jury the issue of whether plaintiff was totally disabled, as defined in the insurance policy, from and after 15 March 1971.

The material evidence offered by plaintiff tends to show the following:

Plaintiff was the exclusive "sales representative" for Jantzen, Inc., in an area covering western North Carolina and a portion of western Virginia. Plaintiff testified that he was responsible for the promotion and advertising of ladies' sportswear and swim suits in his territory and received from Jantzen

at least one sample of each garment manufactured by the ladies' wear division. Plaintiff's duties included unpacking, tagging, hanging and pressing of each garment before showing it to a prospective customer. He testified:

> "We used a special type of hanger which we could put all types of information on so that it was possible to glance at any one of the five hundred items and immedicately [*sic*] to be able to adequately describe it to the customers."
>
> "After hanging the samples in the manner that I have described, it was necessary to put them in the bag or cases and physically load them into an automobile and then drive them where I was about to display them."

After the accident in Virginia on 29 July 1970, plaintiff was hospitalized in Roanoke until about 21 August 1970, when he was removed by "hospital plane" and taken to Charlotte.

Dr. Harold W. Tracy, an expert in the field of orthopedic surgery, examined plaintiff in the Charlotte Memorial Hospital on 24 August 1970. Dr. Tracy testified that plaintiff:

> " . . . had a fracture dislocation of the fourth upon the fifth cervical vertebra. That is in the neck. And a compression fracture as well of the third lumbar vertebra, which is down in the low back. There has also been a dislocation of the left shoulder which had been reduced, and he had residual neurological loss in both arms as a result of his neck injury."

Dr. Tracy treated plaintiff until 8 May 1972 and testified that although his fractures and spinal injuries "went on to satisfactory healing," plaintiff was left with "continuing discomfort in both areas, weakness and tenderness, especially aggravated by fatigue, and he was left with some permanent residual neurologic loss in both arms; that is, weakness and numbness. By neurologic I mean weakness that involves the nerve structure." Dr. Tracy testified that by November, 1971, plaintiff "had reached a plateau of improvement" and estimated that plaintiff had a 40% permanent residual disability in his right arm, a 60% permanent residual disability in his left arm, a 20% permanent residual disability in his neck, and some permanent residual disability resulting from the compression fracture in the low back. In the opinion of Dr. Tracy, the pain suffered by plaintiff as a result of these injuries would affect plaintiff's ability to

work by limiting his tolerance for standing, sitting and walking, and necessitating that plaintiff take frequent rest periods. Dr. Tracy did not feel that plaintiff's condition would improve in the future.

Dr. R. W. Gaul, another expert in the field of orthopedic surgery, examined plaintiff on 11 April 1972. He testified:

> "On examination, I saw a middle aged white male, gross loss of motion in all planes of the cervical spine and this motion was painful at the extremes. This means both bending and rotation and lateral and side to side bending of the neck. The left shoulder was partially dislocated, tenderness of the muscle about this and the muscles of the left shoulder were wasted. There was a rather marked weakness of all this muscle group that extends the elbow, weak biceps that bends it, only a fair grip. Fair means just able to work against gravity. * * * Examination of the lumbar spine revealed stiffness and bending to one side. The motion was almost nonexistent. I was able to get almost nothing in the way of motion in the low back area. Examination of reflexes revealed weakness in all the reflexes in the upper extremities, normal in the lower. Stroking of the foot tended to rule out any serious spinal cord damage."

It was Dr. Gaul's opinion that plaintiff could engage only in an occupation requiring minimal physical or mental exertion and testified:

> "The condition I found would impede such physical action as the unpacking of clothing samples and pressing them. I would certainly think his condition would tend to impede his ability to carry sample cases which weighed more than ten or fifteen pounds."

Dr. Gaul anticipates no further improvement in plaintiff's condition.

Plaintiff testified that on 8 December 1970 he "had my wife drive me over to my showroom at the Charlotte Merchandise Mart where a junior salesman [Craig Ficklin], who had been supplied by the company, was showing the line. I was interested in seeing what he was doing, so forth. I stayed there for possibly half an hour or so. I had to leave." In February, 1971, plaintiff flew to Las Vegas to attend Jantzen's Fall sales meeting.

Commencing about 15 March 1971, plaintiff began riding with Ficklin in the sales area. Ficklin stated that during these trips, plaintiff appeared to be "in severe pain" and would frequently fall asleep in the automobile. He stated that plaintiff was only able to raise his right arm "a little bit" and that plaintiff "couldn't raise his left arm even up to the level of his shoulder." Ficklin testified that he did all the driving, handled all the samples, wrote the orders, prepared the line for show, made all the telephone calls and "everything else concerned."

Plaintiff testified that he was physically unable to perform the duties of his occupation in that he could not carry the bags containing the samples, he could not prepare and display the merchandise, and the pain made it impossible for him to concentrate so as to make the sales and write the orders.

On 27 May 1971, plaintiff's employment with Jantzen was terminated and he has not been reemployed.

In determining what constitutes total disability within the terms of an insurance policy, "each policy must be construed in relation to its particular provisions and each claim must be considered in relation to the particular profession or occupation in which the insured was engaged when injured." *Greenwood v. Insurance Co.*, 242 N.C. 745, 89 S.E. 2d 455 (1955) (hereafter cited as *Greenwood).*

[1] The insurance policy under consideration employs a two stage definition of total disability. Under clause 2 of Coverage C, a disability is total, if, for a period of fifty-two weeks from the commencement of disability, "it shall continuously prevent the insured from performing *every* duty pertaining to *his* occupation." (Emphasis added.) The policy of insurance in *Greenwood, supra,* also employed a two stage definition of total disability. Under the first stage, a disability was defined as total, if, for a period of twelve consecutive months after the injury, it prevented the insured "from performing *any and every* duty pertaining to the *Insured's* business or occupation." (Emphasis added.) Justice Bobbitt, now Chief Justice, writing for the North Carolina Supreme Court in *Greenwood* stated that the test of total disability under the first stage definition was whether "the insured is disabled to such extent that he cannot perform *any important* duty of his profession."

[2] We hold that when the evidence is considered in the light most favorable to plaintiff, it is sufficient to require submission

to the jury the issue of whether plaintiff was totally disabled during the fifty-two week period after the accident from performing any important duty pertaining to his occupation. The inference may be drawn that plaintiff, when he visited the Merchandise Mart on 8 December 1970, flew to Las Vegas in February, 1971, and commenced traveling in his sales territory with Craig Ficklin on 15 March 1971, "simply indulged the false hope that he would recover sufficiently from his . . . injury to resume his practice . . . but that, after making an honest trial, he found that he was totally incapable of performing personally any important duty of his profession." *Greenwood, supra,* at 751. These activities of plaintiff would not *ipso facto* necessitate directing a verdict for defendant or preclude submission of this case to the jury. Such activities are circumstances for the jury to consider, along with other evidence, in determining whether the plaintiff is totally disabled within the meaning of the insurance policy.

[3] The second stage of the definition of total disability is contained in clause 3 of Coverage C of the policy which provides:

> "[A]ny disability after said fifty-two weeks shall be deemed total disability only if it shall continuously prevent the insured from engaging in *any occupation or employment for wage or profit.*" (Emphasis added.)

The counterpart of this definition in *Greenwood* also defined a disability as total if it "shall wholly and continuously disable the Insured beyond twelve months and prevent the Insured from engaging in *any occupation or employment for wage or profit.*" (Emphasis added.) The test enunciated by the court in *Greenwood* as applicable to this definition was "whether the insured is wholly and continuously disabled to such extent that he cannot engage in *any* occupation or employment for *wage* or *profit.*" The North Carolina Supreme Court expounded on this test by quoting with approval the following statement from *Bulluck v. Insurance Co.*, 200 N.C. 642, 158 S.E. 185 (1931):

> "[E]ngaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery."

[4] We hold that the evidence is sufficient to require submission to the jury the issue of whether plaintiff was totally disabled, from and after 29 July 1971, from engaging in any occupation or employment for wage or profit.

The case of *Taylor v. Casualty Co.*, 14 N.C. App. 418, 188 S.E. 2d 728 (1972), cited by defendant is not controlling, since there the evidence disclosed that the plaintiff was actually working and performing "all or substantially all of the duties of his occupation" when he was discharged "for cause." There the court said:

> "There is no construction of the evidence in this case which would permit a jury to find that plaintiff's heart disease prevented him from performing 'each and every duty' of his job."

However, the evidence in the present case will permit a construction by the jury that the plaintiff was totally disabled within the meaning of the policy from the date of the accident until the date of the trial.

For the reasons stated, the judgment is reversed and the case is remanded for a

New trial.

Judges BROCK and VAUGHN concur.

JAMES A. SINK v. KENNETH WESLEY EASTER, JR.

No. 7322SC288

(Filed 1 August 1973)

1. **Actions § 10; Rules of Civil Procedure § 3— issuance of summons — extension of time to file complaint — inability to gain personal service — alternate service by publication — time of commencement of action**

Where, in a father's action to recover for medical expenses of a minor child arising out of an accident which occurred on 6 September 1968, summons was issued on 4 September 1971 and plaintiff was granted an extension of time to file his complaint to 24 September 1971, the sheriff on 10 September 1971 made his return which indicated that defendant was in a foreign country and his address was unknown, and the complaint was filed on 23 September 1971, (1) it was not necessary for plaintiff to get an endorsement of the original

summons or continue to sue out alias or pluries summonses to avoid a discontinuance, but plaintiff could properly proceed with the alternate method of service by publication under G.S. 1A-1, Rule 4(j)(9)c, and (2) the action was commenced when summons was issued and plaintiff was granted an extension of time to file his complaint, not when the complaint was actually filed, and the action did not abate since the complaint was filed within the extended time.

2. **Process § 10; Rules of Civil Procedure § 4— alternate service by publication — failure to mail complaint and notice — stipulation — address not discoverable**

Defendant is bound by his stipulation that he was served by publication and cannot complain that plaintiff's affidavit, filed after publication of notice pursuant to G.S. 1A-1, Rule 4(j)(9)c, is insufficient in that it fails to show a mailing of a copy of the complaint and notice; furthermore, plaintiff showed sufficient justification for omission of the mailing on the ground that defendant's post office address could not be ascertained with reasonable diligence where his affidavit disclosed that the sheriff returned the summons with the notation that defendant was in a foreign country and his address was unknown, and that plaintiff called defendant's residence in High Point and was advised that defendant was in a foreign country, his address was unknown and it was not known when he would return.

APPEAL by plaintiff from *Long, Judge,* 6 November 1972 Session of Superior Court held in DAVIDSON County.

This is an action by the father of a minor to recover medical expenses incurred by him on behalf of the minor for injuries allegedly caused by defendant's negligence.

The accident in which the minor was allegedly injured by the negligence of defendant occurred on 6 September 1968. Summons was issued on 4 September 1971. On the same day, plaintiff made application to the court for an extension of time within which to file his complaint. The application stated the nature and purpose of the action. The court extended the time within which plaintiff could file his complaint to 24 September 1971 and ordered that a copy of the application and order be delivered to the defendant with a copy of the summons. On 10 September 1971 the sheriff returned the summons and order extending time to file complaint unserved, with the following notation: "Kenneth Wesley Easter not to be found in Guilford County—in Amsterdam address unknown." The complaint was filed on 23 September 1971. Notice of service by publication was published on 1, 8 and 15 October 1971. The notice complied with Rule 4(j)(9)c. On 11 November 1971 defendant filed a motion to dismiss, saying that he had not been served with process

and that the court lacked jurisdiction. By order dated 27 December 1971, which was not filed until 27 March 1972, Judge Wood denied the motion to dismiss and allowed defendant thirty days from the date of the order to file answer. Answer was filed on 25 April 1972.

On 4 August 1972 defendant moved for summary judgment on the ground that the action was commenced more than three years after the cause of action accrued. On 16 November 1972 Judge Long signed an order allowing the motion. Plaintiff appealed.

Charles F. Lambeth, Jr., for plaintiff appellant.

Walser, Brinkley, Walser & McGirt by G. Thompson Miller for defendant appellee.

VAUGHN, Judge.

[1] Defendant takes the position that plaintiff's action was not commenced until the complaint was filed on 23 September 1971 which was more than three years after the date of the accident. Rule 3 provides that a civil action is commenced by the filing of the complaint. Rule 3 also provides that: "A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate."

Plaintiff complied with the rule and filed his complaint within twenty days. Defendant contends that plaintiff failed, as required by the rule, to serve the "summons and court's order" and, therefore, the action was not "commenced" until the complaint was filed. We disagree. The action was commenced when

summons was issued and plaintiff applied for and was granted authority by the court to file his complaint by 24 September 1971. If plaintiff had failed to file his complaint within the time allowed, the action, though properly commenced, would have abated. Plaintiff filed his complaint within the time allowed in the order and, therefore, the action did not abate. The summons and order extending time were issued on 4 September 1971. On 10 September 1971 the sheriff made his return which indicated that defendant was out of the State, was in a foreign country and that his address was unknown. Defendant appears to contend that plaintiff was then required to get an endorsement of the original summons or continue to sue out alias or pluries summons to avoid a discontinuance. Undoubtedly plaintiff could have, under Rule 4(d), elected to continue his action indefinitely by that method in order to attempt to obtain personal service under Rule 4(a). He was not, however, limited to that procedure. The action is one in which the court had jurisdiction of the subject matter and there were grounds for personal jurisdiction. G.S. 1-75.4. The parties stipulated that defendant was out of the State from the last day of August until 1 November 1971 and could not be "personally served." Plaintiff, therefore, was at liberty to proceed with the alternative method of service of process provided by Rule 4(j)(9), which actually gives several choices as to the method to be employed. Plaintiff proceeded under Rule 4(j)(9)c. The parties stipulated " . . . summons was issued for defendant in this civil action within the period of limitations; that it could not be personally served upon defendant and thereafter, after the period of limitation had run, defendant was served by publication. . . ." The record discloses that "service by publication" was made in apt time. That it was made after the statute had run on plaintiff's claim is of no consequence. Plaintiff's action was commenced, for the reasons we have stated, on 4 September 1971. His complaint was filed within the time allowed. Thus, in no event could there have been a discontinuance in less than ninety days from the date the summons was issued. Defendant was served by publication within that period.

[2] In his brief defendant says that plaintiff's affidavit, filed after publication of the notice, is insufficient in that it does not show a mailing of the copy of the complaint and notice as required by Rule 4(j)(9)c. We hold that defendant is bound by his stipulation at trial that "defendant was served by publication." Moreover, the affidavit discloses that: the sheriff re-

turned the summons with the notation that defendant was in Amsterdam and that defendant's address was unknown; that the affiant had called the residence of defendant in High Point and was advised that defendant was in Amsterdam, his address was unkown and that when he would return was unknown. Rule 4(j)(9)c provides that "[t]he mailing may be omitted if the post office address cannot be ascertained with reasonable diligence."

For the reasons stated it was error to grant defendant's motion for summary judgment on the grounds that plaintiff's action was barred by the statute of limitations.

Reversed.

Judges BROCK and BALEY concur.

STATE OF NORTH CAROLINA v. JOSEPH HOWES

No. 7328SC434

(Filed 1 August 1973)

Criminal Law § 91— motion for continuance for time to produce witnesses — denial proper

Trial court did not err in denying defendant's motion for continuance requested in order to give him time to produce three additional witnesses at trial where defendant did not undertake to show the nature of the facts he proposed to establish by the witnesses' testimony and did not offer an explanation as to why he waited until the day of his trial to advise his counsel of the witnesses' names for the first time.

APPEAL by defendant from *Martin (Harry C.), Judge,* during the third week of the 27 November 1972 Session of Superior Court held in BUNCOMBE County.

Defendant was charged in a bill of indictment with the felony of an attempt to commit robbery with the use of firearms (G.S. 14-87). The State's evidence tended to show the following: On 19 September 1972, Mrs. Marie Penley was the custodian and operator of the Rock Haven Terrace Court, a tourist court at 1464 Patton Avenue, Asheville, N. C. Mrs. Penley and her husband lived in quarters which adjoined the business office where guests were registered. At about 3:00 a.m. the doorbell

rang and Mrs. Penley went into the office. Two persons were standing outside the front door, but only the defendant came in when Mrs. Penley unlocked the door. Defendant said he wanted a single room and he signed a registration card. As Mrs. Penley turned to get a room key, defendant pointed a pistol at her head and said "don't move," "if you move, I'll kill you." He asked where the money was and, as he reached over the counter to put his hand in the money drawer, Mrs. Penley grabbed the hand in which defendant held the gun. They struggled over the gun until both of them fell to the floor. Defendant got up and left. He did not get any of the money. Defendant was dressed in dark shoes, dark trousers, and a white T shirt. He left in a light-colored old automobile. He was arrested at about 4:00 a.m. of the same morning by the Asheville police. Defendant was identified at trial by Mrs. Penley.

Defendant's evidence tended to show the following: Defendant stayed at Red's Tavern on Lexington Avenue, Asheville, from about 8:00 or 9:00 p.m. until closing time around 2:00 a.m. on 19 September 1972. When he left Red's Tavern he left alone and drove a light-blue 1960 or 1964 Chevrolet automobile which belonged to a friend. He drove straight to the Dinner Bell Restaurant on Enka Highway where he was immediately joined by the friends he had been with at Red's Tavern. The group ate breakfast and sat around for about two hours. When defendant left the Dinner Bell Restaurant he left his friend's car in the parking lot, took the keys, and rode with a Mr. & Mrs. Rell. They drove to several motels to find a room for defendant, but no one would answer the doorbells. At the time they were stopped by the police they were on their way to another motel. Defendant did not at any time go to the Rock Haven Terrace, and did not attempt to rob anyone. Defendant was arrested about 4:00 a.m. at which time he was wearing a white T shirt and blue slacks.

A pistol fitting the general description given by Mrs. Penley was found in the automobile in which defendant was riding at the time of his arrest.

From a verdict of guilty and an active prison sentence, defendant appealed.

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

Floyd D. Brock for the defendant.

BROCK, Judge.

Defendant assigns as error the denial of his motion for a continuance. The record on appeal reflects the following: Mr. Floyd D. Brock was appointed on 19 September 1972 to represent defendant (almost three months prior to trial), and Mr. Brock conferred with defendant from time to time after the appointment. On the day on which defendant was scheduled to be tried, he advised his attorney for the first time that he had three additional witnesses he wanted for the trial. The only witness defendant had previously mentioned (Jack Messer) was served with subpoena on 8 December 1972, but failed to appear for trial. A capias instanter was issued by the court to bring the witness Messer before it, but the Sheriffs' Departments of Buncombe and Haywood Counties were unable to locate him at his residence or place of employment. According to defendant's testimony Mr. and Mrs. Rell, with whom defendant was riding at the time of his arrest, were with defendant at all times that the witness Messer was with him. Mr. and Mrs. Rell testified that defendant was with them at all times from about 9:00 p.m. until 4:00 a.m., except for a brief period about 2:00 a.m. when they traveled from Red's Tavern to the Dinner Bell Restaurant. Defendant, according to his own testimony, traveled alone to the Dinner Bell Restaurant. It appears, therefore, that Messer's testimony merely would have been cumulative.

As for the three additional witnesses requested by defendant on the day of his trial, defendant has not shown that their testimony would have been relevant or competent in his trial. Nowhere in defendant's testimony did he mention that the three witnesses were in his presence during the night and morning involved. He did not undertake to show the nature of the facts he proposed to establish by their testimony. He did not offer an explanation as to why he waited until the day of his trial to advise counsel of the three witnesses' names for the first time.

It is well settled that a motion for continuance is ordinarily addressed to the discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. On this record, defendant has failed to show an abuse of discretion by the trial judge.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. PAUL GRIER SMITH

No. 736SC442

(Filed 1 August 1973)

Criminal Law §§ 101, 169— threatening calls made to witness — incompetent evidence — no prejudicial error

The trial court in a kidnapping and robbery case committed error, though it was not prejudicial to defendant, in allowing the solicitor to ask a State's witness if he had received threatening phone calls and in allowing the witness to answer in the affirmative where there were no further questions or testimony about the threats and the question and answer were not clarified in any way or in any way connected with defendant.

ON *certiorari* to review a trial before *James, Judge,* at the 7 August 1972 Session of Superior Court held in HALIFAX County.

Defendant was charged in two bills of indictment (1) with armed robbery and (2) with kidnapping.

The State's evidence tended to show the following: On 2 November 1971 Dennis Stevens (Stevens) was a truck driver for Southern Wholesale, Goldsboro, N. C. On that morning Stevens loaded his truck in Goldsboro with approximately $16,800.00 worth of cigarettes. He was to deliver these to Lakewood Truck Stop near the town of Halifax. Stevens drove north on Highway 301 and Interstate 95. As he was proceeding north in Halifax County a pickup truck passed him. In addition to the driver of the pickup truck defendant and two other men were in the back. Defendant pointed a 30-30 rifle at Stevens, and the other two men pointed pistols at him. They motioned for Stevens to pull over and stop, which he did. At the direction of defendant, Stevens got out of his truck with his hands up and lay down in the back of the pickup truck. One of the men with defendant got into Stevens truck and drove it away. Stevens was taken in the pickup truck for several miles to an isolated wooded area. While defendant continued to point the rifle at Stevens, the other two men tied Stevens to a tree with a rope. Defendant and his associates then drove away in the pickup truck. The pickup truck was red and white. Stevens was able to free himself after a short time. He walked to the highway, caught a ride into the town of Halifax, and reported to the County Sheriff. Two months later Stevens was advised that his truck was in Fayetteville, N. C.

Defendant's evidence tended to show the following: That on 1, 2 and 3 November 1971 defendant was in the town of Benson, N. C., taking a motor out of his pickup truck and putting another in; that he worked on his pickup truck at the home of his brother-in-law all day on 2 November 1971; that his pickup truck is red and white; that he did not at any time on those days go to Halifax County; that he did not rob or kidnap Stevens. On cross-examination defendant stated that he bought a 30-30 rifle in 1967 or 1968 but that he sold it to one Bo Barnes. Defendant identified the rifle exhibited in court as the one that he had owned.

The jury returned a verdict of guilty of (1) armed robbery and (2) kidnapping.

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

Hux & Livermon, by James S. Livermon, Jr., for defendant.

BROCK, Judge.

Defendant assigns as error that the trial judge permitted, over objection, the following question by the Solicitor and answer by the State's witness:

"Q. Let me ask you if you have not had some threatening phone calls?

"A. Yes, sir."

Defendant's motion to strike was also denied.

There were no further questions or testimony about threats, and the above question and answer were not clarified in any way. Presumably the Solicitor intended to create the impression that defendant had called the State's witness on the telephone and made threats against him if he testified against defendant. However, the question and answer fall short of properly connecting defendant so as to make the question competent. Where a defendant threatens or otherwise intimidates a State's witness in an effort to prevent such witness from testifying against defendant, the fact of the threat or intimidation may be shown in evidence. But it must be shown that defendant made the threat or was privy to it. Annot., 62 A.L.R. 136.

Defendant's objection to the foregoing question should have been sustained, and the trial court having failed in this, it should

have allowed defendant's motion to strike. Nevertheless, because of the strong eyewitness evidence against the defendant, we do not conceive that the question and answer were of sufficient import to prejudice defendant's trial. Appellant must show prejudice as well as error. This assignment of error is overruled.

Counsel for defendant has brought forward numerous assignments of error to the trial judge's instructions to the jury. There are some errors pointed out, but they appear to us to be inconsequential. We do not feel that a discussion of these numerous exceptions would serve any valid purpose. We have considered the judge's charge as a whole, and in our opinion, the jury could not have been misled in the application of the law to the evidence or as to its duty. In our opinion defendant had a fair trial, free from prejudicial error. The assignments of error to the charge of the court are overruled.

The remaining assignments of error are formal and are overruled.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. BRUCE ELLIS WATSON AND RICHARD MICHAEL CAPERS

No. 7321SC540

(Filed 8 August 1973)

1. **Searches and Seizures § 4— search under warrant — requirement that entry be demanded and denied**

In the absence of special or emergency circumstances, an officer may not lawfully make a forcible entry into a private dwelling unless he first gives notice of his authority, makes demand and is denied entry.

2. **Criminal Law § 84; Searches and Seizures § 4— search under warrant — requirement that entry be demanded and denied**

Entry of defendant's home by officers was lawful and marijuana seized pursuant to a valid search warrant was properly admitted into evidence where officers, with a valid search warrant, approached defendant's apartment, one of the officers observed someone looking from behind a pulled back curtain in the apartment, thought he was recognized and ran to the door of the apartment, made two fast

knocks, opened the door immediately and entered shouting "Police. Search warrant." pulling his revolver at the same time, then identified himself to the occupants of the apartment and read the search warrant to defendant before conducting the search.

3. Constitutional Law § 31— confidential informer — disclosure of identity not required

Where officers found within the apartment occupied by defendants 69.5 grams of marijuana, one capsule of phencyclidine, various miscellaneous materials showing marijuana remnants and residue, and personal papers of both defendants indicating the apartment as their current address, evidence was sufficient to sustain a jury finding of possession of marijuana with intent to distribute and possession of phencyclidine without disclosure of the identity of the informant who gave information upon which the search warrant was based.

APPEAL by defendants from *Collier, Judge,* 26 March 1973 Session of Superior Court held in FORSYTH County.

Defendants were charged in separate bills of indictment with possession of more than 5 grams of marijuana with intent to distribute, in violation of G.S. 90-95(a)(1). They had also appealed to the superior court from convictions in the district court upon warrants for possession of phencyclidine, a controlled substance. Without objection all cases against both defendants were consolidated for trial.

Defendants entered not guilty pleas and were convicted by the jury upon all charges.

The evidence for the State shows, in substance, that a search warrant for apartment 1B, Ye Old Barn Apts., 100 Powers Road, Winston-Salem, was obtained by officers of the Sheriff's Department of Forsyth County about 7:00 p.m. on 23 December 1972 upon information furnished by a confidential informant that he had seen a quantity of marijuana in the apartment within the past four hours. Eight officers proceeded to the premises in two cars and parked in front of the apartment at about 8:30 p.m. As they were getting out of the cars, Officer E. P. Oldham saw someone with the curtains pulled back looking out of a window of the apartment and saw someone look out of the bedroom to the door. He immediately ran to the apartment door. When he got to the door he knocked twice with his right hand loud enough to be heard and then reached for the doorknob. He found that the door was not locked. As he opened the door and entered the apartment, he shouted, "Police. Search warrant," and pulled his revolver. After he stepped into

the room he identified himself. He was not in uniform but held in his left hand the search warrant with his badge clipped to it. He showed defendant Capers the search warrant and read it to him before conducting the search. Officer Oldham testified that he acted quickly to enter the apartment because he thought the officers had been recognized by someone looking from the apartment window.

Upon search of the apartment pursuant to the warrant, the officers found two clear plastic bags containing green vegetable material later identified as marijuana. The smaller bag weighing 13 grams was on a foot locker table in the living room and the larger weighing 56.5 grams was concealed between the mattresses in the right rear bedroom. One red gelatin capsule containing white powder, which was later determined to be phencyclidine, was found on the bottom shelf of a cabinet in the only bathroom in the apartment. Various miscellaneous materials which tended to show use of marijuana were discovered about the premises. They included pipes with marijuana residue, pipe rack, packs of rolling papers, pipe cleaning outfit with marijuana residue, a small portion of a rolling outfit, ashtray containing partially burned marijuana, clear plastic vial containing particles of marijuana, glass flask, and boxes with remnants of marijuana. In the left rear bedroom the officers, among other things, found a motorcycle registration card for a motorcycle listed to Richard Michael Capers, a letter and Christmas card addressed to Mike Capers, personal check bearing name of R. Michael Capers and the address as 100 Powers Road, Apartment 1-B, Winston-Salem, North Carolina, and boxes containing remnants of marijuana on or about the dresser. In the right rear bedroom the search disclosed personal papers, military papers, letters, library card, and bank notices with the name and address of Bruce Watson, 100 Powers Road, Apartment 1-B, Winston-Salem.

An expert chemist testified that the green vegetable material was marijuana, that the residue and remnants upon the various articles was marijuana, and that the white powder in the red capsule was phencyclidine.

The defendants moved to suppress all evidence obtained by the search. They also moved that the name of the confidential informant be revealed and that he be produced as a witness. Both motions were denied by the court after *voir dire* hearings.

Defendants offered no evidence.

The court consolidated all cases against each defendant for judgment and imposed similar sentences of two to four years which were suspended and the defendants placed on probation for a period of five years. From this judgment, both defendants appealed.

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

Badgett, Calaway & Phillips, by Richard G. Badgett, for defendant appellant Bruce Ellis Watson.

Jenkins, Lucas & Babb, by F. Gaither Jenkins and Judson D. DeRamus, Jr., for defendant appellant Richard Michael Capers.

BALEY, Judge.

On this appeal defendants object primarily to the methods by which the officers have obtained the evidence which resulted in their convictions. They assert that the prosecution should be required to disclose the name of the confidential informant who gave the information upon which a search warrant was based and make him available to testify in their defense. They challenge the manner in which the search warrant was served as constituting an illegal entry thereby tainting the fruits of the search. These questions are serious and concern the delicate balance which must be maintained between the protection of the constitutional rights of the individual and the fundamental right of society to protect and preserve its members by the proper enforcement of the law.

It seems clear that the search warrant authorizing the search of the apartment occupied by the defendants was lawfully obtained. Its validity is not seriously disputed. It described the premises and evidence for which search was to be made and presented sufficient information by affidavit to justify its issuance. The informant, who was known to the officer and had previously furnished reliable information, reported that he had seen marijuana in the apartment of the defendants within the preceding four hours. Combined with the personal knowledge of the officers who were acquainted with the defendant Capers and had observed known users of narcotics come and go on his premises, there was ample information to show reasonable

cause to believe that the proposed search would reveal evidence of the commission of a crime and to support the validity of the search warrant. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755.

However, defendants strongly contend that the entry and search made by the officers even if pursuant to a valid search warrant was illegal and that evidence obtained upon such search should be suppressed.

[1] While there is no statute in North Carolina which specifically prescribes the method of serving a search warrant, there are implications in the opinion of the North Carolina Supreme Court that, in the absence of special or emergency circumstances, an officer may not lawfully make a forcible entry into a private dwelling unless he first gives notice of his authority, makes demand, and is denied entry.

> "Ordinarily, a police officer, absent invitation or permission, may not enter a private home to make an arrest or otherwise seize a person unless he first gives notice of his authority and purpose and makes a demand for and is refused entry. *Without special or emergency circumstances,* an entry by an officer which does not comply with these requirements is illegal. . . . " (Emphasis added.) *State v. Sparrow,* 276 N.C. 499, 512, 173 S.E. 2d 897, 905. *See also State v. Covington,* 273 N.C. 690, 161 S.E. 2d 140.

Again in *In re Walters,* 229 N.C. 111, 113, 47 S.E. 2d 709, 710, the court states:

> " . . . [E]ven the strong arm of the law may not reach across the threshold of one's dwelling and invade the sacred precinct of his home *except under authority of a search warrant issued in accord with pertinent statutory provisions.*" (Emphasis added.)

In *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706, the court found that the officer in serving an arrest warrant did not make an illegal entry when

> "The State's evidence showed that Deputy Sheriff Respass 'twice called out' in lieu of knocking, before opening the door. Defendant had observed his uniform and was aware of his official status. The officer knew that defendant had observed him and was therefore justified in proceeding to open the door. Under the circumstances of this case there was sufficient compliance with the rationale of *Spar-*

row and *Covington,* to the effect that entrance must be demanded and denied before a police officer can proceed to forcibly enter a dwelling for the purpose of making an arrest." *State v. Harvey, supra,* at 11, 187 S.E. 2d at 713.

Thus our court has given approval to a forcible entrance of a dwelling to serve an arrest warrant under special conditions and circumstances.

In *Ker v. California,* 374 U.S. 23, 10 L.Ed. 2d 726, 83 S.Ct. 1623 (1963), the United States Supreme Court recognized that an entry could be made by officers without notice of authority and demand for admittance, even without a warrant, when there was reasonable ground to believe that the occupant was in possession of narcotics which could be quickly and easily destroyed, quoting with approval from *People v. Maddox,* 46 Cal. 2d 301, 306, 294 P. 2d 6, 9, *cert. den.,* 352 U.S. 858, 1 L.Ed. 2d 65, 77 S.Ct. 81 (1956):

> " . . . Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844 (California statute similar to G.S. 15-44 requiring a demand for admittance). Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. . . . Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance." *Ker v. California, supra,* at 39-40, 10 L.Ed. 2d at 741-42, 83 S.Ct. at 1633.

While under ordinary circumstances the officers must announce their purpose and demand admittance before making a forcible entry to conduct a search pursuant to a valid search warrant, such an entry may be proper under special and emergency conditions when it reasonably appears that such an announcement and demand by the officer and the delay consequent thereto would provoke the escape of the suspect, place the officer in peril, or cause the destruction of disposition of critical evidence.

[2] In the present case the officers had reliable information that marijuana had been seen in the apartment of the defendants within the preceding four hours. As the affidavit to obtain the search warrant sets out, they had made other arrests upon information of this informant and Officer Oldham testified that they had made searches where they were unable to locate narcotics but heard commodes flushing prior to and after their entry and had reason to conclude that the evidence was being destroyed. When eight officers were getting out of two cars in plain view in the parking place in front of the defendants' apartment, Officer E. P. Oldham saw someone with the curtain pulled back looking from the window of the apartment and saw someone look out of the bedroom to the door. The officers had known defendant Capers for approximately eighteen months and had observed his apartment and guests. Most of the officers were known by sight and name to those engaged in narcotics traffic. Officer Oldham testified that he thought the officers were identified and he ran from the car to the door of the apartment. He made two fast knocks with his right hand loud enough to be heard and then reached for the doorknob. The door was not locked and he opened it and entered shouting "Police. Search warrant," pulling his revolver at the same time. He immediately identified himself to the occupants and read the search warrant to defendant Capers before conducting the search.

The length of time an officer must wait before breaking in to serve a valid warrant must be reasonable under the circumstances as they appear to him. He was forced to act on a quick appraisal of the situation with which he was confronted without benefit of the hindsight possessed by those who review his actions. We hold that under the factual circumstances of this case the entry was lawful, and the motion to suppress was properly denied.

[3] The defendants contend that the identity of the informant who gave information upon which the search warrant is based is essential to their defense. In this case the officers found within the apartment occupied by defendants 69.5 grams of marijuana, one capsule of phencyclidine, and various miscellaneous materials showing marijuana remnants and residue. Personal papers of both defendants indicating the apartment as their current address were sufficient to show their occupancy. There was abundant evidence to sustain a jury finding of possession

of marijuana with intent to distribute and possession of phencyclidine. All of these narcotics and other materials were in the custody and subject to the disposition of the defendants who were and had been residing at the apartment where they were found.

> "An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey, supra,* at 12, 187 S.E. 2d at 714. *See also State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680; Annot., 91 A.L.R. 2d 810 (1963).

The disclosure of the informant whose information led the police to the defendants would not be relevant or helpful to the defendants as there is ample independent evidence of their guilt. The activities of the confidential informant are only collaterally connected with the offenses for which the defendants were on trial. Disclosure of the identity of a confidential informer will not be allowed unless it clearly appears 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.

Defendants have been convicted by a jury in a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

JOHN K. BAILEY T/A BAILEY CAR COMPANY v. NATIONWIDE MUTUAL INSURANCE COMPANY, A CORPORATION

No. 7326DC296

(Filed 8 August 1973)

1. **Insurance § 95— automobile liability policy — termination — notice to Department of Motor Vehicles**

Where insurance coverage on the vehicle in question was terminated by insured, insurer was not required to notify the Commissioner of Motor Vehicles of termination of coverage on the replaced vehicle before such termination could become legally effective; therefore, trial court erred in concluding that insurer, for failure to provide such notification, was liable for damages sustained by plaintiff when insured drove the uninsured vehicle onto plaintiff's used car lot, striking three cars. G.S. 20-309.

2. **Insurance § 95— automobile liability policy — termination — failure to notify Department of Motor Vehicles**

G.S. 20-309(e) does direct the insurer, in event the insurance policy is terminated by the insured, to "immediately notify" the Department of Motor Vehicles that such insurance has been terminated, but since such notice can in any event only be given after the effective date of the termination, a failure or delay in giving the notice will not defeat the termination.

APPEAL by defendant from *Abernathy, District Judge,* 6 November 1972 Session of District Court held in MECKLENBURG County.

Civil action for a declaratory judgment to determine the rights, if any, of plaintiff under a policy of automobile liability insurance issued by defendant. Jury trial was waived and the cause submitted on an agreed statement of facts, which are summarized as follows:

On 14 November 1969 defendant issued to one John Jessie Payton (Payton) an assigned risk automobile liability insurance policy covering a 1959 Plymouth acquired by Payton on or about 17 November 1969 and for which he was issued 1969 N. C. license plate number ZP 3180. The premium on the policy was paid and the policy was in full force on 31 January 1970. On 12 December 1969, at Payton's request, defendant amended the policy by substituting a 1961 Oldsmobile for the 1959 Plymouth. As of 15 October 1970 neither defendant nor Payton had notified the N. C. Department of Motor Vehicles of the substitution. On 31 January 1970 Payton, driving the Plymouth with 1969 N. C. license plate number ZP 3180 and which car was still owned by

him, drove the Plymouth across and on the wrong side of a street in Charlotte, N. C., and onto plaintiff's used car lot where he struck and damaged three cars belonging to plaintiff. Thereafter, plaintiff instituted suit against Payton to recover his damages, having a copy of the summons and complaint served on defendant. No defensive pleading was filed in that action and an entry of default and order to docket for trial on the issue of damages have been entered therein. Plaintiff contends defendant is liable to plaintiff, within the limits of the policy, for the damages caused by the Plymouth.

Following a hearing the court entered judgment finding the facts to be as set forth in the stipulations and concluding as a matter of law that defendant is liable, up to the limits of its policy in the minimum statutory amounts under the North Carolina Assigned Risk plan, for the damages, if any, which may be awarded plaintiff in his action against Payton. From judgment in accord with this conclusion, defendant appealed.

Newitt & Newitt by John G. Newitt, Jr. for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman by Charles V. Tompkins, Jr. for defendant appellant.

PARKER, Judge.

As originally issued, the policy involved in this case provides coverage to Payton, the named insured, during the period 14 November 1969 to 14 November 1970 for liability arising from operation of the 1959 Plymouth. The endorsement to the policy, which was issued at Payton's request effective 12 December 1969, provided that a 1961 Oldsmobile described therein "replaces all other insured automobiles heretofore described in the policy. . . . " The endorsement further expressly provided that "[i]t is understood and agreed that there is no insurance with respect to replaced automobiles." Therefore, by the express language of the policy as amended by the endorsement, no coverage was provided on the Plymouth on 31 January 1970, the date when Payton's operation of the Plymouth caused plaintiff's damages. The question presented by this appeal is whether the defendant insurance company nevertheless remained liable because of failure to notify the Commissioner of Motor Vehicles of termination of coverage on the Plymouth. We hold that it did not.

The parties stipulated that the policy was issued as an assigned risk policy. They also stipulated that the 1959 Plymouth, for which the policy was originally applied and on which it was originally issued, was acquired by the insured, Payton, in November 1969, just three days after the application for the policy was submitted. The application, copy of which was attached as an exhibit to the stipulations, indicates that the applicant, Payton, was not required to file proof of financial responsibility in North Carolina because of a driver license suspension or revocation. Accordingly, while the parties did not expressly so stipulate, from the facts to which they did stipulate and the exhibit attached to their stipulation, it appears that this policy was issued pursuant to and subject to the provisions of the Vehicle Financial Responsibility Act of 1957, G.S. Chap. 20, Art. 13, rather than pursuant to the Motor Vehicle Safety and Financial Responsibility Act of 1953, G.S. Chap. 20, Art. 9. Therefore, G.S. 20-279.22, which provides that a motor vehicle liability insurance policy certified under G.S. 20-279.19 or G.S. 20-279.20 "shall not be cancelled or terminated until at least twenty (20) days after a notice of cancellation or termination of the insurance so certified shall be filed in the office of the Commissioner," does not apply in this case. *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303. Accordingly, we must look to other statutory provisions, particularly those contained in G.S. Chap. 20, Art. 13, to determine whether under the facts of this case the insurance company was required to notify the Commissioner of Motor Vehicles of termination of coverage on the Plymouth before such termination could become legally effective.

G.S. 20-309, as in effect at times pertinent to this appeal, contained the following:

> "(e) No insurance policy provided [sic] in subsection (d) [i.e., any policy providing liability insurance with regard to a motor vehicle] may be terminated by cancellation or otherwise *by the insurer* without having given the North Carolina Motor Vehicles Department notice of such cancellation fifteen (15) days prior to effective date of cancellation. Where the insurance policy is terminated by the *insured* the insurer shall immediately notify the Department of Motor Vehicles that such insurance policy *has been terminated*. . . ." (Emphasis added.)

Discussing this statute, our Supreme Court in *Insurance Co. v. Cotten,* 280 N.C. 20, 26, 185 S.E. 2d 182, 186, said:

> "G.S. 20-309(e) expressly distinguishes between a policy terminated by the insurer and a policy terminated by the insured, with reference to when the insurer is required to notify the Department of Motor Vehicles that the policy has been terminated. It is only where the policy has been terminated by the insurer that the statute requires notice to the Department of Motor Vehicles prior to the effective date of cancellation."

The insurance on the Plymouth in the present case was terminated by the insured and not by the insurer. *Levinson v. Indemnity Co.,* 258 N.C. 672, 129 S.E. 2d 297. In that case, in which the facts were very similar to the facts in the present case, one Rutherford was issued on 8 May 1960 an assigned risk policy covering a 1955 Buick. At his request the policy was amended on 21 July 1960 so as to substitute a 1949 Oldsmobile in place of the 1955 Buick, and the policy was discontinued on the Buick. No notice of this was given to the Commissioner of Motor Vehicles. On 24 January 1961 Mrs. Rutherford, while operating the Buick, caused a collision resulting in plaintiffs' damages. The trial court adjudged plaintiffs were not entitled to recover against the insurance company. On appeal, our Supreme Court affirmed, the opinion stating (at p. 675):

> "The stipulated facts do not disclose a cancellation of the policy of insurance. They merely show that the policy did not, after 21 July 1960, cover the 1955 Buick. *Underwood v. Liability Co.,* 258 N.C. 211. Insured's act placed the responsibility of notifying the Commissioner that the replaced vehicle was no longer covered on the insured—not the insurer. If the insured had complied with the law, registered and licensed the Oldsmobile, the records in the Commissioner's office would have disclosed the fact that there was no insurance on the Buick. The operation of that vehicle after 21 July by Mrs. Rutherford was unlawful. This unlawful act did not impose liability on defendant."

[1, 2] While G.S. 20-309 was from time to time amended after the decision in *Levinson v. Indemnity Co., supra,* the decision is still controlling on the crucial question presented by this appeal, and that is that the insurance coverage on the replaced vehicle under the facts of this case was terminated by action of the

insured and not by action of the insurer. None of the amendments which have been adopted to G.S. Chap. 20, Art. 13, after the decision in *Levinson,* place upon the insurer under circumstances here presented the obligation to notify the Department of Motor Vehicles before termination of insurance coverage on a replaced vehicle can become effective. G.S. 20-309(e) does direct the insurer, in event the insurance policy is terminated by the insured, to "immediately notify" the Department that such insurance "has been terminated," but since such notice can in any event only be given after the effective date of the termination, a failure or delay in giving the notice will not defeat the termination. *Insurance Co. v. Cotten, supra; Nixon v. Insurance Company,* 258 N.C. 41, 127 S.E. 2d 892.

For the reasons stated, we find the trial court's conclusion of law in error and the judgment appealed from is

Reversed.

Judges BRITT and MORRIS concur.

BURLINGTON INDUSTRIES, INC. v. MARTIN B. FOIL, JR., WILLIAM H. TAYLOR AND TUSCARORA COTTON MILL

No. 7319SC476

(Filed 8 August 1973)

1. **Frauds, Statute of § 5— promise to pay debt of another — writing required — exception**

Though the Statute of Frauds requires that a promise to pay the debts of another be in writing, there is an exception where the promisor has such a direct, immediate, pecuniary interest in the subject matter of the principal debtor's contract so as to indicate that the guarantor has intended to adopt the original contract as his own. G.S. 22-1.

2. **Frauds, Statute of § 5— oral promise to pay debt of another — insufficiency to bind**

Where the evidence tended to show that the indebtedness in question was fully accrued on 22 May 1971 but no one ever spoke to one defendant about the debt until 3 September 1971, his promise to see that the obligation would be paid did not in any way constitute him an original obligor, and trial court properly directed verdict in his favor in an action to recover the balance of the debt.

3. **Guaranty — unauthorized promise to pay debt of another — insufficiency to bind**

Where plaintiff sold yarn on credit to a fabric company upon the company president's promise that defendant cotton mill would guarantee the account, defendant mill was not bound by the unauthorized guaranty; nor did the defendant mill have such a direct, pecuniary interest in the fabric company's receiving credit from plaintiff so as to render defendant liable on the debt.

4. **Frauds, Statute of § 5— oral promise to pay debt of another — insufficiency to bind**

Where the evidence tended to show that the president of a fabric company negotiated a sale of yarn to the company on credit from plaintiff, the yarn was shipped beginning 6 April 1971, and defendant treasurer of the fabric company had no communications with plaintiff until 19 April 1971, evidence was insufficient to make defendant treasurer an original obligor; furthermore, where the evidence showed verbal but no written promises by defendant, the case came within the Statute of Frauds and the trial court properly directed verdict for defendant.

APPEAL by plaintiff from *McConnell, Judge,* 4 December 1972, Regular Civil Session of CABARRUS County Superior Court.

In this civil action plaintiff seeks to recover $55,577.58, being the balance due from the sale of yarn to Colonial Fabrics, Inc., (Colonial). Plaintiff contends that each of the defendants guaranteed the payment of the account by Colonial and that plaintiff extended the credit because of the verbal guaranty. At the close of the plaintiff's evidence, each of the defendants moved for a directed verdict under Rule 50. This motion was allowed, and the action of the plaintiff was dismissed.

Sanford, Cannon, Adams and McCullough by E. D. Gaskins, Jr., Robert W. Spearman and J. Allen Adams for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey and Hill by Charles E. Nichols and Lindsey R. Davis, Jr.; and Williams, Willeford and Boger by John Hugh Williams for defendant appellees.

CAMPBELL, Judge.

In December 1970 Colonial was organized by the defendants Foil, Taylor and Edwin Fowler. Colonial had very little capital, and it was doing business on credit. Fowler was the President and General Manager and the active operator. During the time of the purchases involved in this case, namely, during April and May 1971, the capital stock of Colonial was owned with Fowler

owning 50% and Foil, Taylor and Mrs. Foil, the mother of Foil and the mother-in-law of Taylor, between them owning the remaining 50%. In addition to being a stockholder, Foil was also Director and Treasurer of Colonial. Taylor, likewise, in addition to being a stockholder of Colonial, was a Director and Secretary of Colonial.

Tuscarora is a corporation engaged in the textile business with its place of business in Mount Pleasant, Cabarrus County, North Carolina. Foil acted as a Director and President of Tuscarora and likewise was a stockholder. Taylor was a Director and Executive Vice-President and likewise a stockholder of Tuscarora. Foil and Taylor were minority stockholders and the majority of the stock of Tuscarora was owned by Mrs. Foil, the mother of Foil and the mother-in-law of Taylor, and by a trust estate created by the deceased husband of Mrs. Foil.

Colonial conducted its operations in Kannapolis, Cabarrus County, North Carolina, which was located some 20 miles from Mount Pleasant. The operations of Colonial consisted of purchasing yarn from producers of yarn such as the plaintiff and then having this yarn fabricated by other concerns. The fabricated product was then sold by Colonial; and with the proceeds of the sale, Colonel paid its obligations.

In the latter part of March 1971 Fowler, on behalf of Colonial, sought to purchase yarn from plaintiff. The salesman for plaintiff reported this to Jay Houston Barnes (Barnes), who was acting as the credit manager for the division of plaintiff which would be involved in the transaction. On March 30, 1971, Barnes telephoned Fowler seeking credit information. Fowler in turn advised Barnes to communicate with Foil who was associated with Fowler and was with Tuscarora. Fowler further told Barnes that Tuscarora would guarantee the account. There is no evidence that Fowler had any authority to speak for, much less bind, Tuscarora to any guaranty agreement.

Pending further investigation, Barnes authorized sales to Colonial; and beginning on April 6, 1971, plaintiff began shipping yarn to Colonial.

By April 15, 1971, plaintiff had shipped yarn with a value of $44,541.72 to Colonial. All of these shipments were based on extension of credit for 60 days.

On April 19, 1971, Barnes, for the first time, talked to Foil on the telephone. Barnes told Foil that shipments had already begun because of the guarantee and that Fowler wanted to increase the program. Foil told him not to increase the program and that he was trying to get Fowler to clear all purchases with him before any increase was made. Barnes told him at that time that plaintiff was looking to Tuscarora and Foil for payment. The next day, April 20, 1971, Barnes confirmed the telephone conversation by letter as follows:

> "Confirming our telephone conversation yesterday, we are enclosing form, in duplicate, by which Tuscarora Cotton Mill, Inc. will guarantee the account of Colonial Fabrics, Inc. Please complete both sides of the form, returning one copy to us, the extra copy is for your file."

Thereafter, contrary to what Foil had said over the telephone about not increasing the program, plaintiff continued shipping yarn to Colonial until on May 6, 1971, the amount of shipments had reached $106,835.47. At that time Carl M. Aycock, the assistant to Barnes, terminated shipments because of a question concerning the execution of the guarantee. On May 13, 1971, Barnes again talked to Foil on the telephone and told Foil that he understood that the guarantee was not going to be executed. Foil told him that that was correct, that he had been advised by counsel that he could not sign the guaranty agreement on behalf of Tuscarora. Despite this, plaintiff renewed shipments of yarn until May 22, 1971, when the account had reached the total sum of $126,191.79. At that time plaintiff ceased shipments and never shipped any more yarn to Colonial.

On June 21, 1971, Colonial, for the first time, began making payments on the account.

On September 3, 1971, Barnes went to Kannapolis, North Carolina, and there saw Fowler and Taylor. This was the first time Taylor was seen or talked to about the entire transaction. At this time Taylor advised Barnes that he was taking an active interest in the operation of Colonial and would see that plaintiff was paid. On September 16, 1971, Barnes again went to Kannapolis because a check for $25,000.00 had not been paid by the bank on which it had been drawn by Colonial because Colonial had insufficient funds in the bank. On this occasion Taylor gave his personal check to Barnes for $25,000.00 payable to plaintiff on behalf of Colonial.

As of September 22, 1971, the account of Colonial to plaintiff stood at $55,577.58; and that is the amount which plaintiff now seeks from the defendants.

"A guaranty of payment is an absolute promise by the guarantor to pay a debt at maturity if it is not paid by the principal debtor. This obligation is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity. . . ." *Investment Properties v. Norburn,* 281 N.C. 191, 188 S.E. 2d 342 (1972).

[1] In the instant case it is conceded that there was no written agreement as to the guaranty. G.S. 22-1 provides:

> "No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized."

There has been carved out an exception to this statute where the promisor has such a direct, immediate, pecuniary interest in the subject matter of the principal debtor's contract so as to indicate that the guarantor has intended to adopt the original contract as his own. This exception is known as the "main purpose rule." It is pursuant to this exception to the general rule that the plaintiff seeks to recover.

[2] The plaintiff relies on the case of *Warren v. White,* 251 N.C. 729, 112 S.E. 2d 522 (1970), where the authorities are collected and reviewed. In that case the guarantor was found to be an original obligor and outside of the statute of frauds. The instant case is readily distinguishable from the *Warren* case. In the instant case, insofar as the defendant Taylor is concerned, the indebtedness was fully accrued on May 22, 1971; and no one ever spoke to Taylor or communicated with him until September 3, 1971. His promise to see that the obligation would be paid did not in any way constitute him an original obligor. The directed verdict in his favor and the dismissal of the plaintiff's case against him was correct.

[3] While the evidence in this case shows that there had been from time to time business dealings between Tuscarora and Colonial, there is no evidence to show that Tuscarora had any direct, pecuniary interest in Colonial receiving credit from the plaintiff. Furthermore, the evidence clearly shows that no one with authority obligated Tuscarora to the plaintiff. In fact, the evidence is to the contrary; and when plaintiff sought to procure a proper guaranty agreement from Tuscarora, it failed to do so. The directed verdict in favor of Tuscarora and the dismissal of the plaintiff's action as to Tuscarora was correct.

[4] While the evidence on behalf of the plaintiff when taken in the light most favorable to the plaintiff, as we are required to do in this instance, makes out a stronger case against Foil than it does as to the other two defendants, nevertheless, we find that the evidence is insufficient to make Foil an original obligor. The evidence shows verbal promises made by Foil but nothing in writing. We think the case, as to Foil, comes within the statute of frauds, G.S. 22-1, and that the trial court was correct in sustaining the directed verdict in favor of Foil and dismissing the plaintiff's action as to him.

Affirmed.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. CHARLES McKINNEY

No. 735SC519

(Filed 8 August 1973)

1. **Criminal Law § 99— questions by judge on voir dire — no error**

Questions put to a State's witness by the trial judge on *voir dire* for the purpose of clarifying the basis of the witness's identification of defendant did not constitute error.

2. **Criminal Law § 66— in-court identification of defendant — observation at crime scene as basis**

Trial judge's findings supported his conclusion that the identification of defendant was based upon the victim's observation of defendant immediately preceding the alleged robbery where the evidence tended to show that the witness was in defendant's presence for approximately twenty minutes at the crime scene, and the witness and defendant were the only people present so that the witness had ample opportunity to observe defendant.

3. Criminal Law § 46— flight of defendant — instruction supported by evidence

Trial court properly instructed the jury on the flight of defendant where the evidence tended to show that the robbery was committed at 5:30 a.m., defendant was stopped by police officers shortly after 6:30 a.m. as he was driving a car some distance from the crime scene, defendant bolted from a police car and ran after he had agreed to accompany officers to the police station to answer questions, and officers were unable to apprehend defendant at that time; furthermore, where defendant did not object to the evidence at trial, he may not offer objection for the first time on appeal.

APPEAL from *Rouse, Judge,* at the 5 February 1973 Session of Superior Court held in NEW HANOVER County.

Defendant was charged in a bill of indictment with common law robbery. Upon defendant's plea of not guilty, the State presented evidence tending to show the following.

On 8 January 1972, Stacy Herring (Herring) was employed at the Farmer's Market on North Fourth Street in Wilmington, N. C. Between 5:00-5:30 a.m., at which time Herring was alone at the Farmer's Market, defendant came in the market, asked if a truck stop were nearby, and chatted with Herring for approximately 20 minutes. Defendant then bought a 15¢ cake and asked about a soda. As Herring was sitting in a chair talking to defendant, defendant "whirled around" and knocked Herring onto the cement floor. Defendant told Herring to "shut my mouth or he would kill me." Defendant took $70 out of Herring's side pocket and $120 out of his billfold. Herring described defendant as wearing a blue jacket and a pair of yellow and blue Coca-Cola pants. At trial Herring identified defendant as the robber.

J. D. Jordan, a sergeant with the North Carolina Department of Corrections drove past the Farmer's Market on his way to work at approximately 5:15 to 5:30 a.m. on the day in question, and noticed a red or burgundy 1965 or 1966 Chevrolet with a yellow or orange decal on the lefthand back window of the car parked on the side of the road near the Farmer's Market. Jordan drove past the market again at about 6:15 a.m. on that same day while carrying an inmate to be released. Jordan saw police cars at the Farmer's Market, stopped, and gave the vehicle description.

On the morning of 8 January 1972, two Wilmington police officers stopped a 1967 maroon Chevrolet with decals on the

back windows. The car was occupied by two men, defendant being the driver. Defendant was asked for his driver's license but did not produce it. Defendant and the other occupant agreed to accompany the police officers to the police station and answer a few questions. Defendant entered the police car and then bolted out the door and ran. Defendant was not apprehended at this time.

The owner of the 1967 maroon Chevrolet reported the car stolen on 8 January 1972. The owner remembered seeing defendant at the 500 Club in Wilmington in the early hours of 8 January 1972.

Defendant presented evidence which tended to show the following: That the Wilmington Coca-Cola Bottling Works, Inc., had no record of defendant's having been employed by them in the years 1970-1973; that Charles Preston Roberts was with defendant at about 6:00 a.m. on 8 January 1972 at the 500 Club in Wilmington; that at this time defendant was wearing a blue dungaree outfit, not a Coca-Cola uniform; that defendant gave Roberts and about 4 other people a ride home when they left the 500 Club; that defendant took the four other people home first; that Roberts and defendant were stopped by the police at about 6:30 a.m. on 8 January 1972 as defendant was taking Roberts home.

From a verdict of guilty of common law robbery and the imposition of an active prison sentence, defendant appealed.

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

Richard L. Stanley for defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge examined the State's witness on voir dire. The primary purpose of the admonition against the trial judge asking questions of witnesses during a trial is to avoid the expression or intimation of an opinion to the jury. However, in this case the jury was not present and could not have been influenced in any way by the judge's questions. Obviously the trial judge may not become an advocate for either side in the trial of a case, but he may ask questions for the purpose of clarifying a witness' testimony. *See* 7 Strong, N. C. Index 2d, Trial § 10, p. 269. In the case presently before

us, the questions asked by the trial judge merely served to clarify the basis of the witness' identification of defendant. Defendant has failed to show an abuse of discretion, and we find no error in the manner in which the questions were propounded.

[2] Defendant has entered a broadside exception to the order of the trial judge which finds facts and concludes that the identification of defendant was independent of the lineup procedure, and, in addition, that the lineup procedure was not illegally suggestive. Defendant makes a broadside exception to the judgment but takes no exception to any particular finding of fact. Therefore, the only question presented is whether the facts found support the trial judge's conclusion. The State's witness was in defendant's company for approximately twenty minutes at the time of the alleged robbery. They were the only two people at the Farmer's Market at the time, and there is nothing in the record to support the contention that the witness did not have more than ample opportunity clearly to observe defendant while they were together. In our view, the findings of fact support the judge's conclusion that the identification of defendant is based upon the victim's observation of defendant immediately preceding the time of the alleged offense. This assignment of error is overruled.

[3] Defendant assigns as error that the trial judge instructed the jury that it could consider the evidence of defendant's flight after he was stopped by officers. Defendant does not contend that the substance of the instruction was incorrect, but only that the rule which applies to consideration of evidence of flight was not applicable in this case. The evidence in this case tends to show that the robbery was committed at about 5:30 a.m.; the officers broadcasted a report of the incident and a description of the car on the police radio at about 6:30 a.m.; the defendant was stopped by police officers shortly thereafter as he was driving the car some distance from the market; when asked to accompany the officers to the police station, defendant bolted from the police car and ran; and the officers were unable to apprehend him at that time. The evidence of defendant's flight was received without objection at trial, although defendant now undertakes to assign its admission as error. Defendant may not object for the first time on appeal to the admission of evidence at trial. We think the trial judge's instruction upon the consideration the jury might give to the evidence of defendant's flight was appropriate under the evidence before it. This assignment of error is overruled.

We have considered defendant's remaining assignments of error and in our opinion the rulings of the trial court which are complained of do not constitute prejudicial error.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. LANGEL CROSSIE GRAINGER

No. 735SC491

(Filed 8 August 1973)

1. **Criminal Law § 90— impeachment of own witness — repetition of question proper**

The trial court has discretionary power to permit a party to re-examine, or even cross-examine, his own witness who surprises him by the testimony, for the purpose of enabling the witness to understand the question and testify correctly; therefore, the trial court did not err in allowing the solicitor to question the witness again with respect to consent after the 13-year-old rape victim testified that she had given defendant consent.

2. **Rape § 4— evidence of victim's prior sexual activity — competency**

Trial court in a rape prosecution did not err in excluding testimony with respect to the victim's prior sexual activity where it was doubtful that the questions involved would have required answers which would have revealed prior sexual activity and where the defendant later did ask the witness about prior sexual activity, to which the witness responded that she "had never had relations with any other man."

3. **Rape § 6— submission of lesser offense of assault with intent to commit rape proper**

Where defendant in a rape prosecution offered evidence which would support a finding that there was no penetration, it was proper for the trial court to submit to the jury the lesser included offense of assault with intent to commit rape.

APPEAL by defendant from *Rouse, Judge,* 4 December 1972 Session of Superior Court held in NEW HANOVER County.

Defendant was charged in a bill of indictment, proper in form, with the felony of rape. Upon his plea of not guilty he was tried by a jury.

Evidence for the State tended to show the following: Ruby Beatrice Simmons (Ruby) was thirteen years of age on 15 October 1972. She lived with her mother, father, two sisters, and two brothers on Highway 421 in New Hanover County. Mr. & Mrs. Jack Reynolds lived across the road from Ruby. The Reynolds' lot contains a house (in which they lived), a trailer and a storage shed. Defendant, a 37-year-old man, often visited the Reynolds, and on occasions he would bring cold drinks, potato chips, and cigarettes to Ruby and her sisters. Defendant told Ruby two or three times that he was going to rape her.

Between 5:30 p.m. and 7:00 p.m. on 15 October 1972, Ruby and her sisters were cleaning house while their mother and father were visiting a relative. As Ruby was sweeping the front porch and walkway, Mr. Donnie Reynolds called to Ruby to come over to the Reynolds' yard. Ruby went over to see what he wanted. As she was talking to Reynolds, defendant came out of the Reynolds' house, grabbed Ruby from behind, held his hand over her mouth, and dragged her into the storage shed. Once inside the shed, defendant locked the doors, removed all of Ruby's clothes and all of his own. He laid her on an old bed and had sexual intercourse with her. Defendant offered Ruby money and clothes if she would not tell anyone. When defendant released Ruby, she dressed and went immediately home where she told her sisters what had happened. When her mother and father returned home she also told them.

Defendant's evidence tended to show the following: The State Bureau of Investigation laboratory examination failed to shows the presence of hair, blood, or seminal stains on the underclothing of defendant or Ruby. A vaginal smear was taken in a medical examination of Ruby on 15 October 1972 and no sperm was found.

The jury found defendant guilty of the lesser included offense of an assault with intent to commit rape. Judgment was entered that defendant be imprisoned for a term of not less than fourteen nor more than fifteen years. Defendant appealed.

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

Prickett & Scott, by Herbert P. Scott and Carlton S. Prickett, Jr., for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge permitted the State to impeach its own witness. Immediately following the description by Ruby Beatrice Simmons of the manner in which defendant forced her into the shed, removed her clothes, and had sexual intercourse with her as she struggled with him, the examination by the Solicitor continued as follows:

> "Q. Now, Miss Simmons, state whether or not at any time during your being in the shed with Mr. Grainger you ever gave consent to Mr. Grainger to have sexual intercourse with you?
>
> MR. PRICKETT: OBJECTION.
>
> COURT: Well, OVERRULED. Let's see what she says?
>
> A. Yes.
>
> Q. What was your answer?
>
> A. Yes.
>
> Q. Did you or did—did you give consent to him?
>
> A. No.
>
> MR. PRICKETT: I OBJECT. She is a bound—
>
> COURT: OVERRULED."

Defendant argues that the State is bound by the first answer given by the witness. It is obvious that the witness misunderstood the question and the trial judge was correct in permitting the question to be asked again. It is well established that a party may not impeach his own witness in either a civil or criminal trial. However, the trial court has discretionary power to permit a party to reexamine, or even cross-examine, his own witness who surprises him by the testimony, for the purpose of enabling the witness to understand the question and testify correctly. 7 Strong, N. C. Index 2d, Witness, § 4, p. 695. Defendant has shown no abuse of discretion. This assignment of error is overruled.

[2] Defendant next assigns as error that the trial court failed "to permit the defense to cross-examine the State's witness as

regarding prior sexual activity." Objections to the following questions asked by defense counsel were sustained:

"Q. Now, has anyone else ever touched you before?

MR. STANLEY: OBJECTION, Your Honor.

COURT: Well, objection to that question is SUSTAINED.

Q. Ruby, have you ever had your clothes off in front of any other man?

MR. STANLEY: OBJECTION.

COURT: SUSTAINED.

Q. Had Donnie Reynolds ever taken your clothes off?

MR. STANLEY: OBJECTION.

COURT: OBJECTION IS SUSTAINED."

It is doubtful that any of the above questions required an answer that would reveal prior sexual activity. But, whether relevant or not, defendant later was allowed to ask Ruby about prior sexual activity. Her answer was "Before this thing occurred, I had never had relations with any other man." This assignment of error is overruled.

[3] Defendant next assigns as error that the trial judge permitted the jury to consider the lesser included offense of assault with intent to commit rape.

"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. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547. However, if an error favorable to defendant is committed, he is not prejudiced and has no grounds to complain. *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738. Nevertheless, in the present case defendant offered the recording of a prior interview of Ruby Beatrice Simmons from which there is a reasonable inference which would support a finding that there was no penetration. In view of this evidence it was proper to submit the lesser included offense of assault

with intent to commit rape. This assignment of error is overruled.

No error.

Judges VAUGHN and BALEY concur.

PRINCE JOHNSON v. VERNON ALEXANDER WILLIAMS AND JAMES REID DOUGLAS

No. 7311DC269

(Filed 8 August 1973)

Automobiles § 62; Negligence § 29— striking of pedestrian — insufficient evidence of negligence

In order for plaintiff to be entitled to go to the jury on the issue of negligence he must introduce evidence either direct or circumstantial, or a combination of both, sufficient to support a finding that defendant was guilty of the act of negligence complained of and that such act proximately caused plaintiff's injury, including the element that the injury was reasonably forseeable under the circumstances; hence, the trial court properly directed verdict for defendant driver where plaintiff pedestrian did not indicate by diagram or otherwise the relative positions of the parties at the accident scene nor by testimony establish the duties of each party to the other.

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

Plaintiff instituted this action to recover damages for personal injury inflicted upon him as a pedestrian by the alleged negligence of defendant Williams in the operation of an automobile owned by defendant Douglas.

Plaintiff's evidence tended to show that at about 1:00 a.m. on 12 May 1968 plaintiff was struck by defendant's automobile and suffered personal injury. Plaintiff's testimony is the only evidence of how the accident occurred. The total of his testimony relating to how the accident occurred is as follows:

"I was struck by an automobile that night at Rock Street, now they call it Fields Drive. I was crossing Rock Street, coming off Washington when I was struck. I was going on Hudson. Hudson is another street near Rock Street. I had been on the side of Rock Street that is towards

town. Hudson Street is the next street off Washington. It comes in on the railroad side of the highway. I don't know the name of the street. As I crossed Fields Drive the railroad was to my left. I did not see any traffic or vehicles about Fields Drive when I got there, there was no car coming neither way. When I say 'neither way' I mean there wasn't no car on Rock Street. There was a car coming down Washington Avenue. I mean that it was coming meeting me. It was across Rock Street, coming from Washington. I don't know exactly how far it was from Rock Street when I first saw it, but when I crossed on Rock Street, he turned right on Rock Street and hit me. I don't know what happened when he hit me. I don't know exactly how far I was on Rock Street when this happened to me. I was in the Street because I was crossing it. I do not read and write. I can make out that diagram—the streets, I would call Rock Street going North. The car that struck me was coming down Washington when I first saw it, and I was crossing and he just turned right in, he didn't stop. I don't recall what part of the car hit me. I was trying to get out of the way of the car that turned there. I did not run out in the street in front of any car, he turned in on me.

"The next thing I remember I was trying to get out of the way and after that he just hit me and that is all I know. I don't remember anything else happening."

* * *

"That night I saw and talked to Mr. Judd at his residence, ate supper with him. When I left his residence, I was going to get my brother to carry me home. He lives on Hudson Avenue. Hudson is down next to the railroad. I never did get across Rock Street. I didn't get to my brother's house that night, I got hit before I crossed Rock Street, I got hit on Rock Street. Coming from the cafe, I had been walking on Washington Street on the left-hand side, I mean the shoulder of the road there. That is where people walk up and down that street. There is not a path or a walkway there. I have seen other people walking there. I have seen other people walking on that side of Washington Avenue on both sides of Fields Drive. There is not a sidewalk in that neighborhood."

* * *

"There is an open field between Washington Avenue and this warehouse down there. There is a path across there. When I was coming off Washington Ave. I was coming to this path if I had got to it. I don't think this path on the south side of Fields Drive or Rock Street starts at a point about 50 or 60 feet from Washington Avenue and goes across to the back of the warehouse. It goes back to the warehouse but it don't start no 50 feet down the street. It starts probably ten feet from Washington Avenue. My brother lives on Hudson Avenue."

* * *

"On the night of May 11, 1968 or the morning of May 12, 1968, I said I was coming down Washington Ave., I was going from the North on Washington Ave., crossing Rock Street, I was going straight across."

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

Hoyle & Hoyle, by J. W. Hoyle, for the plaintiff.

Pittman, Staton & Betts, by R. Michael Jones, for the defendants.

BROCK, Judge.

In order for plaintiff to be entitled to go to the jury on the issue of negligence he must introduce evidence either direct or circumstantial, or a combination of both, sufficient to support a finding that defendant was guilty of the act of negligence complained of and that such act proximately caused plaintiff's injury, including the element that the injury was reasonably foreseeable under the circumstances. 5 Strong, N. C. Index 2d, Negligence § 29, p. 60.

Negligence is not presumed from the mere fact of an accident or injury, except in the narrow class of cases to which the doctrine of *res ipsa loquitvr* is applicable.

Plaintiff is required to establish by his evidence, beyond mere speculation or conjecture, every essential element of negligence, and upon his failure to do so a directed verdict for the defendant is proper. *Coakley v. Motor Co.*, 11 N.C. App. 636, 182 S.E. 2d 260.

Plaintiff's evidence of how the accident occurred presents, at most, an opportunity for speculation and conjecture. There is no chart or diagram depicting the relative positions of the parties, and their relative positions and duties are not established by the testimony. In our opinion a directed verdict for the defendant was proper.

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. LEWIS PIERSON WILLIS

No. 733SC427

(Filed 8 August 1973)

Clerks of Court § 12— money used as exhibit in murder trial held by clerk — right of convicted defendant to payment

Where the evidence tended to show that male petitioner borrowed $5,000 from a bank and forged his wife's name on the note to the bank, petitioner intended to use the money to pay for the murder of a third person but the State discovered and impounded $4,600 of the money for an exhibit at petitioner's trial for murder, petitioner was convicted of murder and is now in prison, and feme petitioner paid the bank the $5,000 due on the note though she had never received any of the proceeds, the trial court properly held that petitioners had failed to establish ownership of the $4,600 held by the clerk of Superior Court of the county in which male petitioner had been tried for murder.

APPEAL by petitioners Joseph D. Merrill and wife, Evelyn Merrill, from an Order of *Rouse, Judge,* dated 26 January 1973, filed in the Superior Court in CARTERET County.

By a petition filed in the above entitled criminal action the petitioners seek to recover from the Clerk of Superior Court in Carteret County the sum of $4,600.00 which was offered as a part of the State's evidence in the above criminal action.

The defendant in the above criminal action was prosecuted for, and convicted of, first-degree murder. The facts in the murder trial are set out in *State v. Willis,* 281 N.C. 558, 189 S.E. 2d 190, and we quote them in part as follows:

"On and prior to April 10, 1971, Joseph Dennis Merrill operated The Village Shoppe in Ho Ho Village near

Morehead City in Carteret County. Marine Sergeant Eugene Thomas Givens and his wife lived in a house trailer across the road from the Merrill store. Merrill conceived a plan to 'eliminate' Givens. He contacted his friend Stroud who made arrangements with the defendant, Lewis Pierson Willis, to do the eliminating. The defendant agreed to kill Givens for $5,000.00 in cash. Merrill borrowed the $5,000.00 from the bank and delivered it to Stroud who notified the defendant the money was ready. The defendant accepted $200.00 from Stroud as a down payment and apparently called his friend, John Braxton Richardson from Norfolk, Virginia, to assist in executing the plan. Richardson came from Norfolk directly to the Willis home, arriving April 9th. Willis identified Givens as the person to be killed."

Thereafter, through the contrivance of Merrill (petitioner herein), Givens went into a back room of Merrill's store where Willis shot him four times in the head. Willis and Richardson then removed the body and dumped it on the side of the road some distance away.

Merrill (petitioner herein) admitted that he borrowed $5,000.00 from the bank in Morehead City and gave it to Stroud to be used in the payoff. The evidence indicated Merrill (petitioner herein) had an affair with Givens' wife. Merrill, however, claimed that his differences with Givens related to business matters.

The incriminating evidence in the trial of the above entitled criminal action came from the participants, Virgil Stroud, John Braxton Richardson, and Joseph Dennis Merrill (petitioner herein), all of whom were convicted for their participation in the homicide. Joseph Dennis Merrill (petitioner herein) is in prison.

The petition filed in this cause reads as follows:

"The petition of Joseph D. Merrill and Evelyn Merrill, his wife respectfully represents the following matters.

"1. In the above captioned matter evidence was presented that Joseph D. Merrill had borrowed Five Thousand ($5,000.00) Dollars from First-Citizens Bank and Trust Company in Morehead City, that he had deposited said funds with Virgil Stroud to be delivered to defendant Willis in portions from time to time as Merrill directed, that Mer-

rill directed one payment of Two Hundred ($200.00) Dollars and Willis simply took another Two Hundred ($200.00) Dollars, leaving a balance of Forty Six Hundred ($4600.00) Dollars in the hands of Virgil Stroud.

"2. The State discovered and impounded this money and it became an exhibit at the trial.

"3. The Defendant was convicted and sentenced to life imprisonment but appealed the sentences.

"4. The Supreme Court of North Carolina found no error in the trial record or sentence and the time for further appeal or petition for rehearing has expired.

"5. During all this time the Forty Six Hundred ($4600.00) Dollars has been held by the Clerk of Superior Court of Carteret County, in specie of course, since the bills themselves were the evidence. As a result it has earned no interest.

"6. Petitioners have repaid the loan to First-Citizens Bank and Trust Company in Morehead City, as evidence (sic) by letter from the Bank to this Court.

"Wherefore, petitioners pray your Honorable Court for an Order directed to A. H. James, Clerk of the Superior Court of Carteret County, authorizing and directing him to return the money to petitioners."

Petitioners' evidence tended to support the allegations of the petition. In addition, however, feme petitioner testified that her husband forged her signature on the note to the bank; that she never received any of the proceeds of the note; and that she paid the Bank the $5,000.00 due on the note and it gave her the note marked "paid."

The trial judge found the facts to be substantially as the evidence tended to show, but ruled that petitioners had failed to establish that they were the owners of the $4,600.00 in the hands of the Clerk. The Order denied petitioners' request that the Clerk be authorized and directed to pay the $4,600.00 to them.

Petitioners appealed.

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

Sherman T. Rock for petitioners.

BROCK, Judge.

The trial judge found the facts to be as contended by petitioners. Therefore, petitioners do not except to any finding of fact; they only except to the conclusion made upon the facts found. The trial judge concluded that petitioners had failed to establish ownership of the $4,600.00 in the office of the Clerk of Superior Court of Carteret County, and denied their petition that it be turned over to them. In our opinion the ruling of the trial judge is correct, and the judgment appealed from is therefore

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. LASALE CORNELL RAYNOR

No. 738SC450

(Filed 8 August 1973)

Forgery § 2; Indictment and Warrant § 17— date of crime — variance in allegation and proof not fatal

In a prosecution for forgery and uttering forged instruments where the indictments charged the commission of the crimes on 5 and 9 May 1972 but the evidence showed that they actually occurred on 29 May 1972, any variance between allegation and proof was not prejudicial to defendant where the checks involved were attached to and made a part of the indictments, thus fully informing defendant of the charges against him and protecting him from any subsequent trial for the same offenses.

APPEAL by defendant from *Webb, Judge,* 27 November 1972 Session of Superior Court held in WAYNE County.

Defendant was charged with forgery and uttering forged instruments in two separate bills of indictment. He pleaded not guilty. The jury found him guilty and the judge imposed four prison terms of five to seven years to run concurrently.

The bills of indictment set out that the offenses occurred on 5 May 1972 and 9 May 1972 respectively although the attached checks, which were incorporated into the indictment, were dated 29 May 1972.

The evidence for the State tended to show that 34 personalized checks were stolen from Ed's Trailer Park and Rentals in Pikeville and two of them in the amounts of $83.00 and $136.00 were presented to Belk-Tyler Department Store in Goldsboro by the defendant on 29 May 1972. The checks were payable to Wash Raynor and purportedly endorsed by him. The check for $83.00 was accepted by a clerk and defendant was given merchandise worth approximately $20.00 and the balance in cash. Upon a second occasion the check for $136.00 was presented to another clerk who called the bank to determine if there were sufficient funds to cover it. While the clerk was making the call, defendant "took off" leaving the check. Defendant did not come back for the check, and it was never cashed.

Defendant was arrested on 31 August 1972. After being advised of his constitutional rights, he signed waiver of counsel. Upon a *voir dire* hearing at the trial the court found that the defendant freely, knowingly and understandingly executed this waiver of counsel.

Later he admitted to the officer that he had written the endorsement on the $83.00 check and cashed it at Belk-Tyler's and had written the $136.00 check and attempted to cash it but left the store.

Defendant did not introduce any evidence.

From judgment imposed, defendant appealed.

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

Herbert B. Hulse for defendant appellant.

BALEY, Judge.

Defendant contends there is a fatal variance between the charge in the indictments and the proof in that the indictments charged the commission of the crimes on 5 and 9 May 1972 when the evidence showed that they actually occurred on 29 May 1972.

The checks involved were attached to and made a part of the indictment. Defendant was fully informed of the charges against him and protected from any subsequent trial for the same offenses. Any variance in allegation and proof was not prejudicial.

"The time alleged in an indictment is not usually an essential ingredient of the offense charged, and the State ordinarily may prove that it was committed on some other date." *State v. Wilson,* 264 N.C. 373, 377, 141 S.E. 2d 801, 804. *See also State v. Lilley,* 3 N.C. App. 276, 164 S.E. 2d 498. G.S. 15-155 also provides in part: "No judgment upon any indictment for felony or misdemeanor . . . shall be stayed or reversed . . . for stating the time imperfectly. . . . "

Other assignments of error concerning the charge of the court with respect to flight and the procedure by which the verdict was returned are without merit. The evidence against defendant was clear and convincing. We find no prejudicial error in the trial.

No error.

Judges CAMPBELL and BRITT concur.

SARA TUTTEROW POTTS v. JAMES MELVIN POTTS

No. 7319DC279

(Filed 8 August 1973)

1. **Appeal and Error § 57— assignment of error to findings of fact — no evidence included in record on appeal**

Where there was evidence offered before the trial court at a hearing on plaintiff's motion to increase the amount of support payments required of defendant and defendant assigned as error that the evidence did not support the findings of fact by the trial judge, but did not include the evidence in the record on appeal, it is presumed that the facts found were supported by competent evidence.

2. **Divorce and Alimony § 23— increase in support — hearing in defendant's absence — no error**

Trial court did not err in conducting a hearing on plaintiff's motion to increase the amount of support payments due from defendant in the absence of defendant and his counsel where the hearing had previously been continued at defendant's request and then, on the day set, was continued for part of the day to accommodate defense counsel who had another conflict.

APPEAL by defendant from *Warren, District Judge,* 13 November 1972 Session of District Court held in ROWAN County.

This cause was commenced on 2 February 1968 as an action for absolute divorce. A decree of absolute divorce was entered on 11 March 1968, and on the same day, by separate order in the cause, an order was entered awarding custody of two minor children to plaintiff and requiring defendant to make certain periodic payments for their support. The amount of the support payments was increased upon motion in the cause on 16 March 1970. On 27 October 1972 a motion in the cause was filed to obtain an order further increasing the amount of support payments the defendant is required to make. A hearing was held, without the presence of defendant and his counsel, in district court on 14 November 1972, following which an order was entered increasing the periodic support payments the defendant is required to make. Defendant appealed from this latter order.

Robert V. Somers, for the plaintiff.

Olive, Howard, Downer, Williams & Price, by Paul J. Williams, for the defendant.

BROCK, Judge.

Defendant assigns as error that the facts found by Judge Warren are not supported by the evidence.

[1] The order appealed from recites: "The Court, after hearing evidence and testimony in this cause from the plaintiff, finds the following facts." It appears from the foregoing recitation that an evidentiary hearing was conducted by Judge Warren; however, appellant has failed to include the evidence in the record on appeal. Appellant did file five sheets of paper each of which is marked substantially as follows: "Designated plaintiff's exhibit # ____ *presumably* offered and accepted into evidence at hearing on November 14, 1972." (Emphasis added.) The source of relevancy of these five sheets of paper is not clear and they will not be considered.

Where there is evidence offered before the trial court and appellant assigns as error that the evidence does not support the findings of fact by the trial judge, but does not include the evidence in the record on appeal, we will presume the facts found are supported by competent evidence.

[2] Defendant assigns as error that the hearing was conducted in the absence of defendant and his counsel. The record reflects that the hearing on plaintiff's motion had been continued at

defendant's request and was set for a day certain. Defendant and his counsel were well aware of the date set. Counsel apparently had another conflict and requested a further continuance. The trial court delayed the hearing for a part of the day to accommodate defense counsel, but when the matter was again reached the trial court proceeded to hear the plaintiff's evidence. Under the circumstances disclosed by this record defendant has failed to show an abuse of discretion.

Affirmed.

Judges VAUGHN and BALEY concur.

STATE OF NORTH CAROLINA v. CHARLES MEEKS

No. 7326SC331

(Filed 8 August 1973)

Robbery § 4— element of intent — specificity required in proof

In a robbery prosecution the element of intent in the taking is satisfied by a showing that the taking was with intent permanently to deprive the rightful possessor of the use of the property, and it is not required that the State prove specifically whether defendant (1) intended to convert the property to his own use, or (2) intended to convert it to the use of another, or (3) intended to destroy it altogether so that no one could use it.

ON *certiorari* to review a trial before *Snepp, Judge*, at the 11 September 1972 Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a bill of indictment with the felony of armed robbery. The State's evidence tended to show the following:

On 29 October 1971 Miss Rachel Brinkhoff was employed as bookkeeper for Family Loom, a wholesale buying office located at 1620 South Boulevard in Charlotte, N. C. At about 11:00 a.m. Miss Brinkhoff left the office to go to three banks to make deposits and to cash checks for fellow employees. She made the deposits and obtained cash in the sum of about $1630.00 for the fellow employees' checks.

At about 11:30 of that same morning, defendant and a companion went into the office of Family Loom. Defendant's companion asked about job openings and was given a blank employment application. An application blank was offered to defendant but he did not take one. Defendant and his companion stood, looking at the application for a few seconds. At that time Miss Brinkhoff entered the office with the bank bag in which she carried the cash from the fellow employees' checks. As she came in the door, defendant and his companion ran to her, scuffled with her saying "Give me that," and pulled the bag from her hands as she fell. Defendant and his companion ran out the door carrying the bank bag and the money. Defendant was identified by two employees who were in the office during the whole episode. Defendant offered no evidence.

The trial judge submitted the case to the jury only upon the offense of common law robbery. From a verdict of guilty of common law robbery and an active prison sentence, defendant appealed.

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

Lila Bellar for the defendant.

BROCK, Judge.

Defendant assigns as error portions of the trial judge's instructions to the jury. Defendant argues that the State must prove the specific intent of the defendant at the time he took the property, *i.e.*, (1) that he intended to convert the property to his own use, or (2) that he intended to convert it to the use of another, or (3) that he intended to destroy it altogether so that no one could use it. Defendant argues, therefore, that the jury must be instructed that they must be satisfied beyond a reasonable doubt as to which specific intent existed at the time of the taking.

This is a novel argument, but not a convincing one. It is true that the element of the intent in the taking may be satisfied by a showing of any one of the three listed specific intents. However, the element of intent in the taking is satisfied by a showing that the taking was with intent permanently to deprive the rightful possessor of the use of the property. The trial judge so instructed the jury.

Defendant's assignments of error are overruled.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. WALTER GUNTER AND ISAAC GUNTER, JR.

No. 7324SC472

(Filed 8 August 1973)

APPEAL by defendants from *Ervin, Judge,* 27 November 1972 Session of MADISON County Superior Court.

Each defendant was tried on valid indictments charging breaking and entering and larceny at Jess Whitson Phillips 66 Service Station at Hot Springs, North Carolina on 3 September 1971. Each entered a plea of not guilty to both charges, was found to be guilty by a jury of breaking and entering only, and each was sentenced to imprisonment for eighteen months to three years.

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

Brock and Howell by Ronald W. Howell for defendants appellant.

CAMPBELL, Judge.

We have reviewed the assignments of error brought forward by the defendants and find no merit in them. They were seen, recognized and positively identified as the perpetrators. The defendants have had a fair trial free from prejudicial error.

Affirmed.

Judges MORRIS and PARKER concur.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1973

HELEN DEVINE v. THE AETNA CASUALTY & SURETY COMPANY

No. 7228SC712

(Filed 22 August 1973)

1. **Insurance § 85— automobile liability policy — owned vehicle — no coverage**

   Where insured purchased and took possession of an automobile on 25 September 1967, the vehicle, driven by insured, was involved in a collision with plaintiff on 22 October 1967, and title was not transferred to insured until 31 October 1967, the vehicle was not an "owned automobile" within the meaning of the insurance policy issued by defendant since the vehicle (1) was not an automobile described in the policy for which a specific premium charge indicated that coverage was afforded, (2) it was not a trailer, a temporary substitute vehicle, or a replacement vehicle, and (3) there was no showing that defendant insured all private passenger, farm and utility automobiles owned by insured on the date he acquired ownership of the vehicle in question.

2. **Insurance § 85— non-owned vehicle — regular use by insured — no liability coverage**

   Trial court's finding that insured had had continuous possession of the vehicle in question from the date of purchase until it was repossessed sometime after the accident upon which this suit was based fully supported the conclusion that the vehicle was furnished for insured's "regular use" and that it did not come within the policy definition of a "non-owned" automobile for which liability insurance coverage was provided.

APPEAL by plaintiff from *Thornburg, Judge,* 12 June 1972 Session of Superior Court held in BUNCOMBE County.

Civil action to recover on a policy of automobile liability insurance. The parties stipulated to certain facts, waived jury trial, and submitted the case to the trial judge to find facts,

make conclusions of law, and enter judgment. In summary, facts found by the trial judge or admitted by the parties are as follows:

The defendant, The Aetna Casualty and Surety Company (Aetna), is a corporation engaged in the business of writing and selling policies of liability insurance. It has its principal place of business in Connecticut and is authorized to do business in New Jersey. On 6 November 1966 Aetna sold and delivered in New Jersey to Elmer and Selma C. Phillips, residents of New Jersey, its family automobile liability insurance policy No. 26FA11312PC, a copy of which is attached as an exhibit to the trial court's judgment. This policy, among other things, obligated Aetna to pay on behalf of the insured all sums, up to specified limits, which the insured should become legally obligated to pay as damages because of bodily injury arising out of the ownership, maintenance or use of "the owned automobile or any non-owned automobile." The words "owned automobile" and "non-owned automobile" are defined in the policy, and the policy specifically described two owned automobiles, a 1961 Chevrolet station wagon and a 1957 Chevrolet ½ ton pickup. The policy also provided comprehensive and collision insurance on the station wagon. The policy was written for the policy period 6 November 1966 to 6 November 1967, and was in full force and effect on 22 October 1967, the date of the collision hereinafter referred to.

On 25 September 1967 Elmer Phillips went to Peoples Pontiac in Clayton, New Jersey, where he entered into an agreement to purchase a 1964 Cadillac sedan, and on the same date he executed an automobile installment note in the amount of $3,050.28 to the First National Bank of Glassboro, New Jersey (the Bank), and signed a motor vehicle security agreement to the Bank describing the 1964 Cadillac as security for said loan. Also on 25 September 1967 Phillips, with consent of Peoples Pontiac, took possession of the 1964 Cadillac with dealer's tags on it, but title to the vehicle was not transferred at that time. Prior to 21 October 1967 Elmer Phillips called Peoples Pontiac for registration, which they did not have, but they advised him that the car was insured and that it was all right for him to go on a business trip in the South. On 22 October 1967 Phillips, as operator of the 1964 Cadillac sedan, was involved in a collision with another car on Interstate 40 in Haywood County, North Carolina, in which collision Helen Devine, plaintiff in the

present action, was injured. On 31 October 1967 legal title to the 1964 Cadillac was transferred to Phillips as indicated by the records of the Division of Motor Vehicles of the State of New Jersey.

On 15 July 1969 plaintiff in the present action instituted suit in the Superior Court of Buncombe County, N. C., against Elmer Phillips and Peoples Pontiac Agency, alleging damages from injuries which resulted from the collision which occurred on 22 October 1967 between the car driven by her and the 1964 Cadillac driven by Elmer Phillips and owned by Peoples Pontiac, and alleging that Phillips was the agent of Peoples Pontiac. On 23 October 1969 judgment by default and inquiry was taken against both defendants in that action, but on 10 March 1970 plaintiff took a voluntary dismissal against Peoples Pontiac. On 11 March 1970 judgment was entered in plaintiff's favor against Elmer Phillips for the sum of $20,000.00. Execution on this judgment was returned unsatisfied and this judgment has not been paid.

In the meantime, and on 25 January 1968, the 1964 Cadillac was sold at public auction (presumably as result of foreclosure of the Bank's security interest, though there is no express finding to such effect), and on 29 May 1968 the Bank instituted suit against Elmer Phillips in the Superior Court of New Jersey to recover $2,650.06 deficiency on its automobile installment note and motor vehicle security agreement. Elmer Phillips filed answer in that proceeding and filed third-party complaint against The Travelers Indemnity Company (Travelers), alleging that Travelers had issued to Peoples Pontiac a collision insurance policy on automobiles owned by it, and against Aetna, the defendant in the present action, alleging collision insurance coverage under Aetna's Policy No. 26FA11312. In his third-party complaint Phillips alleged that on 25 September 1967 Peoples Pontiac sold him the 1964 Cadillac and that he took possession of the car, although it was still titled in the name of Peoples and carried the license tag of Peoples; that the 1964 Cadillac was misrepresented and defective and "upon discovery of the misrepresentation and defective nature of the automobile Phillips rescinded the sale which in fact had not been completed since title had not been transferred"; and that "Peoples refused to accept the return of the car or the rescission of the sale." As to Aetna, Phillips alleged in his third-party complaint that "[o]n all dates hereinabove mentioned Phillips was the holder of an automobile insurance policy No. 26FA11312 with the

Aetna Casualty and Surety Company, hereinafter called 'Aetna' which policy provided for collision coverage of both owned and non-owned automobiles." In his third-party complaint Phillips alleged that either Aetna or Travelers was responsible for any deficiency found due to the First National Bank of Glassboro. In the New Jersey court Aetna moved for summary judgment on the grounds that there existed no issue of material fact and that it was entitled to judgment as a matter of law in Phillips' third-party action against it, supporting this motion by its request for admission that on 22 October 1967 the 1964 Cadillac was legally titled in the name of Peoples Pontiac as reflected by the records of the Director of Motor Vehicles of the State of New Jersey, the admission of Phillips' attorney not denying this, and the non-negotiable Bill of Sale of the State of New Jersey covering the 1964 Cadillac dated 31 October 1967. This motion was allowed, the New Jersey court adjudging that Aetna was entitled to judgment as a matter of law.

In the present action the trial judge also found as facts that the liability policy issued by Aetna to Phillips was renewed effective 6 November 1967 to 6 November 1968 with the same coverage to the same two vehicles insured in 1966, that there was no evidence that on 22 October 1967 (the date of the collision) the 1964 Cadillac replaced a described vehicle in the policy or was being used as a substitute for a described vehicle which was withdrawn from normal use because of breakdown, repairing, servicing, loss or destruction, and that there was no evidence that on the date of the collision the 1964 Cadillac "was not furnished for his (Phillips') regular use but to the contrary that he had had continuous possession for his regular use with no restrictions from September 25, 1967, until it was repossessed by the First National Bank of Glassboro."

Upon the findings of fact the court concluded as a matter of law that Aetna did not afford liability insurance coverage to Elmer Phillips in the operation of the 1964 Cadillac on 22 October 1967, and entered judgment dismissing plaintiff's action. Plaintiff appealed.

Joseph C. Reynolds for plaintiff appellant.

Roberts & Cogburn by Landon Roberts for defendant appellee.

PARKER, Judge.

By stipulation of the parties jury trial was waived and the trial court made findings of fact, to which no exceptions were noted. Indeed, the record on appeal as docketed in this Court contains no exceptions whatever. For this reason questions argued in appellant's brief concerning admissibility of evidence and concerning sufficiency of the evidence to support certain of the trial court's findings of fact are not properly before us for review. "An assignment of error will not present a question unless it is based upon an exception set out in the case on appeal and numbered as required by Rule 21. Exceptions which appear for the first time in the assignments of error will not be considered." *City of Kings Mountain v. Cline,* 281 N.C. 269, 188 S.E. 2d 284. Plaintiff's appeal, however, is itself an exception to the judgment and to any matter appearing on the face of the record proper and presents for review the question whether error of law appears on the face of the record. *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882. This includes the question whether the facts found or admitted support the trial court's conclusions of law and the judgment entered pursuant thereto. 1 Strong, N. C. Index 2d, Appeal and Error, § 26. We hold that they do.

Aetna's liability to plaintiff, if any exists, must be found in the terms of its insurance policy issued to Phillips. By this policy Aetna agreed to pay on behalf of Phillips all sums, up to the policy limits, which he should become legally obligated to pay as damages because of bodily injury sustained by any person "arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile." The words "owned automobile" and "non-owned automobile" are defined in the policy, and the question presented by this appeal becomes whether, under the facts found or admitted, the Cadillac driven by Phillips on 22 October 1967, the date on which the collision occurred which caused plaintiff's injuries, was on that date within the policy definition either of an "owned automobile" or a "non-owned automobile." We first examine whether the Cadillac can properly be considered an "owned automobile" as that term is defined in the policy. Under the heading "Definitions," the policy provided:

" *'owned automobile'* means

"(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded,

"(b) a trailer owned by the named Insured,

"(c) a private passenger, farm or utility automobile ownership of which is acquired by the named Insured during the policy period, provided

"(1) it replaces an owned automobile as defined in (a) above, or

"(2) the Company insures all private passenger, farm and utility automobiles owned by the named Insured on the date of such acquisition and the named Insured notifies the Company during the policy period or within 30 days after the date of such acquisition of his election to make this and no other policy issued by the Company applicable to such automobile, or

"(d) a temporary substitute automobile;"

[1] Clearly, the Cadillac cannot be considered an "owned automobile" within the definitions contained in subparagraphs (a) and (b) above; it was not an automobile described in the policy for which a specific premium charge indicated that coverage was afforded nor was it a trailer. Further, the evidence presented in this case was not sufficient to support a finding that the Cadillac was "a temporary substitute automobile" so as to bring it within the definition of an "owned automobile" under subparagraph (d) above. The policy expressly defines the words "temporary substitute automobile" as follows:

"'*temporary substitute automobile*' means any automobile or trailer, not owned by the named Insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;"

The burden was on the plaintiff in this case to present evidence sufficient to show coverage of the Cadillac under defendant's policy, 19 Couch on Insurance 2d, § 79:351, and the trial judge expressly found that there was "no evidence that the 1964 Cadillac automobile being driven by Elmer Phillips on October 22, 1967, was being used as a substitute for a described vehicle which was withdrawn from normal use because of break-down, repairing, servicing, loss or destruction." There remains only the definition contained in subparagraph (c) above, which we now examine.

Appellant contends that Phillips acquired ownership of the Cadillac on 25 September 1967, the date he paid Peoples Pontiac and took possession of the car. Phillips, however, did not obtain legal title to the Cadillac until 31 October 1967, nine days after the accident. Under New Jersey law, which is here controlling, there must be strict compliance with the statutory requirements regarding transfer of title before title to a vehicle can be said to be transferred for insurance purposes. *Eggerding v. Bicknell,* 20 N.J. 106, 118 A. 2d 820; *Velkers v. Glens Falls Insurance Co.,* 93 N.J. Super. 501, 226 A. 2d 448. This is so even though payment of the purchase price precedes transfer of legal title. *Eggerding v. Bicknell, supra.* If it be conceded that subparagraph (c) requires only that ownership be acquired by the insured "during the policy period" and makes no requirement that such acquisition be completed prior to the occurrence of an accident, plaintiff still may not prevail; there was no showing that the Cadillac fell within either proviso contained in subparagraph (c) (1) or (2). In its findings of fact, the trial court expressly found that there was no evidence that the Cadillac "replaced a described vehicle in the policy," which fact plaintiff would have been required to establish in order to bring the Cadillac within the proviso of subparagraph (c) (1). Under the heading "Conclusions of Law," the trial court also found "[t]hat there is no evidence upon which the Court can find that the defendant insured all automobiles owned by Elmer Phillips on the date of acquisition or that Elmer Phillips notified the defendant during the policy period or within 30 days after the date of such acquisition of his election to make policy No. 26FA11312PC and no other policy applicable to such automobile." We note the New Jersey decisions to the effect that notice to the insurance company of acquisition of a newly acquired automobile is not a condition precedent to coverage and therefore failure to give notice does not forfeit coverage where the accident occurs during the notice period prescribed by the policy. *Nat'l Union Fire Ins. Co. v. Falcioni,* 87 N.J. Super. 157, 208 A. 2d 422; *Carr v. State Farm Mut. Ins. Co.,* 115 N.J. Super. 103, 278 A. 2d 239 (dictum); Annotation, 34 A.L.R. 2d 936, 944; 7 Blashfield, Automobile Law and Practice 3d, § 316.6. While under these authorities it may not have been necessary for plaintiff to show notice given by the insured to the company under the facts of the present case in order to establish coverage under the policy sued upon, this would not relieve plaintiff of showing compliance with the other requirement of subparagraph (c) (2) by offering evidence sufficient to obtain a factual find-

ing by the trial court that the company insured all private passenger, farm and utility automobiles owned by Phillips at the date he acquired ownership of the Cadillac. Absent such evidence and finding, the Cadillac did not come within the proviso of subparagraph (c) (2). Again, the burden was upon the plaintiff to present evidence sufficient to convince the trial judge, as trier of the facts, that he should find those facts which would establish coverage of the Cadillac under the defendant's policy. This the plaintiff has failed to do.

[2] Finally, we consider whether under the facts found or admitted the Cadillac came within the definition of a "non-owned automobile" for which liability insurance coverage was provided by the policy. The policy defines a "non-owned automobile" as follows:

> " *'non-owned automobile'* means an automobile or trailer not owned by or furnished for the regular use of either the named Insured or any relative, other than a temporary substitute automobile;"

In this connection the trial judge found that there was no evidence that the Cadillac "was not furnished for his (Phillips') regular use but to the contrary that he had had continuous possession for his regular use with no restrictions from September 25, 1967, until it was repossessed by the First National Bank of Glassboro." Appellant's counsel contends that in making this finding the trial judge acted under a misapprehension of law as to what constitutes "regular use" of an automobile, stating in his brief that "[a]ll the cases involved in the term 'regular use' are concerned with an insured who is driving a motor vehicle provided the insured by his employer." No cases are cited in support of this contention, however, and the clause has been frequently invoked in cases involving family and other relationships in which no employer-employee situation was presented. *Hartford Accident & Indemnity Company v. Hiland,* 349 F. 2d 376 (7th Cir. 1965); *Pennsylvania T. & F. Mut. Cas. Ins. Co. v. Robertson,* 259 F. 2d 389 (4th Cir. 1958); *Campbell v. Aetna Casualty and Surety Co.,* 211 F. 2d 732 (4th Cir. 1954); and cases cited in Annotation, 86 A.L.R. 2d 937. In *Hartford Accident & Indemnity Company v. Hiland, supra,* a sister and brother, for purposes of their own, traded use of their cars. Prior to the time of this trade the brother had been returning to his sister's home about once a month and his sister told him on this occasion to return the car as soon as possible.

Because of business and social obligations, however, the brother did not return his sister's car for approximately two months, at which time he was involved in an accident while driving it. The question presented was whether under these circumstances the sister's car had been furnished for the brother's "regular use." The definition of a "non-owned automobile" in the brother's policy in that case was identical with the definition above quoted from the policy in the case now before us. In that case the Court of Appeals for the Seventh Circuit held that the district court's finding that the brother had unrestricted use of the sister's car, based on the facts in the record, could only lead to the conclusion that the car was furnished for his "regular use," with the result that the sister's car was excluded from coverage under the brother's policy. The opinion in that case points out that "[w]hile the purpose for which the vehicle was supplied may be a relevant factor in determining whether it was for the insured's regular use, . . . the factor of motive bears no necessary relation to the risk assumed by the insurer under the policy, as do the factors of length and type of use. . . . " We find appellant's contention that "regular use" should be limited to the situation where the insured is furnished the vehicle by his employer supported neither by reason nor authority. The contract of insurance contains no such limiting language.

The clear import of the provision excluding coverage of another's automobile which is furnished the insured for his "regular use" is to provide coverage to the insured while engaged in only an infrequent or merely casual use of another's automobile for some quickly achieved purpose but to withhold it where the insured uses the vehicle on a more permanent and reoccurring basis. While each case must be decided on its own particular facts and circumstances, the trial court's finding in the present case that Phillips had had continuous possession of the Cadillac with no restrictions from 25 September 1967 until it was repossessed by the Bank sometime after the accident, fully supports the conclusion that it was furnished for his "regular use" and that it did not come within the policy definition of a "non-owned automobile" for which liability insurance coverage was provided.

Since plaintiff, who had the burden of proof, failed to establish facts sufficient to bring her case within coverage provided by defendant's policy, the judgment appealed from is

Affirmed.

Judges CAMPBELL and MORRIS concur.

UNITED ARTISTS RECORDS, INC. v. EASTERN TAPE CORPORATION, G & G SALES, INC., SUPER HITS, INC., AND J. H. PETTUS

No. 7326SC362

(Filed 22 August 1973)

1. **Unfair Competition — record piracy**

Defendants' appropriation of recording performances owned by plaintiff by reproducing them on magnetic tapes for sale in competition with plaintiff's recordings constitutes unfair competition which subjects defendant to injunctive restraint and liability for damages.

2. **Unfair Competition— record piracy — effect of statute — recordings in public domain**

The appropriation of sound recordings by reproducing them on magnetic tapes for sale in competition with the original recordings is not justified either by G.S. 66-28 or by the fact that such recordings are in the public domain.

3. **Unfair Competition— record piracy — monopoly is no defense**

Contention that plaintiff is asserting a monopoly in violation of Article I, Section 34 of the N. C. Constitution, is no defense to an action seeking compensatory damages and injunctive relief for the unfair competition of pirating sound recordings owned by plaintiff.

4. **Unfair Competition; Equity § 1— clean hands doctrine — same transaction**

Any tying arrangement plaintiff may have had concerning the production of its records or any refusal by plaintiff to sell to customers of defendants would not invoke the "clean hands" doctrine in an action seeking injunctive relief and damages for the "pirating" of plaintiff's recordings since such actions by plaintiff do not relate to the methods of unfair competition employed by defendants which are the subject of plaintiff's action.

5. **Unfair Competition; Monopolies— failure to make individual performances available in single record form — no anti-trust violation**

Plaintiff's conduct in selecting musical performances for transcription on long-playing albums and failing to make some individual performances available to the public in single record form does not constitute a tying arrangement in violation of the anti-trust laws and is not contrary to public policy.

6. **Unfair Competition; Monopolies— refusal to sell to certain dealers**

Plaintiff's refusal to sell its recordings to dealers who also sell the "pirated" tapes of defendants is not unlawful where plaintiff's

action is unilateral and not pursuant to any agreement with such dealers not to deal with the defendants.

7. **Corporations § 15; Unfair Competition— record piracy by corporation — liability of dominant shareholder**

The individual defendant is subject to personal liability for damages resulting from the corporate defendants' "piracy" of plaintiff's recordings where the individual defendant is the dominant force which motivates, directs and controls the corporate defendants and the corporations are mere instruments set up and used by him to avoid personal liability.

APPEAL by defendants from *Snepp, Resident Superior Court Judge* of MECKLENBURG County, from judgment entered in Chambers 24 October 1972.

This is an action seeking injunctive relief and compensatory damages for alleged unfair competition. Plaintiff is a corporation engaged in the manufacture and sale of phonograph recordings. It enters into contracts with individuals and groups of performers under the terms of which it secures the exclusive right to manufacture, reproduce, and sell phonograph recordings embodying performances by these individuals and groups. Plaintiff charges defendants with appropriating performances transcribed on recordings manufactured by plaintiff, a practice known in the trade as "pirating." This "pirating" is accomplished by acquiring a copy of the original recording and, through the use of electronic recording equipment, transposing the performance to magnetic tapes which are then sold in competition with the products of the plaintiff.

Upon a previous appeal this conduct of the defendants was held to constitute unfair competition and a temporary restraining order prohibiting such conduct was affirmed. *Liberty/UA, Inc.* [*now United Artist Records, Inc.*] *v. Tape Corp.*, 11 N.C. App. 20, 180 S.E. 2d 414, *cert. denied*, 278 N.C. 702, 181 S.E. 2d 600.

Again, in a second appeal, this Court considered the legality of awarding costs, remedial damages and attorney fees to plaintiff's attorneys in a contempt proceeding arising out of violations by the defendants of the temporary restraining order. *Records v. Tape Corp.* and *Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 196 S.E. 2d 598.

After extended discovery proceedings, including lengthy depositions of the parties and supplementary interrogatories,

the plaintiff filed two motions: (1) for summary judgment under Rule 56, North Carolina Rules of Civil Procedure, upon the issue of liability and injunctive relief and (2) for a compulsory reference under Rule 53(a)(2), North Carolina Rules of Civil Procedure, to determine the amount of damages to be awarded.

The individual defendants, J. H. Pettus, J. M. Pettus, Fred G. Dixon and Charles Dixon also moved for summary judgment.

Judge Frank W. Snepp filed a comprehensive memorandum opinion and order on 31 July 1972 in which he concluded that plaintiff was entitled to entry of summary judgment against the corporate defendants and against the individual defendant, J. H. Pettus, as to all issues except damages and that a reference should be ordered under Rule 53(a)(2)a to determine the issue of damages. The motion for summary judgment of the individual defendants, except J. H. Pettus, was granted, and the actions against these individual defendants were dismissed. Summary judgment was entered on 24 October 1972 in favor of the plaintiff against Eastern Tape Corporation, G & G Sales, Inc., S-H, Inc., and J. H. Pettus, individualy, which:

1. Granted permanent injunction prohibiting the unfair competitive practices described in the complaint.

2. Awarded judgment for such monetary recovery as shall be found to be due as provided by law.

3. Ordered a reference to determine the amount of monetary recovery.

4. Dismissed the case as to all individual defendants except J. H. Pettus.

From this judgment, the corporate defendants and the individual defendant, J. H. Pettus, have appealed.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Harold N. Bynum; and Cecil M. Curtis, for plaintiff appellees.

Mraz, Aycock, Casstevens & Davis, by Gary A. Davis; Levine, Goodman & Murchison, by Alton G. Murchison III; and Richards, Shefte & Pinckney, by Francis M. Pinckney, for defendant appellants.

BALEY, Judge.

The defendants raise three major questions upon this appeal. First, they contend there are genuine issues as to material facts preventing summary judgment upon plaintiff's claim of unfair competition. Second, they assert that the affirmative defenses offered in their answer constitute valid legal defenses to plaintiff's claim, or, at least, present issues of material fact. Third, they urge that there is no personal liability of the individual defendant, J. H. Pettus. The trial court resolved all these questions in favor of the plaintiff, and we are in accord with this judgment.

The history of this case reveals that the defendants have consistently admitted the conduct about which plaintiff complains in its complaint. In the previous appeals to this Court, defendants conceded, through various affidavits and briefs, that they were appropriating record performances owned by plaintiff and reproducing them on magnetic tapes for sale in competition with the original recordings. Defendants have heretofore taken the position that such conduct did not amount to unfair competition and, therefore, did not constitute any basis for injunctive relief or compensatory damages.

Defendants now contend that despite these admissions concerning their general business activities, they have not admitted the appropriation of any particular performance embodied in phonographic recordings which are owned, produced, and sold by the plaintiff.

The complaint lists particular performances owned by plaintiff which have been pirated and appropriated by defendants. Affidavits of defense counsel for the injunction hearing show search of copyright records and payment of royalties upon specific musical compositions listed by plaintiff and appropriated by defendants. After the preliminary injunction was obtained, affidavits of employees of the defendants indicate that the prohibited recording performances owned by plaintiff were eliminated and replaced. It was determined that defendants were violating the injunction and they were found guilty of contempt. The material facts are not in dispute. It is clear that defendants were engaging in pirating activity which involved plaintiff's property. The exact extent of such activity is for later determination, but the issue of liability is a proper issue to be determined by summary judgment.

Indeed, in response to interrogatories, plaintiff has furnished information concerning the particular recordings involved, and the parties have entered a stipulation which provides in part:

> "COUNSEL FOR THE PLAINTIFFS AND COUNSEL FOR THE DEFENDANTS hereby stipulate and agree to the following:
>
> 1. If it be finally determined in these actions that the defendants are engaged in business activities as complained of by the plaintiffs in the present actions, that such business activities constitute unfair competition with the plaintiffs, and that the plaintiffs' claim and cause of action is not barred by any of the defenses asserted herein by the defendants, the defendants stipulate that the plaintiffs have suffered legal injury. Plaintiffs at the trial or hearing of these cases shall not attempt to prove the amount of profits, if any, lost by them."

This stipulation was obviously designed to eliminate a lengthy accounting and reduce the issue to one of liability, leaving the amount of damages, if any, for later determination.

[1] The decision in *Liberty, supra,* has settled the question of liability. Defendants have utilized the skill and resources of plaintiff to enrich themselves unjustly at plaintiff's expense. Their appropriating of the performances recorded by plaintiff and selling them in competition with plaintiff constitutes unfair competition in North Carolina. Such unfair competition entitles plaintiff to recover damages and it is subject to injunctive restraint.

Defendants have attempted to assert the following affirmative defenses in bar of plaintiff's claim:

> 1. Common law rights attaching to phonograph records or electrical transcriptions have been expressly abrogated or repealed by N.C. G.S. 66-28.
>
> 2. Musical performances appropriated by defendants are in the public domain.
>
> 3. Plaintiff is asserting a monopoly in violation of Article I, Section 34 of the Constitution of North Carolina.
>
> 4. Plaintiff ties and combines musical performances together in albums and refuses to make individual musical performances available to the public in single record form.

5. Plaintiff refuses to deal with customers of the defendants thereby creating a trade boycott.

[2] The first two affirmative defenses were decided adversely to the defendants in *Liberty, supra,* when the conduct of defendants was determined to be unfair competition. Since the decision in *Liberty,* modern electronic equipment continues to become more sophisticated and record piracy more widespread. The United States Congress has now extended copyright protection to sound recordings which were copyrighted after February 1972 and before 1 January 1975. 17 U.S.C. §§ 1, 5, 19, 20, 26, 101 (Supp. I, 1971), *amending* 17 U.S.C. §§ 1, 5, 19, 20, 26, 101 (1970) (Act of Oct. 15, 1971, Pub. L. No. 92-140, §§ 1-3, 85 Stat. 391). The United States Supreme Court distinguished *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed. 2d 661 (1964), and *Compco Corp. v. Day-Brite Lighting,* 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed. 2d 669 (1964), and approved state regulation of sound recordings prior to 15 February 1972 when it held a California statute which bars unauthorized copying of sound recordings to be a valid exercise of the powers of the state. *Goldstein v. California,* 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed. 2d 163 (1973). *See also Columbia Broadcasting System, Inc. v. Custom Recording Co.,* 258 S.C. 465, 189 S.E. 2d 305 (1972), where *Liberty* was cited with approval. It seems clear that in North Carolina the conduct and techniques employed by defendants to copy and appropriate sound recordings are not justified either under G.S. 66-28 or the fact that such recordings are in the public domain.

[3] The defense that plaintiff is asserting a monopoly in violation of Article I, Section 34, of the Constitution of North Carolina has no merit. Plaintiff is simply trying to prevent defendants from stealing its property. Defendants are not restricted from securing their own performers, recording these performances, and selling their own records or tapes in fair competition with plaintiff. Even if plaintiff's conduct in protecting its property should be considered a monopolistic practice, it is not a defense to this action where defendants' conduct has been determined to be unfair competition. *See M. Witmark & Sons v. Pastime Amusement Co.,* 298 F. 470, 480 (E.D.S.C.), *aff'd,* 2 F. 2d 1020 (4th Cir. 1924).

The last two defenses urged by defendants seek to invoke the well established equitable maxim "he who asks equity must do equity." There is, however, a reasonable limitation to the

application of this "clean hands" doctrine, recognized in *Cuthbertson v. Morgan,* 149 N.C. 72, 62 S.E. 744, which holds that any wrong invoked must have arisen out of the transaction before the court, and not some collateral matter.

"The court will not, arbitrarily, impose conditions or require him to pay for the relief by doing, or abstaining from doing, something demanded by the other party against whom the relief is granted, separate and distinct from the transaction involved in the litigation out of which the demand for relief grew." *Id.* at 78, 62 S.E. at 747.

[4] In this case any tying arrangement which plaintiff may have had concerning the production of its records or any refusal by plaintiff to sell to customers of the defendants would not relate to the methods of unfair competition employed by the defendants which are the subject of this action. Defendants cannot avoid the consequences of their own unlawful conduct on the ground that plaintiff has committed some unlawful acts in collateral matters. *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* 296 F. Supp. 920 (D. Hawaii 1969).

"A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from another supplier. A seller's offering two items as a unit at a single price is not a tying arrangement if the buyer is free to take either product by itself." 54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 59, p. 701.

[5] No case has been cited and our research has disclosed none which has held that the selection of musical performances for transcription on long-playing albums constitutes any tying arrangement which would so restrict competition as to fall within the structures of the anti-trust laws. The facts in this record with respect to the alleged "tying" or "combining" of musical performances by plaintiff are not disputed. Usually plaintiff will include in an album a series of performances by the same identifiable individual or group. Frequently, only one or two of these performances strike the fancy of the public and are issued as individual records. They remain on the market as long as there is any significant consumer demand. Single per-

formances of proven popularity if combined in albums continue to be issued and distributed as singles as long as sales justify. Upon the basis of the undisputed facts, the conduct of plaintiff in marketing its products has not been shown to be improper or contrary to public policy.

[6] With respect to the refusal of the plaintiff to sell its recordings to dealers who also sell the "pirated" tapes of the defendants, the evidence shows that this action on the part of plaintiff was unilateral and not pursuant to any agreement with such dealers not to deal with the defendants. In the absence of conspiracy or monopoly, one may deal with whom he pleases. In *McNeill v. Hall,* 220 N.C. 73, 74, 16 S.E. 2d 456, 457, the court said:

> "The determination of the defendants to decline to buy from the salesmen if they continued to sell to the plaintiffs was not an unlawful act. It was simply the exercise of the right they had to buy from or to refrain from buying from whomsoever they pleased."

In *McElhenney Co. v. Western Auto Supply Co.,* 269 F. 2d 332, 337 (4th Cir. 1959), Chief Judge Sobeloff speaking for the court clearly states the rule:

> "Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. . . .
>
> * * *
>
> Neither in terms nor inferentially does the statute [Clayton Act] prohibit a unilateral refusal to sell."

Any refusal to deal which is intended to stiffle legitimate competition is a far cry from a refusal to deal to prevent others from competing unfairly.

The affirmative defenses asserted by the defendants do not raise any genuine issue of material fact and cannot be sustained in law.

There yet remains the question of personal liability of the individual defendant, J. H. Pettus.

It is the general rule that an officer or agent of a corporation is liable individually for the consequences of torts committed by him on behalf of the corporation.

> "Broadly speaking a director, officer, or agent of a corporation is not, merely by virtue of his office, liable for the torts of the corporation or of other directors, officers, or agents.
>
> He is, however, as in the case of torts committed by agents generally . . . liable in damages for injuries suffered by third persons because of his own torts, regardless of whether he acted on his own account or on behalf of the corporation and regardless of whether or not the corporation is also liable. He cannot escape liability on the ground that in committing the tort he acted as a director, officer, or agent of the corporation, or on the ground that the corporation may also be liable." 19 C.J.S., Corporations, § 845, pp. 271-72.

See also Mills v. Mills, 230 N.C. 286, 52 S.E. 2d 915; *Minnis v. Sharpe,* 198 N.C. 364, 151 S.E. 735; *Cone v. Fruit Growers' Association,* 171 N.C. 530, 88 S.E. 860.

Robinson, N. C. Corporation Law and Practice, § 102 provides:

> "As a general rule, an officer or other agent of a corporation who commits a tort is individually liable therefor even though he was acting on behalf of the corporation."

In a trademark infringement case against a corporation and its individual officers who were actively aiding in carrying on unlawful business practices, the court recognized that the individual defendants could claim no immunity but could be sued either separately or jointly. *Tobacco Co. v. Tobacco Co.,* 144 N.C. 352, 57 S.E. 5.

The application of the general rule of personal liability for torts which an individual officer has committed on behalf of a corporation is invariably approved and extended when an officer is the dominant shareholder and has clearly used the corporation as a cloak or cover for his illegal conduct.

In *Henderson v. Finance Co.,* 273 N.C. 253, 260-61, 160 S.E. 2d 39, 44-45, the court stated:

"However, when, as here, the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation. (Citations omitted.) As Sanborn, J., said in *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255, '[W]hen the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.' "

Again in *Utilities Comm. v. Morgan, Attorney General,* 277 N.C. 255, 272, 177 S.E. 2d 405, 416, there is this succinct statement:

"It is well established that the doctrine of the corporate entity may not be used as a means for defeating the public interest and circumventing public policy."

[7] In the present case we do not have a corporate officer from a corporation in which the stock is widely held who might be deterred from continuing his unlawful conduct by a judgment against the corporation. The record shows two defendant corporations in which the individual defendant owned all the stock now in the process of liquidation with the assets of these corporations being transferred to other corporate entities or individuals some of whom were employed by the defendant corporations. Part of the equipment has been moved by one of the former employees to a building, owned by the mother of J. H. Pettus, which is used for storage by G & G Sales and by an inactive corporation, Wholesale Salvage, of which J. H. Pettus is president. It is undisputed that J. H. Pettus, who was knowledgeable in the recording business, participated in the organization of Eastern Tape Corporation and G & G Sales, Inc., for the express purpose of conducting the pirating activity which has been determined to be unfair competition. He was president and general manager of Eastern Tape and vice president of G & G Sales and the sole shareholder in both corporations. He admitted that there had been no regular meetings of either corporation and that all business was handled from the same office. After the issuance of the preliminary injunction,

the prohibited activities apparently continued at the same location with the same telephones and personnel and with relatives of J. H. Pettus employed using new corporations, S-H, Inc. and Sound Duplicator Service, Inc. The individual defendant maintained the same office and was available for direction and guidance. He admits in his deposition:

> "They all know that I duplicate other peoples' music. I have told them that I thought I was in the right about this . . . .
>
> At no time have I ever hidden the fact that I was manufacturing or selling these tapes."

From the uncontroverted facts it is evident that J. H. Pettus is the dominant force which motivates, directs and controls the corporate defendants. The corporations are mere instruments set up and used by him to avoid personal liability for the wrongful conduct in which he was engaged. To permit him to escape liability under the facts in this case by wrapping around him the cloak of corporate immunity would thwart the ends of justice and is not in the public interest.

The order of the trial court awarding summary judgment against the corporate defendants and the individual defendant, J. H. Pettus, is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

COLUMBIA BROADCASTING SYSTEM, INC. v. EASTERN TAPE CORPORATION, G & G SALES, INC., SUPER HITS, INC., AND J. H. PETTUS

No. 7326SC360

(Filed 22 August 1973)

APPEAL by defendants from *Snepp, Resident Superior Court Judge* of MECKLENBURG County, from judgment entered in Chambers 24 October 1972.

Upon motion of all parties and pursuant to order of this Court entered 29 May 1973, this case was heard in conjunction

with *United Artists Records, Inc. v. Eastern Tape Corporation, G & G Sales, Inc., Super Hits, Inc.,* and *J. H. Pettus,* decided this date, 19 N.C. App. 207, 198 S.E. 2d 452. Consolidated briefs were filed by the parties as it was conceded that the issues involved are identical.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Harold N. Bynum; and Cecil M. Curtis, for plaintiff appellees.

Mraz, Aycock, Casstevens & Davis, by Gary A. Davis; Levine, Goodman & Murchison, by Alton G. Murchison, III; and Richards, Shefte & Pinckney, by Francis M. Pinckney, for defendant appellants.

BALEY, Judge.

For the reasons set out in *United Artists Records, Inc. v. Eastern Tape Corporation, supra,* the order of the trial court awarding summary judgment against the corporate defendants and the individual defendant, J. H. Pettus, is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

MCA, INC. v. EASTERN TAPE CORPORATION, G & G SALES, INC., SUPER HITS, INC. AND J. H. PETTUS

No. 7326SC363

(Filed 22 August 1973)

APPEAL by defendants from *Snepp, Resident Superior Court Judge* of MECKLENBURG County, from judgment entered in Chambers 24 October 1972.

Upon motion of all parties and pursuant to order of this Court entered 29 May 1973, this case was heard in conjunction with *United Artists Records, Inc. v. Eastern Tape Corporation, G & G Sales, Inc., Super Hits, Inc.,* and *J. H. Pettus,* decided this date, 19 N.C. App. 207, 198 S.E. 2d 452. Consolidated briefs were filed by the parties as it was conceded that the issues involved are identical.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Harold N. Bynum; and Cecil M. Curtis, for plaintiff appellees.

Mraz, Aycock, Casstevens & Davis, by Gary A. Davis; Levine, Goodman & Murchison, by Alton G. Murchison, III; and Richards, Shefte & Pinckney, by Francis M. Pinckney, for defendant appellants.

BALEY, Judge.

For the reasons set out in *United Artists Records, Inc. v. Eastern Tape Corporation, supra,* the order of the trial court awarding summary judgment against the corporate defendants and the individual defendant, J. H. Pettus, is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

CAPITOL RECORDS, INC. v. EASTERN TAPE CORPORATION, G & G SALES, INC., SUPER HITS, INC. AND J. H. PETTUS

No. 7326SC361

(Filed 22 August 1973)

APPEAL by defendants from *Snepp, Resident Superior Court Judge* of MECKLENBURG County, from judgment entered in Chambers 24 October 1972.

Upon motion of all parties and pursuant to order of this Court entered 29 May 1973, this case was heard in conjunction with *United Artists Records, Inc. v. Eastern Tape Corporation, G & G Sales, Inc., Super Hits, Inc.,* and *J. H. Pettus,* decided this date, 19 N.C. App. 207, 198 S.E. 2d 452. Consolidated briefs were filed by the parties as it was conceded that the issues involved are identical.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Harold N. Bynum; and Cecil M. Curtis, for plaintiff appellees.

Mraz, Aycock, Casstevens & Davis, by Gary A. Davis; Levine, Goodman & Murchison, by Alton G. Murchison, III; and Richards, Shefte & Pinckney, by Francis M. Pinckney, for defendant appellants.

BALEY, Judge.

For the reasons set out in *United Artists Records, Inc. v. Eastern Tape Corporation, supra,* the order of the trial court awarding summary judgment against the corporate defendants and the individual defendant, J. H. Pettus, is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

MARIE C. CHILDERS v. DWAIN A. CHILDERS

No. 7325DC430

(Filed 22 August 1973)

1. **Courts § 21; Parent and Child § 10— Uniform Reciprocal Enforcement of Support Act — governing law**

Under the Uniform Reciprocal Enforcement of Support Act, the law of the state where the obligor is found governs.

2. **Divorce and Alimony § 23— no finding of changed circumstances — increase in support error**

Trial court erred in ordering an increase in the amount of child support due from respondent in the absence of any evidence and finding of any change in circumstances.

3. **Parent and Child § 10— Uniform Reciprocal Enforcement of Support Act — no statutory offense created**

No statutory offense is created by the Uniform Reciprocal Enforcement of Support Act, and the trial court erred in finding respondent guilty as charged of inadequate support under the Act and in sentencing him to six months in jail, suspended on the payment of costs and $150 per month child support.

APPEAL by respondent from *Matheson, Judge,* 13 February 1973 Session of CATAWBA County District Court.

This action was instituted in the District Court of Catawba County on 29 January 1973 under the Uniform Reciprocal Enforcement of Support Act, G.S. Chap. 52A, upon receipt of a transmittal letter from the District Attorney of Muscogee County, Georgia, accompanied by the following petition:

"PETITION FOR SUPPORT (Filed Jan. 29, 1973)

UNIFORM SUPPORT OF DEPENDENTS ACT (sic)

(Georgia Laws 1958, page 34)

STATE OF GEORGIA
COUNTY OF MUSCOGEE

TO THE SUPERIOR COURT OF THE COUNTY OF MUSCOGEE:

THE PETITION OF Marie C. Childers respectfully shows:

1. THAT she is the wife of Dwain A. Childers (legally separated), the Respondent; that Petitioner was duly married to said Respondent on or about Sept. 18, 1966 In the State of North Carolina and now resides at 909 Farr Rd. Apt. # 51, Columbus, Ga.

2. THAT Petitioner is the mother and said Respondent is the father of the following named dependent:
1. Dawn Amber Childers, Born Oct. 22, 1969

3. THAT Petitioner and said child (is) ~~(are)~~ in need of and (is) ~~(are)~~ entitled to support from the Respondent under the provisions of the Uniform Support of Dependents Act (sic) (Ga. Laws 1958, page 34), a copy of which is attached and made a part hereof.

4. THAT Respondent, on or about Oct. 6, 1971 and subsequent thereto, refused and neglected to provide fair and reasonable support for Petitioner and other dependent according to his means and earning capacity;

Petitioner needs more money. Respondent sometimes deducts from support, has skipped a few payments. Respondent would not cooperate with the attorney in North Carolina when appointments etc. were made.

5. THAT, upon information and belief, Respondent now is residing or domiciled at Rt. 6, Box 351, Hickory, North Carolina which State has enacted a law substantially similar and reciprocal to the Uniform Support of Dependents Act (sic).

WHEREFORE, the Petitioner prays for such an Order for Support, directed to said Respondent, as shall be deemed fair and reasonable, and for such other and further relief as the law provides.

s/ E. MULLINS WHISNANT
Petitioner's Representative
Solicitor General CJC
Courthouse
Columbus, Georgia

(Verified by Marie C. Childers on Jan. 17, 1973)."

The petition was transferred pursuant to an order entered in the following certificate:

"CERTIFICATE (Filed Jan. 29, 1973)

THE UNDERSIGNED, JUDGE of the Superior Court of Muscogee County, State of Georgia, hereby certifies:

THAT on the 17th day of January, 1973, a Petition was verified by the above named Petitioner and duly filed in this Court in a proceeding against the above named Respondent commenced under the provisions of the Uniform Support of Dependents Act (sic) (1958 Georgia Laws 34), to compel the support of the dependent named in the petition.

THAT in the opinion of the undersigned JUDGE, the petition sets forth facts from which it may be determined that the Respondent owes a duty of support, and that the State of North Carolina responding state, may obtain jurisdiction of Defendant or his property.

WHEREFORE, it is hereby ORDERED that this certificate together with the exemplified copies of the Petition be transmitted to the Court having jurisdiction of this case in County of Catawba, City of Hickory, State of North Carolina.

Dated January 17, 1973.

s/ JOHN H. LAND
Judge, Superior Court, C.J.C."

Also filed with the petition and certificate was a certified copy of the Uniform Reciprocal Enforcement of Support Act in effect in Georgia, Ga. Laws 1958 p. 34, and the sworn affidavit of petitioner in which she stated the following: that respondent's last child support payment was $40, received on 31 December 1972; that respondent by order of the court was required to pay $80 per month child support; that her earnings were $400 per month; that respondent's salary was approximately $950 per month; that her rent was $104.37 per month; and that she needed $150 per month for the room and board of her child.

Upon receipt of the certified copy of the Georgia proceeding, notice was issued and served upon respondent, and a hearing was held before Judge Matheson, sitting without a jury, at which time petitioner's affidavit was read into evidence by her privately retained counsel. Respondent then testified that he and petitioner entered into a separation agreement on 6 October 1971 which gave custody of their minor child to petitioner and which required respondent to pay $80 per month child support, $40 on the 15th and $40 on the 30th of each month. Respondent further testified that he has always made these payments regularly and has never been in arrears. He also testified that his take-home pay is $784 per month with home expenses of $251.25 per month, $103.54 car payment each month, $92.09 in child support, life and hospitalization expenses for the child each month, and $267.37 for notes and personal bills. Respondent introduced the duly executed separation agreement into evidence by which he was required to pay $80 per month child support.

Upon the conclusion of the hearing the trial judge entered the following judgment:

"JUDGMENT OR OTHER DISPOSITION

W. J. Houck, Atty. for Defendant
Thomas C. Morphis, Atty. for Plaintiff
Offense: Reciprocal Support
Plea: Not Guilty
Verdict: Guilty

Judgment of the Court is that the defendant

Judgment is that the defendant be confined in the common jail of Catawba County for a period of 6 months to be assigned to work under the control and supervision of the State

Department of Correction. This sentence suspended for 5 years with the consent of defendant in open court upon the following terms and conditions:

(1) that the defendant pay the costs

(2) that the defendant pay into the office of the Clerk the sum of $150.00 per week beginning February 15, 1973 for the support of the minor child.

This 13 day of February, 1973.

s/ JOE K. MATHESON
Presiding Judge."

Pursuant to the above judgment, the trial judge entered an order on 16 February in which he stated the following:

"[I]t appearing to the Court that the defendant was guilty as charged of inadequate support under the Uniform Reciprocal Enforcement Support Act to his minor child, Dawn Amber Childers; and the Court finding as a matter of fact that the defendant is an able bodied man and has currently now take-home pay in the amount just under Seven Hundred Fifty ($750) Dollars per month and is, therefore, able to and should be required to pay One Hundred Fifty ($150.) Dollars per month for the support and maintenance of said minor child."

From the above judgment and order, respondent appealed.

Attorney General Morgan, by Deputy Attorney General Vanore, and Associate Attorney Reed, for petitioner appellee.

Cagle and Houck, by William J. Houck, for respondent appellant.

MORRIS, Judge.

[1] Respondent's appeal challenges the sufficiency of the evidence upon which the trial court ordered an increase in child support and also the failure of the trial court to make any finding of fact of "changed circumstances" upon which to justify an increase. Under the Uniform Reciprocal Enforcement of Support Act, it is the law of the state where the obligor

is found, or the "responding state," which governs. G.S. 52A-8. *Mahan v. Read,* 240 N.C. 641, 83 S.E. 2d 706 (1954).

In North Carolina it is well settled that while the marital and property rights of the parties under the provisions of a valid separation agreement cannot be ignored or set aside by the court without the consent of the parties, such agreements are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73 (1966); *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235 (1962); *Rabon v. Ledbetter,* 9 N.C. App. 376, 176 S.E. 2d 372 (1970). Yet where parties to a separation agreement agree upon the amount of the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable and that upon motion for an increase in such allowance, a court is not warranted in ordering an increase in the absence of any evidence of a change of conditions. *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487 (1963). Similarly, 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." (Emphasis added.)

[2] The order appealed from in the case *sub judice* contains no finding as to any change of circumstances. While petitioner did state in her affidavit that she needed $150 per month for the bed and board of her child, she introduced no evidence of any change in the needs of her child or that the amount provided for under the separation agreement was inadequate or unreasonable. In the absence of any evidence and finding of any change in circumstances, it was error for the trial court to order an increase in the amount of child support and we so hold.

[3] Also respondent contends that it was error for the trial court to find him "guilty as charged of inadequate support under the Uniform Reciprocal Enforcement of Support Act," and in sentencing him to six months in jail, suspended on the payment of costs and $150 per month child support.

> "A proceeding under the Uniform Reciprocal Enforcement of Support Act is a civil proceeding 'as in actions for ali-

mony without divorce.' G.S. 52A-12." *Cline v. Cline*, 6 N.C. App. 523, 528, 170 S.E. 2d 645 (1969).

While a trial court of a "responding state" may punish a respondent for noncompliance with its orders "as is provided by law for contempt of the court," G.S. 52A-15(3), and while certain provisions of the act provide for the interstate rendition of persons charged in other states with the crime of nonsupport, G.S. 52A-6, no statutory offense is created by the act and it was error for the trial court to treat it as such given the civil nature of the proceeding.

An examination of the finding of facts contained in the trial judge's order of 16 February 1973, set out above, reveals that the trial court was under a total misapprehension as to the applicable law, and for the reasons stated above, the judgment and order appealed from are

Reversed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JESTON HANSON GURKINS

No. 732SC504

(Filed 22 August 1973)

1. **Indictment and Warrant § 14— motion to quash warrant — refusal to conduct voir dire — no error**

Trial court did not err in refusing to conduct a *voir dire* before denying defendant's motion to quash the warrant against him, since the court, in ruling on such motion, may inspect the face of the warrant but may not consider extraneous evidence.

2. **Criminal Law § 84— voir dire on lawfulness of search — failure to make findings**

Where no conflicting evidence was offered on the *voir dire* examination to determine admissibility of evidence obtained upon defendant's arrest, the trial judge's failure to make and enter findings of fact in the record was not fatal.

3. **Criminal Law § 169— denial of motion to suppress — no error**

In a prosecution for driving under the influence, third offense, any error committed by the trial court in denying defendant's motion to suppress evidence concerning a nearly empty liquor bottle found in

his vehicle was subsequently rendered harmless by defendant's own testimony and failure to object.

4. **Automobiles § 127— driving under the influence, third offense — sufficiency of evidence**

In a prosecution for driving under the influence, third offense, the case was properly submitted to the jury where the evidence tended to show that defendant unknowingly sideswiped several cars, he was stopped shortly thereafter by a witness who was of the opinion that he was under the influence of intoxicants, a nearly empty liquor bottle was found in defendant's vehicle by a patrolman who was also of the opinion that defendant was under the influence of intoxicants, and defendant in his own testimony admitted two prior convictions for driving under the influence.

APPEAL by defendant from *Cowper, Judge,* 5 March 1973 Session of MARTIN County Superior Court.

Defendant was charged in a warrant with operating a motor vehicle under the influence of intoxicating liquor, this being the third offense. At trial in District Court he pleaded not guilty and was found guilty. Upon appeal to the Superior Court the State presented evidence which briefly summarized tended to show the following:

On the night of 17 November 1972 at approximately 9:30 p.m., Terry Roberson was sitting with three other people in a car parked on the shoulder of the highway in front of the Bear Grass High School gymnasium. He heard the noise of the car behind him being hit, he later discovered, by the front fender of a damaged pickup truck which was being towed by a wrecker. Four other parked vehicles were sideswiped. The wrecker failed to stop and continued down the highway in the direction of Stokes, N. C. Terry Roberson followed the wrecker and was able to overtake it and stop it about a mile and a half from Bear Grass, N. C. The wrecker was being driven by defendant Gurkins and Roberson told him that he had hit several cars in front of the high school. Defendant said he would pay for any damage and gave Roberson his name. Defendant then got back in the wrecker and continued toward Stokes. Terry Roberson continued to follow him.

Thad Hodges, Deputy Sheriff of Martin County, testified that he was on duty at a basketball game in the Bear Grass gymnasium on the night of 17 November 1972 and received a message that there had been a hit-and-run accident outside and that help was needed by the people who were following the wrecker

which had proceeded toward Stokes. Deputy Hodges gave pursuit and was able to overtake and stop defendant, still being followed by Roberson, in Stokes. Deputy Hodges told defendant that it was reported that he had hit some cars in Bear Grass and informed him that he was not placing him under arrest but thought it advisable that he remain in Stokes until a Highway Patrolman arrived. Stokes is located in Pitt County and out of Deputy Hodges' jurisdiction. Deputy Hodges also testified that while waiting for the patrolman he had an opportunity to observe the defendant and that defendant was a little hesitant in his walk. Also there was the odor of alcohol on his breath. Based on this observation of defendant, Deputy Hodges was of the opinion that defendant was under the influence of some intoxicant to an appreciable degree.

Walter Parrish, of the North Carolina Highway Patrol, arrived in Stokes at approximately 10:15 p.m. and testified that Gurkins told him he did not know that he had hit any cars but that others told him that he had. Patrolman Parrish stated that he noticed the odor of both whiskey and Listerine on defendant's breath and that defendant appeared red faced and glassy eyed, and swayed when he walked. Based upon these observations Parrish was of the opinion that defendant was under the influence of intoxicating liquor to an appreciable degree. Defendant and Parrish then returned to Bear Grass and further investigated the matter. Patrolman Parrish also testified that the defendant requested that he be given a breathalyzer test to prove that he wasn't under the influence. Results of that test were ruled inadmissible because the test was administered two and one half hours after the incident took place. It was while defendant was in the courthouse in Williamston and after he had taken the breathalyzer test that a warrant for his arrest was issued.

Defendant Gurkins took the stand in his own behalf and testified that he was an employee of Crisp Auto Salvage in Greenville, N. C., and was engaged in the towing of a wrecked truck for his employer on the night in question. At approximately 8:30 or 9:00 p.m., he stopped at an oyster bar in Williamston to get something to eat and took two small drinks of whiskey with his meal. He stated that this was all he had to drink on the night in question. He then proceeded toward Greenville via Bear Grass and was not aware that anything had happened until stopped by a young man a short distance from

Bear Grass. He did state that as he passed through Bear Grass, cars were parked on both shoulders of the road and that it was a "tight squeeze" due to approaching traffic from the other direction. Upon being stopped in Stokes and while waiting for the patrolman, defendant testified that he gargled with Listerine offered him by a bystander. On cross-examination, defendant testified that he had purchased a pint of Ancient Age liquor in Williamston and that Patrolman Parrish had said that he removed it from his vehicle while parked in Stokes. He couldn't explain why only a small amount of liquor was left in the bottle, unless it had run out because the bottle was not tightly capped. He still maintained that he had only two small drinks earlier from the bottle and that he was not under the influence. It was also brought out on cross-examination that defendant had been convicted on two prior occasions for driving under the influence of intoxicating liquor and that he was an alcoholic.

Defendant also offered the testimony of three witnesses who were present when he was stopped in Stokes and all three were of the opinion that defendant was rational and not under the influence of any intoxicating beverage.

On rebuttal for the State, Patrolman Parrish testified that he removed a pint bottle of Ancient Age liquor from the glove compartment of defendant's wrecker and that the bottle was almost empty.

The case was submitted to the jury and defendant was found guilty. From a judgment suspending sentence upon payment of a fine, defendant appealed.

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

Edgar J. Gurganus for defendant appellant.

MORRIS, Judge.

[1] Defendant first assigns as error the failure of the trial judge to quash the warrant in this case on the ground that it was issued only after incriminating evidence was unlawfully obtained from the defendant and also the failure of the trial court to conduct a voir dire examination and make findings of fact upon defendant's motion to quash. It is well settled in this State that a motion to quash does not lie unless it appears from an inspection of the face of the warrant or bill of indictment

that no crime is charged or that the warrant or indictment is otherwise so defective that it will not support a judgment. A court, in ruling on the motion, is not permitted to consider extraneous evidence and when the defect must be established by evidence *aliunde* the record, the motion must be denied. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972). It appears from the record in this case that defendant was charged in a warrant proper in form with operating a motor vehicle while under the influence of intoxicating liquor and because the trial court is not permitted to go outside the record, it was clearly not error for the court to refuse to conduct a voir dire before denying defendant's motion.

[2] Defendant next contends that the trial court failed to make findings of fact and conclusions of law following the voir dire examination held upon defendant's motion to suppress evidence obtained as a result of an illegal arrest and in failing to suppress such evidence. Upon defendant's motion to suppress, the trial court properly held a voir dire examination. At its termination, however, the court failed to make any findings of fact but simply overruled defendant's objection.

> "When conflicting evidence is offered at a *voir dire* hearing held to determine the admissibility of evidence, the trial judge must make findings of fact to show the basis of his rulings on the admissibility of the evidence offered. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53. While it is the better practice for the trial judge to make findings of fact and enter them in the record in all such cases, where, as here, there was no conflict in the evidence at the *voir dire,* the trial judge's failure to make findings of fact is not fatal. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841." *State v. Basden,* 8 N.C. App. 401, 407, 174 S.E. 2d 613 (1970).

No evidence was offered by the defendant on voir dire, and only Patrolman Parrish testified for the State. As was said in *Basden,* it would have been better practice for the trial judge to make and enter findings of fact in the record; but because no conflicting evidence was offered on voir dire, the trial judge's failure to do so was not fatal.

[3] It is not clear from the record just what evidence defendant was seeking to suppress. However, it is clear from the evidence presented on voir dire that the liquor bottle taken from

the glove compartment of defendant's wrecker was not taken incident to a lawful arrest or volunteered by defendant and should have been ruled inadmissible. Yet no evidence concerning the liquor bottle was introduced at trial until defendant testified on cross-examination by the State that he purchased a pint of Ancient Age liquor and that "Trooper Parrish said he removed that pint of liquor from my vehicle in Stokes." No objection was raised by defense counsel nor upon Patrolman Parrish's testimony on rebuttal that the bottle of liquor was almost empty. Any error committed by the trial court in denying defendant's motion to suppress was subsequently rendered harmless by defendant's own testimony and failure of defense counsel to object, and this assignment of error is overruled.

[4] Equally without merit is defendant's contention that there was insufficient evidence to take the case to the jury. With respect to defendant's argument that the State presented no evidence as to defendant's two previous convictions before resting its case, defendant in his own testimony admitted to two prior convictions for driving under the influence. See G.S. 15-173.1. This assignment of error is overruled.

We have also examined defendant's assignments of error relating to the trial court's charge to the jury and find no prejudicial error.

No error.

Judges BRITT and PARKER concur.

WILLIAM N. PUETT v. GASTON COUNTY, C. GRIER BEAM, CHARLES A. RHYNE, POLIE Q. CLONINGER, GENE FRONEBERGER, W. J. PHARR, CHARLES A. GLENN

No. 7327SC380

(Filed 22 August 1973)

1. Injunctions § 12— preliminary injunction — presumption of regularity

An order granting or continuing a preliminary injunction is presumed to be correct and the burden is on appellants to show that it is erroneous.

2. Injunctions § 12— continuation of preliminary injunction

To justify a continuation of a preliminary injunction until the final hearing, it must appear that there is probable cause that plaintiff will be able to establish his asserted right at the final hearing.

3. Counties § 7; Injunctions § 12 —sale of county property — limitation to medical purposes — continuation of preliminary injunction

The trial court did not err in continuing a preliminary injunction in effect pending a final trial in this action to restrain a board of county commissioners from selling lots owned by the county with restrictions limiting the use of the lots to medical purposes on grounds that the restrictions put members of the medical profession in a favored position and that they limited competitive bidding and thereby tended to depress the selling price of the property.

APPEAL by defendants from *McLean, Judge,* 9 February 1973 Session of Superior Court held in GASTON County.

Plaintiff, William N. Puett, is a citizen, resident, and taxpayer of Gaston County. Defendants are Gaston County and the individual members of the Gaston County Board of Commissioners.

Plaintiff instituted this proceeding on 2 February 1972 praying, *inter alia,* "[t]hat an order issue directing . . . defendants to show cause why a preliminary injunction not issue pending the trial of this matter on the merits enjoining the defendants from the sale of the [hereinafter] described lands under the terms and conditions described in this complaint." When this matter came on for hearing for defendants to show cause why a preliminary injunction not issue pending the trial of the case on its merits, the plaintiff offered evidence tending to show the following:

Gaston County owns two tracts of land containing 108 acres and 75 acres respectively which were conveyed in 1969 to the county by Gaston Memorial Hospital, a private corporation. On 7 August 1972, County Commissioners C. G. Beam and Charles A. Rhyne, were appointed by the Board of County Commissioners "to serve on a Land Development Committee to study disposal of the 75 acre tract of land and to act on behalf of the Board of County Commissioners in connection therewith."

Two members of the Board of Trustees of the Gaston Memorial Hospital comprised the other half of the "Joint Land Development Committee" which met on 18 September 1972 to discuss development of a medical office complex on the 75 acre tract. At that meeting it was agreed that "[s]uch funds will

be recovered and reimbursed to the hospital through the sale of the developed land [and] [l]and will be made available to any person or developer who has definite intention to construct medical office facilities for sale, lease, or his own use." On 19 January 1973, a resolution was adopted by the Gaston County Board of Commissioners providing, *inter alia*, " . . . that it would be in the best interests and to the benefit and advantage of the welfare and health of the citizens of Gaston County to establish a medical office and health related complex within the seventy-five acres of land . . . . " Twenty-one acres of this seventy-five acre tract were surveyed and divided into seventeen lots; sixteen of the seventeen lots are to be sold subject to a "Declaration of Restrictions" ratified and approved by the Commissioners on 19 January 1973. These restrictions prohibit construction on these lots of edifices other than "medical office buildings" (hereafter defined) and limit use of these lots to medical and dental purposes.

The Director of Development of Gaston Memorial Hospital, Billy G. McSwain, was placed in charge of developing the twenty-one acre medical park subdivision. He testified as a witness for plaintiff that "[t]he lots were developed from the type of buildings that different doctors would like to build, the size of their operation, what would be needed" and stated, "[t]he land was restricted to be sure that it was used for medical office buildings."

Based on the sworn testimony offered by plaintiff, stipulations, exhibits and admissions of counsel, the trial court made findings and conclusions which, except where quoted, are summarized as follows:

Gaston County authorized Gaston Memorial Hospital, Inc., to improve the twenty-one acre tract prior to its sale and "is, or may be responsible for the costs of some or all of . . . said improvements." "[N]o vote of the people of Gaston County has authorized the spending of money by the corporate defendant for said costs of said improvements or sale by said county or any other costs connected with said sale." Money spent or to be spent by Gaston County in the development of the twenty-one acre tract is an "unnecessary expense" and placing restrictions on said land prior to the sale thereof is an "arbitrary and capricious" and "unlawful" act which "depresses or may depress its value by reducing the number of purchasers and places members of the medical profession in a favored position."

Thereupon, the trial court ordered, adjudged and decreed "that the proposed sale by the defendants according to the terms and conditions of the resolution and restrictions be and the same is hereby restrained and that the restrictions placed upon the subject property are hereby declared illegal, null and void, and of no force and effect." Defendants appealed.

Jeffrey M. Guller for plaintiff appellee.

Hollowell, Stott & Hollowell by Grady B. Stott for defendant appellants.

HEDRICK, Judge.

[1] In reviewing on appeal an order granting or continuing a preliminary injunction in effect pending a final determination in a case, the presumption is indulged that the judgment of the trial court is correct and the burden is upon the appellants to assign and show error. *Register v. Griffin,* 6 N.C. App. 572, 170 S.E. 2d 520 (1969).

[2] To justify a continuation of a preliminary injunction until the final hearing, ordinarily it must appear that there is probable cause the plaintiff will be able to establish his asserted right at the final hearing. *Cablevision v. Winston-Salem,* 3 N.C. App. 252, 164 S.E. 2d 737 (1968).

Defendant contends, among other things, that Judge McLean erred in concluding as a matter of law:

> "[1] That the pacing [sic] of said restrictions on said land prior to the sale thereof is an arbitrary and capricious act of the defendants and is unlawful.
>
> [2] That subjecting said land to said restrictions restricts and depresses or may depress its value by reducing the number of purchasers and places members of the medical profession in a favored position.
>
> [3] That said restrictions are null and void and may not be placed on said land prior to its sale by the corporate defendant."

The "Declaration of Restrictions" ratified and approved by the Commissioners on 19 January 1973, in pertinent part provides:

"USE. Each lot and the improvements thereon may be utilized only by the persons enumerated in this section, and then only for the practice of his profession:

(a) Medical doctors . . .

(b) Dentists . . .

(c) Optometrists . . .

(d) Osteopaths . . .

(e) Podiatrists . . . "

Only a "medical office building," defined as "structure . . . occupied solely for the purpose of rendering medical treatment in compliance with the restrictions herein relating to use," and approved accessory structures may be built on each lot.

Although G.S. 153-9 (14) empowers the boards of commissioners of the several counties to sell or lease real property belonging to the county, in so doing, they are acting as fiduciaries or trustees for the taxpayers and citizens of the county and must exercise their best judgment and skill, as reasonable men, to obtain the best price for the land. G.S. 153-2(4); *Hughes v. Commissioners,* 107 N.C. 598, 12 S.E. 465 (1890); *Gooch v. Gregory,* 65 N.C. 142 (1871); *Malcom v. Webb,* 211 Ga. 449, 86 S.E. 2d 489 (1955).

[3] In his complaint the plaintiff alleges in substance, among other things, that the action of the defendants in placing the restrictions on sixteen of the seventeen lots was arbitrary, capricious, and unlawful, and that the restrictions put members of the medical and dental professions in a favored position, limited competitive bidding, and thereby tended to depress the selling price of the property. Whether the restrictions complained of do tend to reduce the market value of the lots is a fact which can be determined only after a final hearing of the case where both parties will have had an opportunity to fully develop their respective contentions.

While Judge McLean was premature in concluding as a matter of law that the action of the defendants in placing the restrictions upon the subdivided lots was "arbitrary and capricious" and "unlawful" and that the restrictions were "null and void," it is our opinion the record establishes probable cause to believe that the plaintiff might prevail on his asserted claim at

a final hearing on the merits; and the court did not err in continuing the preliminary injunction in effect pending a final trial.

Since the preliminary injunction will be continued in effect pending a final hearing of the whole case, it is not necessary that we discuss the further contentions of the parties. The order appealed from is

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

IN RE: PROBATE OF WILL OF LEVI E. (L. E.) MITCHELL

No. 738SC454

(Filed 22 August 1973)

Wills § 8— revocation of will by marriage — revocation unaffected by statute enacted before testator's death

Though a will is ambulatory and is entirely inoperative during the lifetime of the testator, a revocation is not ambulatory and is not dependent for effectiveness upon the law in force at the time of testator's death; therefore, upon the marriage of testator in 1963, his will which had been executed earlier was revoked *eo instanti* and immediately became a void instrument, notwithstanding amendment to G.S. 31-5.3 enacted prior to testator's death which provided that a will was not revoked by a subsequent marriage.

APPEAL by contestant Alma Mitchell from *Perry Martin, Judge,* 22 January 1973 Session of WAYNE County Superior Court.

Levi Mitchell died on 18 July 1972 leaving a paper writing executed 16 January 1963 purporting to be his last will and testament which was presented by the named executors, L. E. Mitchell, Jr., and Leon C. Mitchell, to the Clerk of Superior Court for probate in common form. The Clerk refused to admit the will for probate because it was the Clerk's opinion that the will had been revoked by decedent's marriage to Alma Mitchell after the execution of the will as a result of the provisions of G.S. 31-5.3 in effect at the time of his marriage.

The Clerk's order was appealed to the Superior Court, sitting without a jury, upon the following stipulated facts:

"1. Levi E. (L. E.) Mitchell died a resident of Wayne County on July 18, 1972. He was married three times. By his first wife, Rittie Bunn Mitchell, who died in 1923, he had three children: Levy Mitchell; Lois Mitchell Brewer; and Liza M. Beasley, deceased. Liza M. Beasley is survived by one child, Joe Mitchell Beasley (Rhodes). By his second wife, Esther Beasley Mitchell, who died in 1962, he had seven children: L. E. Mitchell, Jr., Pauline M. Faircloth, Leon C. Mitchell, Carole M. Mitchell, Joyce M. Cooke, Yvonne M. Evans, and David B. Mitchell.

2. After his second wife's death, the decedent executed a paper writing purporting to be his last Will and Testament dated January 16, 1963, wherein he devised all of his property to his seven children born of his marriage to Esther. This is the paper writing which has been submitted to the Court for probate. This document on its face meets all of the legal requirements of a valid written, attested Will.

3. In November, 1963, the decedent married Alma Mitchell, who survived him. No children were born of this marriage.

4. On or about August 14, 1972, the paper writing dated January 16, 1963 was presented to the Clerk of Superior Court, Wayne County by L. E. Mitchell, Jr. and Leon C. Mitchell, the Executors named therein, for probate. Affidavits have been secured from the witnesses to this paper writing and a hearing was held before the Clerk of Superior Court on the question of whether or not (sic) this paper writing should be probated. By Order dated October 16, 1972, the Clerk of Superior Court disallowed said paper writing to be probated for the sole reason that in the Clerk's opinion said paper writing had been revoked by decedent's marriage to Alma Mitchell subsequent to his execution of said paper writing.

5. This decision of the Clerk is now before the Superior Court on appeal and it is stipulated and agreed that the certified copy of a paper writing dated the 16th day of January, 1963, purporting to be the last Will and Testament of Levi E. Mitchell, deceased; application for probate and letters testamentary dated August 14, 1972 made by L. E. Mitchell, Jr. and Leon C. Mitchell; affidavits of probate of

Evelyn G. Davis and Velma L. Toler; and Order of the Clerk of Superior Court, disallowing probate, dated October 16, 1972, together with this stipulation; constitute all of the facts and documents necessary for determination of this case."

The court adopted the stipulations as its findings of fact and concluded as a matter of law "that due to the 1967 Amendment to G.S. 31-5.3, the paper writing purporting to be the last Will and Testament of Levi E. Mitchell was not revoked by his subsequent marriage and it should be probated." The paper writing was ordered admitted to probate and contestant appealed.

Herbert B. Hulse, Braswell, Strickland and Rouse, by Roland C. Braswell, for contestant appellant.

Taylor, Allen, Warren and Kerr, by John H. Kerr III, for applicant appellees.

MORRIS, Judge.

The sole issue for our determination is whether the will executed by Levi Mitchell (then unmarried) was revoked by his subsequent marriage at a time when G.S. 31-5.3 (providing for revocation of a will by a subsequent marriage) was effective although the statute was amended prior to his death to provide that a will is not revoked by a subsequent marriage of the maker.

At the time Levi Mitchell executed his will on 16 January 1963, G.S. 31-5.3 provided as follows:

"*Revocation by marriage; exceptions.*—A will is revoked by the subsequent marriage of the maker, except as follows:

(1) A will made prior to the marriage of the maker which contains an express statement to the effect that it is made in contemplation of marriage to a person named therein is not revoked by the maker's marriage to such person.

(2) A will made in the exercise of a power of appointment, or so much thereof as is made in the exercise of a power of appointment, if the real or personal estate thereby appointed would not, in default of such appointment, pass to the maker's heirs or next of kin, is not revoked by the maker's subsequent marriage."

There is no contention that Levi Mitchell's will was executed within the exceptions to former G.S. 31-5.3.

In November 1963, Mitchell married the contestant, Alma Mitchell. The 1967 General Assembly by Chapter 128, 1967 Session Laws, amended G.S. 31-5.3 to read as follows:

> *"Will not revoked by marriage; dissent from will made prior to marriage.*—A will is not revoked by a subsequent marriage of the maker; and the surviving spouse may dissent from such will made prior to the marriage in the same manner, upon the same conditions, and to the same extent, as a surviving spouse may dissent from a will made subsequent to marriage."

As rewritten, G.S. 31-5.3 is made applicable to the wills of persons dying on or after 1 October 1967.

Appellees contend that because a will is ambulatory and speaks at the maker's death, the law applicable in determining whether a will has been revoked is the law in effect at the maker's death. Appellant argues, however, that Levi Mitchell's will was, upon his subsequent marriage, revoked *eo instanti* by operation of former G.S. 31-5.3. If appellant's contention is valid, it is clear that there has been no revival of the will pursuant to G.S. 31-5.8 which provides as follows:

> *"Revival of revoked will.*—No will or any part thereof, which shall be in any manner revoked, can be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference."

We agree with appellees that a will is an ambulatory instrument and is entirely inoperative during the lifetime of the testator. As stated by our Supreme Court, " 'the will of a testator is ambulatory even to his death,' which means, in other words, that it is not fixed legally, but may be changed even to the time of his death." *In re Bennett,* 180 N.C. 5, 11, 103 S.E. 917 (1920). Yet we do not agree that a revocation is ambulatory and dependent for effectiveness upon the law in force at the time of testator's death.

Revocation, being a thing done and complete, is not, in its nature ambulatory. The principles applicable to the reviving of wills revoked by acts of the makers are equally applicable to the reviving of wills revoked by operation of law, e.g., the effect of marriage; for in either case the will, being revoked, is of no effect until new life is given to it. *Sawyer v. Sawyer,* 52 N.C.

134 (1859). Under the statutory predecessor to former G.S. 31-5.3 a will revoked by the marriage of the testator could only be revived by a valid reexecution. *In re Will of Coffield,* 216 N.C. 285, 4 S.E. 2d 870 (1939). "The object of G.S. 31-5.3 [before amendment] is set out as plainly as language can do it. The statute provides that a person's subsequent marriage *ipso facto,* with certain exceptions, revokes all prior wills made by such person." *In re Will of Tenner,* 248 N.C. 72, 73, 102 S.E. 2d 391 (1958).

In *Wilson v. Francis,* 208 Va. 83, 87, 155 S.E. 2d 49 (1967), a case on "all fours" with the case *sub judice,* the Supreme Court of Virginia held as follows:

> "[T]he fact that a will is ambulatory and speaks as of the maker's death does not preclude the General Assembly from enacting laws which revoke and declare a nullity an existing will upon the occurrence of a specified event such as marriage. After such a revocation, unless the will is revived in a manner prescribed by law, the will never speaks."

Likewise, we hold that upon the marriage of Levi Mitchell in 1963, his will was revoked *eo instanti* and immediately became a void instrument. Since there was no revival under G.S. 31-5.8, supra, it was error for the trial court to order the will admitted to probate.

While this case presents an issue of first impression in this State, other jurisdictions have ruled similarly upon the same basic facts. *Wilson v. Francis, supra; In re Estate of Stolte,* 37 Ill. 2d 427, 226 N.E. 2d 615 (1967); *Estate of Berger,* 198 Cal. 103, 243 P. 862 (1926). See also *Butte v. Crohn,* 8 Or. App. 284, 494 P. 2d 258 (1972), where a statute in effect at the time of testator's divorce provided that a will was revoked by divorce and it was held that testator's will, executed during his marriage and devising his entire estate to his former son, was revoked upon the divorce, even though the statute enacted subsequent to the divorce and prior to testator's death provided that divorce would revoke all provisions in the will in favor of the former spouse.

For the reasons stated above, the judgment of the trial court ordering the will of Levi Mitchell admitted to probate, must be reversed and the order of the Clerk of Superior Court denying probate be reinstated.

Reversed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. WILLIE ALBERT CURRIE

No. 7312SC529

(Filed 22 August 1973)

1. **Constitutional Law § 35— automatic restoration of citizenship — retroactive application**

G.S. 13-1 to 13-4 providing for automatic restoration of citizenship to persons convicted of crime must be given retroactive application in order to be constitutionally valid.

2. **Statutes § 11— statute amended after conviction while appeal pending**

An act or conduct which is made criminal at the time of its commission but which is not criminal by repeal or amendment of the statute at the time of appeal upon conviction is an act or conduct which will not support an appellate court's affirmance of the lower court conviction.

3. **Criminal Law § 127; Statutes § 11; Weapons and Firearms — possession of firearm by felon — statute amended — judgment arrested**

Where by virtue of the passage of G.S. 13-1 to 13-4 on 20 April 1973 defendant's citizenship rights were restored, his conviction under G.S. 14-415.1 for possession of a firearm by a felon on 23 February 1973 was rendered void, since criminals restored to their citizenship rights are exempted from the provisions of G.S. 14-415.1 by G.S. 14-415.2, and therefore defendant's conviction is vacated and judgment is arrested.

Judge BALEY dissenting.

APPEAL by defendant from *Martin (Robert), Special Judge,* 19 February 1973 Session of CUMBERLAND County Superior Court.

On 23 February 1973 defendant was convicted of violation of G.S. 14-415.1, possession of a firearm by a convicted felon, and was sentenced to a term of imprisonment for nine to ten years.

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

James R. Nance and James R. Nance, Jr. for defendant appellant.

CAMPBELL, Judge.

The felony of which defendant had previously been convicted was possession of marijuana. Judgment was entered on 7 September 1966 in Cumberland County Superior Court. The record did not indicate when the crime was committed. Defendant was sentenced to imprisonment for three to five years, execution of that sentence to be suspended and the defendant placed on probation for a period of five years.

There is no evidence in the record to indicate that defendant's period of probation did not unconditionally terminate in September 1971.

At the time of defendant's trial for possession of the firearm, G.S. 14-415.2 provided: "Any person whose citizenship is restored under the provisions of Chapter 13 of the General Statutes . . . shall thereafter be exempted from the provisions of G.S. 14-415.1."

At the time of defendant's trial and conviction, G.S. 13-1 to 13-3 established a procedure by which the felon had to have appeared before a judge of the General Court of Justice, shown himself entitled under the statute, and taken an oath prescribed by the statute, before citizenship rights could be restored.

Judgment in the instant case was entered on 23 February 1973. On 20 April 1973, Chapter 13 of the General Statutes was repealed and replaced by new provisions. Codified as G.S. 13-1 to 13-4, Chapter 251, 1973 Session Laws provides:

> "AN ACT TO PROVIDE FOR THE AUTOMATIC RESTORATION OF CITIZENSHIP.
>
> * * *
>
> § 13-1. *Restoration of citizenship.*—Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights restored upon the occurrence of any one of the following conditions:
>
> (1) The unconditional discharge of an inmate by the State Department of Correction or the North Carolina Board of Juvenile Correction, of a probationer by the State Probation Commission, or of a parolee by the Board of Paroles; or of a defendant under a suspended sentence by the court."

The Act further provides for the filing of a certificate of restoration with the clerk of court in the county where the record of the case from which the conviction arose is filed. The clerk must file the certificate with the official record of the case.

Section 2 of the Act provides that "all laws and clauses of laws in conflict with the provisions of this act shall be null and void."

If Chapter 251 of the 1973 Session Laws has retroactive effect to restore this defendant's citizenship rights, then by virtue of G.S. 14-415.2 his conviction for possession of a firearm is void.

The Act must be construed so as to be constitutional in application. If it were held that only felons who have satisfied the terms of their sentences after 20 April 1973 are entitled to automatic restoration of citizenship, there must exist some reasonable basis for classification of persons with respect to that date—before and after April 1973. In order to withstand an equal protection claim a statute's classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *Assoc. of Licensed Detectives v. Morgan, Attorney General,* 17 N.C. App. 701, 195 S.E. 2d 357 (1973).

A classification of felons equally circumstanced based upon the unconditional termination of their judicial sentences before and after a given date has no substantial relation to the legislation, the purpose of which is to grant automatic restoration of citizenship to all persons who have served their sentence.

[1] Chapter 251, Session Laws of 1973, Chapter 13 of the General Statutes, must be given retroactive application in order to be constitutionally valid. It therefore follows that after this defendant's conviction in the trial court, but while his appeal was pending before this Court, his rights of citizenship were restored to him.

The general rule is that an appellate court must apply the law in effect at the time it renders its decision. *Thorpe v. Housing Authority of Durham,* 393 U.S. 268, 21 L.Ed. 2d 474, 89 S.Ct. 518 (1969), reversing *Housing Authority v. Thorpe,* 267 N.C. 431, 148 S.E. 2d 290 (1966).

[2] An act or conduct which is made criminal at the time of its commission but which is not criminal by repeal or amendment of the statute at the time of appeal upon conviction, is an act or conduct which will not support an appellate court's affirmance of the lower court conviction. *State v. McCluney,* 280 N.C. 404, 185 S.E. 2d 870 (1972); *State v. Melton,* 7 N.C. App. 721, 173 S.E. 2d 610 (1970).

[3] It follows that when the class of persons subject to specific criminal sanction is reduced, a person who is thereby removed from that class after his conviction but before final judgment on appeal is entitled to have that conviction vacated and the judgment arrested.

Judgment arrested.

Judge HEDRICK concurs.

Judge BALEY dissents.

Judge BALEY dissenting.

In my judgment the majority opinion places undue emphasis upon citizenship rights as they relate to the criminal statute involved.

By the passage of G.S. 14-415.1 the legislature made it unlawful for a convicted felon to possess firearms.

G.S. 14-415.2 granted an exemption for convicted felons whose citizenship had been restored under the law as it then existed.

Chapter 251 of the 1973 Session Laws automatically restores citizenship to all convicted felons.

The majority interprets Chapter 251 as effectively emasculating the Felony Firearms Act and permitting all convicted felons who have served their sentences to possess firearms. I disagree.

In my view G.S. 14-415.2 was applicable only to the law existing at the time it was passed. Chapter 251 negates and makes null and void the exemption concerning restoration of citizenship, not the penal statute itself, and thereby makes it an offense for all convicted felons to possess firearms without

regard to their restoration of citizenship. The federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. App., Sections 1201, *et seq.*, contains a similar provision.

I do not think it is an arbitrary or unreasonable classification to forbid those who have committed felonies to possess firearms. I would affirm the conviction.

JAMES N. GOLDING v. TOM F. TAYLOR

No. 7328SC376

(Filed 22 August 1973)

1. **Process § 9; Rules of Civil Procedure § 4— defendant in another state — sufficiency of process**

An action for alienation of affections and for criminal conversation is an action *ex delicto* and involves "injury to person or property" within the contemplation of G.S. 1-75.4; therefore, defendant was properly served and the North Carolina court obtained jurisdiction over his person and the cause of action where process was served on defendant by a person authorized under the laws of the State of Georgia to serve process, defendant was a citizen and resident of North Carolina at the time of the occurrence of the matters complained of in the complaint, the acts complained of occurred in North Carolina, and defendant departed from the State subsequent to the occurrence of the matters complained of.

2. **Constitutional Law § 33; Rules of Civil Procedure § 33— objections to interrogatories on ground of self-incrimination — waiver**

Though failure to object to interrogatories within the time fixed by Rule 33 of the Rules of Civil Procedure is ordinarily a waiver of any objection, that principle must yield to the privilege against self-incrimination guaranteed by the Fifth Amendment to the Federal Constitution; therefore, the trial court erred in denying defendant's objections to, and requiring him to answer, all unanswered interrogatories, even though defendant did not object to the interrogatories within ten days after they were served, where many answers would have been incriminating to defendant.

APPEAL by defendant from *Thornburg, Judge,* from order filed 12 December 1972, BUNCOMBE Superior Court.

This action was instituted by the filing of complaint and issuance of summons on 22 June 1972. In the complaint, plaintiff alleges a cause of action for alienation of affections and criminal conversation occurring between 1 September 1971 and

22 June 1972. The complaint alleges: Plaintiff is a citizen and resident of Buncombe County, North Carolina, and defendant was a citizen and resident of said county and state until 9 May 1972 when he fled from North Carolina and since that time has resided in Atlanta, Georgia. Plaintiff and his wife were married to each other on 19 December 1959, thereafter had three children, and until the acts by defendant complained of, plaintiff, his wife and children enjoyed a happy home relationship. On various dates subsequent to 1 September 1971, defendant committed acts of adultery with plaintiff's wife, most of said acts being in North Carolina but others being in Georgia and Tennessee. On 9 May 1972, defendant came to Buncombe County and persuaded plaintiff's wife to leave plaintiff's household, accompany defendant to Atlanta, Georgia, and there live with him. Plaintiff prays for compensatory damages in amount of $45,000.

The stipulation of counsel recites that defendant received a copy of the summons and complaint from the Sheriff of Fulton County, Georgia, on 27 June 1972. On 24 July 1972 defendant's counsel obtained an order enlarging the time for answering or otherwise pleading to the complaint until 21 August 1972. On 27 July 1972 plaintiff's counsel delivered to defendant's counsel 93 interrogatories.

On 21 August 1972 defendant filed answer setting forth, among other things, (1) motion to quash the service of process and dismiss the action, (2) motion for stay of proceeding and transfer of action to the Superior Court of Fulton County, Georgia, and (3) motion for protective order.

On 25 August 1972 defendant filed answers to some 10 of plaintiff's interrogatories but objected to the others on the ground that defendant's answers to them "could or might tend to incriminate him" in violation of his rights guaranteed by Amendment V of the U. S. Constitution.

Various other motions not pertinent to this appeal were filed and notices of hearings were served. After several continuances, a hearing was held on (1) defendant's motions set forth in his answer, (2) defendant's motion for protective order as set forth in a separate pleading, (3) defendant's objections to interrogatories, and (4) plaintiff's motion to strike certain portions of defendant's answer.

Following the hearing the court entered an order setting forth specific findings of fact on the question of service of process, denied all of defendant's motions and ordered that defendant answer all interrogatories not theretofore answered. Defendant appealed.

Morris, Golding, Blue & Phillips by William C. Morris, Jr., attorneys for plaintiff appellee.

Bennett, Kelly & Long, P.A., by E. Glenn Kelly, attorneys for the defendant.

BRITT, Judge.

Defendant assigns as error the denial of his motion to quash the service of process and dismiss the action. This assignment has no merit.

G.S. 1-75.4 provides in pertinent part: "A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances: * * * (3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant."

[1] We hold that an action for alienation of affections and for criminal conversation is an action *ex delicto* and involves "injury to person or property" within the contemplation of the above quoted statute. *Hardison v. Gregory,* 242 N.C. 324, 88 S.E. 2d 96 (1955). The court found facts to the effect that process in this action was served on defendant by a person authorized under the laws of the State of Georgia to serve process, that at the time of the occurrence of the matters complained of in the complaint, defendant was a citizen and resident of North Carolina, that acts of defendant complained of occurred in North Carolina and that defendant departed from the State of North Carolina subsequent to the occurrence of the matters complained of in the complaint. The findings of fact are fully supported by the affidavits and answers to interrogatories presented at the hearing and the findings fully support the court's conclusion that personal service "has been had" upon the defendant and that the Superior Court of Buncombe County has jurisdiction over the cause of action and over the parties.

[2] Defendant assigns as error the overruling of his objections to, and the court's requiring him to answer, plaintiff's interrogatories.

Answers to many of the interrogatories could be incriminating to defendant. As an example, Interrogatory 17 inquires as to whether defendant saw plaintiff's wife in Atlanta, Georgia, during September of 1971, whether defendant had sexual intercourse with plaintiff's wife in Atlanta, how defendant and plaintiff's wife traveled from Asheville to Atlanta, where defendant and plaintiff's wife stayed while in Atlanta, etc.

Plaintiff contends that defendant failed to object to the interrogatories within ten days after they were served as required by G.S. 1A-1, Rule 33, therefore, defendant has lost his right to object. This contention is supported by Wright and Miller in their treatise on Federal Practice and Procedure; in Vol. 8, § 2173, p. 544, in their comments on Federal Rule 33, which is very similar to our Rule 33, we find: "It is inappropriate for a party to decide for himself that an interrogatory is improper. It is his responsibility either to answer the interrogatory or to object. In the absence of an extension of time, failure to object within the time fixed by the rule is a waiver of any objection."

While we agree that ordinarily, in the absence of an extension of time, failure to object to interrogatories within the time fixed by the rule is a waiver of any objection, we hold that this principle must yield to the privilege against self-incrimination guaranteed by the Fifth Amendment to the Federal Constitution. In 98 C.J.S., Witnesses, § 456, pp. 311-312, it is said: "The waiver [of the privilege against self-incrimination] may be express or specific, that is, by word of mouth or by writing, or it may be by some act amounting to waiver; in the latter event an act alleged to constitute the waiver must be carefully appraised, and any doubt must be resolved against the waiver."

In view of our holding on the question of waiver, that portion of Judge Thornburg's order denying defendant's objections to, and requiring him to answer, all unanswered interrogatories is vacated. The cause will be remanded to the superior court where the court will conduct a hearing, pass upon the merits of defendant's refusal to answer each of the unanswered interrogatories on ground of self-incrimination, and require defendant to answer the interrogatories where his answers would not be self-incriminating.

We have considered the other assignments of error brought forward and argued in defendant's brief but finding them to be without merit, they are overruled.

Remanded.

Chief Judge BROCK and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. CHARLES McKINNEY

No. 735SC520

(Filed 22 August 1973)

Criminal Law § 23— plea bargain — voluntariness of guilty plea

Defendant's plea of guilty to a charge of felonious larceny of an automobile was not rendered involuntary where the trial court agreed with defendant's counsel to impose sentence to run concurrently with a sentence previously imposed by the judge, defendant was informed of the judge's promise and had it explained to him, and the trial court honored its promise.

APPEAL by defendant from *Rouse, Judge,* 5 February 1973 Session of NEW HANOVER County Superior Court.

By indictment proper in form, defendant was charged with the felonious larceny of an automobile. Through his court-appointed counsel he pleaded guilty. Before accepting the plea the court examined defendant under oath in open court and concluded that his plea of guilty was "freely, voluntarily, understandingly and knowingly made." Upon such plea the court entered judgment sentencing defendant to not less than five nor more than seven years in prison to run concurrently with a sentence of not less than eight nor more than ten years for common law robbery imposed on the same day. From entry of this judgment, defendant appealed.

Attorney General Morgan, by Assistant Attorneys General Ricks and Magner, for the State.

Richard L. Stanley for defendant appellant.

MORRIS, Judge.

Defendant challenges the trial court's conclusion that his plea of guilty was freely, voluntarily, understandingly and know-

ingly made. During the examination of the defendant the following proceedings took place:

"COURT: Mr. McKinney, before I permit your plea to be entered, as counsel has announced that you want to enter in this automobile larceny case, the court is going to ask you a series of questions and you will be sworn to speak truthfully in response to those questions.

CHARLES MCKINNEY: Upon being first duly sworn, answered questions of court as follows:

BY COURT:

Q. Are you able to hear and understand my statements and questions?

A. Yes, sir.

Q. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills?

A. No, sir.

Q. Do you understand that you are charged with the felony of automobile larceny?

A. Yes, sir.

Q. Has that charge been explained to you?

A. Yes, sir.

Q. Are you ready for trial?

A. Yes, sir.

Q. Do you understand that you have the right to plead not guilty and to be tried by a jury?

A. Yes, sir.

Q. Your lawyer has announced that you desire to enter in this case a plea of guilty to this charge?

A. Yes, sir.

Q. Is that the plea you want to enter?

A. Yes, sir.

Q. Are you in fact guilty of this charge?

A. Yes, sir.

Q. Do you understand that upon your plea of guilty you could be imprisoned for as much as ten years?

A. Yes, sir.

Q. Now, let me say this to you. Your counsel inquired of the court if upon a plea the court would consider imposing a sentence which would run concurrently with the sentence which I have just imposed and I have stated to him that I would. Has your counsel informed you that I would let the two sentences run concurrently, that is, the automobile larceny sentence and the sentence in the robbery case run at the same time? Has your lawyer told you this?

MR. STANLEY: Your Honor, what I informed him is it wouldn't be any time past what he was serving, wouldn't be any additional time taxed on to the end.

COURT: Well, I used the word concurrently. Do you understand that this sentence and the sentence in the robbery case will run at the same time?

A. Yes, sir.

Q. Now, are there any witnesses that you want who are not in the courtroom today?

A. No, sir.

Q. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services?

A. Yes, sir.

Q. Has the solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise or threat to you to influence you to plead guilty in this case except as I have already stated?

A. No, sir.

Q. Has anyone violated any of your constitutional rights that you know anything about?

Q. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of guilty in this case?

A. Yes, sir.

Q. Do you have any questions or any statement to make about what I have just said to you?

A. No.

COURT: Mr. Stanley, go over this with him, please.

(Let the record show that the court finds the defendant's plea is freely, voluntarily, understandingly and knowingly made.)"

Defendant argues that by pleading guilty to the larceny charge he had nothing to lose since at the time he entered his plea of guilty he had not given notice of appeal on the common law robbery conviction entered against him the same day and that it was solely due to the offer of a concurrent sentence that he pleaded guilty. We feel defendant's contention is without merit.

With commendable candor and openness, the trial judge asked defendant if his attorney had informed him that he would order the two sentences to run concurrently upon a guilty plea. Defendant answered affirmatively and with that understanding also affirmatively replied to the question of whether he still wished his attorney to enter a plea of guilty.

Whether conducted by the court or by the solicitor, " 'plea bargaining' is an essential component of the administration of justice. *Properly administered,* it is to be encouraged." (Emphasis added.) *Santobello v. New York,* 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed. 2d 427, 432 (1971). Defendant does not contend that such plea bargaining was conducted unfairly or that he failed to secure the full benefits of any bargain which had been made. See *Santobello, supra.* Clearly the trial court honored its promise. The fact that defendant was fully aware of the promise made by the trial court does not render his plea any less voluntary. Indeed it serves to strengthen its voluntariness.

We conclude that the record affirmatively shows that defendant's guilty plea was made freely, understandingly, and voluntarily as required by *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969), and we find no error in the action of the trial court in accepting that plea.

No error.

Chief Judge BROCK and Judge PARKER concur.

WILLIAM O. TROTTER T/A TROTTER ELECTRICAL CONSTRUCTION COMPANY v. GENE W. HEWITT AND WIFE, JANE A. HEWITT

No. 7310DC474

(Filed 22 August 1973)

1. **Rules of Civil Procedure § 52; Trial § 58— sufficiency of findings — separate statement of conclusions**

In this action to recover for materials and labor furnished in the performance of electrical work wherein defendants counterclaimed for an amount allegedly necessary to complete and correct plaintiff's faulty work, the trial court made sufficient findings of fact and separately stated his conclusions of law so as to comply with G.S. 1A-1, Rule 52 and afford proper appellate review.

2. **Evidence § 40— installation of electrical system— counterclaim for faulty work — testimony as to difficulties with system — nonexpert witness**

In this action to recover for materials and labor furnished in the performance of electrical work on defendants' building wherein defendants counterclaimed for an amount allegedly necessary to complete and correct plaintiff's faulty work, the trial court did not err in the admission of testimony by employees of defendant as to defects they had encountered in their use of the electrical system installed by plaintiff.

APPEAL by plaintiff from *Barnette, District Court Judge,* 29 January 1973 Session of District Court held in WAKE County.

Plaintiff instituted this action to recover $2,946 alleged to be due from defendant pursuant to an oral contract in which plaintiff furnished materials and labor in performing certain electrical work on a house owned by defendants located at 111 Brooks Avenue, Raleigh, N. C. Both parties admit the existence of an oral contract in which plaintiff agreed to perform certain electrical work for defendants at a price of $1190. Both parties also admit that the original oral contract was subsequently modified. However, neither party agrees on any of the other terms of the original contract or the modified contract.

The parties stipulated at pretrial conference that defendants had paid $1200 to plaintiff for work performed and that defendants were entitled to a credit of $319 for twelve lighting fixtures purchased by defendants and delivered to plaintiff for installation. The parties also stipulated as to what the contested issues were.

Defendants counterclaimed against plaintiff for $2000 which was the amount alleged to be necessary to complete and correct the faulty and unworkmanlike electrical work alleged to have been performed by plaintiff.

The court, sitting without a jury, made findings of fact and conclusions of law. It concluded that defendants were entitled to recover $1000 from plaintiff as damages for defects caused by plaintiff's faulty workmanship, less $120 due plaintiff by defendant. Plaintiff appealed.

Thompson & Lynn, by Dan Lynn, for plaintiff.

Reynolds, Farmer & Russell, by E. Cader Howard, for defendants.

BROCK, Chief Judge.

Plaintiff excepts to most of the findings of fact and conclusions of law in the trial court's judgment. The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence to the contrary. *Brooks v. Brooks,* 12 N.C. App. 626, 184 S.E. 2d 417. Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts. *Lane v. Honeycutt,* 14 N.C. App. 436, 188 S.E. 2d 604. After a scrutiny of the record, we find that the trial court's findings of fact are supported by competent evidence and that the conclusions of law in the judgment are supported by the findings of fact.

[1] Plaintiff also contends that the trial judge failed to find facts specially in that he failed to find all the facts involved in this action. In our view this contention is without merit. Rule 52(a) of our Rules of Civil Procedure provides in part: "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 conclusions of law thereon. . . ." "The Rule does not place a severe burden upon the trial judge, for he 'need only make brief, definite, pertinent findings and conclusions upon the contested matters' . . ." 5A, Moore, Federal Practice Par. 52.06 (2nd ed. 1948), p. 2705. "And the court need not find on every issue requested, but a finding of such essential facts as lay a basis for the decision is sufficient." *Id.,* at Par. 52.06[1], p. 2713. The plaintiff argues for more specificity than is required.

Plaintiff also contends that some of the findings of fact are actually conclusions of law. In particular, plaintiff argues in his brief that the finding of fact that plaintiff *contracted* with defendants on 6 April 1972 to do certain electrical work is a conclusion of law. The parties stipulated at pretrial conference that a contract was entered into between plaintiff and defendants on 6 April 1972. Assuming that this finding of fact should be labeled a conclusion of law, plaintiff has suffered no prejudice. We hold that the trial court made sufficient findings of fact and separately stated his conclusions of law so as to comply with Rule 52 and afford proper appellate review. These assignments of error are overruled.

[2] Plaintiff excepts to the allowance of certain testimony by employees of defendant, who worked in the building in question, as to difficulties with the electrical system. These witnesses testified to problems with the electrical system observed from their everyday use. Their testimony concerned defects they had encountered in *their* use of the electrical system, *e.g.*, if foot heater and photocopy machine were on at same time, the circuit would blow and lights go out. This testimony was properly allowed. These assignments of error are without merit.

We have carefully examined plaintiff's other assignments of error and find them to be without merit.

No error.

Judges VAUGHN and BALEY concur.

MARY BETH RAMSEY v. BRENDA DAVIS CHRISTIE

No. 7327SC545

(Filed 22 August 1973)

Automobiles § 53— sudden stop — skidding across center lane — negligence — jury question

In this action for damages resulting from an automobile collision, defendant's evidence did not establish her negligence as a matter of law but presented a question for the jury as to whether defendant exercised the same degree of care which a reasonably prudent person would have exercised under the circumstances confronting her where her evidence tended to show that she was driving in the northbound lane of a two-lane highway at about 30 mph, that immedi-

ately before the collision two northbound cars passed defendant's car, that two hitchhikers were on the side of the road, that the front car in the northbound lane stopped suddenly, causing the driver of the second car also to stop suddenly, and that defendant applied her brakes and skidded partially across the center line into the southbound lane where she came to a complete stop just before colliding with plaintiff's oncoming southbound car.

APPEAL by plaintiff from *McLean, Judge,* 12 February 1973 Session of Superior Court held in GASTON County.

Civil action in which plaintiff seeks recovery of damages for personal injuries and property damages resulting from a collision between automobiles operated by plaintiff and defendant. The collision occurred at approximately 1:30 p.m. on 10 July 1971 on N. C. Highway 274 at a point shortly south of Gastonia, N. C. At that point Highway 274 is a two-lane highway, with one lane for northbound and one lane for southbound traffic, the two lanes being separated by a broken white center line. The highway was straight and approximately level, the weather was clear, and the road was dry. The posted speed limit was fifty-five miles per hour. The collision occurred when defendant's northbound automobile partially crossed over the center line and struck, or was struck by, plaintiff's southbound vehicle.

Plaintiff testified that the collision occurred under the following circumstances: Plaintiff was driving south in the southbound lane at approximately thirty-five miles per hour. As she approached the scene of the accident, she saw three cars stopped straight in the northbound lane of the road. She thought a license check was in progress. When she reached the stopped cars, defendant's car, which was the third or rear car facing plaintiff in the northbound lane, suddenly pulled out into the southbound lane. In so doing, the left front of defendant's car struck the left front and left side of plaintiff's vehicle, damaging it and causing plaintiff's personal injuries.

Defendant offered evidence to show that the collision occurred under the following circumstances: Defendant was driving north in the northbound lane at about thirty miles per hour with her three-year-old daughter as a passenger in the front seat. Immediately prior to the collision two northbound cars, traveling approximately twenty miles per hour faster than defendant's car, passed defendant's car. Two hitchhikers were on the side of the road. The front car in the northbound lane stopped suddenly,

causing the driver of the second car also to apply brakes and stop suddenly. Defendant, at that time the third car in line, also applied her brakes and brought her car to a stop within a few feet of but without striking the vehicle immediately in front of her. In so doing, however, defendant's car skidded partially across the center line into the southbound lane, coming to a complete stop "just a matter of seconds before the collision" with plaintiff's oncoming southbound car.

The jury answered the issue of negligence in defendant's favor. From judgment on the verdict dismissing her action, plaintiff appealed.

Frank Patton Cooke and James R. Carpenter for plaintiff appellant.

Hollowell, Stott & Hollowell by L. B. Hollowell, Jr., for defendant appellee.

PARKER, Judge.

Plaintiff assigns error to denial of her motions for a directed verdict and for judgment notwithstanding the verdict on the issue of defendant's negligence. In this we find no error. Contrary to plaintiff's contention, defendant's evidence did not establish her negligence as a matter of law but presented a question for the jury as to whether defendant exercised the same degree of care which a reasonably prudent person would have exercised under the circumstances confronting her. Plaintiff's right to recover in this case depended upon the jury accepting as credible her testimony as to the events causing the collision. Plaintiff had the burden of proving defendant's negligence. There was no error in denying her motions. *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297.

Plaintiff's remaining assignments of error are primarily directed to portions of the court's charge to the jury. Considered contextually and as a whole the charge was free from prejudicial error. The court expressed no opinion as to which of the sharply conflicting versions of the events leading to the collision was proved, but left this for the jury to determine after correctly declaring and explaining the law arising on the conflicting evidence given in the case. From their verdict it is apparent that the jury determined that the defendant's rather than plaintiff's version was established by the evidence.

In the trial and judgment appealed from, we find

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. DORIS LEE BASDEN

No. 724SC829

(Filed 22 August 1973)

Criminal Law § 75— admissibility of confession — subnormal mental capacity

The fact that defendant had a subnormal mental capacity did not render defendant's confession incompetent where the trial court found upon competent evidence that the confession had been in fact freely, voluntarily and understandingly made after defendant had received the full *Miranda* warnings and after she had expressly waived her right to counsel.

APPEAL by defendant from *Rouse, Judge,* 12 June 1972 Session of Superior Court held in DUPLIN County.

Defendant was indicted for the first-degree murder of her ten-year-old son. At the outset of the trial the solicitor announced that he would not seek a verdict of guilty of first-degree murder but would seek a verdict of guilty of murder in the second degree or of manslaughter as the evidence might justify. Defendant pled not guilty. In summary the State's evidence showed: Defendant's son died in the emergency room of Duplin General Hospital on 19 December 1971 as result of a condition known as methemoglobinemia, which was secondary to nitrite poisoning; subsequently, in December 1971 and in January 1972, two other children of defendant were admitted to the hospital exhibiting the same symptoms; prior to these events and in May 1971, defendant's family physician had treated her for high blood pressure and for that purpose had prescribed and dispensed to her 100 veratrite capsules; this drug can cause methemoglobinemia and an overdose can cause death. Over defendant's objection the court allowed in evidence a statement signed by her in the S.B.I. office in Raleigh, N. C., on 20 January 1972 after interrogation by S.B.I. agents. In this statement she admitted that two days prior to her son's death she had given

him six of her high blood pressure pills and that after his death she had given some of the same pills to her two other children, who immediately thereafter became ill. Defendant did not testify, but introduced evidence that she had always taken good care of her children and had never mistreated them. There was also evidence that defendant was of low intelligence, having an I.Q. of sixty.

The jury found defendant guilty of involuntary manslaughter. From judgment imposing a prison sentence, she appealed.

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

Russell J. Lanier, Jr. for defendant appellant.

PARKER, Judge.

Defendant assigns error to the admission of her signed statement given to the S.B.I. agents in which she admitted giving the veratrite pills to her children. Before allowing this in evidence the trial judge conducted a voir dire examination and heard testimony of the S.B.I. agents to whom the statement was given concerning the circumstances under which it had been made. Defendant also testified on the voir dire hearing, stating she did not remember seeing or talking to anyone at the S.B.I. building in Raleigh on 20 January 1972 for the reason that on that date she had been on heavy medication. After hearing this evidence in the absence of the jury, the trial judge entered an order in which he found that defendant's statement had been freely, voluntarily and understandingly made after she had received the full *Miranda* warnings and after she had expressly waived her right to counsel. These findings, being based on competent evidence in the record, are conclusive on this appeal. *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37. Certainly, a subnormal mental capacity is an important factor to be considered by the trial court along with other relevant factors in determining whether a purported confession was in fact freely, voluntarily and understandingly made. It does not, however, in itself render incompetent a confession that was in fact freely, voluntarily, and understandingly made. *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396. Nothing in the record suggests that the trial court in this case failed to give adequate consideration to all pertinent circumstances in making its determination as to the competency of defendant's statement.

In the trial and judgment appealed from, we find

No error.

Judges CAMPBELL and MORRIS concur.

VIRGINIA DORIS COLLIER HOWELL v. JOHN JAMES HOWELL

No. 736DC473

(Filed 22 August 1973)

Divorce and Alimony § 18— alimony pendente lite hearing—denial of court reporter

The trial court did not err in the denial of defendant's motion to continue an alimony *pendente lite* hearing until a court reporter could be present to record the testimony. G.S. 7A-198(a); G.S. 50-16.8(f); Court of Appeals Rule 19(f).

APPEAL by defendant from *Gay, Judge,* 12 February 1973 Session of District Court held in NORTHAMPTON County.

This is a civil action instituted by Virginia Doris Collier Howell, wife, against John James Howell, husband, for divorce from bed and board, permanent alimony, and counsel fees, heard on plaintiff's motion for relief *pendente lite.*

In his answer, and when the case came on for hearing on plaintiff's motion for alimony *pendente lite,* the defendant requested that the court have a "qualified and approved Court Reporter" present to record all testimony and moved that the hearing on the motion be continued if a reporter was not available. The defendant's motion was denied.

The court heard plaintiff's evidence (defendant offered no evidence), made findings of fact, conclusions of law, and entered an order *pendente lite* that defendant pay to plaintiff $75.00 each week, deliver to plaintiff for her use a 1969 Dodge Charger automobile, and pay plaintiff's counsel $200.00. Defendant appealed.

Johnson, Johnson & Johnson by Bruce C. Johnson for plaintiff appellee.

Manning, Fulton & Skinner by John B. McMillan for defendant appellant.

HEDRICK, Judge.

The only exception brought forward and argued on this appeal is to the denial of defendant's motion to continue the alimony *pendente lite* hearing until a "qualified and approved court reporter" could be present to record the testimony.

In *McAlister v. McAlister,* 14 N.C. App. 159, 187 S.E. 2d 449 (1972), this court held that in the absence of a showing of prejudice, a new trial would not be ordered when the trial court failed to allow the defendant's motion to have a court reporter record the testimony at a *pendente lite* hearing. In the present case defendant has shown no such prejudice in the denial of his motion.

Furthermore, G.S. 7A-198(a) states: "Court-reporting personnel shall be utilized, if available, for the reporting of civil trials in the district court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon request of the chief district judge." A hearing on a motion for alimony *pendente lite* is not a civil trial within the meaning of G.S. 7A-198. See 88 C.J.S., Trials, § 3, p. 22.

In addition, G. S. 50-16.8(f) provides that the evidence in an alimony *pendente lite* hearing may be confined to verified pleadings, affidavits, or other proof aside from oral testimony. See also *Miller v. Miller,* 270 N.C. 140, 153 S.E. 2d 854 (1967); *Harrell v. Harrell,* 253 N.C. 758, 117 S.E. 2d 728 (1961); *Moore v. Moore,* 185 N.C. 332, 117 S.E. 12 (1923). Therefore, it seems clear that there is no necessity that the testimony be recorded.

Finally, Rule 19(f) of the Rules of Practice of this court reflects the expectation of the court that there will be certain circumstances in which there will be no stenographic record of a prior hearing. This rule outlines an alternative course for appellant's counsel to follow, and in so doing, indicates that a written transcript of the testimony is not essential in filing a record on appeal.

The court did not err in denying the motion to continue.

The order appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. RONALD COLEMAN IRBY

No. 7320SC541

(Filed 22 August 1973)

Criminal Law § 23— guilty plea to one offense — sentence for two offenses — plea stricken

Defendant's plea of guilty is stricken where it is stated in the judgment and commitment that defendant pleaded guilty to breaking, entering and larceny but the transcript of plea and the court's adjudication of voluntariness of the plea refer only to the charge of breaking or entering, notwithstanding only one sentence of three to five years was imposed.

APPEAL by defendant from *Falls, Judge,* 19 March 1973 Session of Superior Court held in STANLY County.

Defendant was charged in a bill of indictment, proper in form, with (1) the felony of breaking or entering, (2) the felony of larceny after breaking and entering, and (3) the felony of receiving.

Defendant entered a plea of guilty but the record does not clearly disclose to which charge, or charges, the plea was entered.

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

Brown, Brown & Brown, by Fred Stokes for the defendant.

BROCK, Chief Judge.

His honor failed to make clear entries in the case. In the Transcript of Plea defendant was asked if he understood that he was charged with *breaking* or *entering.* In adjudicating the voluntariness of the plea, his honor found that defendant pleaded guilty to *breaking* and *entering.* In the judgment and commitment his honor found and adjudicated that defendant pleaded guilty to *breaking, entering* and *larceny* in violation of G.S. 14-54 and G.S. 14-70. Defendant was sentenced to a term of not less than 3 nor more than 5 years. The sentence appears to have been entered upon two offenses, but it appears that defendant pleaded guilty to only one.

While it is true that the sentence imposed would not be excessive if entered as to either charge, nevertheless, defendant

is entitled to have the record correctly reflect the offense for which he was sentenced. If he was sentenced for both offenses, he is entitled to have the record clearly show that fact. Upon this record it is doubtful that defendant would be able to successfully plead and show former jeopardy upon the charge of larceny. He is entitled to protection from a second prosecution for the same offense.

Because of the conflicts in the orders entered by the trial judge, this Court, in its discretion, vacates the judgment and remands the cause to the Superior Court in Stanly County with directions that the presiding judge strike the plea of guilty and permit defendant to plead again to the bill of indictment.

Cause remanded with directions.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE AND THE NORTH CAROLINA COMPENSATION RATING AND INSPECTION BUREAU v. STATE OF NORTH CAROLINA, EX REL. ATTORNEY GENERAL

No. 7310INS493

(Filed 29 August 1973)

1. **Master and Servant § 80— workmen's compensation insurance rates — admissibility and sufficiency of evidence**

Testimony by a workmen's compensation insurance actuary and charts used by the actuary were properly admitted in a workmen's compensation hearing before the Commissioner of Insurance and provide substantial evidence supporting the Commissioner's determination that workmen's compensation insurers should be allowed a profit of 2.5% of total premiums received and the Commissioner's ultimate decision allowing a 3.4% increase in workmen's compensation insurance rates.

2. **Master and Servant § 80— workmen's compensation insurance rates — investment capital and rate of return**

In determining workmen's compensation insurance rates, the Commissioner of Insurance is not required to consider the amount of capital necessary to engage in the workmen's compensation insurance business in North Carolina and the rate of return needed to attract such investment capital.

3. Master and Servant § 80— workmen's compensation insurance rates — use of countrywide expense data

The Commissioner of Insurance had the discretion to use countrywide expense data in fixing workmen's compensation insurance rates rather than requiring the Compensation Rating Bureau to submit information on expenses actually incurred by the companies in North Carolina. G.S. 97-104.

4. Master and Servant § 80— workmen's compensation insurance rates — investment income

In fixing workmen's compensation insurance rates the Commissioner of Insurance is not required to consider investment income received by the workmen's compensation insurance companies. G.S. 97-104.1.

APPEAL by Attorney General, Intervenor, from decision and order of Commissioner of Insurance entered 3 January 1973.

This proceeding concerns a proposed revision of rates for workmen's compensation insurance. It was initiated by the Compensation Rating and Inspection Bureau of North Carolina (hereinafter called Rating Bureau) which was created by G.S. 97-102. The Rating Bureau on 21 September 1972 filed with the Commissioner of Insurance a proposed schedule of rates providing for a 3.4% increase in the overall level of rates. Before such rates can become effective, they must be approved by the Commissioner of Insurance, G.S. 97-100(a).

As permitted by G.S. 114-2(8) the Attorney General intervened on behalf of the insurance-consuming public by filing notice of intervention with the Commissioner 1 November 1972. Public hearings were held on 2 November 1972 and 15 December 1972.

At the public hearings the Rating Bureau presented testimony from Mr. Roy Kallop, the actuary at the National Council on Compensation Insurance, who was admitted to be an expert in workmen's compensation rate making. Mr. Kallop testified in detail as to the procedure used by the Rating Bureau in arriving at the proposed increased rate and explained the charts and exhibits attached to the filing of the Bureau which showed the profit allowance of 2.5%, the premium receipts, the losses paid on claims, and the expenses incurred on an annual basis. He stated that the procedure for determining rates which was here employed had been used in North Carolina in the past and was generally accepted in the rate making field throughout the United States. The statistical data were reviewed each year by the National Council on Compensation Insurance to reflect

the latest available information concerning experience in North Carolina.

The Attorney General did not present any evidence and none was offered in opposition to the filing by the Rating Bureau.

On 3 January 1973 the Commissioner made comprehensive findings of fact and approved the proposed rate increase. The Attorney General has appealed from the Commissioner's decision.

Allen, Steed & Pullen, by Arch T. Allen and Thomas W. Steed, Jr., for plaintiff appellee the North Carolina Compensation Rating and Inspection Bureau.

Attorney General Morgan, by Assistant Attorney General Charles A. Lloyd, for intervenor appellant.

BALEY, Judge.

The statutory method for judicial review of decisions by the Commissioner of Insurance concerning insurance rates is set out in G.S. 58-9.4 through G.S. 58-9.6.

G.S. 58-9.4 provides in part:

> ". . . Any order or decision of the Commissioner, if supported by substantial evidence, shall be presumed to be correct and proper. . . ."

G.S. 58-9.6(e) sets out:

> "Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commissioner under the provisions of this Chapter shall be prima facie correct."

The position of the Attorney General is that there is no substantial evidence supporting the Commissioner's approval of the rate increase in the present case. In particular, he contends that the Commissioner was not supported by substantial evidence in determining that the insurance company should be allowed a profit figure equal to 2.5% of the total premiums received. In our judgment there is substantial evidence to support the decision of the Commissioner, and it is affirmed.

The standard of "substantial evidence" is widely used in judicial review of administrative decisions. It has been defined

by the North Carolina Supreme Court as "more than a scintilla or a permissible inference." *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 690, 28 S.E. 2d 201, 203. The United States Supreme Court has interpreted it as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and has stated that "it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). *See generally* 4 K. Davis, Administrative Law Treatise, §§ 29.01-.06. In the application of the "substantial evidence" standard courts will generally defer to the expertise of the administrator in his specialized field if there is reasonable evidence to support his decision.

Here the expert witness Roy Kallop, a workmen's compensation insurance actuary, testified in detail at the public hearing as to the procedure used by the Bureau in arriving at the increased rate. He stated that this procedure involved determining the total amount of premiums received by the companies over a year-long period and their yearly losses (payments on claims by policyholders) and loss adjustment expense. It involved adjusting these figures to reflect current premium rates and benefit levels and determining the proportion of total premiums received which is paid out by the companies in losses and loss adjustment expense. Detailed charts (based on policies taking effect during the twelve-month periods beginning 1 August 1968 and 1 August 1969) were submitted at the hearing, showing that in North Carolina, at the present premium rates, losses and loss adjustment expense would take up such a large proportion of total premiums (67.9%) that, when other company expenses and taxes (amounting to 31.1% of total premiums) were added, the amount remaining for the companies' profit would be less than 2.5% on premium receipts. Additional charts, based on more recent data involving all policies in effect in the twelve-month period beginning 1 July 1971, likewise indicated that present premium levels were inadequate. Kallop testified that the Bureau's procedure for determining rate levels had been followed for many years, was generally accepted throughout the United States, and was brought up to date by review each year by the National Council on Compensation Insurance. As to the validity of setting the companies' profit at 2.5% of total premiums received, Kallop testified in his opinion as an expert that

the 2.5% figure is "a minimum profit allowance," that it "has been adhered to for many years," that it is followed in all states except California, that it is not a guaranteed profit since it also covers contingencies such as unforeseeably high losses, that "the profit allowance is less than what it is in other [types of insurance] because this is a highly regulated line," that it "is a *minimum factor* that is necessary to attract capital," that "[a]fter taxes the 2.5 is reduced to 1.3," and that the 2.5% allowance is reasonable and "eminently fair."

In *In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155, it was held that hearings before the Commissioner are not within the scope of G.S. 143-317 and -318, requiring administrative agencies to consider only evidence that would be admissible in court. The Commissioner is free to hear " 'all evidence of any type having reasonable probative value,' " including " '[a]ny evidence of the type upon which responsible persons are accustomed to rely on the conduct of insurance affairs.' " 278 N.C. at 318, 180 S.E. 2d at 166, *quoting* Rules and Regulations for Public Hearings, promulgated by the Insurance Advisory Board in 1950.

[1] The testimony of Kallop, along with the charts presented at the Commissioner's hearing, seems clearly to come within the standard of admissibility established in the *Automobile Rate* case, and to provide more than a scintilla of evidence supporting the validity of the 2.5% profit allowance and of the increased premium rates. If these issues were being submitted to a jury, the judge would not be justified in directing a verdict that the profit allowance or the rate increase was improper. Thus both the Commissioner's determination that 2.5% is an appropriate profit figure, and his ultimate decision that the rate increase was fair and reasonable, are supported by substantial evidence and should be upheld.

[2] However, the Attorney General has raised three additional issues, each of which, he contends, requires reversal of the Commissioner's decision. First, he insists that the Commissioner should have required the presentation of evidence relating to the amount of capital necessary to engage in the workmen's compensation insurance business in North Carolina and the rate of return needed to attract such investment capital. This contention has been rejected in several North Carolina cases. *In re Filing by Automobile Rate Office,* 278 N.C. 302, 314-15, 180 S.E. 2d 155, 164; *In re Filing by Fire Ins. Rating*

Bureau, 275 N.C. 15, 38, 165 S.E. 2d 207, 223; *Comr. of Insurance v. Attorney General,* 16 N.C. App. 724, 729, 193 S.E. 2d 432, 435. Evidence of this type is commonly used in fixing utility rates. *See, e.g., Utilities Comm. v. Telephone Co.,* 281 N.C. 318, 189 S.E. 2d 705, *noted in* 51 N.C.L. Rev. 1140. It is much less relevant in determining insurance rates, because as the Court explained in the *Automobile Rate Office* case, an insurance company "has no significant inventory of assets which are used and useful in the prosecution of its business. The primary function of such a company is to render a service." 278 N.C. at 315, 180 S.E. 2d at 164. Utility companies own large quantities of expensive equipment, which is necessary for them to provide their services. To purchase this equipment, large amounts of capital must be invested; and thus it is possible to determine utility rates by reference to the amount of capital invested in the company and the fair value of its property. Insurance companies, on the other hand, do not require so much costly equipment or so large a capital investment. The importance of the service they provide is not in proportion to the value of their property or the amount of their capital investment. For this reason the courts have determined that proper profit levels for insurance companies may be more appropriately ascertained by taking a percentage of their premiums than by specifying a certain rate of return on their capital investment.

[3] Second, the Attorney General contends that the Commissioner should have required the Bureau to submit for his consideration information on expenses actually incurred by the companies in North Carolina. Instead of requiring a separate listing of North Carolina expenses, the Commissioner used countrywide expense information. This was not an error on the Commissioner's part. According to Kallop's testimony, breaking down the countrywide expense figures by state and providing separate figures for North Carolina would have required a great deal of time and expense, and there would have been little gain in accuracy. The expenses involved here are for items such as the salaries of company employees. Most workmen's compensation insurers do business in many states, and a company employee may deal with transactions from several states in the course of a day. The employee is not paid any more or any less while working on a North Carolina transaction than while working on a matter from another state. These expenses tend to be uniform from state to state, and therefore a state-by-state breakdown would result in figures differing very little

from those the Commissioner obtained by using the countrywide data. Claim adjustment expenses, which might vary significantly from state to state, are in a different category and are computed separately for each state.

It is true that in the *Automobile Rate Office* case, the Supreme Court construed G.S. 58-248(1965), *as amended,* G.S. 58-248 (Supp. 1971), to require the Commissioner to consider North Carolina rather than countrywide expense data in fixing automobile liability insurance rates. It is also true that G.S. 97-104, dealing with workmen's compensation insurance, is worded almost identically with G.S. 58-248 as it was worded in April 1971 when the *Automobile Rate Office* case was decided.

The relevant portions of G.S. 58-248 in April 1971 were as follows:

> "[T]he Commissioner of Insurance is hereby authorized to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the pure cost and expense loading of automobile bodily injury and property damage insurance in North Carolina and this information shall be available and for the use of the North Carolina Automobile Rate Administrative Office for the . . . promulgation of rates on automobile bodily injury and property damage insurance."

The relevant portions of G.S. 97-104, now in effect, read as follows:

> "[T]he Insurance Commissioner is hereby authorized to compel the production of books, data, papers, and records relating to or bearing upon such data as is necessary to compile statistics for the purpose of determining the pure cost and expense loading of workmen's compensation insurance in North Carolina and this information shall be available and for the use of the Compensation Rating and Inspection Bureau, for the . . . promulgation of rates on workmen's compensation insurance."

Although the two statutes are very similar, nevertheless it seems appropriate to construe G.S. 97-104 so as not to require the use of North Carolina expense data. Workmen's compensation insurance is almost entirely an interstate business, and it is difficult to allocate transactions to one state rather than

another. Almost all workmen's compensation insurers doing business in North Carolina are multi-state corporations; in addition, in workmen's compensation insurance the insured also is often a multi-state corporation, whereas the typical automobile liability insurance policyholder is an individual. Even with respect to automobile liability insurance, the General Assembly apparently determined that the policy of requiring North Carolina expense data was an unsatisfactory one, for less than four months after the *Automobile Rate Office* case was decided, G.S. 58-248 was amended so as to eliminate the phrase "in North Carolina." Ch. 1115, § 3, [1971] N.C. Sess. L. 1667.

G.S. 97-104 authorizes but does not compel the Commissioner to require the production of expense data in North Carolina, and if he decides, in his discretion, that a quick, inexpensive and reasonably accurate method of "determining the . . . expense loading of workmen's compensation insurance in North Carolina" is to take a proportional part of the country-wide total, he is free to do so. Such an interpretation does no violence to the language of the statute and would appear practical and realistic when applied to the workmen's compensation insurance business.

[4] Third, the Attorney General contends that the Commissioner erred in failing to request and consider evidence concerning the amount of investment income received by the companies. *In Comr. of Insurance v. Attorney General,* 16 N.C. App. 724, 193 S.E. 2d 432, a case involving automobile physical damage insurance, a similar argument was made. The Court rejected the argument, pointing out that whereas G.S. 58-246(5) specifically requires that the Commissioner be furnished with data on investment income when he is considering automobile *liability* insurance rates, the statutes dealing with *physical damage* insurance contain no such requirement. Instead, the Court said, the physical damage insurance statute merely "requires the Commissioner to determine whether the *rates charged* are adequate to produce a fair and reasonable profit. This, it seems to us, refers to underwriting profit and does not include investment income." 16 N.C. App. at 728-29, 193 S.E. 2d at 435 (emphasis by the Court). The analogous workmen's compensation insurance statute is G.S. 97-104.1, which reads as follows:

> "Whenever the Commissioner . . . shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreason-

able, 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. . . ."

No mention is made of investment income. Like the physical damage insurance statute, G.S. 97-104.1 requires only that the *rates charged* not be excessive or unreasonable. *Under Comr. of Insurance v. Attorney General, supra,* the Commissioner is not required to consider investment income received by the workmen's compensation insurers. It appears, however, from the evidence presented that investment income from the unearned premium and loss reserves was taken into consideration in the establishment of the 2.5% allowance for profit and contingencies.

We are of the opinion that the objections made by the Attorney General should be overruled. The conclusions reached by the Commissioner of Insurance are supported by substantial evidence. His decision approving the rate increase of 3.4% for workmen's compensation insurance is affirmed.

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. GOLDEN A. FRINKS

No. 737SC475

(Filed 29 August 1973)

1. **Indictment and Warrant § 9— parading without permit — reference to statute — sufficiency of warrant**

Although the warrant charging defendant with parading without a permit did not expressly identify the definitional section of the pertinent ordinance, it did refer to the ordinance as a whole and thereby put defendant on notice of the particular meaning of "parade" as that term was used in the warrant; therefore, the warrant sufficiently expressed the charge against defendant and the trial court properly refused to quash the warrant.

2. **Criminal Law § 77— statement of defendant to police — admissibility**

Where an officer observed defendant and 75-100 other individuals proceeding along a public street in a manner which obstructed traffic,

it was reasonable for the officer to believe that a misdemeanor was being committed in his presence; hence, defendant's arrest was not illegal, and the officer could properly testify as to statements made to him by defendant.

3. **Constitutional Law § 4— constitutionality of statute — standing to question**

Defendant's failure to attempt to secure the requisite permit for a parade through city streets did not preclude his attacking the constitutionality of the permit requirement.

4. **Constitutional Law § 18— parading — protection under First Amendment**

Parading may constitute a method of expression entitled to First Amendment protection, but reasonable restrictions on the time, place and manner of public parading are permissible when necessary to further significant governmental interests.

5. **Constitutional Law § 18; Statutes § 4— parading without permit — constitutionality of statute — preferred construction of statute**

Where two statutory constructions are possible, the interpretation which will prevent a finding of unconstitutionality should be adopted; therefore, where the contested provisions of the Wilson City Code could be construed to mean that (1) the city manager had unfettered discretion to reject parade permit applications on the basis of his own personal and perhaps subjective determination of which parades in fact threatened the health, safety and morals of the city, or (2) the city manager and city council could only deny a permit when the proposed parade, due to the time for which it was scheduled, its intended route, or the proposed manner of execution, irreconcilably conflicted with public safety and convenience, the second construction was adopted by the court, and the city ordinance was a reasonable regulatory provision which did not constitute an unconstitutional prior restraint on First Amendment rights.

6. **Statutes § 4— allegedly unconstitutional provision — severability from ordinance**

Possible unconstitutionality of a section of a city ordinance regulating parades did not affect defendant's conviction under other sections of the ordinance for parading without a permit since defendant was not charged under the questionable section and since that particular section was severable from the rest of the ordinance.

APPEAL by defendant from *James, Judge,* 5 February 1973 Session of Superior Court held in WILSON County.

On 30 November 1972 at approximately 9:00 p.m., defendant Golden Frinks was arrested for parading without a permit in violation of Sections 141 and 142 of Article VII of the Wilson City Code which provides in pertinent part:

"Sec. 30-140. Definition.

The term 'parade' as used in this article is defined as an assemblage of more than five (5) vehicles or twenty (20) pedestrians in a public procession along the streets and/or sidewalks of the city, but shall not include funeral processions or sight-seeing groups or bands or marching groups proceeding to a point of assembly to participate in a parade. (Ord. No. 0-29-68 Sec. 13.108 11-14-68)

Sec. 30-141. Conformance to article provisions.

It shall be unlawful for any person to initiate, promote or participate in any parade over the streets and/or sidewalks of the city except in conformance with the provisions of this article. (Ord. No. 0-29-68, Sec. 13.109, 11-14-68)

Sec. 30-142. Permit required.

It shall be unlawful for any person to initiate, promote or participate in any parade within the city until a permit therefor has first been secured. (Ord. No. 0-29-68, Sec. 13.110, 11-14-68)

Sec. 30-143. Application for permit.

Parade permits may be obtained from the city manager upon application made in writing at least seventy-two (72) hours before the date on which the parade is to be held, upon application forms furnished by the city manager. (Ord. No. 0-29-68, Sec. 13.110, 11-14-68)

Sec. 30-144. Conditions of issuance.

The city manager shall issue parade permits unless he finds as a fact that the proposed parade will be contrary to the health, welfare, safety, and morals of the city. (Ord. No. 0-29-68, Sec. 13.111, 11-14-68)

Sec. 30-145. Denials; public hearing.

In the event an application for a parade permit is denied by the city manager, the applicant may apply to the city council for a hearing concerning the same.

At such hearing the applicant shall have the burden of proof of showing that the proposed parade will not be contrary to the health, welfare, safety and morals of the city. The city manager shall be heard in rebuttal to the granting of the application.

If, after hearing the applicant and the city manager, the city council shall find as a fact that the proposed parade will not be contrary to the health, welfare, safety and morals of the city, the application shall be granted by the city council. Otherwise, the action of the city manager in denying the application shall stand. (Ord. No. 0-29-68, Sec. 13.112, 11-14-68)"

Testifying for the State, Wilson police officer Robert T. Johnston stated that defendant was arrested after he and approximately 100 other persons were observed proceeding *en masse* up a public street in a manner which precluded the passage of vehicular traffic. Evidence tended to show that defendant and his companions traveled approximately seventy-five feet while Officer Johnston was present, that defendant was arrested before the others in the group and that the crowd refused to disperse upon being informed that parading without a permit was not allowed.

As a witness for the State, Bruce J. Boyette, City Manager of Wilson, stated that neither defendant nor any other person applied to him or his office for a permit to parade on 30 November 1972. Boyette also explained that although defendant had previously secured a parade permit for 17 September 1972, he had been denied same on 12 October for a procession on 15 October 1972. The evidence indicated that upon Boyette's refusal to grant the requisite permit, defendant appealed the decision to the city council pursuant to section 30-145 of the ordinance and the appeal was heard on the 13th. The city council agreed with Boyette's determination that as a matter of fact the proposed parade constituted a threat to public safety and to that of the march participants. The city council then informed defendant that a permit would issue for 15 October 1972 regardless of the 72-hour time requirement embodied in section 30-143 above, provided the applicant modified the intended parade route. Boyette stated that after this offer was tendered, no further request from defendant was forthcoming and no parade transpired on that route at that time.

The defendant presented no evidence.

The jury found defendant guilty of the charge of parading without a permit on 30 November 1972. From the imposition of an active prison sentence of thirty days, defendant appealed.

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

Paul, Keenan & Rowan by Jerry Paul and James E. Keenan for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that the warrant against him should have been quashed for failing to state specifically the nature of the parade in issue. Although the warrant did not expressly identify the definitional section of the pertinent ordinance, it did refer to the ordinance as a whole, a fact which put defendant on notice of the particular meaning of "parade" as that term was used in the warrant. We conclude that the warrant contained terms of "sufficient certainty to apprise the defendant of the specific accusations against him so as to enable him to prepare his defense and to protect him from a subsequent prosecution for the same offense." 4 Strong, N. C. Index 2d. Indictment and Warrant, § 9, p. 348. *See State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897. Every criminal proceeding by warrant is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible and explicit manner. G.S. 15-153. The court properly declined to quash the warrant.

[2] Defendant asserts that the court erred in admitting into evidence a statement made by him after an allegedly illegal arrest. G.S. 15-41(1) provides in relevant part that "a peace officer may without warrant arrest a person (1) When the person to be arrested has committed a . . . misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that a person to be arrested has committed a . . . misdemeanor in his presence." Officer Johnston observed defendant and approximately 75-100 other individuals proceeding along a public street in a manner which obstructed traffic. It was reasonable for the officer to believe that a misdemeanor was being committed in his presence. We hold, therefore, that defendant's arrest was not illegal. When informed he was under arrest for parading without a permit, defendant immediately volunteered the statement: "How do you know I don't have a permit?" Under these circumstances it was not error to allow the officer to testify that defendant made the statement. With respect to defendant's statement to the effect he wanted to go to jail, we are unable to determine from the record before us

whether it was made in response to a question posed by the interrogating officer or whether it was merely volunteered in a manner which would render *Miranda* inapplicable. We will not presume error and therefore conclude that the statement was properly admitted.

Defendant's most serious contention appears to be that the article of the Wilson City Code under which he was convicted is repugnant to the Constitution of the United States and the Constitution of North Carolina. Defendant maintains that since they lack definite, objective criteria on which to base administrative decisions, those sections impermissibly attenuated the right of freedom of assembly, petition and speech guaranteed by the first amendment to the United States Constitution and by Article I, Section 12 and Article I, Section 14 of the North Carolina Constitution.

[3] A question exists as to whether defendant may attack the constitutionality of the permit requirement since he made no attempt to secure the requisite permit for the 30 November 1972 parade. In *Lovell v. Griffin,* 303 U.S. 444, 82 L.Ed. 949, where appellant failed to apply for a permit prior to distributing religious literature, the Court asserted that "as the ordinance is void on its face, it is not necessary for appellant to seek a permit under it. She is entitled to contest its validity in answer to the charge against her." 303 U.S. at 452-53, 82 L.Ed. at 954, *citing Smith v. Cahoon,* 283 U.S. 553, 75 L.Ed. 1264. Similarly, in *Staub v. Baxley,* 355 U.S. 313, 2 L.Ed. 2d 302, the Court, rejecting the lower court's view that having made no effort to secure a license before soliciting union memberships, the defendant was estopped from alleging that the licensing law was invalid, observed that "the decisions of this Court have uniformly held that the failure to apply for the license under an ordinance which on its face violates the Constitution does not preclude review of the Court." 355 U.S. at 319, 2 L.Ed. 2d at 309. Numerous other decisions contain similar statements. *E.g., Shuttlesworth v. Birmingham,* 394 U.S. 147, 22 L.Ed. 2d 162; *Cox v. Louisiana,* 379 U.S. 536, 13 L.Ed. 2d 471; *Jones v. Opelika,* 316 U.S. 584, 86 L.Ed. 1691, *dissent adopted on rehearing,* 319 U.S. 103, 87 L.Ed. 1290; *Cox v. New Hampshire,* 312 U.S. 569, 85 L.Ed. 1049; *Thornhill v. Alabama,* 310 U.S. 88, 84 L.Ed. 1093. Because of these cases we have elected to consider the merits of defendant's attack on the ordinance.

[4] Defendant argues that the permit requirement impermissibly abridges his right to free expression. In *Shuttlesworth v. Birmingham, supra,* the Court struck down a local ordinance prohibiting parades or any other public demonstrations "unless a permit therefore has been secured from the commission" and which provided that permits were to be granted "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." Although the Court notes that parading does not qualify as pure speech, it also points out that prior decisions "have made it clear that picketing and parading may nonetheless constitute methods of expression entitled to First Amendment protection." While recognizing that streets and parks are traditionally viewed as being held in trust for public use and for purposes of assembly and communication, the Supreme Court has simultaneously acknowledged that reasonable restrictions on the time, place and manner of public parading, demonstrating and picketing are permissible when necessary to further significant governmental interests. *See Shuttlesworth v. Birmingham, supra; Kunz v. New York,* 340 U.S. 290, 95 L.Ed. 280; *Cox v. New Hampshire, supra; Hague v. CIO,* 307 U.S. 496, 83 L.Ed. 1423. Nevertheless, the relevant decisions indicate that where prior restraints, such as a licensing requirement, are imposed on "speech-plus" activity like parading, "narrow, objective and definite standards to guide the licensing authority" must accompany those restraints. 394 U.S. at 151, 22 L.Ed. 2d at 167. *See Staub v. Baxley,* 355 U.S. 313, 2 L.Ed. 2d 302; *Cantwell v. Connecticut,* 310 U.S. 296, 84 L.Ed. 1213. Without definite, meaningful standards which relate to the proper regulation of public places, the risk of arbitrary action which impermissibly impinges upon jealously protected first amendment rights becomes intolerable.

[5] We recognize that it is not impossible to construe the contested provisions of the Wilson code as vesting unfettered discretion in the city manager to reject permit applications on the basis of his own personal and perhaps subjective determination of which parades in fact threaten the health, safety and morals of the city. *Shuttlesworth v. Birmingham, supra; Saia v. New York,* 334 U.S. 558, 92 L.Ed. 1574; *Cox v. New Hampshire, supra; Cantwell v. Connecticut, supra; Lovell v. Griffin, supra.* Such a construction might well place the Wilson ordinance squarely within the purview of *Shuttlesworth v. Birmingham, supra,* and render it incompatible with the first amendment.

We find, however, that another cogent construction of the contested provision presents itself. Adhering to the general rule that where two statutory constructions are possible, the interpretation which will present a finding of unconstitutionality should be adopted, *Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E. 2d 902; *Finance Co. v. Leonard*, 263 N.C. 167, 139 S.E. 2d 356, we hold that when the ordinance is considered in light of its purpose and the legislative intent it fulfills rather than merely on its face, it does not constitute an impermissible prior restraint on freedom of expression.

Because the statutes confer general authority on cities to regulate and control public streets within their corporate limits and because the ordinance in question is entitled "Traffic," it is reasonable to find that the intent of the city council in passing the provisions was to insure that order prevailed on city streets and sidewalks. This view is reinforced by the terms of Article VII. A reading thereof reveals that the purpose of the pertinent provisions is in fact the regulation and control of traffic for the benefit of public conveyance and safety. *Cf. Cox v. New Hampshire, supra.* The Article contains regulations for permissible parade times, the maximum number of processions per day, the selection of routes, the number of parade units and the control of parking. Given the nature of these provisions, it is clear that Article VII is purely regulatory. The dictionary defines "regulate" to mean "3, to fix or adjust the time, amount, degree, or rate of." Webster's Third New International Dictionary (1967). This is precisely what the Wilson ordinance attempts to do. In view of our interpretation of legislative intent outlined above, we construe the boiler plate "health, safety, welfare, and morals" language of the ordinance to mean that the city manager and city council may only deny a permit when the proposed parade, due to the time for which it is scheduled, its intended route, or the proposed manner of execution, irreconcilably conflicts with public safety and convenience. *See Shuttlesworth v. Birmingham, supra; Cox v. New Hampshire, supra.* Moreover, in our view the ordinance requires that in passing on the above considerations, a systematic, consistent and just procedure be adopted by city officials to insure that administrative action is free from improper or inappropriate consideration. *Cf. Shuttlesworth v. Birmingham, supra.* For these reasons, we conclude that the Wilson ordinance, as we have construed it, is a reasonable regulatory provision which does not constitute an unconstitutional prior restraint on first amendment rights.

[6] We are cognizant of the fact that section 30-151 renders it "unlawful of anyone riding in a parade to distribute from the vehicle upon which he is riding any handbills, advertising matter, candy, cigarettes, prizes or favors of any kind." Although there is some indication in *Cox v. New Hampshire, supra,* that such a provision may be unconstitutional, we need not pass on its validity since defendant was not charged thereunder. Moreover, the section is severable from the rest of the ordinance and would thus not destroy the validity of other provisions thereof or have any bearing on defendant's conviction for parading without a permit. *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1.

In *Shuttlesworth v. Birmingham, supra,* the Supreme Court rejected a state court construction not dissimilar from that which we espouse regarding the Wilson ordinance. In *Shuttlesworth,* however, the Court noted that in fact administrative officials had actually acted in a manner inconsistent with the state court's construction. In the instant case, the record lacks evidence of any arbitrary or inconsistent action by the city manager or the city council in determining when permits will issue. Defendant was granted a permit for a parade on 17 September 1972. Although he was denied a permit for 15 October 1972, the council gave defendant the option of modifying the parade route and agreed to reconsider the denial and waive the 72-hour notice if such was done. We perceive this to be the antithesis of arbitrary, inflexible and unreasonable action. With respect to the 30 November 1972 parade, defendant did not apply for a permit, and the record gives no indication that such would have been denied had application been made. This case and *Shuttlesworth* are thus distinguishable on their facts, and the outcome of the latter does not require the same result here.

Defendant brings forward numerous other challenges to the validity of the ordinance and his trial which we have considered. We conclude that defendant has failed to show any defect that is prejudicial to him.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

HOBERT E. PICKLESIMER v. SAM HENRY ROBBINS

No. 7227DC723

(Filed 29 August 1973)

1. **Automobiles § 56— striking car stopped on ice-covered bridge — negligence**

In this action arising from a collision on an ice-covered bridge between two cars traveling in the same direction, plaintiff's evidence was sufficient to support, but not to compel, a jury finding that the collision was proximately caused by defendant's negligence where it tended to show that defendant had a clear view of the bridge and plaintiff's car, which was already on the bridge, when he came around a curve 75 or 80 feet from the bridge, that he observed or should have observed plaintiff's car sliding slowly into the right-hand side of the bridge but that defendant delayed applying his brakes until he reached the bridge itself, and that defendant's car skidded across the ice on the bridge and struck plaintiff's car.

2. **Automobiles § 75— sliding into curb on ice-covered bridge — contributory negligence**

In this action arising from a collision on an ice-covered bridge between two cars traveling in the same direction, the evidence was insufficient to support a jury finding of negligence on the part of the driver of plaintiff's car where all the evidence was to the effect that plaintiff's driver approached the bridge at a moderate speed, that she observed ice on the bridge and stopped before driving upon it, that she then drove very slowly upon the bridge, that other cars were on the bridge and were able to proceed safely despite the ice, that plaintiff's driver was required to stop because cars in front of her stopped to allow oncoming traffic to clear before turning onto an exit ramp at the far end of the bridge, that in doing so her car slid into the curb on the right side of the bridge and that she took prompt action to move it but was struck by defendant's car before she could do so.

APPEALS by plaintiff and defendant from *Mull, District Judge,* 30 May 1972 Session of District Court held in GASTON County.

This civil action arises from a two-car collision which occurred on an ice-covered bridge on the morning of 8 January 1971. Each party alleged that the collision resulted from the negligence of the other, and each seeks to recover of the other property damages for injuries to his vehicle. Plaintiff's car was being driven by his daughter as his agent under the family-purpose doctrine. Defendant was driving his own car. The collision occurred on the bridge which carries Edgewood Road (RP-1307) over Interstate 85 at a point about two miles south of Bessemer City, N. C. At that point Edgewood Road is

a two-lane paved road which runs in a generally north-south direction. The bridge is 75 to 80 feet long and crosses over all four lanes and the median of I-85. The speed limit on Edgewood Road was 55 miles per hour. Both cars were proceeding south on Edgewood Road, defendant's car being the following vehicle. Approaching the bridge proceeding south on Edgewood Road, there is an exit ramp on the right which leads down onto I-85. After crossing the bridge to its south end, there is a similar exit on the left.

At the trial before judge and jury plaintiff alone introduced evidence. Plaintiff's daughter testified in substance as follows: She was 23 years old and lived in Bessemer City. About 8:00 a.m. on 8 January 1971 she drove her father's car south on Edgewood Road, headed to work in Gastonia. The sky was cloudy and overcast and it had been raining, but there was no ice on the road. She could see ice in puddles where water had been standing on the side of the road. As she approached the bridge she could see it was iced over, so she came to a stop at the edge of the bridge and then "started up real slow again." There were two Volkswagens in front of her, which had stopped to let oncoming traffic go by before making a left turn into the exit ramp which leads down into I-85 on the other side of the bridge. To keep from hitting the Volkswagens, she had to stop on the bridge. As she started to stop, the right front wheel of her car bumped the rail on the bridge, her car turned to the right, slid over, and stopped. She was ready to move off again when defendant's car struck hers.

On direct examination plaintiff's daughter further testified:

> "Edgewood Road is straight immediately prior to the time you get to the bridge. Well, you can see the bridge—there's a curve you come out of, and you can see it from there; maybe 75 or 80 feet away from there when you can see the bridge. Comparing the distance to the bridge and the distance from the bridge to the curve, I would say the two distances are the same length. I was at the first exit place, about 25 feet when I first saw the ice on the bridge, between the bridge and the curve. I was going about 15 or 20 miles an hour when I first saw the ice on the bridge. I had been going about the same speed as I rounded the curve. After I saw ice on the bridge, my car came to a stop before I got onto the bridge. The bridge looked frosty

looking and shiny in spots. I was about two-thirds across the bridge when my automobile came to a stop against the side of the bridge. I would say I was approximately 20 feet from the end of the bridge to where I had stopped. I saw Mr. Robbins' car when I started sliding. I looked up to the right to see if there was a car near enough to hit me. . . . I don't think that Mr. Robbins' car was on the bridge. I was going about five miles an hour when I hit the side of the bridge. The right tire of my car hit the bridge. No other part of the car struck the bridge. . . . When the front wheel hit the bridge, my car was in neutral when it came to a stop. I put it back in drive and started turning my wheels to move. Mr. Robbins' car hit my car before my car moved. In my opinion it was just a few seconds that I was motionless on the bridge before my car was struck. . . . My car was at about a 50 degree angle on the bridge. The front of my car pointed towards the bridge, not exactly this way, just my right front fender partways toward the bridge. I was headed south and that was the same direction I was in. My right door and then the front fender and axle was struck by Mr. Robbins' car. After the impact my car slid off the bridge and down on the right side, down on the grass. Mr. Robbins' car took my position on the bridge, but a little more straight. At the time I came to a stop the first time after I struck the curb of the bridge, I was still on my side of the road in relation to the center line of the bridge."

On cross-examination she testified:

"As I drove down Edgewood Road, I didn't see any ice on the road. I didn't have any trouble driving. As I approached the bridge, I came around a curve and was going 25 or 30. When you come out of the curve, you are 75 feet from the bridge. That's when you first see the bridge. You can see through the bridge—all the way through. And I was going about twenty-five or thirty at this point. And then I brought my car to a stop. I did not brake hard to come to a stop—it was normal braking and I got stopped. And that's because I saw the bridge had ice on it. It was frosty. You could see the ice on the bridge —actually see sheets of it. After I saw sheets of ice on the bridge, I went ahead and drove across it. There were vehicles ahead of mine—and I had to hit my brakes—and

the right front tire of my car hit the bridge. My car didn't spin out of control. It just slid over that way, and the tire hit the rail, but my car slid out of control. . . .

"I hit the bridge—but not very hard. It would be easy to knock the car into neutral. . . . I traveled maybe halfway across the bridge before I hit the brakes. I slid about maybe ten feet. That's until I hit the bridge, and that stopped me. Then the next thing was when Rev. Robbins' car hit my car. And I was still at a stop. And I hadn't been able to get started yet. . . .

"I guess the two Volkswagens I saw made their turn and left. They did not stop. They were not involved in any way in this collision. When my car struck the bridge, the curb was about eight to ten inches high."

Defendant, who was called and examined by the plaintiff as an adverse witness, testified in substance as follows: He was going home that morning, having gotten off from work a few minutes after seven o'clock. It is 60 or 65 feet between the edge of the bridge and the end of the curve as you come down Edgewood Road. You can't see across the bridge from the curve; you have to straighten out before you can see across the bridge. When he first observed plaintiff's car, it was already on the bridge and was skidding into the right-hand side of the bridge a little over halfway across. He was going about forty-five when he came out of the curve. He applied his brakes before he got to the bridge and just as he touched the end of the bridge. He did not see any ice on the road or on the side of the road that day and didn't see any ice on the bridge before he entered the bridge. He did not know how fast he was going when he entered the bridge or at the moment of impact. It is downgrade, and it seemed when he applied his brakes downhill he got faster. He further testified:

"When I first saw the vehicle driven by Miss Picklesimer that is what I focused my attention on. My reaction at that time was to stop. I was at the edge of the bridge when I hit the brakes. The car skidded. I was aware then there was ice on the bridge, and I skidded across the bridge to where her car was at, and I hit her because she was absolutely across-ways the road.

"My car hit her directly in the right side of her car. I touched no bumper at all because the end of her car

was pointed directly facing the bridge railing, and the two-lane road and the width of the car was blocking the road. I couldn't stop due to the ice, and I hit her. I had applied my brakes all the way across the bridge. When I got on the bridge, I locked my car down. We pushed my car off the bridge, it was so slick—just slid it off."

The highway patrolman who investigated the collision testified that the road was wet and there was some ice occasionally along the side of the road; the bridge was extremely slick with ice when he observed it, but he could not see the ice on the bridge until he walked out on it; Miss Picklesimer told him at the scene that the car in front of her was making a left turn, that she started to slow her vehicle down, and that it turned sideways with her and hit the right side of the bridge; defendant told him he was following the vehicle in front of him and that "she went up on the bridge and her vehicle turned sideways and he tried to stop to keep from hitting her, and was unable to stop."

At the close of the evidence each party moved for a directed verdict pursuant to Rule 50(a), each motion being made on the grounds that the evidence failed to disclose actionable negligence on the part of the respective movants and on the further grounds that the evidence disclosed, as a matter of law, contributory negligence on the part of his opponent. Both motions were allowed, and judgment was entered dismissing plaintiff's claim for relief and dismissing defendant's counterclaim. Both parties appealed.

Harris & Bumgardner by Don H. Bumgardner; and Hedrick, McKnight, Parham, Helms, Warley & Jolly by Richard Feerick for plaintiff.

Carpenter, Golding, Crews & Meekins by James P. Crews for defendant.

PARKER, Judge.

PLAINTIFF'S APPEAL

[1] Viewing the evidence in the light most favorable to the plaintiff and giving him the benefit of every favorable inference which may reasonably be drawn therefrom, it is our opinion that the evidence was sufficient to support, but certainly not to compel, a jury finding that the collision was proximately

caused by defendant's negligence. The evidence would warrant the jury in finding the following: Defendant had a clear view of the bridge and of plaintiff's car, which was already on the bridge, at least by the time he came around the curve. At that time, while defendant was still 75 or 80 feet from the end of the bridge, he observed, or in the exercise of due care should have observed, plaintiff's car sliding slowly into the right-hand side of the bridge. Even though defendant might not have been able to see the ice on the bridge until he had approached somewhat nearer, the sight of plaintiff's skidding car was sufficient to put him on notice of some unusual and dangerous condition on the bridge. Despite this notice he delayed applying his brakes until he reached the bridge itself. He testified: "I was at the edge of the bridge when I hit the brakes." From the foregoing the jury might legitimately find that defendant failed to exercise that care and alertness which a reasonably prudent person would have exercised under the circumstances to slow or halt his vehicle before it reached the bridge, and that had he done so he could have avoided striking plaintiff's car. It is, of course, entirely possible that a jury hearing all of the evidence would determine that defendant did exercise due care, both in observing what was before him and in taking prompt action to avoid the collision, and that the collision resulted from conditions over which he had no control and which in the exercise of due care he could not have reasonably foreseen. We hold, however, that the issue of defendant's negligence was one for the jury to determine and that it was error to direct a verdict for defendant on that issue. We further hold that the directed verdict for defendant cannot be sustained on the second ground stated in defendant's motion, i.e., that the evidence established plaintiff's contributory negligence as a matter of law; as hereinafter noted in our analysis of defendant's appeal, not only does the evidence fail to establish plaintiff's contributory negligence as a matter of law, but in our opinion it was insufficient even to warrant submission to the jury of an issue as to plaintiff's negligence.

DEFENDANT'S APPEAL

[2] Viewing the evidence in the light most favorable to the defendant we find the evidence insufficient to support a jury finding that the collision was proximately caused by any negligence on the part of the driver of plaintiff's car. All of the evidence is to the effect that she approached the bridge at a

moderate speed. She observed the ice on the bridge in time to stop before driving upon it, thus demonstrating that she was both maintaining a careful lookout and keeping her car under control. She started up again, driving very slowly. Other cars were on the bridge and, so far as the evidence discloses, were apparently able to proceed safely despite the ice. Her entrance upon the bridge under these circumstances in our opinion would not warrant a finding of negligence on her part. Because the cars in front of her stopped to allow oncoming traffic to clear before turning left into the exit ramp at the far end of the bridge, she was also required to stop. In doing so, her car slid into the curb on the right side of the bridge. "The mere skidding of a motor vehicle does not imply negligence," *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688, and the skidding of plaintiff's car under the circumstances here disclosed does not, in our opinion, imply any negligence on the part of its driver. After her car had slid to a stop against the curb on the right-hand side of the bridge, all of the evidence shows she took prompt action to move it but that before she could do so it was struck by defendant's car.

The result is:

On plaintiff's appeal the judgment allowing defendant's motion for a directed verdict is reversed and the case is remanded for a

New trial.

On defendant's appeal the judgment allowing plaintiff's motion for a directed verdict and dismissing defendant's counterclaim is

Affirmed.

Judges CAMPBELL and MORRIS concur.

ELLEN DICKINSON, JAMES LUPTON, CALLIE FERRIER, WILLIAM BAKER LUPTON, AND ALLEN W. LUPTON v. CHARLES L. PAKE AND WIFE, TOMMIE PAKE

No. 733DC528

(Filed 29 August 1973)

1. **Easements § 4— easement by prescription — requirements to establish**

In order to show acquisition of an easement by prescription a plaintiff must show that his use has been adverse or hostile, open, notorious and continuous, and the easement must have boundaries sufficiently definite to be located with reasonable certainty.

2. **Easements § 4— permissive use of road — no easement by prescription**

Trial court properly granted defendant's motion for judgment n.o.v. in plaintiffs' action to enjoin defendants from obstructing a roadway over lands of defendants in which plaintiffs claimed a right-of-way by prescription where plaintiffs' evidence tended to show permissive use in that plaintiffs and their mother used the road for thirty years, family friends and persons who came on business used the road, no one ever gave plaintiffs permission to use the road and no one ever asked for such permission, male defendant and plaintiffs were first cousins and were "very close," and defendants had never interfered with plaintiffs' use of the road until 1968 when defendants blocked the road.

APPEAL by plaintiffs from *Wheeler, Judge,* 26 February 1973 Session of CARTERET County District Court.

Plaintiffs instituted this action in 1968 seeking permanently to enjoin defendants from obstructing a roadway over lands of defendants in which plaintiffs claim a right-of-way by prescription. At trial, the plaintiffs introduced evidence which in brief summary tended to show the following:

Plaintiffs are the children of Sophia Lupton, now deceased. On 28 March 1938 Julia Pake conveyed to Sophia Lupton a tract of land lying next to Taylor's Creek in Carteret County. A house was mistakenly built on an adjoining tract and Sophia and four of her five children occupied the house in 1938. The property upon which the house was built was acquired by Sophia in 1960, but the actual location of the home place is immaterial to this case. In June 1938, Sophia and her children started using an existing driveway that led to the public road known as the Lennoxville Road. The driveway was unpaved and was defined "more or less as cart ruts," and ran from the tract purchased by Sophia in 1938 across the tract of land purchased by defend-

ant Charles Pake on 16 March 1939. Charles Pake built a house on his land in 1940 and has lived there ever since. Sophia Lupton died in 1967.

Plaintiff Ellen Dickinson, daughter of Sophia Lupton, testified that since 1938 until 1968, when this suit was filed, the driveway was in constant use by Sophia Lupton, the plaintiffs, and more recently by tenants of the plaintiffs. Mrs. Dickinson also stated that the road was used by family friends who came there to visit and by people who came there on business. Also, immediate family members and friends who docked their boats in Taylor's Creek used the road. No one ever gave them permission to do so, nor did anyone ever ask for permission. Plaintiffs and defendant Charles Pake were first cousins, and Mrs. Dickinson testified that they had always been "very close" and had had no trouble until 1968 when defendants blocked the driveway. Prior to that time there had been no interference with plaintiffs' use of the driveway.

From 1938 until the present the location of the driveway has remained basically unchanged. Some maintenance was done on the road by Sophia Lupton and plaintiffs during the period. Also defendants and people having business with them have used the portion of the driveway on defendants' land. Part of defendants' answer was read into evidence in which they admitted obstructing the road in order to bar any vehicular traffic on the driveway.

Defendants offered no evidence, and the following issue was submitted to the jury:

> "Have the plaintiffs acquired an easement over the lands of the defendants by prescriptive, adverse, hostile and non-permissive use of the same road as described in the complaint for a period of twenty (20) years next preceding the institution of this action?"

The jury answered in the affirmative and judgment was entered awarding plaintiffs an easement by prescription over lands of defendants and permanently enjoining the defendants from interfering with the use of said easement by the plaintiffs.

However, upon defendants' motion for judgment notwithstanding the verdict, the trial court ordered the judgment set aside and entered judgment for the defendants. In the alternative, the trial court granted defendants' motion for a new trial

on the grounds that the verdict was contrary to law and contrary to the weight of the evidence. From this action of the trial court, plaintiffs appealed.

Taylor and Marquart, by Nelson W. Taylor, for plaintiff appellants.

Wheatly and Mason, by L. Patten Mason, for defendant appellees.

MORRIS, Judge.

A "party claiming a right-of-way by prescription has the burden of proving the several elements essential to its acquisition." *Williams v. Foreman,* 238 N.C. 301, 77 S.E. 2d 499 (1953). As to the requirements for acquisition of easements by prescription, see generally Webster, Real Estate Law in North Carolina, §§ 285-291. 3 Strong, N. C. Index 2d, Easements, § 4.

[1] Of those requirements, the following are well settled:

(1) A claimant must show an adverse or hostile use. *Weaver v. Pitts,* 191 N.C. 747, 133 S.E. 2 (1926). A mere permissive use of a way over another's land, however long it may be continued cannot ripen into an easement by prescription, and a permissive use is presumed until the contrary is made to appear. *Nicholas v. Furniture Co.,* 248 N.C. 462, 103 S.E. 2d 837 (1958). To show that the use is hostile rather than permissive, it is not necessary to show there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate. A hostile use is simply of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right. *Dulin v. Faires,* 266 N.C. 257, 145 S.E. 2d 873 (1965).

(2) The adverse or hostile use of land must be open and notorious. The use must be of such character that the true owner may have notice of the claim, and this may be proven by circumstances as well as by direct evidence. *Dulin v. Faires, supra. Snowden v. Bell,* 159 N.C. 497, 75 S.E. 721 (1912).

(3) The adverse use of the land must be continuous and uninterrupted for a period of twenty years. *Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906 (1944).

(4) An easement by prescription must have boundaries sufficiently definite to be located with reasonable certainty. *Fremont v. Baker,* 236 N.C. 253, 72 S.E. 2d 666 (1952).

[2] With these principles in mind we examine plaintiffs' contention that their evidence was sufficient to withstand defendants' motion for judgment notwithstanding the verdict. Upon motion for judgment *non obstante veredicto,* under G.S. 1A-1, Rule 50(b)(1), all the evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor. *Horton v. Insurance Co.,* 9 N.C. App. 140, 175 S.E. 2d 725 (1970), *cert. denied,* 277 N.C. 251 (1970). Taking plaintiffs' evidence in this light, we are constrained to affirm the trial court's action. Plaintiffs' proof simply falls short of showing the requisite "hostility" or "adverseness" for an easement by prescription.

The following was stated by the Supreme Court of North Carolina, per Justice Ervin, and is equally applicable to the evidence in the case *sub judice:*

> "The evidence does not suffice to show that the use of the roadway by the plaintiff and her tenants was accompanied by circumstances giving it an adverse character and rebutting the presumption that it was permissive. The circumstance that the owners of the soil did not object to the use of the way harmonizes with the theory that they permitted the use of the way. There is, moreover, no inconsistency between the circumstance that the plaintiff and her tenants used the way without asking the owners of the soil for permission to do so, and the conclusion that the plaintiff and her tenants used the way with the implied consent of the owners of the soil. When all is said, the assertion that the plaintiff and her tenants used the way without asking the permission of the owners of the soil is tantamount to the assertion that the plaintiff and her tenants used the way in silence. Neither law nor logic can confer upon a silent use a greater probative value than that inherent in a mere use." *Henry v. Farlow,* 238 N.C. 542, 544, 78 S.E. 2d 244 (1953).

Plaintiffs have failed to rebut the presumption that use of the driveway by them and their mother was permissive and this assignment of error is overruled.

Plaintiffs' other assignments of error have been carefully examined and are equally without merit. For the reasons stated above the judgment of the trial court in favor of defendants must be affirmed.

Affirmed.

Judges CAMPBELL and PARKER concur.

B. W. ELLIOTT v. CLYDE PAUL BURTON, INDIVIDUALLY AND TRADING AS BURTON ENTERPRISES, JACK L. FRIAS, AND BURTON ENTERPRISES CORPORATION

No. 7321SC605

(Filed 29 August 1973)

1. **Judgments § 10; Rules of Civil Procedure § 70— consent judgment — original cause of action merged — enforcement of judgment**

Plaintiff's original cause of action for damages for injuries to his house trailer allegedly caused by defendants' negligence became merged into a consent judgment entered by the parties, and enforcement of the judgment upon defendants' failure to comply within the time specified could be effected through various methods set forth in G.S. 1A-1, Rule 70.

2. **Contempt of Court § 7; Judgments § 10— noncompliance with consent judgment — punishment for contempt**

Though plaintiff did ask that defendants be held in contempt of court for failure to comply with a consent judgment, plaintiff did not show and the court did not make the required finding that defendants' default was the result of willful disobedience; furthermore, had such finding been made, the trial judge had no authority to award an indemnifying fine or other compensation to a private party in a contempt proceeding.

3. **Judgments § 10; Rules of Civil Procedure § 70— noncompliance with consent judgment — award of monetary damages error**

Where defendants failed to comply with a consent judgment requiring them to repair all damage to plaintiff's trailer and plaintiff filed a verified motion in the cause alleging defendants' noncompliance and alleging that estimates for repair of the damage could not be had for less than $4700, the trial court erred in awarding plaintiff monetary damages of $4700, since none of the procedures for enforcement of the judgment provided for in Rule 70 were followed.

APPEAL by defendants from *Collier, Judge,* 14 May 1973 Session of Superior Court held in FORSYTH County.

Civil action to recover damages allegedly caused by defendants' negligence. Plaintiff alleged that he was owner of a house trailer which had been manufactured by defendant Burton, that Burton contracted with him to deliver and install the trailer on plaintiff's lot, and that in attempting to do this, Burton's employee, Frias, negligently operated the tractor to which the trailer was hitched, causing damage to the trailer. Plaintiff prayed for $4,300.00 on account of physical damage to the trailer, $248.00 as reimbursement for plaintiff's expenses incurred in employing others to tow the trailer from the point it was abandoned by defendants to plaintiff's lot, and $1,000.00 as reasonable rental value for loss of use of the trailer.

The following judgment was entered in the cause:

"THIS CAUSE coming on to be heard and being heard before the Honorable Robert A. Collier, Judge Presiding over the January 2, 1973, Session of Superior Court for Forsyth County, North Carolina, and it appearing to the Court that the parties have compromised and settled all differences and disagreements between them and have agreed as hereinafter ordered.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED: That the defendant [sic] shall go upon the premises of the plaintiff in Wilkes County, North Carolina, and shall fully repair all damage to the trailer referred to in the complaint, including inside and outside damage, and including chassis damage, if any, and the defendants shall repair the same to the satisfaction of the plaintiff and that the said work shall be completed not later than March 1, 1973; and upon the completion of the same, the defendants shall be free of all obligation to the plaintiff as set out in the pleadings, and this action may then be dismissed and the costs taxed to the plaintiff.

"This the 6 day of January, 1973.

"ROBERT A. COLLIER, JR.
"Judge Presiding."

This judgment was consented to and signed by all parties and their attorneys.

On 19 April 1973 plaintiff's counsel filed the following motion:

"NOW COMES the plaintiff and respectfully shows unto the Court:

"1. That judgment was entered heretofore as appears of record and that by the terms of the judgment, the defendants were required to complete certain repairs and restoration of a trailer home located in Wilkes County, on or before March 1, 1973.

"2. That the defendant [sic] has not commenced the repairs as of April 14, 1973, and has made so far as the plaintiff is informed and believes, no effort whatever to complete the repairs.

"WHEREFORE, the plaintiff respectfully moves the Court that the Court assess damages to the plaintiff for the defendant's [sic] failure to comply with the judgment; that the defendants be held in contempt of Court and that the defendants be required to forthwith comply with the orders of the Court and to pay damages to the plaintiff for his failure to do so."

In support of this motion plaintiff filed his affidavit, sworn to on 27 April 1973, that no work had been done to repair the trailer and no response had been made by defendants to requests that the work be completed. In his affidavit plaintiff stated that he had "sought estimates to do the repair and the lowest estimate this affiant has been able to obtain for the repairs is $4,700.00."

On 17 May 1973 judgment was entered as follows:

"THIS CAUSE coming on to be heard and being heard before the Honorable Robert A. Collier and it appearing to the Court that a judgment has heretofore been entered as appears of record wherein the defendants were ordered to fully repair all damage to a trailer of the plaintiff and were allowed through March 1, 1973, to complete the said repairs, and whereas, from the verified motion of the plaintiff in this cause and from other evidence before the Court, it appears that the defendants have not made any effort toward the repair of the said trailer and that the plaintiff has been unable to get estimates for repair of the

same for less than Four Thousand Seven Hundred Dollars ($4,700.00), and it appearing to the Court that the plaintiff is entitled to the entry of a money judgment in the amount of Four Thousand Seven Hundred Dollars ($4,700.00) by virtue of the defendants' failure to comply with the judgment of this Court.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendants, and each of them, the sum of Four Thousand Seven Hundred Dollars ($4,700.00). Let the costs of this action be taxed against the defendants."

From this judgment, defendants appealed.

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

Carlton, Rhodes & Thurston by Richard F. Thurston and Linda A. Thurston for defendant appellants.

PARKER, Judge.

[1] "[A] judgment merges the cause of action upon which it was rendered, and becomes itself the obligation." 2 McIntosh, N. C. Practice and Procedure 2d, § 1735. Therefore, plaintiff's original cause of action, in which he sought recovery of damages for injuries to his property allegedly caused by defendants' negligence, became merged into the consent judgment dated 6 January 1973. Where a judgment directs a party to perform a specific act and the party fails to comply within the time specified, various methods by which enforcement of the judgment may be effected are set forth in G.S. 1A-1, Rule 70. This Rule provides in part as follows:

"If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The judge may also in proper cases adjudge the party in contempt."

[2] In the present case none of the procedures provided for in Rule 70 was followed. Plaintiff did ask in his motion "that the defendants be held in contempt of Court," but plaintiff failed to show and the court made no finding that defendants' default in complying with the consent judgment was the result of willful disobedience. Such a finding is required before punishment may be imposed in civil contempt proceedings, *Mauney v. Mauney,* 268 N.C. 254, 150 S.E. 2d 391, and even then the trial judge in this State has no authority to award indemnifying fines or other compensation to a private party in a contempt proceeding. *Records v. Tape Corp. and Broadcasting System v. Tape Corp.,* 18 N.C. App. 183, 196 S.E. 2d 598.

[3] We hold that it was error for the trial court to enter the judgment awarding plaintiff monetary damages under the procedures disclosed by the present record. Resort should be had to other procedures, which may include one or more of those provided for in Rule 70, to obtain in this action defendants' compliance with the obligation imposed upon them by the consent judgment of 6 January 1973.

The judgment appealed from is vacated and this cause is remanded to the Superior Court of Forsyth County for further proceedings not inconsistent herewith.

Vacated and remanded.

Chief Judge BROCK and Judge MORRIS concur.

SPARTAN LEASING, INC. v. WILLIAM W. BROWN, JR., AND JAMES M. HOWARD, t/a COASTAL STEEL ERECTORS, A PARTNERSHIP, AND COASTAL STEEL ERECTORS, INC., A CORPORATION

No. 7326SC424

(Filed 29 August 1973)

1. **Process § 9— service on nonresidents — insufficient minimum contacts with this State**

Defendants did not have sufficient contacts with North Carolina to subject them to suit within this State for rental payments alleged to be due under a lease of construction equipment from a North Carolina corporation where the equipment lease between plaintiff and the individual defendants was entered in South Carolina before the corporate defendant was organized, the equipment was shipped by the

manufacturer directly from Iowa to South Carolina and was used exclusively in South Carolina, the initial rental payment was made by the individual defendants in South Carolina and the corporate defendant thereafter mailed three rental payments from South Carolina to North Carolina, and neither the individual nor the corporate defendants have ever engaged in any kind of business activity in North Carolina. G.S. 55-145(a)(1); G.S. 1-75.4(5)(a) and (c).

2. **Process § 9— service on nonresidents — necessity for connection with forum state**

Substituted service upon nonresidents violates the due process clause of the Fourteenth Amendment of the U. S. Constitution unless the contract upon which it is based has a substantial connection with the forum state.

APPEAL by plaintiff from *Snepp, Judge,* 2 January 1973 "C" Civil Session of Superior Court held in MECKLENBURG County.

Plaintiff, Spartan Leasing, Inc. (Spartan), is a North Carolina corporation. The individual defendants, William W. Brown, Jr. and James M. Howard, are residents of Berkeley County, South Carolina, and prior to 30 June 1970 were doing business as a partnership under the firm name of Coastal Steel Erectors. Coastal Steel Erectors, Inc. (Coastal), is a South Carolina corporation organized on or after 30 June 1970.

Plaintiff instituted this action on 3 March 1971 to recover from defendants rental payments alleged to be due under a lease for the use of construction equipment. Copies of the summons and complaint were served upon defendants on 11 May 1971 in South Carolina by a deputy sheriff of Berkeley County, South Carolina.

Defendants moved to dismiss the action for lack of jurisdiction of the person and for insufficiency of process.

Both parties filed affidavits and the defendants answered interrogatories propounded by plaintiff. Pertinent facts contained in these affidavits and answers to interrogatories will be referred to in the opinion.

The court below made findings of fact and granted the motion to dismiss for lack of jurisdiction.

Plaintiff appeals.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage, for plaintiff appellant.

Parker Whedon for defendant appellee.

BALEY, Judge.

[1] This is the second appeal in this case. In *Leasing, Inc. v. Brown,* 14 N.C. App. 383, 188 S.E. 2d 574, it was held that the defendant had not waived the defense of lack of jurisdiction over the person by requesting an enlargement of time under Rule 6(b). The cause was remanded to determine if the facts when fully discovered would show sufficient contacts in North Carolina by the defendants to confer jurisdiction upon the courts of this State. That is the sole question here presented.

The facts found by the trial court reveal that the equipment lease between plaintiff and the individual defendants was entered on 8 June 1970 in Moncks Corner, South Carolina, before the corporate defendant was organized. The truck-crane described in the lease was shipped by the manufacturer directly from Cedar Rapids, Iowa, to Charleston, South Carolina, and used exclusively in the state of South Carolina. The initial rental payment under the lease was made by the individual defendants in South Carolina and thereafter the corporate defendant forwarded three rental payments by mail from South Carolina to the plaintiff in North Carolina. None of the defendants, individual or corporate, had ever engaged in any kind of business activity in North Carolina.

[2] Upon these findings of fact which were supported by affidavits and evidence of record, the court concluded as a matter of law that the defendants were not subject to the *in personam* jurisdiction of the courts of this State and dismissed the action. We approve and affirm his judgment of dismissal. Substituted service upon nonresidents violates the due process clause of the Fourteenth Amendment of the Constitution of the United States unless the contract upon which it is based has a substantial connection with the forum state. We hold that the defendants do not have sufficient connection with North Carolina in the manner prescribed by G.S. 55-145(a)(1) and G.S. 1-75.4(5)(a) and (c) to subject them to suit within this State.

"It has been consistently held, since the landmark case of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, that ' "due process requires only that in order to subject a defendant to 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 'the traditional notions of fair play and substantial justice.' " ' *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.C. 199, 2 L.Ed. 2d 223; see *Byham v. House Corp.*, *supra* [265 N.C. 50, 143 S.E. 2d 225], and cases therein cited." *Koppers Co., Inc. v. Chemical Corp.*, 9 N.C. App. 118, 127, 175 S.E. 2d 761, 768.

"Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *International Shoe Co. v. Washington, supra* at 319, 66 S.Ct. at 160, 90 L.Ed. 2d at 104.

There is no precise or mechanical formula which may be employed to determine whether certain activities constitute "minimum contacts" sufficient to confer jurisdiction upon the courts of the forum state. Each case must be considered on its own merits. *Byham v. House Corp., supra; Farmer v. Ferris*, 260 N.C. 619, 133 S.E. 2d 492.

As far as the record in this case indicates neither the individual defendants nor the officers of Coastal have ever been in North Carolina. They have never conducted or engaged in any business activity in this State which would entitle them to invoke the benefits and protection of its laws. The individual defendants have done nothing but enter an agreement at their own residence in South Carolina with an authorized representative of Spartan for the use of equipment at a construction site in South Carolina for a stated rental. Defendants were paying for the use of the equipment, not its purchase, and the use was to occur and did occur entirely in South Carolina. The first rental payment was made in hand in South Carolina and the other three rental payments were mailed from South Carolina to North Carolina. The payment was for services performed or to be performed in South Carolina and did not concern the delivery of goods or things of value within or shipped from North Carolina. The defendants have had no connection or contact with North Carolina unless the deposit of rental payments in the mail in South Carolina directed to the plaintiff in North Carolina be held to constitute such contact. The fact that plaintiff has secured North Carolina license plates and registered the equipment in North Carolina and has delivered items in South Carolina which were used in connection with it cannot be considered acts of the defendants which would invoke any North Carolina jurisdiction or constitute any contact with this State.

In our view plaintiff has not shown that the defendants have had the necessary minimum contact in North Carolina which would be required to enable this State to acquire jurisdiction. To hold otherwise would do violence to the fundamental elements of due process and fair play.

The judgment of the court below which dismissed this action for lack of jurisdiction is affirmed.

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. BENNIE NORMAN

No. 7315SC559

(Filed 29 August 1973)

1. **Criminal Law § 162— nonresponsive testimony — necessity for motion to strike**

   Defendant's failure to move to strike a nonresponsive answer to a proper question waived any objection thereto.

2. **Criminal Law § 96— objection sustained — failure to instruct jury to disregard testimony**

   Failure of the trial court to instruct the jury to disregard testimony of a State's witness upon the sustaining of defendant's objection cannot be held prejudicial error where the record fails to disclose the nature and substance of the question and answer to which defendant's objection was sustained.

3. **Criminal Law § 162— failure to rule on objection — absence of prejudice**

   Defendant was not prejudiced by failure of the trial judge to rule on his objection to a question calling for hearsay testimony where the witness's answer was proper and merely revealed that he had given a full statement to a law officer.

ON *Certiorari* to review the trial of defendant before *Bickett, Judge,* 1 March 1971 Session of Superior Court held in ALAMANCE County.

Defendant, Bennie Norman, was charged in a bill of indictment, proper in form, with the murder of Roosevelt Baxter.

Defendant pleaded not guilty, whereupon, the State offered evidence tending to show the following:

At approximately midnight on 5 December 1970, the defendant, Nathaniel Brown (the principal witness for the State), and three other persons went to the home of Alease Richmond in Burlington, North Carolina.

Around 6:00 a.m. the following events occurred according to the testimony of Nathaniel Brown. "I saw Bennie call Roosevent [deceased] in the room where Alease was and he said 'Alease, tell Roosevelt what you told me,' but Alease didn't say anything. All she would say was 'go on Bennie, go on and leave him alone.' So Roosevelt went back in the kitchen . . . . "

Shortly thereafter, the defendant and Alease Richmond engaged in a loud argument which terminated upon the appearance of Roosevelt Baxter. Brown testified further: "[Roosevelt] was coming in with his hand up like this (indicates) and I glanced up and Bennie Norman grabbed up and pulled out a gun. When he pulled out the gun Norman was backing up. I did not see Roosevelt Baxter have anything in his hand. As Baxter came in the room, Norman backed up and pulled out his gun and told him, Baxter, to get back, not to come any further and he, Bennie, fired the gun." Defendant fired several shots and Baxter collapsed on the floor.

A post-mortem examination of the victim disclosed five bullet wounds. Death, according to expert medical testimony, resulted from a bullet wound through the chest which pierced the left lung and heart of the deceased.

Defendant testified and denied committing the murder. Defendant stated.

> "I was coming back in the house and heard the shooting. I had just stepped in the front door. I heard four, five or six or three or four shots . . . . * * *
>
> When I heard the shots I did not proceed in the house any further. * * *
>
> After the shooting stopped I stepped in the house further and she, Alease, was in a nervous state of condition. * * *
>
> * * *
>
> I did not have a gun that night. I do not own a gun. I had not had any difficulty that night or argument with Roosevelt Baxter. * * *

* * *

I haven't any idea who shot Roosevelt Baxter."

Defendant was found guilty of second degree murder and from a judgment imposing a prison sentence of 28-30 years he appealed.

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

Vernon, Vernon & Wooten, P.A., by Wiley P. Wooten for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends that the court erred in failing to rule on his objection to the testimony of Brown that, "Alease was telling him that he killed that man in her house." The challenged testimony was not responsive to the question asked which was itself proper. Defendant objected to the testimony but did not move to strike. Defendant's failure to move to strike the unresponsive answer waived any objection. *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599; *State v. Dickens,* 11 N.C. App. 392, 181 S.E. 2d 257. Furthermore, similar testimony had been admitted earlier without objection. This contention is without merit.

[2] Next defendant contends that the trial court committed error in not instructing the jury to disregard the testimony of one of the State's witnesses upon the sustaining of the defendant's objection. The exception upon which this argument is based appears in the record as follows:

"MR. HAYES: Objection. If I understand he went without the defendant.

COURT: Objection sustained."

The record fails to disclose the nature and substance of the question and answer to which appellant's objection was sustained. Clearly the exception has no merit.

[3] Defendant further asserts that the trial court committed error when it failed to rule on his timely objection to a question which called for hearsay testimony. While the trial court is required to rule on timely objections, Stansbury, N. C. Evidence, Brandis Revision, Vol. 1, Sec. 28, p. 74, an examination of the

exception upon which defendant's contention is based reveals that, although the question called for hearsay testimony, the answer was in all respects proper and merely revealed that the witness gave a full statement to Mr. Sam George, a member of the Alamance County Sheriff's Department. Defendant was not prejudiced by failure of the trial judge to rule on the objection.

Based on ten exceptions duly noted, defendant contends the trial court erred in its instructions to the jury. We have carefully examined each of these exceptions and find that when the charge is considered contextually as a whole, it is fair, adequate, and correct, and is free from prejudicial error. Defendant's trial in the Superior Court was free from prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY v. W. P. ROSE SUPPLY COMPANY

No. 738DC525

(Filed 29 August 1973)

1. **Insurance § 75— partial payment by insurer — action against tortfeasor — splitting of claim**

Since insured's claim against tortfeasor for damages to his motor vehicle could not be split, insured could properly maintain a suit against tortfeasor for the entire amount of damages, though his collision insurer had previously paid insured for a part of his loss.

2. **Insurance § 75— partial payment by insurer — partial recovery against tortfeasor — distribution of funds**

When the sum recovered by the insured from the tortfeasor is less than the total loss and thus either the insured or his collision insurer must to some extent go unpaid, the loss should be borne by the insurer, for that is a risk the insured has paid it to assume; therefore, the trial court properly refused to prorate insured's partial recovery from tortfeasor but properly awarded insurer, who in no way participated in insured's action against tortfeasor, the amount insurer had previously paid insured for damages to the vehicle, less the amount of the judgment insured received against tortfeasor which remained unpaid.

APPEAL by plaintiff from *Wooten, District Judge,* 23 April 1972 Session of District Court held in WAYNE County.

Plaintiff (Insurer) seeks a declaratory judgment as to what part of certain funds now held by defendant (Insured) Insurer is entitled to recover.

Insurer, under the terms of a $500.00 deductible collision insurance policy purchased by Insured, has paid Insured $3,428.16 for part of the damages done to Insured's truck when it collided with a vehicle owned by a third party (Tort-feasor) on 4 November 1969.

On 11 September 1970 in the Superior Court of Wayne County, Insured commenced suit against Tort-feasor to recover $4,113.66 for damages to the truck and $8,374.95 for loss of use of the truck while it was being repaired, alleging that the damages were due to the negligence of Tort-feasor.

On 24 November 1970, more than one year after the accident and more than two months after Insured had started the action against Tort-feasor, Insurer wrote the attorney Insured had employed to represent it in the claim against Tort-feasor. In the letter Insurer advised that: it was a member of an intercompany arbitration committee; it would arbitrate its interest in the claim with the adverse carrier and that insured should not include Insurer's interest in Insured's lawsuit. After receipt of Insurer's letter of 24 November 1970, Insured's counsel advised Insurer by letter dated 16 December 1970, that Insured's loss exceeded the sum paid by Insurer; that the insurance carrier for Tort-feasor had not paid the loss and that "since under the law this State, a claim may not be split even under circumstances existing in this case, suit was brought by W. P. Rose Supply Company for the total damages. However, in view of your letters, I will be glad to state to the court that you have elected to proceed by arbitration and that credit must be given for whatever amount is proper on the judgment rendered in the pending suit." Insured's case against Tort-feasor was tried in May, 1972. The jury found Tort-feasor negligent and awarded Insured a verdict of $4,113.66 for damages to the truck and $1500.00 as damages for the loss of use thereof, for a total verdict of $5,613.66. Insured has collected $5000.00 on the judgment leaving $613.66 unpaid. Tort-feasor has not been released.

Insurer had knowledge of the action against Tort-feasor but did not make itself a party thereto and did not assist in any

manner in the prosecution of the action against Tort-feasor which resulted in the recovery by Insured. Insured incurred expenses of $600.00 for attorney fees and $10.00 in other expenses in prosecuting this action against Tort-feasor.

In the present action the court held that Insurer was entitled to $2,204.50 of the funds held by Insured from its recovery in the earlier action against Tort-feasor. Insurer appealed.

C. K. Brown, Jr., for plaintiff appellant.

Smith & Everett by James N. Smith and James D. Womble, Jr., for defendant appellee.

VAUGHN, Judge.

[1] Insured's counsel took the position that the claim against the Tort-feasor could not be split and maintained suit for the total damages. His view is supported by *Insurance Co. v. Sheek,* 272 N.C. 484, 158 S.E. 2d 635. There the court said: "When the insurance pays only a part of the loss, the insured must bring the suit for the entire loss in his own name. . . . The sole right to sue in this case was in Ogburn, the insured whose property was negligently damaged." Similarly, in *Phillips v. Alston,* 257 N.C. 255, 125 S.E. 2d 580, the court said:

> "When the sum paid is only partial compensation, the owner is a necessary party to an action against a *tort-feasor.* If he desires full compensation for his loss, he should bring the suit. If he refuses, insurer may sue, making the owner a party defendant."

In *Insurance Co. v. Spivey,* 259 N.C. 732, 131 S.E. 2d 338, the court approved a suit by an insured against a tort-feasor wherein the insured had limited his claim to the uncompensated part of his loss. In *Spivey* the court said, "It should be noted . . . the insured *may* recover, not that he *must* recover, the full loss. True the tort-feasor cannot be compelled against his will to defend two actions for the same wrong. His remedy, if sued by the injured party for the uncompensated portion of the loss and he wishes to settle the entire controversy in one action, is to require a determination of the entire damages to the motor vehicle. To accomplish that purpose he would be entitled to have the insurance carrier made a party." With respect to the Insured in the present case, therefore, without regard to whether it might have limited its claim against the Tort-

feasor to its uncompensated loss, it could and did properly sue for the entire loss. The Insurer would have been a proper, but not necessary party. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231.

[2] Insurer urges that its right of subrogation requires that Insured's partial recovery against the Tort-feasor be prorated between Insured and Insurer in the ratio that their respective loss bears to the cash received. Insurer also argues that its share should be calculated without regard to expenses for counsel that Insured incurred in the prosecution of the suit against the Tort-feasor which resulted in the recovery of the funds in dispute.

In *Powell v. Water Co.,* 171 N.C. 290, 88 S.E. 426, the court said:

> "The great weight of authority is . . . that when the loss exceeds the insurance, as the cause of action is indivisible and the right of the insurer is not because of any interest in the property destroyed or damaged, and is enforced upon the equitable principle of subrogation, the action must be brought by and in the name of the owner of the property, and that he is entitled to recover the entire damages, without diminution on account of the insurance, *and that he holds the recovery first to make good his own loss,* and then in trust for the insurer. . . . " (Emphasis added.)

Although *Powell v. Water Co., supra,* did not involve subrogation rights under an automobile collision policy, there seems to be no reason why the owner of such a policy should not hold his recovery "first to make good his own loss." When the sum recovered by the insured from the tort-feasor is less than the total loss and thus either the insured or the insurer must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume.

The Insurer declined to bring, participate in or assist with the action against the Tort-feasor. On this record Insured's action on the claim against the Tort-feasor was brought in good faith and there is no indication that the expenses incurred, including counsel fees paid by him, were unreasonable. On these facts if the Insured is to "first make good his own loss" he must recover these expenses before the Insurer is entitled to reimbursement. The judgment of the trial court is in accord with the principles expressed in most of the cases dealing with reimburse-

ment of a subrogated Insurer by the Insured. *See* 44 Am. Jur. 2d, Insurance, § 1846, p. 773.

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

WALTER BARNES v. HOWARD ANGE AND WIFE, ARTIE B. ANGE

No. 732DC419

(Filed 29 August 1973)

Evidence § 48— failure to qualify witness as expert

In an action to recover the balance due for construction of a building for defendants wherein defendants counterclaimed for damages for faulty workmanship, the trial court did not err in the exclusion of testimony by defendants' witness as to the fair market value of necessary repairs to the building where there was no admission or stipulation that the witness was an expert, no evidence from which the trial judge could determine the witness's qualifications and no finding by the trial judge that the witness was an expert.

APPEAL by defendant from *Ward, District Court Judge*, 29 November 1972 Session of District Court held in WASHINGTON County.

Plaintiff instituted this action to recover the sum of $345.00 for the balance due on materials and labor furnished in the construction of a service station-grocery store in Washington County, North Carolina.

Defendant answered alleging that payment had been made. Defendant also filed counterclaim for damages in the amount of $8,000.00, alleging faulty workmanship and construction.

Plaintiff's evidence tended to show that an agreement was reached between plaintiff and Mr. Jim Hughes of Plymouth Oil Company, acting as agent of the defendant Howard Ange, concerning the construction of the service station-grocery store building; that plaintiff knew that construction according to plans and specifications would result in water seepage, but did not advise defendant or his agent; that plaintiff completed construction according to plans and specifications; that water seepage occurred; that the parties agreed that if a ditch were

dug and lined with rock, it would eliminate seepage; that defendant agreed to dig the ditch and line it with rock.

Defendant's evidence tended to show that Hughes, as agent of the defendant, contracted with plaintiff for the construction of the building; that defendant had complained to plaintiff about water seepage prior to completion of construction; that at a later date plaintiff advised defendant to dig a ditch which would divert the water source; that defendant did not dig the ditch; that water seepage damaged the building.

Defendant called Mr. Robert Furcy to give testimony as to damages to the building. The witness gave an opinion as to the fair market value of all repairs on the building which were necessary to correct the water problem; the value was $6,000.00.

Plaintiff's motion to strike the testimony of Mr. Furcy was allowed. Plaintiff then moved to dismiss defendant's counterclaim for failure to establish damages. The motion was allowed.

The jury found that defendant was indebted to plaintiff in the sum of $232.50, and judgment was entered upon the verdict. Defendant appealed.

Hutchins & Romanet, by R. W. Hutchins, for the plaintiff.

Bailey & Cockrell, by Arthur E. Cockrell, for the defendants.

BROCK, Chief Judge.

The defendants assign as error that the trial judge sustained the objection to and allowed plaintiff's motion to strike the testimony of Mr. Furcy concerning the cost of necessary repairs. Defendants argue that testimony of an expert witness is admissible in evidence. This is true, but there must be an admission or stipulation that the witness is an expert, or there must be a determination by the trial judge that the witness is an expert, before such expert testimony is admissible. In this case, plaintiff neither admitted nor stipulated that defendants' witness was an expert. It is implicit in the trial judge's ruling, which excluded the testimony, that the trial judge did not determine that the witness was an expert.

From this record, it is clear that the trial judge was correct in excluding the testimony. Mr. Furcy may be the expert that he stated he was, but no evidence was offered from which

the trial judge could determine the witness' qualifications. The total of the evidence upon the question of the witness' qualification as an expert is the following statement by the witness himself: "I am an expert witness in the field of commercial and domestic construction of houses."

Counsel for defendants stipulated in argument before this Court that plaintiff offered sufficient evidence to entitle him to have his case submitted to the jury. With the testimony of defendants' witness relating to damages excluded, defendants failed to establish a *prima facie* case on their counterclaim. Therefore, submission of the case to the jury only upon plaintiff's claim was proper.

No error.

Judges VAUGHN and BALEY concur.

STATE OF NORTH CAROLINA v. LUTHER LOUIS CHEEK

No. 7319SC349

(Filed 29 August 1973)

1. **Homicide § 14— proof of cause of death**

To warrant conviction in a homicide case, the State must produce evidence sufficient to establish beyond a reasonable doubt that the death of the deceased proximately resulted from the defendant's unlawful act.

2. **Homicide § 21— involuntary manslaughter — cause of death — insufficiency of evidence**

The State's evidence of cause of death was insufficient for submission to the jury of an issue of defendant's guilt of involuntary manslaughter where it showed that decedent was a passenger in defendant's vehicle which left the road and overturned, that the ambulance attendant who took decedent to the hospital could find no pulse, that decedent was dead when she was examined by a doctor at the hospital but the doctor had no recollection as to the cause of death, and that there were no lacerations, bleeding or open wounds on decedent's body, there being no expert medical evidence of the cause of death and there being no evidence upon which an average layman could form a well grounded opinion as to the cause of death.

Judge BALEY concurring in result.

State v. Cheek

APPEAL by defendant from *Armstrong, Judge,* 27 November 1972 Session of RANDOLPH Superior Court.

Defendant was tried on a bill of indictment charging that on 5 March 1972 he did "kill and slay" one Beverly J. Cross (Miss Cross). The charge arose out of a single-car automobile collision, defendant being the driver of, and Miss Cross being a passenger in, the vehicle.

Defendant pleaded not guilty. Following the presentation of the State's evidence, defendant moved for nonsuit and his motion was overruled. Defendant declined to offer evidence, renewed his motion for nonsuit and that motion was overruled. A jury found defendant guilty of involuntary manslaughter and from judgment imposing prison sentence of not less than three nor more than ten years, defendant appealed.

Attorney General Robert Morgan by Ann Reed, Associate Attorney, and Robert R. Reilly, Associate Attorney for the State.

H. Wade Yates for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the court to allow his motion for nonsuit interposed at the close of the evidence for the reasons that the State (1) failed to prove the cause of Miss Cross' death and (2) failed to show culpable negligence on the part of defendant. We think the assignment is well taken on the question of cause of death and we do not reach the question of culpable negligence.

[1] On a motion to nonsuit a criminal action, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged; evidence which raises no more than a surmise or conjecture of guilt is insufficient to overrule nonsuit and there must be legal evidence of each fact necessary to support conviction. 2 Strong, N. C. Index 2d, Criminal Law, § 106, p. 655. To warrant conviction in a homicide case, it is necessary that the State produce evidence sufficient to establish beyond a reasonable doubt that the death of the deceased proximately resulted from the defendant's unlawful act. *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844 (1951); *State v. Locklear,* 7 N.C. App. 493, 172 S.E. 2d 924 (1970).

[2] With respect to the decedent, Beverly Cross, the evidence tended to show:

On the evening of the accident, Miss Cross, defendant and others were at a restaurant in Asheboro. Miss Cross did not know defendant and asked a third party to ask defendant to take her home. Pursuant to the request, Miss Cross and two other passengers got into defendant's station wagon with defendant and he proceeded to drive out of Asheboro on old Highway 64. Defendant was not familiar with the road and did not know where Miss Cross lived and she assisted in giving directions. Some distance out of Asheboro on a crooked road, the station wagon left the highway, went down an embankment, struck a tree, and came to rest on its top. Following the wreck, Miss Cross and another passenger were found inside the rear of the vehicle. A State Trooper and ambulance attendants removed Miss Cross from the vehicle and she was taken by ambulance to the Randolph County Hospital. After Miss Cross was placed in the ambulance, an attendant checked her pulse but was unable to find any. The attendant detected no "profuse bleeding."

At the hospital emergency room Miss Cross was examined around 10:00 p.m. by Dr. Griffin whose testimony is summarized as follows: He found Miss Cross dead at the time he saw her. He did not have any recollection as to the cause of death but recalled that she had been dead for a very short time and he was told that she had been in an automobile accident. Her body had not suffered any lacerations and there was no bleeding or open wounds. He did not recall anything else about her condition and any notes which he made were in the medical examiner's office in Chapel Hill.

Since the testimony of Dr. Griffin failed to establish the cause of death, we are confronted with the question as to whether the cause was established by other testimony. In *State v. Minton, supra,* pp. 721-722, in an opinion by Justice Ervin, we find:

> "* * * The cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that *the wound* was mortal in character. (Citations.) There is no proper foundation, however, for a finding by the jury as to the cause of death

without expert medical testimony where the cause of death is obscure and an average layman could have *no well grounded* opinion as to the cause." (Emphasis added.)

In the case at bar there is no evidence of any wound of any description and although there is strong suspicion that Miss Cross died from injuries proximately caused by the collision, the cause of death is obscure and evidence upon which an average layman can form a "well grounded opinion as to the cause" is woefully lacking. Convictions for crimes cannot stand on evidence "which raises no more than a surmise or conjecture of guilt."

We hold that the court erred in denying the motion for nonsuit.

Reversed.

Chief Judge BROCK concurs.

Judge BALEY concurring in result.

In my view there is sufficient evidence of cause of death for submission to the jury, but the evidence does not meet the test for culpable negligence.

"On a charge of culpable negligence in the operation of a motor vehicle, resulting in death, conduct is not to be measured with precision instruments or weighed on golden scales." *State v. Hewitt,* 263 N.C. 759, 763, 140 S.E. 2d 241; *State v. Cope,* 204 N.C. 28, 167 S.E. 456.

STATE OF NORTH CAROLINA v. ROY McNEIL MYERS

No. 738SC537

(Filed 29 August 1973)

Criminal Law §§ 23, 171; Larceny § 9; Receiving Stolen Goods § 7— guilty pleas to larceny and receiving — error cured by sentence

Although the trial court erred in accepting defendant's pleas of guilty to inconsistent counts in an indictment charging larceny of and receiving the same property, and the trial court incorrectly informed defendant that he could be sentenced for as much as 30 years upon his plea of guilty to the indictment charging him with breaking and entering, larceny and receiving, defendant was not prejudiced thereby

where defendant received only one sentence which was less than the maximum he could have received on any one of the counts in the indictment.

ON *certiorari* to review judgment of *Martin (Perry), J.*, entered at the 15 January 1973 Session of WAYNE Superior Court.

Defendant was tried on a bill of indictment containing three counts. The first count charged him with felonious breaking and entering. The second count charged him with felonious larceny after breaking and entering. The third count charged him with the felony of receiving stolen merchandise. The defendant entered a plea of guilty to all charges; and after being examined as to his plea, there was a proper adjudication that the plea of guilty was entered freely, understandingly and voluntarily without undue influence, compulsion or duress and without any promise of leniency. Thereafter judgment was entered to the effect that the defendant be imprisoned for a term of not less than five nor more than seven years.

From this judgment the defendant noted an appeal but failed to perfect the appeal in apt time and filed a petition for a writ of certiorari in lieu of an appeal. This Court granted the writ.

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

Langston and Langston by W. Dortch Langston, Jr., for defendant appellant.

CAMPBELL, Judge.

The defendant contends that the count in the bill of indictment charging felonious larceny, which was the second count, and the third count in the bill of indictment charging receiving stolen property, are inconsistent counts and the defendant could not properly plead guilty to both of them. *In re Powell*, 241 N.C. 288, 84 S.E. 2d 906 (1954). This position is well taken, and we do not commend the careless manner in which this case was presented. The solicitor should have dismissed the third count when he learned that the defendant was actually guilty of the first count of breaking and entering and the second count of felonious larceny. The solicitor failed to do this, and the trial judge treated the bill of indictment as though three separate

felonies were charged; and, in fact, he informed the defendant that he could be sentenced for as much as thirty years. Despite the manner in which the case was handled at the trial level, nevertheless, we do not think that on this record the defendant has shown any prejudice. The record reveals that the defendant was clearly guilty of the felony of breaking and entering and of the felony of larceny and that he was pleading guilty to those two felonies for which he could have received a sentence of ten years on each one or a total of twenty years. The defendant was in no way misled. He was incorrectly informed by the trial judge that he could receive a maximum of thirty years, but he actually received a sentence of five to seven years which was considerably less than the maximum on any one of the counts charged in the bill of indictment. The case is controlled by *State v. Meshaw*, 246 N.C. 205, 98 S.E. 2d 13 (1957). Also see *State v. Turner*, 8 N.C. App. 541, 174 S.E. 2d 863 (1970).

In the absence of any prejudicial error we find

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES ELLIE DANIEL

No. 7315SC564

(Filed 29 August 1973)

Constitutional Law § 28— waiver of indictment by defendant without counsel

Defendant's waiver of the bill of indictment against him is set aside and his plea of guilty and judgment pronounced thereon are vacated where defendant signed a waiver of indictment and was sentenced on an information filed by the solicitor when he was not represented by counsel. G.S. 15-140.1.

ON *certiorari* from an order of *Cooper, Judge,* on 6 December 1972 denying post-conviction review of a trial before Bailey, Judge, 14 May 1972 Session of Superior Court held in ORANGE County.

Defendant waived his right to counsel and entered a plea of guilty to the felony of bigamy. Judgment was entered imposing a prison sentence.

Attorney General Robert Morgan by John R. B. Matthis, Assistant Attorney General, for the State.

Manning, Allen & Hudson by Marcus Hudson for defendant appellant.

VAUGHN, Judge.

At trial defendant signed what purports to be a waiver of indictment and was sentenced on an information filed by the solicitor. He was not represented by counsel. In non-capital felony cases a defendant may waive a bill of indictment only *when represented by counsel* and when both defendant *and his counsel* sign a written waiver of indictment. G.S. 15-140.1. *State v. Hayes,* 261 N.C. 648, 135 S.E. 2d 653.

Defendant's waiver of the bill of indictment is set aside; his plea of guilty and the judgment pronounced thereon are vacated. The State may prosecute defendant on a bill of indictment or proper waiver thereof if it so elects, otherwise defendant will be discharged. *State v. Hayes, supra.*

The cause is remanded to the Superior Court of Orange County for proceedings consistent with this opinion.

Vacated and remanded.

Judges CAMPBELL and HEDRICK concur.

CITY OF GASTONIA v. DUKE POWER COMPANY

No. 7327SC457

(Filed 12 September 1973)

1. **Contracts § 17— termination time not stated — reasonable time**

A contract of indefinite duration may be unilaterally terminated by either party on giving reasonable notice after the contract has been in effect for a reasonable time, taking into account the purpose the parties intended to accomplish.

2. **Contracts § 17— 1929 agreement to sell power equipment in annexed area to city — reasonable time — termination by notice to city**

A 1929 contract of indefinite duration in which a power company agreed that, upon extension of a city's boundaries, the power company would sell to the city its electric lines and other distribution equipment located within the annexed area was not intended by the parties to last as long as the power company should supply electricity within the vicinity of the city and had been in effect for a reasonable time when the power company notified the city in 1965 that it was terminating the contract; consequently, the power company's notice terminated the contract in 1965 and it was under no obligation to sell the city its electric lines and other equipment in an area annexed by the city in 1968.

APPEAL by plaintiff from *Ervin, Judge,* 17 November 1972 Civil Session of Superior Court held in GASTON County.

The City of Gastonia (City) filed suit on 3 March 1970 against Duke Power Company (Duke) praying that the court grant specific performance of a contract dated 16 January 1929. The original parties to the contract were the City and Southern Public Utilities Company (Southern). Duke succeeded to the rights and obligations of Southern in 1935 when Southern was merged into Duke.

Prior to 1929, the City provided electricity to most electricity consumers living within its boundaries as well as to various consumers living near but outside the city limits. During this time, Southern, under a limited franchise granted by the City in 1906, operated as a public utility within the municipality, selling electricity to large manufacturers located therein.

Under the 1929 contract this arrangement was modified. The City agreed, with several exceptions not presently relevant, to stop supplying electricity to consumers outside the city limits. Southern in turn promised to take over this service and to pur-

chase the City's electric equipment located outside the city limits. The contract also contained the following provisions:

> " 'SEVENTH: The parties agree that in case the limits of the City are extended so as to include any portion or all of the lines constituting the system used in providing service for consumers in the immediate vicinity of the City, the Company will sell to the City all lines, poles, transformers, meters and other physical property owned or held by the Company within such extended limits, and the City will pay the Company for same at a fair appraised value; the value shall be agreed upon by the parties and in case they cannot agree, then such value shall be fixed by two arbitrators, one to be selected by each party, and these two to select a third, in case they cannot agree. Immediately upon the extension of the city limits the supplying meters will be transferred to the new city limits.
>
> " 'EIGHTH: Except as provided in Paragraph Seventh, the lines and other property above referred to are and shall continue to be the property of the Company.' "

The contract contained no express provisions as to how long paragraphs seven and eight were to remain in force.

From time to time thereafter the City extended its boundaries, purchasing from Duke electric equipment located within the annexed areas. This process of annexation and purchase occurred in 1952, 1956, 1963 and January of 1965. In each instance neither party referred to the 1929 contract either in the City resolution authorizing the transaction, in the petition before the North Carolina Utilities Commission, or in the sales contract which preceded the actual transfers of electric facilities in each instance. The 1929 contract, however, was discussed during negotiations for the 1965 purchase. Throughout this period it was the general policy of Duke throughout its franchise area in North and South Carolina to sell its electrical distribution facilities located in annexed areas to annexing municipalities, and prior to 1965 such sales had been made in High Point and Shelby, as well as in Gastonia, North Carolina, and in Gaffney, Laurens and Newberry in South Carolina.

In 1965, however, Duke changed its policy. In that year the North Carolina General Assembly enacted Ch. 287, 1965 Session Laws, which, among other matters, prescribed the condi-

tions upon which an electric utility might continue to furnish service in an annexed area. By letter dated 14 October 1965 Duke notified the City that it was terminating the 1929 contract effective the last day of October 1965. The record contains no indication that the City at that time accepted or rejected Duke's decision.

On 29 October 1968, the City, acting pursuant to authority granted in G.S. Ch. 160, Art. 36, Part 3, annexed a small area of land on its western boundary that contained electric facilities owned by Duke. In November 1968, the City notified Duke that it had elected to purchase this equipment under provision of the 1929 contract. Duke, however, refused to agree to the purchase on grounds that the contract had been validly terminated on 31 October 1965 and, even if still in effect, did not cover facilities not in existence in 1929. The City thereupon instituted this action to compel specific performance of paragraph seven.

Jury trial was waived and the case was submitted to the judge upon admissions in the pleadings, stipulations of fact, affidavits and exhibits. Upon these the court entered judgment making findings of fact substantially as above set forth. From the findings of fact, the court made conclusions of law, including among these that the 1929 contract had been in existence a reasonable period of time before Duke gave the City notice of termination on 14 October 1965, that such notice was a reasonable notice, and that the 1929 contract was terminated in 1965 as the result of said notice. From judgment holding that Duke was under no contractual obligation to sell to City its electric lines and facilities in the area annexed by the City in 1968 and denying City specific performance or any other relief in this action, City appealed.

Garland & Alala by James B. Garland for plaintiff appellant.

W. H. Grigg and W. I. Ward, Jr., for defendant appellee.

PARKER, Judge.

[1] The parties to the 1929 contract which plaintiff now seeks to enforce failed to specify how long the provisions germane to this action should remain in effect. This State follows the generally accepted view that a contract of indefinite duration may be terminated by either party on giving reasonable notice. *Rubber Co. v. Distributors,* 253 N.C. 459, 117 S.E. 2d 479; *Fulghum*

v. Selma and *Griffis v. Selma,* 238 N.C. 100, 76 S.E. 2d 368; *Distributing Corp. v. Parts, Inc.,* 7 N. C. App. 483, 173 S.E. 2d 41. To avoid injustice, however, this rule is subject to the qualification that such a contract may not be unilaterally terminated until it has been in effect for a reasonable time, taking into account the purposes the parties intended to accomplish. *Scarborough v. Adams,* 264 N.C. 631, 142 S.E. 2d 608; *Atkinson v. Wilkerson,* 10 N.C. App. 643, 179 S.E. 2d 872; *Hardee's v. Hicks,* 5 N.C. App. 595, 169 S.E. 2d 70. The North Carolina position is succinctly set forth in 2 Strong, N. C. Index 2d, Contracts, § 17, p. 322, as follows:

> "As a general rule, where no time is fixed for the termination of a contract it will continue for a reasonable time, taking into account the purposes that the parties intended to accomplish; and where the duration of the contract cannot be implied from its nature and the circumstances surrounding its execution, the contract is terminable at will by either party on reasonable notice to the other."

[2] Appellant does not challenge the adequacy of the two-week notice given by Duke on 14 October 1965, nor does appellant claim that it has so relied upon the continued vitality of the contract as to make its termination by Duke unjust or inequitable. Rather, appellant contends that the 36 years that elapsed between the creation and termination of the contract is not a reasonable time, and alternatively, that the parties, by their silence as to duration, actually intended that the contract last as long as Duke should supply electricity within the vicinity of the City. We find both arguments without merit.

In *Fulghum v. Selma, supra,* our Supreme Court construed a contract in some respects similar to the contract presently before us. In that case the Town of Selma agreed in 1946 to sell water to C. B. Fulghum at a point within the city limits. Fulghum then resold the water to inhabitants of nearby Selma Mill Village, conveying the water to the village in water mains built at his expense. The contract did not fix the time of its duration. The Town regularly supplied water under this agreement until 1952, when a Town ordinance raised the price of the water purchased by Fulghum. Fulghum thereupon instituted suit to compel the Town to continue supplying water at the original contract price. The trial court dismissed the action upon defendant's motion for nonsuit, and on appeal our Supreme Court affirmed on the grounds *inter alia,* that either party to a con-

tract silent as to duration may terminate the contract after giving reasonable notice to the other. It would seem that in the present case Duke's right to terminate the 1929 contract is even clearer than that of the Town of Selma to terminate its contract with Fulghum. Not only was the 1929 contract with which we are here concerned in existence for a substantially longer time prior to being terminated than was the case in *Fulghum,* but *Fulghum* dealt with an ongoing contract, the Town supplying an average of 80,000 gallons of water a month under the agreement. In the present case there is little evidence, if any, that Duke ever sold its electric facilities to the City because of the 1929 contract. Rather, the sales of 1952, 1956, 1963 and 1965 reflected general corporate policy, the 1929 contract resurfacing only after that policy had been changed.

The Court in *Fulghum,* however, did not expressly deal with the question of reasonable time, and the appellant here, relying on *Scarborough v. Adams, supra,* argues that in the present case a reasonable time is "an indefinite time extending for the period in which Duke continues to serve consumers in the immediate vicinity of the City of Gastonia." *Scarborough,* however, does not support this inference. The contracts in *Scarborough* reflected the efforts of various political subdivisions of Buncombe County to solve a common waste disposal problem. Each subdivision contracted separately with the Metropolitan Sewerage District of Buncombe County in order to implement the plan. Each contract provided that the agreement was to continue in force only so long as the district sewerage disposal system remained in existence and in operation. The differences between *Scarborough* and the present case are apparent. The *Scarborough* contracts not only contained express provisions as to duration, but also formed the contractual basis for a county-wide sanitary system. The contract between Duke and the City contains no provision as to duration, nor does it involve an attempt to solve a pressing metropolitan problem such that its termination would jeopardize a proposed solution.

Appellant suggests that in determining what is a reasonable time in this case an analogy should be drawn to the sixty-year limit placed on franchises by former G.S. 160-2, citing *Boyce v. Gastonia,* 227 N.C. 139, 41 S.E. 2d 355, as authority that where a franchise granted by a municipality fails to stipulate its duration, the statutory term of sixty years will be read into the contract. The Court in *Boyce* did apply this rule of construction, but it did not hold that the statute was always dis-

positive of the length of a franchise silent as to duration. Further, whatever the precedential weight of *Boyce* for curing problems of indefiniteness as to duration in franchise agreements, the case is not authority for treating other types of municipal contracts as franchises for that purpose. Appellant does not contend that the 1929 contract is a franchise in substance although not in form, and we see no reason to treat it as such.

Alternatively, appellant finds the silence of the contract to be eloquent, stating in its brief that "it would seem that the intention of the parties to an agreement that it should be perpetual and without time limit as to duration could not be more properly expressed than by silence as to any time limit or power of revocation." Thus appellant urges the following rule of law, "that where no limitation is expressed in the agreement, neither party can terminate it without the consent of the other, unless the nature of the contract itself indicates with sufficient clearness that the parties must have intended some other termination." The cases cited in support of this rule, however, contain specific equities, such as reliance or complete performance by one party, that would make termination by the other party unjust. The present case does not present such a situation.

Taking into account the nature and subject matter of the 1929 contract and the purposes which the parties intended to accomplish by its execution, we agree with the trial court's conclusion that the contract had been in existence a reasonable period of time when, more than 36 years after its date and on 14 October 1965, Duke gave notice of termination.

Since we agree with the trial court's further conclusion that the 1929 contract was terminated on 31 October 1965 as result of that notice, we find it unnecessary to pass upon the alternative ground for decision given by the trial judge, i.e., that in any event the 1929 contract related only to such electrical facilities as were in existence when the contract was entered into. The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

TOMMY LEE THERRELL v. ROZA LEE THERRELL

No. 7326DC322

(Filed 12 September 1973)

1. **Divorce and Alimony § 16— action for divorce from bed and board — cross-action for alimony without divorce**

Although defendant wife did not indicate precisely what "cross-action" she intended to bring in plaintiff husband's suit for divorce from bed and board, it was probable from the allegations in the pleadings that she intended to commence a cross-action for alimony without divorce as permitted by G.S. 50-16.8(b)(3).

2. **Divorce and Alimony § 18— alimony pendente lite to dependent spouse — requisites for award**

In order to be entitled to payment of alimony *pendente lite*, a dependent spouse must present evidence tending to show (1) that she is entitled to the relief demanded in the action in which the application for alimony *pendente lite* is made and (2) that she has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. G.S. 50-16.3(a).

3. **Divorce and Alimony § 18— maintenance of cats and dogs — provocation for abandonment of dependent spouse — award of alimony pendente lite erroneous**

At a hearing to determine defendant's right to alimony *pendente lite* where the evidence tended to show that defendant maintained a large number of dogs and cats who were allowed to roam at will in the parties' home and the presence of the animals constituted a nuisance to plaintiff, the trial court erred in ruling as a matter of law that plaintiff's withdrawal from the marriage was unjustified and in awarding defendant alimony *pendente lite* and counsel fees.

APPEAL by plaintiff from *Stukes, Judge*, 7 August 1972 Session of District Court held in MECKLENBURG County.

Plaintiff husband complained of the defendant wife alleging facts tending to show that the plaintiff was forced to withdraw from the marital relationship because of acts on the part of the defendant which rendered it impossible for the plaintiff to continue the marital relationship with health and self-respect, and seeking a divorce from bed and board and custody of the two adopted children of the marriage. Defendant answered, denying the material allegations of the complaint, and alleging that the plaintiff abandoned the defendant, that the plaintiff was the supporting spouse and the defendant a dependent spouse within the meaning of G.S. 50-16.1, and the defendant prayed that she be given custody of the adopted children of the marriage, child support, alimony, and attorney fees.

At a hearing to determine defendant's right to alimony pendente lite, the evidence tended to show the following: At the time of their marriage in January 1961, the plaintiff was 18 years of age and the defendant 32 years of age. Defendant had custody of two children of a prior marriage. During their marriage, plaintiff and defendant adopted two young boys in South Carolina, who, at the time of the hearing, were aged six and seven. During the course of their marriage, the parties lived first in South Carolina, and at the time of the hearing, the parties resided in a house in Charlotte, North Carolina, jointly owned and valued at some $55,000. Plaintiff and defendant each owned fifty per cent of the stock of a corporation which employed plaintiff at a salary of $190 a week, after taxes and other deductions, to conduct the corporate "drywall" business. Defendant was an officer in the corporation and drew a weekly salary of $80. In 1971, the corporation showed a net profit of $31,000 which, as of the time of the hearing, remained undistributed. Defendant was in the business of buying and selling dogs and cats for profit, but the amount of earnings from that business was not disclosed at the hearing and was not reported on defendant's income tax returns. Plaintiff testified that he also received income of $130 a month from a mortgage on a mobile home sold by plaintiff, and $200 a month from the jointly owned corporation for the rental value of space used in the parties' home in Charlotte for the corporation's business. The corporation owned the Buick automobile that the plaintiff operated and the Lincoln automobile that the defendant operated.

Defendant testified that monthly expenses for her and her children amounted to some $1200.

The parties also testified extensively concerning the defendant's use of the home of the parties as a large dog kennel and the number of dogs running about the house, and concerning certain alleged acts of moral misconduct on the part of both the plaintiff and the defendant. The plaintiff testified at the hearing that he withdrew from the marital relationship on 12 February 1972 as a result of the defendant's abusive attitude toward plaintiff, and because of the number of dogs and cats allowed by the defendant to roam at will in the parties' home, resulting in an offensive odor pervading the house and animal droppings throughout the house.

After hearing the evidence, the trial judge entered an order commanding the plaintiff to pay to the defendant $600 a month

"for the support and maintenance of his wife" and ordered that possession of the jointly owned house be delivered to the defendant along with the furnishings therein, that the plaintiff pay the house mortgage payment, all taxes and repair costs, that the plaintiff maintain in effect health insurance for the benefit of the defendant and two children, and that plaintiff provide defendant with an insured automobile for transportation. The order also provided that custody of the two children be awarded to the defendant and that plaintiff pay child support in the amount of $180 a month, and that plaintiff pay attorney fees in the alimony pendente lite matter in the amount of $800 and in the custody action in the amount of $400.

From the order entered, the plaintiff appealed, assigning error.

Harkey, Faggart, Coira and Fletcher, by Charles F. Coira, Jr., for plaintiff appellant.

E. Clayton Selvey, Jr., for defendant appellee.

MORRIS, Judge.

[1] The initial problem we must deal with is to determine what relief the defendant wife is seeking. It appears that defendant intended to commence a cross-action for alimony without divorce in plaintiff's suit for divorce from bed and board, as is permitted by G.S. 50-16.8(b)(3), although no specific language to that effect was used by the defendant in her pleadings or otherwise.

In the defendant's answer to the complaint, under the caption "A FURTHER DEFENSE AND ANSWER AND CROSS ACTION," appear allegations to the effect that the plaintiff abandoned the defendant, that the plaintiff was the supporting spouse and the defendant a dependent spouse within the meaning of G.S. 50-16.1.

Defendant's prayer for relief in her answer reads, in pertinent part, as follows:

> "WHEREFORE, having fully answered the complaint of the plaintiff *and having alleged a cause of action under the provisions of North Carolina General Statutes 50-16.1*, the defendant prays the court:
>
> 1. That the action brought by the plaintiff herein be dismissed.

. . .

3. That she be awarded alimony for the adequate support and maintenance for herself pendente lite *and upon trial of this action* and attorney's fees pendente lite and upon trial of this action.

. . .

5. That she be awarded exclusive possession and use for herself and the minor children of the marriage of the home previously occupied by the plaintiff and defendant, together with all furniture and furnishings contained therein.

. . .

7. That she have and receive such other and further relief as to the court may seem just and proper." (Emphasis added.)

Although the defendant wife has not clearly indicated precisely what "cross-action" she intended to bring, we think it is probable from the allegations in the pleadings that the defendant intended to commence a cross-action for alimony without divorce. See *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909 (1946).

It follows, therefore, that the order appealed from in this case was an award of alimony pendente lite in the defendant's action for alimony without divorce. We proceed to the merits of this appeal on that basis.

[2] In order to be entitled to payment of alimony pendente lite, a dependent spouse must present evidence tending to show (1) that she is entitled to the relief demanded in the action in which the application for alimony pendente lite is made, and (2) that she has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. *Little v. Little,* 18 N.C. App. 311, 196 S.E. 2d 562 (1973); G.S. 50-16.3(a).

[3] Under the facts of the case at bar, in order to prove her entitlement to alimony pendente lite, the defendant was required to show that the plaintiff had abandoned the defendant without justification. In the order awarding alimony pendente lite, finding of fact No. 3 reads as follows:

"3. That the plaintiff left the family household and home occupied by the parties on February 12, 1972, with the in-

tent not to resume the marital relationship and without the consent of the defendant; the court further finds as a fact that the defendant maintains a number of dogs and cats which constitute a nuisance to the plaintiff and over which the parties have been unable to resolve their differences concerning the occupancy of the house but that such conduct does not constitute adequate provocation on the part of the defendant for the subsequent abandonment of the defendant by the plaintiff and that the plaintiff has wilfully abandoned the defendant without legal justification."

The issue raised by finding of fact No. 3, therefore, is whether the large number of dogs and cats roaming about the parties' house, over the objection of the plaintiff, constituting, in the words of Judge Stukes, "a nuisance to the plaintiff," was proper justification for the withdrawal of the plaintiff from the marital relation. If the answer to that issue is "yes," then the award of alimony pendente lite was error. For this reason, in order to warrant the allowance of alimony pendente lite, the court must look to the merits of the action to determine if the petitioning party in law has made out a case entitling her to the relief demanded. *Garner v. Garner,* 270 N.C. 293, 154 S.E. 2d 46 (1967); *Harper v. Harper,* 9 N.C. App. 341, 176 S.E. 2d 48 (1970); G.S. 50-16.3.

In *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923 (1953), the Court stated:

"This Court, in applying the provisions of G.S. 50-7(1), has never undertaken to formulate any all-embracing definition or rule of general application respecting what conduct on the part of one spouse will justify the other in withdrawing from the marital relation, and each case must be determined in large measure upon its own particular circumstances. Ordinarily, however, the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, and self-respect, and constitute ground in itself for divorce at least from bed and board." See also *Panhorst v. Panhorst,* 277 N.C. 664, 178 S.E. 2d 387 (1971); 27A C.J.S., Divorce, § 56(4), p. 185-86; 24 Am. Jur. 2d, Divorce and Separation, § 115; Annot., 19 A.L.R. 2d 1428 (1951).

We are of the opinion that the trial judge was in error in ruling as a matter of law that the maintenance of numbers of dogs and cats, constituting a nuisance to the plaintiff, was not "adequate provocation on the part of the defendant for the subsequent abandonment of the defendant by the plaintiff . . ."

The evidence taken at the hearing reveals that one of the parties' adopted children was allergic to the animals, and that the child's doctor had recommended that the animals be removed from the parties' home. The plaintiff's testimony tended to show that animal excretions, hair, and cages were to be found throughout the house, leaving a permanent odor, and that the number of dogs in the home varied from month to month. At times there were 75 dogs in the parties' home. The defendant's evidence, while contradictory of the plaintiff's evidence, tended to show that the defendant did keep dogs for breeding purposes in the basement of the home and that the largest number of dogs the defendant maintained at one time was 28 and the largest number of cats maintained at one time was six. In any event there was ample evidence to support the trial court's finding that the number of animals kept in the home was such as to constitute "a nuisance to the plaintiff."

In *Winnan v. Winnan*, 1949 Prob. 174 (1948) 2 All Eng. 862 (Court of Appeal 1948), the British Court held that the husband's withdrawal from the parties' home because of the refusal of the wife to remove a large number of pet cats which the wife permitted to roam over the house was justified, and that the wife's acts constituted a "constructive desertion" from the marital relation.

We hold that the trial judge erred in ruling that the plaintiff's withdrawal from the marriage was unjustified; therefore, it was error for the court to award defendant alimony pendente lite and counsel fees.

In regard to the award of custody of the children of the marriage to the defendant, child support, and counsel fees pertaining to that matter, we perceive no abuse of discretion and affirm those portions of the order, including that portion of the order which grants the defendant and the children possession of the parties' home and furniture for the benefit of the children.

Reversed in part; affirmed in part.

Chief Judge BROCK and Judge PARKER concur.

MRS. CAROLYN WALKER HENDRIX, FIFTH WIDOW, CYNTHIA LEE HENDRIX AND MICHAEL LYNN HENDRIX, MINOR CHILDREN, AND MRS. CORDIA FRANCES JARRELL HENDRIX, SIXTH WIDOW OF CHARLES EDWARD HENDRIX, DECEASED, EMPLOYEE-PLAINTIFFS, V. L. G. DEWITT, INC., EMPLOYER, INSURANCE COMPANY OF NORTH AMERICA, CARRIER; DEFENDANTS

No. 7319IC646

(Filed 12 September 1973)

1. **Marriage § 2; Master and Servant § 79— presumption of validity of marriage — workmen's compensation — sixth widow entitled to benefits**

A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it; therefore, in a proceeding to determine whether the fifth widow or the sixth widow of deceased employee was entitled to workmen's compensation benefits, the Industrial Commission properly awarded benefits to the sixth widow where the marriage license for deceased's marriage to her was introduced into evidence and where the fifth widow failed to carry the burden of proof that deceased's prior marriage to her had not been dissolved by divorce prior to his subsequent marriage to the sixth widow.

2. **Marriage § 2; Trial § 6— stipulation as to divorce — interpretation — effect on validity of marriage**

A stipulation between the attorney for deceased employee's sixth widow and the attorney for employer "that there was no divorce of record, and that no one was able to find any record of a divorce" between deceased and his fifth widow is construed by the Court to mean that there was no evidence of record in the county where the Industrial Commission hearing was conducted, and not that there was no divorce of record in any jurisdiction; therefore, the stipulation does not compel the finding that deceased's subsequent marriage to his sixth widow was invalid.

APPEAL by Carolyn Walker Hendrix from opinion and award of the North Carolina Industrial Commission filed 23 February 1973.

This is a proceeding under the Workmen's Compensation Act to determine to whom compensation benefits should be paid on account of the death of Charles Edward Hendrix (Charles), the deceased employee, who died on 30 August 1971 as result of injuries received that day by accident arising out of and in the course of his employment. Awards for the benefit of two minor children are not questioned on this appeal, and the sole question at issue is which of two claimants, Carolyn Walker Hendrix (Carolyn) or Cordia Frances Hendrix (Cordia), is entitled to receive benefits as widow of the deceased employee. At hearings

before Deputy Commissioners evidence was introduced to show the following:

At the time of his death Charles, the deceased employee, was fifty-one years old and had been employed as a long-haul truck driver. He had been married six times, Carolyn being his fifth wife and Cordia his sixth. He was married to Carolyn on 2 October 1963 and they lived together as man and wife until September 1964, when they separated. Thereafter Carolyn and the child born of this marriage lived in the home of her parents in Randolph County, N. C. On 3 December 1968 Charles was married to Cordia in Marlboro County, South Carolina, the marriage license for this marriage being introduced in evidence, and thereafter he and Cordia lived together as man and wife at Route 1, Asheboro, North Carolina, until the date of his death. During this period Charles and Cordia filed joint Federal Income Tax returns, had a joint bank account in the name of Mr. and Mrs. Charles Edward Hendrix, took out life insurance policies in which each named the other as beneficiary, and held themselves out in the community as being man and wife.

Evidence was presented from which the Deputy Commissioner found that Charles's first four marriages were terminated by divorce proceedings, and no exception has been taken to these findings on this appeal. The sole point of contention is whether his fifth marriage, that to Carolyn, had been similarly so terminated. On this point the evidence was as follows:

Carolyn testified:

"No sir, Mr. Hendrix and I were not divorced. He did not get a divorce from me, that I know of. I mean I didn't say he didn't but I have no record or no information about him. Yes, I have searched the records, and they looked, and they couldn't find a record of a divorce. I don't know if he lived outside of Randolph County after we were separated, whether he was out or not, because he drove a truck and I don't know whether he went on long distance trips, so I don't know.

On cross-examination she testified:

"Yes, Charles Hendrix was a truck driver. Well, I guess, he stayed away from the state for extended periods of time after he and I separated. I mean, I knew he drove a long distance truck, but how long he was out of town, I

couldn't tell you. . . . As far as I know I did not have a divorce. . . . Well, yes, I had heard that Charles Hendrix had married Cordia Frances Jarrell Hendrix. . . . I did not receive a divorce, and the records here in Randolph County indicate that there was no divorce granted. Well, there could have been a divorce granted in some other jurisdiction, but Social Security can't find one.

"No, no papers were ever served on me or delivered to me in which he was asking for divorce in this or any other county in the state. The Sheriff has served no process on me at any time."

* * * * *

"Yes, after Mr. Hendrix and I separated I lived in the home of my parents. Well, after my husband and I separated he came by the house several times and I would see him, you know, passing. Yes, he knew where I was. I have been there ever since. Yes, I still reside with my father."

Charles's father testified:

"I do not know whether or not my son, Charles, obtained any divorces in the state of North Carolina from any of the six people who claim to have been married to him. The divorces could have been in any of the 48 states. He traveled from Maine to the State of Washington. He was out of the state and lived in many other states other than North Carolina. I don't know whether he obtained a divorce from Carolyn Hendrix."

Charles's brother testified:

"Yes, I did maintain a close relationship with Charles Edward Hendrix. I knew Cordia Hendrix. I knew about their marriage. Yes, I sure did visit with them during the time they were married from 1968 until the date of my brother's death. Yes, the reputation in the community was that they were married. They lived together as man and wife. Yes, I knew about them going to South Carolina and getting married.

". . . Yes, Carolyn Walker is my brother's former wife. Yes, that marriage was terminated in a divorce. I do not recall when. Yes, it was prior to the marriage of Cordia Frances Jarrell. No sir, I sure don't know where they obtained the divorce.

"Yes, Carolyn Walker Hendrix and my late brother were divorced."

* * * * *

". . . . My brother, Charles, obtained one or two divorces in the State of California and one was obtained in the State of Florida, and one in Randolph County. The one in Randolph County was from . . . the fourth wife. There's been so many, it's hard to keep up with. He lived all over the fifty states about. He stayed gone from Randolph County for an extended period of time ever since he came out of the service in '45."

The Deputy Commissioner found as facts: that neither Charles nor Carolyn ever commenced a divorce proceeding to dissolve their marriage; that they were lawfully married but living apart at the time of Charles's death and Carolyn was so living apart for justifiable cause; and that Charles and Cordia were not lawfully married but were living together at the time of his death. On these findings the Deputy Commissioner entered an award directing payments of benefits to Carolyn as the widow of the deceased employee.

Upon appeal by Cordia to the Full Commission, the opinion and award of the Deputy Commissioner was amended and modified by striking therefrom the findings of fact that neither the deceased nor Carolyn ever commenced a divorce proceeding to dissolve their marriage and that they were lawfully married at the time of his death, the Full Commission finding as a fact on the contrary that the deceased employee and Cordia were legally married and were living together as man and wife at the time of his death. On the revised findings the Full Commission awarded benefits to Cordia as the widow of the deceased employee rather than to Carolyn. To these findings and award of the Full Commission, Carolyn duly excepted and appealed.

H. Wade Yates for appellant, Carolyn Walker Hendrix.

Bell, Ogburn & Redding by J. Howard Redding for appellee, Cordia Frances Hendrix.

PARKER, Judge.

[1] The evidence before the Industrial Commission as to whether the deceased employee's prior marriage to Carolyn had been dissolved by divorce prior to his subsequent marriage to

Cordia was at best contradictory and inconclusive. Upon evidence no more convincing, our Supreme Court in *Chalmers v. Womack*, 269 N.C. 433, 152 S.E. 2d 505, held that the issue as to the validity of a subsequent marriage was properly submitted to the finders of the fact, in that case a jury, and found no error in a judgment entered upon a verdict finding the subsequent marriage valid. The opinion in that case quoted with approval from the decision in *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871, as follows:

> " ' "A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage." . . . (I)t is always for the jury where the demand is for an affirmative finding in favor of the party having the burden, even though the evidence may be uncontradicted. . . . Moreover, proof of the second marriage adduced by the defendant, if sufficient to establish it before the jury, raises a presumption of its validity, upon which property rights growing out of its validity must be based.' "

In the present case, the subsequent marriage between the deceased employee and Cordia being shown, the burden fell upon Carolyn to prove its invalidity. The Industrial Commission, as finder of the facts, has found in effect that Carolyn failed to carry that burden, and this finding will not be disturbed on this appeal.

Appellant cites and relies upon the case of *Williams v. Williams*, 254 N.C. 729, 120 S.E. 2d 68, which was decided by a divided court with three Justices dissenting. Without attempting to distinguish that case, it is our opinion that the present appeal is controlled by the more recent decision in *Chalmers v. Womack, supra*, which was decided by a unanimous court and which is in accord with substantial authority from other jurisdictions. See: Annotation, 14 A.L.R. 2d 7.

[2] The record contains the statement that the attorney for Cordia and the attorney for the employer during a hearing before one of the Deputy Commissioners stipulated "that there was no divorce of record, and that no one was able to find any record of a divorce." In the context in which this stipulation was made, we think it is clear that it meant there was no evidence of record in Randolph County, where the hearing was

conducted, and not that there was no divorce of record in any jurisdiction. In our opinion the stipulation does not, as appellant contends, compel the finding that the subsequent marriage to Cordia was invalid.

The opinion and award of the Industrial Commission is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

STATE HIGHWAY COMMISSION v. SARAH CLICK FERRY AND HUSBAND, ALAN L. FERRY; NANCY CLICK DILLON AND HUSBAND, HENRY E. DILLON; GENE CLICK HEYWOOD AND HUSBAND, WILLIAM F. HEYWOOD

No. 7317SC562

(Filed 12 September 1973)

1. **Eminent Domain § 7— condemnation proceeding — failure of court to limit instruction — error**

In a condemnation proceeding where the landowners' witness testified with respect to property values and then made an incompetent statement to which Highway Commission counsel objected, the trial court erred in instructing the jury to "Disregard what he said about the values when you weigh and consider the matter before you," since this instruction was not limited to the objectionable testimony but was permitted to apply to all of the testimony from the witness pertaining to property values.

2. **Eminent Domain § 7; Trial § 36 — condemnation proceeding — instruction on weight to be given evidence — error**

The trial court in a condemnation proceeding erred in its charge to the jury where it placed an emphasis upon the type of witnesses appearing on behalf of the Highway Commission as contrasted to the laymen who testified on behalf of the landowners and where the court instructed the jury to consider the training, experience, knowledge and ability of various value and appraisal witnesses in determining what weight to give their testimony.

APPEAL by defendants from *Kivett, Judge,* 5 February 1973 Session, Superior Court of SURRY County.

This was a condemnation proceeding wherein the plaintiff, under its right of eminent domain, sought to acquire a fee simple interest in a portion of the property belonging to the defendants

and likewise a perpetual construction easement in a portion of said property.

The property was located in the downtown area in the Town of Elkin and consisted of several acres with a total area of 57,957 square feet. The portion taken consisted of 16,999 square feet and the construction easements contained 883 square feet with the result that the property owners retained 40,075 square feet. There was located on the property an old ante-bellum, two-story frame home built in the year 1855 and in an excellent state of preservation. In connection with the home there were two outbuildings, one being an automobile garage and the other what had formerly been a stable but now converted into a shed. Both of the two outbuildings were in the portion taken. The new highway came within some six to eight feet of the rear of the home. Before the taking the property had a frontage of approximately 106 feet on West Main Street. There was no other street frontage, but there was a 16-foot, paved driveway that extended into the property from Main Street with a turn-around area in the back. The new highway would give access to the remaining property along the rear property line and would leave the access on West Main Street as it had previously been.

The jury found that the benefits to the remaining property were equal to, if not greater than, the value of the property which was taken; and the result was that the property owners received no damages. From a judgment entered upon the jury verdict awarding no damages, the property owners appealed.

Attorney General Robert Morgan by Assistant Attorney General H. A. Cole, Jr., for the plaintiff appellee, State Highway Commission.

Allen, Henderson and Allen by W. Marion Allen and H. F. Henderson; and Folger and Folger by Fred Folger, Jr., for defendant appellants.

CAMPBELL, Judge.

The thrust of this appeal is to the effect that when considered in its entirety, the trial judge interjected his weight and position into the trial and did not remain a completely neutral arbiter between the parties so that the jury was influenced in favor of the Highway Commission and against the landowners. This position is supported by numerous exceptions and assignments of error.

It may well be that no different result will obtain but, nevertheless, we are inclined to agree with the position taken by the landowners and we accordingly award a new trial.

[1] The witnesses, on behalf of the landowners, were not full-time real estate dealers, brokers and appraisers. They were laymen; whereas, those witnesses who testified on behalf of the Highway Commission were full-time real state dealers, brokers and appraisers and so-called "professional" witnesses. A Mr. Norman testified on behalf of the landowners as to his familiarity with the property in question and his background and real estate transactions over the years. He gave his opinion as to the value of the property prior to the taking as contrasted with the value after the taking and came up with a difference of $51,452.00. He then attempted to explain as to how he arrived at the figures that he used, and in doing so referred to another home built near this property some twelve to fourteen years ago and stated, "It was about a $40,000 to $45,000 residence." There had been no showing of similarity or other foundation laid to make this competent. The Highway Commission attorney entered an objection and thereupon the court stated: "Disregard what he said about the values when you weigh and consider the matter before you." This instruction by the trial judge to the jury was not limited to the objectionable testimony and was permitted to apply to all of the testimony from this witness pertaining to the values. This was error.

Again, when a Mr. Chappell, who testified on behalf of the Highway Commission, was being cross-examined by Mr. Allen on behalf of the landowners, he was being questioned as to his familiarity with the property and particularly with reference to the landscaping, shrubbery, etc. The following appears in the record:

> ". . . I made an appraisal on the property on the basis of its highest and best use and its highest and best use being commercial property and commercial properties don't normally recognize plants and trees and so forth. I know that they are used as offices.
>
> COURT: You are saying if it was utilized for its highest and best use they could not contemplate the plants and structures in there?
>
> A. They could not have if they are going to use the property for commercial purposes.

ATTORNEY ALLEN: In other words, you say that to take a person's property and by eminent domain, that is to take it from people, that you had no need to put any value on any of the property taken or lost and that—

ATTORNEY COLE: He just answered that.

COURT: Let him finish the question.

ATTORNEY ALLEN: And that should not be counted as anything at all?

COURT: Objection is sustained. I believe that he explained—

ATTORNEY ALLEN: For commercial purpose because you appraised for commercial purpose?

COURT: You explained did you not that you were commissioned to arrive at a fair market value, in your opinion, immediately before and after?

A. Yes, sir.

COURT: And in arriving at this value you considered the highest and best use and therefore the maximum value would be in terms of utilizing the property for commercial purpose?

A. Yes, sir.

COURT: And therefore you could not contemplate keeping the property in its present state and at the same time treat it as if for commercial purposes?

A. That is right.

COURT: So, in the light of that you did not consider the trees and the shrubs?

A. They were considered but they were not of value when you consider the land being adapted to commercial purposes.

ATTORNEY ALLEN: And you did not consider the taking away of about 28% of the property?

A. My instructions were to make an appraisal of the property before the taking and make an appraisal of the remainder after the taking.

COURT: Inasfar as answering that question, you did take into consideration the entire area before and then you considered afterwards the diminution or reduction in size and you still came to the figure that you gave?

A. Yes, sir."

[2] Again in the court's charge to the jury we find an emphasis placed upon the type of witnesses appearing on behalf of the Highway Commission as contrasted to the laymen who testified on behalf of the landowners. The court stated in its charge:

"Now, at this point I want to instruct you that there are witnesses who are termed value or appraisal witnesses. In a suit such as this value or appraisal witnesses are those that by reason of their training, experience, knowledge and ability, have special qualifications in that particular field in this case having to do with real estate values and in this case you have heard the testimony of various real estate appraisers, both professional and others that have dealt in real estate on their own behalf. In weighing the testimony of these witnesses, you should consider their training, experience, knowledge and ability, and you may give to their testimony and opinions such weight as you reasonably believe that the testimony is entitled to."

The requirement in North Carolina that a trial judge shall refrain from in any way intimating his opinion to the jury has been before the appellate courts innumerable times. Sometimes it has been held that the participation of the trial judge in the trial is not prejudicial as in *Andrews v. Andrews,* 243 N.C. 779, 92 S.E. 2d 180 (1956). In other cases it has been held to be prejudicial. While G.S. 1A-1, Rule 51(a) refers to the judge's charge, nevertheless, the admonition has always been construed to forbid the judge to convey to the jury in any manner at any stage of the trial his opinion on the facts in evidence. *In Re Will of Bartlett,* 235 N.C. 489, 70 S.E. 2d 482 (1952).

In *Upchurch v. Funeral Home,* 263 N.C. 560, 140 S.E. 2d 17 (1965), Justice Moore states:

"The slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any ex-

pression from the bench which is likely to prevent a fair and impartial trial. *State v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29; *State v. Ownby,* 146 N.C. 677, 61 S.E. 630. 'Every suitor is entitled by law to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of properly instructed jury. This right can neither be denied nor abridged.' *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855."

The error of the court in not adhering to this well-settled doctrine requires that another trial be awarded.

New trial.

Judges HEDRICK and VAUGHN concur.

INEZ HOOKER WILLIAMS v. GENERAL MOTORS CORPORATION AND TRADERS CHEVROLET COMPANY

No. 7318SC561

(Filed 12 September 1973)

1. **Courts § 21— breach of warranty — law of place of contract**

The law of the place of contract governs an action for breach of warranty.

2. **Sales § 17; Uniform Commercial Code § 15— breach of warranty — car manufacturer — necessity for privity**

Plaintiff who was injured while driving a borrowed automobile could not recover from the manufacturer of the automobile on the theory of breach of warranty where plaintiff presented no evidence of an express warranty to which she had privity and no evidence of any advertising or directions as to use by the manufacturer so that a warranty could be viewed as running to her, and plaintiff's evidence showed that she was not a member of the family or household or a guest in the home of the buyer so as to escape the privity requirement under the Uniform Commercial Code. G.S. 25-2-318.

3. **Courts § 21; Negligence § 6— res ipsa loquitur — law of place of injury**

Where plaintiff's injury occurs in another state and plaintiff relies on the doctrine of *res ipsa loquitur,* the substantive rights of the parties are governed by the law of such other state.

4. **Negligence §§ 6, 31; Sales § 22— action against car manufacturer — one-car accident — inapplicability of res ipsa loquitur**

The doctrine of *res ipsa loquitur* would not apply under Virginia law in plaintiff's action against a car manufacturer to recover for

injuries received in a one-car accident where plaintiff presented evidence that the accident was caused by a carburetor defect which caused the accelerator to stick, and where plaintiff's evidence showed that the manufacturer did not at all times have exclusive control of the car.

5. **Courts § 21; Negligence § 5— strict liability — what law governs**

Rights of the parties under the doctrine of strict liability are to be determined by the *lex loci deliciti commissi.*

6. **Negligence § 5; Sales § 23— strict liability — car manufacturer**

Under Virginia law, the doctrine of strict liability in tort would not apply in plaintiff's action against a car manufacturer to recover for injuries received in a one-car accident when the accelerator stuck.

7. **Negligence § 29; Sales § 22— one-car accident — action against car manufacturer — insufficiency of evidence of negligence**

In this action against the manufacturer of a 1966 Chevrolet to recover for injuries received in a one-car accident allegedly caused by a defective carburetor which caused the accelerator to stick, plaintiff's evidence was insufficient to be submitted to the jury on the theory of negligence where it tended to show only that there had been a recall of some 1966 Chevrolets because of a carburetor defect but there was no evidence that the carburetor of the car plaintiff was driving was defective, and there was no evidence of any breach of duty with respect to the design, manufacture, inspection or testing of the carburetor on the car plaintiff was driving.

APPEAL by plaintiff from *Exum, Judge,* 10 January 1972 Civil Session of GUILFORD Superior Court.

Plaintiff instituted this action to recover for personal injuries sustained in a one-car automobile accident in Mecklenburg County, Virginia, plaintiff being the driver. At the close of plaintiff's evidence, defendants' motions for directed verdict were granted and from judgment entered in favor of defendants, plaintiff appeals.

Max D. Ballinger for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Beverly C. Moore for defendant appellee General Motors Corporation.

Jordan, Wright, Nichols, Caffrey & Hill by Karl N. Hill for defendant appellee Traders Chevrolet Company.

BRITT, Judge.

Plaintiff's sole assignment of error is the granting of the motions for directed verdict. The test of whether the court may grant a motion for directed verdict in favor of a defendant at

the close of plaintiff's evidence is whether, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff when all the evidence is considered in the light most favorable to the plaintiff. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

Plaintiff's evidence tended to show: She had borrowed the automobile in question from one James Milton for a trip to Baltimore, Maryland. Milton had recently acquired the vehicle, a 1966 Chevrolet Caprice made by defendant General Motors Corporation (GMC), from defendant Traders Chevrolet Company (Traders). She had borrowed the car on other occasions but had never had the accelerator to stick. The accelerator had stuck previously while Milton was driving the car and he had told Mr. Edwards, a salesman of Traders who had sold him the car, about the problem. However, at the time of the accident Milton was not driving or riding in the car and had not had the problem corrected. As plaintiff was driving the borrowed auto along Interstate 85 near Petersburg, Virginia, and where the road came to a dead end, she could not stop the car either by taking her foot off the accelerator, depressing the brakes, or applying the emergency brake. Plaintiff noted that the speedometer registered 90 m.p.h. at this point. All traffic was forced to take an exit ramp by the dead end and in negotiating the ramp plaintiff struck a guardrail due to the excessive speed, left the road, and sustained injuries.

Through the testimony of W. D. McClure of GMC, plaintiff showed that there was a recall of some 1966 Chevrolets due to a problem with the fast idle cam in the carburetor breaking and jamming the throttle open. McClure's testimony also showed that there were specific serial numbers involved, not all 1966 Chevrolet Caprice automobiles were recalled, and he did not know if this particular auto was one of those which should have been recalled.

As to GMC, plaintiff relies on seven theories: (1) misrepresentation, (2) breach of warranty, (3) negligence in design of the accelerator and brake systems, (4) negligence in failure to inspect and test the accelerator and brake systems, (5) negligence in the manufacture and installation of the accelerator and brake systems, (6) negligence under the doctrine of *res ipsa loquitur*, and (7) strict liability in tort.

Plaintiff presented no evidence tending to show representations or misrepresentations made by GMC to anyone.

[1, 2] Plaintiff concedes that as to breach of warranty, the law of the place of the contract governs, *Fast v. Gulley,* 271 N.C. 208, 155 S.E. 2d 507 (1967), and that in this case the place of the contract is North Carolina. It appears to be settled in this jurisdiction that, subject to some exceptions, it is the general rule that only a person in privity with the warrantor may recover on the warranty. *Wyatt v. Equipment Company,* 253 N.C. 355, 117 S.E. 2d 21 (1960). The slight erosion in this State of the privity requirement in breach of warranty actions appears to have been limited to cases involving food, drink and insecticides in sealed containers, which had warnings on the label which reached the ultimate consumer. *Byrd v. Rubber Company,* 11 N.C. App. 297, 181 S.E. 2d 227 (1971). Plaintiff presented no evidence of an express warranty to which she has privity, and no evidence of any advertising or directions as to use by GMC so that a warranty can be viewed as running to her as in the cases of *Tedder v. Bottling Co.,* 270 N.C. 301, 154 S.E. 2d 337 (1967) and *Corprew v. Chemical Corp.,* 271 N.C. 485, 157 S.E. 2d 98 (1967). Neither may plaintiff take advantage of any warranties implied by the Uniform Commercial Code, G.S. Ch. 25, since her evidence shows that she is not a member of the family or household or a guest in the home of the buyer so as to escape the privity requirement. G.S. 25-2-318.

[3] As to *res ipsa loquitur,* our Supreme Court has held that where the plaintiff's injury occurs in Virginia and plaintiff relies on the doctrine of *res ipsa loquitur,* the substantive rights of the parties are governed by the law of that state. *Jones v. Elevator Co.,* 234 N.C. 512, 67 S.E. 2d 492 (1951). Therefore, we look to the law of Virginia for the law of this case on that theory.

In *Arnold v. Wood,* 173 Va. 18, 25, 3 S.E. 2d 374, 376 (1939), we find:

> "* * * [I]t is well settled in this State that this doctrine applies only in the absence of evidence and when the cause of the accident is not explained. It does not apply where, as in the instant case, there is evidence explaining the cause of the accident. *Richmond v. Hood Rubber Products Co.,* 168 Va. 11, 16, 17, 190 S.E. 95; *Norfolk Coca-Cola Bottling Works, Inc. v. Krausse,* 162 Va. 107, 115, 173 S.E. 497; *Riggsby v. Tritton,* 143 Va. 903, 912, 129 S.E. 493, 45 A.L.R. 280."

"* * * The doctrine rests upon the assumption that the thing which causes the injury is under the exclusive management and control of the defendant, and that the accident is such as in the ordinary course of events does not happen without fault on the part of the defendant. *Duke v. Luck,* 150 Va. 406, 412, 143 S.E. 692. But the doctrine does not apply in the case of an unexplained accident which may have been attributable to one of several causes, for some of which the defendant is not responsible. *Peters v. Lynchburg Light & Traction Co.,* 108 Va. 333, 337, 61 S.E. 745, 22 L.R.A. (N.S.) 1188; *Riggsby v. Tritton, supra* (143 Va. 903, at pages 914, 915, 129 S.E. 493, 45 A.L.R. 280)."

[4] In the instant case plaintiff had ready access to the cause of the accident and, indeed, put on evidence as to the cause. Therefore, this is not a case of an unexplainable event so that the doctrine would apply under Virginia law. In addition, plaintiff's evidence clearly shows that GMC did not at all times have exclusive control over the automobile, and there was ample time after the vehicle left the hands of GMC during which time something else could have happened to it which could cause the accident.

[5] Strict liability is similar to the doctrine of *res ipsa loquitur* in that it creates substantive rights in the parties. This being true, under the strict liability theory the rights of the parties in this case will be determined by the *lex loci deliciti commissi,* which is the law of Virginia. *Shaw v. Lee,* 258 N.C. 609, 129 S.E. 2d 288 (1963); *Jones v. Elevator Co.,* 234 N.C. 512, 67 S.E. 2d 492 (1951); *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911 (1943).

In the case of *Olds v. Woods,* 196 Va. 960, 86 S.E. 2d 32 (1955), the Virginia court recognized the rule that a manufacturer or seller of an inherently dangerous article, or one which becomes so when used in its intended and customary manner, is liable to any person, who, without fault on his part, sustains an injury which is the natural and proximate result of negligence in the manufacture or sale of the article. But our research of Virginia law reveals no case where the court has held that an automobile is an article which is inherently dangerous or which becomes so when used in its normal manner. We, therefore, find it necessary to speculate as to how the Virginia court would hold were it presented this problem. *Cooper v. American Airlines,* 149 F. 2d 355 (2d Cir. 1945).

[6] In *Olds, supra,* the court held that a hair shampoo was not inherently dangerous. In *Bronze Corporation v. Kostopulos,* 203 Va. 66, 122 S.E. 2d 548 (1961), the court did not apply this doctrine to sliding glass doors which allowed water to penetrate hotel rooms. In *Green & Company v. Thomas,* 205 Va. 903, 140 S.E. 2d 635, 9 A.L.R. 3d 376 (1965) the court refused to apply *res ipsa loquitur* in a blasting case which was apparently tried on a strict liability theory. In view of this last case, which presented a situation in which strict liability is by far the most commonly applied, we are of the opinion that the Virginia court, faced with the situation in the present case, would refuse to apply the doctrine of strict liability in tort.

[7] Plaintiff's other theories of negligence can be treated identically. Again the *lex loci delicti commissi* will apply and again we look to the law of Virginia. The law of negligence in Virginia requires that there be a duty, a breach thereof, and consequent harm resulting therefrom. *Manieri v. S. A. L. Ry. Co.,* 147 Va. 415, 137 S.E. 496 (1927); *Boggs v. Plybon,* 157 Va. 30, 160 S.E. 77 (1931); *Filer v. McNair,* 158 Va. 88, 163 S.E. 335 (1932); *C. D. Kenny Co. v. Dennis,* 167 Va. 417, 189 S.E. 164 (1937); *Cleveland v. Danville, etc., Co.,* 179 Va. 256, 18 S.E. 2d 913 (1942); *Trimyer v. Norfolk Tallow Co.,* 192 Va. 776, 66 S.E. 2d 441 (1951); *Bartlett v. Recapping, Inc.,* 207 Va. 789, 153 S.E. 2d 193 (1967). In this case there is no evidence that there has been any breach of duty with respect to the design, manufacture, inspection, or testing of the carburetor on the car complained of. There is evidence that the carburetors of some 1966 Chevrolets were defective but there is none to show that the carburetor of the car involved in this action was one of those which was defective and caused the harm suffered by plaintiff.

We conclude that as a matter of law, on the evidence presented in this action, plaintiff could not recover from GMC on any of her theories and that the trial judge was correct in directing a verdict in GMC's favor.

The plaintiff relied on five theories as to Traders: breach of warranty, misrepresentation, negligence under the doctrine of *res ipsa loquitur,* negligence in failure to inspect and test the brake and accelerator systems, and strict liability in tort. The same reasoning which applies in the case against GMC applies as to Traders on all these theories. There could be no recovery under express warranty because there was no evidence as to

any warranties, directions as to use, or advertising. There could be no recovery by implied warranty since the plaintiff is not one of those persons to whom the implied warranties extend by G.S. 25-2-318. There is no evidence of any representations or any failure on the part of Traders to inspect and test the auto that plaintiff was driving. And finally under the law of Virginia the doctrines of strict liability and *res ipsa loquitur* would not apply.

Therefore, as a matter of law plaintiff could not recover from Traders on any theory advanced and the trial judge was correct in directing a verdict in Traders' favor.

Affirmed.

Judges MORRIS and PARKER concur.

GEORGE HARVEY CAMPBELL, INDIVIDUALLY AND AS REPRESENTATIVE OF THE CITIZENS AND TAXPAYERS OF DURHAM, NORTH CAROLINA v. FIRST BAPTIST CHURCH OF THE CITY OF DURHAM, AN UNINCORPORATED ASSOCIATION; THE CITY OF DURHAM; AND THE REDEVELOPMENT COMMISSION OF THE CITY OF DURHAM

No. 7314SC488

(Filed 12 September 1973)

Injunctions §§ 4, 7; Municipal Corporations § 22— property exchange between city and church — failure to comply with statute — denial of motion for preliminary injunction error

In an action to have declared ultra vires and invalid an exchange of property between the defendant Church and the defendant Redevelopment Commission which was executed by an exchange of deeds on 19 January 1973, the trial court erred in denying plaintiff's motion for a preliminary injunction to enjoin all defendants from exercising any rights of ownership or occupancy of the exchanged property pending trial on the merits where plaintiff's evidence tended to show that the defendant Redevelopment Commission, in violation of G.S. 160-464(e)(4), did not (1) advertise for a public hearing upon the proposal to exchange property with the defendant Church, and (2) appoint a commission of three real estate appraisers to agree upon the fair value of the property to be exchanged, and where the evidence tended to show that the value of the property to be exchanged was set by defendants Redevelopment Commission and City of Durham at approximately $90,000 less than its fair market value, that defendant Church had changed and would continue to change the topography of the property if not restrained, and that defendant City of Durham intended to use the property it received in the exchange for street purposes if not restrained.

APPEAL by plaintiff from an order entered by *Hall, Judge,* on 23 February 1973 in the Superior Court in DURHAM County.

By his first cause of action, plaintiff seeks to have the Court declare ultra vires and invalid an exchange of property between the defendant Baptist Church and the defendant Redevelopment Commission which was executed by an exchange of deeds on 19 January 1973. It is plaintiff's contention that the exchange was made by the Commission, without its first complying with G.S. 160-464(e)(4). Particularly, plaintiff contends the exchange was made at less than fair value for the Commission property.

By his second cause of action, plaintiff seeks to have the Court declare ultra vires and invalid the obligations and undertakings agreed to by the defendant City of Durham in the Cooperation Agreement on 25 July 1968. It is plaintiff's contention that the City undertook to pledge its faith and lend its credit to the defendant Commission without first submitting the proposal to a vote of the people in accordance with Article V, Section 2 and Section 4 of the Constitution of North Carolina.

Plaintiff filed a motion for temporary restraining order and a motion for a preliminary injunction contemporaneously with the filing of the complaint on 7 February 1973. Notice of the motion for a preliminary injunction was also filed.

Following an ex parte hearing on plaintiff's complaint and motion, on 13 February 1973, Honorable Sammie Chess, Jr., Judge of Superior Court, issued a temporary restraining order which restrained all defendants from exercising any rights of ownership or occupancy of the exchanged property. On 23 February 1973, the matter was heard again by Honorable Clarence W. Hall, Resident Judge of Superior Court.

At the time of the hearing on 23 February 1973, before Judge Hall, defendants had not filed answers to the complaint or to the motion for a preliminary restraining order, and defendants offered no evidence in the hearing before Judge Hall.

By the verified complaint, and the verified motion for a preliminary restraining order, both considered as affidavits for the purpose of the hearing, and the testimony offered by plaintiff at the hearing before Judge Hall on 23 February 1973, plaintiff offered evidence which tended to show the following:

The Markham property which adjoins the property of the defendant Baptist Church was acquired by condemnation by the

Redevelopment Commission at the price of $164,300.00. Approximately 15.8 per cent of the Markham property was subsequently utilized for the purpose of widening the streets on its northern and eastern boundaries. The Redevelopment Commission determined, and the City of Durham concurred, that the Commission would exchange the remaining Markham property for a price of $15,614.00. The exchange was to be made with the defendant Baptist Church for a twelve foot strip of its lot along Roxboro Street for a price of $17,500.00. This twelve foot strip was to be used in widening Roxboro Street. The exchange was made on 19 January 1973. The fair market value of the Markham property at the time of the exchange was $105,000.00, more than $89,000.00 in excess of the price for which the exchange was made. After 19 January 1973, some of the trees and shrubbery were cut and removed from the Markham property, and it was the intention of defendant Baptist Church to carry out its plan of clearing and leveling the land, paving of a part or all thereof, construction of entrances and exits, and the erection of other improvements. The defendant City of Durham intends to immediately use for street purposes the twelve foot strip of land obtained from defendant Baptist Church in the exchange. Plaintiff's evidence further tended to show that the defendant Redevelopment Commission did not advertise for a public hearing upon the proposed property exchange and did not appoint a committee of appraisers for the purpose of agreeing upon the fair value of the property to be exchanged. The Council of defendant City of Durham approved the exchange at the price of $15,614.00 because the exchange was with a church, not because the price represented fair value.

Judge Hall dissolved the temporary restraining order and denied plaintiff's motion for a preliminary injunction pending trial on the merits, and denied plaintiff's motion for injunction pending appeal.

Plaintiff appealed.

Blackwell M. Brogden, for the plaintiff.

Daniel K. Edwards, for the defendants, Redevelopment Commission of the City of Durham and First Baptist Church of the City of Durham.

Rufus C. Boutwell, Jr., for the defendant, City of Durham.

BROCK, Chief Judge.

G.S. 160-464(e)(4) provides:

"After a public hearing advertised in accordance with the provisions of G.S. 160-463(e), and subject to the approval of the governing body of the municipality, convey to a nonprofit association or corporation organized and operated exclusively for educational, scientific, literary, cultural, charitable or religious purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, such real property as, in accordance with the redevelopment plan, is to be used for the purposes of such associations or corporations. Such conveyance shall be for such consideration as may be agreed upon by the commission and the association or corporation, which shall not be less than the fair value of the property agreed upon by a committee of three professional real estate appraisers currently practicing in the State, which committee shall be appointed by the commission. All conveyances made under the authority of this subsection shall contain restrictive covenants limiting the use of property so conveyed to the purposes for which the conveyance is made."

According to plaintiff's evidence at the hearing before Judge Hall on plaintiff's motion for a preliminary injunction the defendant Redevelopment Commission did not (1) advertise for a public hearing upon the proposal to exchange property with the defendant Baptist Church, and did not (2) appoint a commission of three real estate appraisers to agree upon the fair value of the property to be exchanged. It appears that compliance with the terms of the statute by the Redevelopment Commission is necessary before it can legally make an exchange as described by plaintiff's evidence. Therefore, if the Redevelopment Commission makes such an exchange without effectively complying with the statute, its acts outside of its authority. It appears, therefore, that plaintiff's evidence makes a prima facie showing of a right to the relief requested in his first alleged cause of action.

According to plaintiff's evidence at the hearing before Judge Hall on plaintiff's motion for a preliminary injunction the value of the property to be exchanged was set by defendants Redevelopment Commission and City of Durham at $15,614.00, but that the fair value thereof is $105,000.00. Also, that the de-

fendant Baptist Church has and will continue to change the topography of the property if not restrained. According to said evidence the defendant City of Durham will use for street purposes the twelve foot strip of property received from the defendant Baptist Church in the exchange, if not restrained. It appears, therefore, that plaintiff has made a prima facie showing that the status quo should be maintained to protect plaintiff's rights until the controversy can be determined on its merits.

In our opinion the preliminary injunction should have been issued enjoining defendant Baptist Church from exercising any right or privilege of ownership or occupancy of the premises known as 506 Cleveland Street, bounded by Cleveland, Elliott and Roxboro Streets in the city of Durham, which premises is described in a purported conveyance from the Redevelopment Commission of the City of Durham on 19 January 1973, to the defendant Baptist Church in accordance with an exchange agreement. This injunction should extend to enjoin said defendant from the destruction and removal of trees and shrubbery, the clearing and leveling of the land, or the construction of improvements thereon.

Also, in our opinion the preliminary injunction should have been issued enjoining the defendant City of Durham and the defendant Redevelopment Commission from exercising any right or privilege of ownership or occupancy in that strip of land, twelve feet in width, along Roxboro Street which was described in a purported conveyance from the defendant Baptist Church to the defendant Redevelopment Commission on 19 January 1973 in accordance with an exchange agreement. This injunction should extend to enjoining said defendants from destruction of existing improvements on the land, the clearing and leveling of the land and the construction of streets or other improvements thereon.

The order appealed from insofar as it denied plaintiff's motion for a preliminary injunction, is reversed and this cause is remanded to the Superior Court in Durham County for entry of a preliminary injunction in accordance with this opinion.

Reversed and remanded.

Judges VAUGHN and BALEY concur.

LESSIE McNEIL v. PILOT LIFE INSURANCE COMPANY

No. 738DC516

(Filed 12 September 1973)

1. **Insurance §§ 51, 67— accidental death — proof of death within 90 days — sufficiency**

In an action to recover benefits under the accidental death provisions of an insurance policy issued by defendant, the trial court erred in directing verdict for defendant on the ground that plaintiff failed to prove that the death of insured occurred within 90 days of the accident causing death where plaintiff offered into evidence the death certificate of the insured, showing that the immediate cause of death was "Pistol Shot in Head," and that the "interval between onset and death was approximately 2½ hours."

2. **Insurance § 46— death from pistol shot — presumption of death by accident**

Where there is proof that the death of insured occurred by unexplained external and violent means and under circumstances not wholly inconsistent with an assumption of accidental means, the presumption arises that the means were accidental; therefore, where plaintiff's evidence tended to show that death of insured was caused by an unexplained pistol shot in the head, plaintiff's evidence made out a prima facie case of death by accidental means, and the trial judge erred in directing verdict for defendant insurer.

3. **Insurance §§ 66, 67— failure to give notice and proof of loss — waiver by insurer**

Failure to give notice or furnish proof of loss within the time provided by the contract of insurance is waived by a denial of liability, within such time, on other grounds, since to require notice under such circumstances would require the doing of a vain thing; therefore, proof by plaintiff that notice of insured's death had been given defendant within 90 days was not required where defendant denied liability on the ground that deceased was killed by an intentional act rather than by accident.

APPEAL by plaintiff from *Wooten, District Court Judge,* 14 February 1973 Session of District Court held in WAYNE County.

Plaintiff seeks to collect $5,000 as designated beneficiary under the accidental death provisions of an insurance policy issued by defendant to James Jack McNeil, the insured.

The policy in question was issued on or about 6 April 1959. The insured died on 10 August 1970 as a result of a pistol shot in the head. At the time of his death, the death benefit of the policy was $5,000. Plaintiff is the surviving spouse of the insured and the named beneficiary of the policy in question.

The policy covered the life of the insured in instances where death was caused "solely as a direct result, and independent of all other causes, of accidental bodily injury." The policy specifically excepts coverage for any loss caused or contributed to by "an intentional act of any person."

Plaintiff offered into evidence the policy, the death certificate of the insured, admissions in defendant's answer, and answers to plaintiff's interrogatories. The death certificate stated that the immediate cause of death was by a pistol shot in the head; that an autopsy was performed, and that death was the result of an act of homicide. At the conclusion of plaintiff's evidence, defendant moved for a directed verdict on grounds that plaintiff had failed to prove that the death of the insured arose solely as a direct result of accidental bodily injury, failed to prove the giving of notice and filing of proof of claim or proof of death within required time specified by the policy, and that mere introduction of the death certificate, stating death caused by homicide, is not sufficient evidence to survive defendant's motion for a directed verdict. The motion was denied.

Defendant presented testimony of a witness present when the insured was shot. The insured was at the home of Mertie B. Shackleford at the time of the shooting. Witness said he heard one shot but did not see a firearm nor the manner in which the insured was shot. The investigating police officer testified to finding the insured in the Shackelford home, a wound in the head of the insured, a .22 caliber pistol in the home, and observing the removal of two bullets from the body of the insured during an autopsy, one of which came from the head of the insured. Defendant also introduced into evidence three exhibits: (1) a transcript of a guilty plea to manslaughter, (2) an adjudication of the voluntariness of the guilty plea in that case, and (3) a judgment suspending sentence in State v. Myrtle Bee Shackleford. Defendant's exhibits also fail to show any connection with the death of the insured.

At the close of defendant's evidence, defendant renewed the motion for a directed verdict which was allowed.

Sasser, Duke & Brown, by John E. Duke, for the plaintiff.

Taylor, Allen, Warren & Kerr, by James J. Edmondson and John H. Kerr III, for the defendant.

BROCK, Chief Judge.

The trial judge granted defendant's motion for a directed verdict upon the two grounds set out by defendant, i.e., (1) that plaintiff failed to prove that the death of insured arose "solely as a direct result, and independent of all other causes, of accidental bodily injury" sustained after the effective date of the policy, and that the loss occurred within ninety days of the accident causing such loss; and (2) that plaintiff failed to prove filing of proof of loss within ninety days after the date of loss.

The insurance contract in suit provides for payment of benefits for certain scheduled losses, death being included, "if such loss occurs within ninety days after the date of the accident causing such loss." The contract further provides for notice of claim (proof of loss) as follows: "Written notice of claim must be given to the Company within twenty days after the occurrence of any loss covered by the policy, or as soon thereafter as is reasonably possible."

[1] The trial judge was in error in directing a verdict upon the first ground asserted by defendant. To establish the death of the insured within the terms of the insurance contract, plaintiff offered in evidence the death certificate of the insured. The certificate showed the date of death of insured to be 10 August 1970, and that the immediate cause of death was "Pistol Shot in Head." It further showed that the "interval between onset and death was approximately 2½ hours."

[2] It seems that this clearly constitutes evidence that the loss occurred within ninety days of the accident causing such loss so as to overcome defendant's motion so far as that point is concerned. Also, the greater weight of the authorities supports the rule that proof that the death of the insured occurred by unexplained external and violent means, and under circumstances not wholly inconsistent with an assumption of accidental means, the presumption arises that the means were accidental. Annot. 12 A.L.R. 2d 1264, *Barnes v. Insurance Company,* 271 N.C. 217, 155 S.E. 2d 492. The statement in the death certificate that death was the result of an act of homicide does not constitute conclusive evidence that the death was the result of an intentional act. Homicide is defined as "[t]he killing of any human creature." "The killing of one human being by an act, procurement, or omission of another." "The act of a human being taking away the life of another." Black's Law Dictionary, Fourth Edition. A homicide often is an intentional act, but it is not neces-

sarily so. An *un*intended killing of one human being by another is also a homicide.

In our view, this evidence of death (a homicide) caused by an unexplained pistol shot in the head is not wholly inconsistent with an assumption that the shot was inflicted solely by accidental means. Therefore, plaintiff's evidence made out a prima facie case of death by accidental means. Defendant's evidence that a Mertie Bee Shackleford entered a plea of guilty to manslaughter may serve to create some suspicion, but it was not tied in any way to the death of insured and therefore had no probative value.

[3] The trial judge was also in error in directing a verdict upon the second ground asserted by defendant (that plaintiff failed to prove that proof of loss was given within ninety days after the date of the accident causing such loss).

Defendant's answer does not allege a denial of payment of the claim because of plaintiff's failure to give proof of loss within the terms of the policy. Its answer admits that it has refused to pay the plaintiff any sum, and its answer to interrogatories admits that its records reflect the date of death of deceased, and that it investigated the circumstances of the death of deceased. Defendant affirmatively asserts in its answer that it is not indebted to plaintiff under the insurance contract because the death of deceased was caused or contributed to by an intentional act of Mertie Bee Shackleford. It is clear from defendant's answer that it is not concerned over a proof of loss; actual notice is admitted. The reasonable inference from the pleadings and the evidence is that proof of loss was filed in accordance with the terms of the policy. The general rule seems to be that failure to give notice or furnish proofs of loss within the time provided by the contract is waived by a denial of liability, within such time, on other grounds. The reason being that to require notice under such circumstances would require the doing of a vain thing. *Gorham v. Insurance Company,* 214 N.C. 526, 200 S.E. 5, and cases cited. From the posture of the pleadings and the evidence as shown by the record on appeal, the inference is strong that notice (proof of loss) was given to defendant within the time specified in the insurance contract and that defendant denied liability upon the grounds that deceased was killed by an intentional act. This being the situation, proof by the plaintiff that notice (proof of loss) had been given would be a vain thing because defendant denied liability upon other

grounds. The law is not disposed to require a vain thing. *Gorham v. Insurance Company, supra.*

We express no view upon plaintiff's right to recover, we are only ruling upon the propriety of a directed verdict for defendant under the circumstances presented by this record on appeal.

New trial.

Judges HEDRICK and VAUGHN concur.

JUNE P. WHITEHURST v. VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED AND CAROLINA COACH COMPANY

No. 731SC286

(Filed 12 September 1973)

1. **Carriers § 19— injury to bus passenger — leased bus — rights between owner and carrier — retrial**

Action to recover for injuries received by a passenger on a bus leased by defendant common carrier from defendant owner when the bus left the highway and struck a culvert is remanded to the superior court for a retrial as to the relative rights between the carrier and the owner in accordance with the rules of law stated in *Mann v. Transportation Co.*, 283 N.C. 734, an action by other passengers to recover for injuries received in the same accident.

2. **Limitation of Actions § 12; Rules of Civil Procedure § 41—dismissal without prejudice — statute allowing new action within one year — action commenced after one year — statute of limitations not expired**

The provision of G.S. 1A-1, Rule 41(a)(1), permitting a new action to be commenced within one year after a dismissal without prejudice of an action based on the same claim is an extension of time beyond the statute of limitations and does not limit the time for bringing a new action to one year if the statute of limitations applicable to the action has not expired.

APPEAL by Virginia Dare Transportation Company from *Cowper, Judge,* 23 October 1972, Civil Session, PASQUOTANK Superior Court.

This is a civil action for personal injuries instituted by June P. Whitehurst. On 17 September 1968, she was a paying passenger on a bus owned by the defendant, Carolina Coach Company (Coach Company) and operated by the defendant Virginia Dare Transportation Company (Transportation Company)

under a lease arrangement when the bus was involved in a single vehicle accident. Plaintiff alleges that the accident was caused by the joint negligence of Transportation Company in the driving of the bus by its employee and by mechanical failure of the bus due to the negligence of Coach Company in maintenance of the bus.

At the close of the plaintiff's evidence, a motion for a directed verdict in favor of Coach Company was sustained as to plaintiff. Plaintiff did not appeal.

Transportation Company introduced evidence as to its version of the accident in the principal action and on its cross action against Coach Company seeking either indemnification or contribution from Coach Company. At the close of that evidence the motion of Coach Company for a directed verdict was sustained as to Transportation Company. From this result, Transportation Company appealed.

The case was submitted to the jury as between plaintiff and Transportation Company. The jury answered the issues in favor of the plaintiff and awarded damages in the sum of $30,206.09. From a judgment in accordance with the verdict, Transportation Company appealed.

Twiford, Abbot & Seawell by Christopher L. Seawell for plaintiff appellee.

J. Kenyon Wilson, Jr.; and White, Hall & Mullen by Gerald F. White and John H. Hall, Jr., for defendant appellant, Virginia Dare Transportation Company, Incorporated.

James, Speight, Watson & Brewer by W. W. Speight and William C. Brewer, Jr.; and Allen, Steed and Pullen, by Arch T. Allen III for defendant appellee, Carolina Coach Company.

CAMPBELL, Judge.

Other passengers on the bus at the time instituted similar actions for their personal injuries in Dare County. These actions were consolidated for trial and are entitled *Pernell R. Mann v. Virginia Dare Transportation Company, Inc. and Carolina Coach Company* and *Sally Baum Tillett v. Virginia Dare Transportation Company, Inc. and Carolina Coach Company.* They are reported in 283 N.C. 734, 198 S.E. 2d 558 (1973). The facts in the *Mann* and *Tillett* cases are sufficiently similar to the facts in the intsant case that they will not be repeated but simply refer-

red to. The plaintiff in the instant case was asleep at the time of the accident and gave no testimony as to how the accident occurred.

Pernell Mann in this case testified on behalf of the plaintiff as to how the accident occurred. Her testimony in the instant case varied somewhat from her previous testimony in that she was quite definite to the effect that the driver of the bus did not attempt to turn the bus to the left until after it had hit something in the ditch, her testimony being:

> ". . . Before the bus hit the ditch I saw him trying to turn the wheel—no, after he hit the ditch he started pulling—after he hit the ditch he started pulling the steering wheel, tried to pull the bus back on the road. The bus did not come back on the road after it hit the ditch. It kept on down that shoulder. . . ."

And on cross-examination she testified:

> "The accident happened at a curve that was bearing to the left the way we were going. It was a gradual curve, not a sharp curve, but a gradual curve. And the bus gradually went to the ditch after it left the paved surface, yes. The driver turned the steering wheel after the accident took place. I mean after the accident took place, after it left the road. After he left the road he hit something, and he tried to turn it back on the road. He turned the steering wheel, I don't know whether it went to the left or not. He turned the steering wheel—I know he turned the steering wheel to the left. But the bus didn't go to the left. . . ."

Thus, the witness Mann did not corroborate the bus driver as she had done on the previous trial of her own case as pointed out in the opinion of Justice Sharp.

[1] Despite this slight variance in the testimony, we nevertheless feel that the decision of Justice Sharp is controlling in this case as to the dispute between the two companies. We therefore refer to the opinion of Justice Sharp in the *Mann* and *Tillett* cases.

There are other features of this case, however, which are dissimilar and not controlled by the opinion of Justice Sharp in the *Mann* and *Tillett* cases. We will discuss these features.

Plaintiff filed her original action on 11 September 1969, and on 15 May 1970 filed notice of voluntary dismissal without prejudice under G.S. 1A-1, Rule 41(a)(1). The complaint in the case at bar was filed on 29 June 1971, more than one year after the voluntary dismissal previously taken but within the three-year statute of limitations from the date of the accident.

Transportation Company moved for summary judgment under G.S. 1A-1, Rule 56, because of the lapse of time between the voluntary dismissal and the new action. This motion was denied and is the subject of an exception and an assignment of error.

In support of its motion for summary judgment Transportation Company relies upon Rule 41(a)(1) which reads in part:

> ". . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced *within one year after such dismissal.* . . ." (Emphasis added.)

The above provision is not the major accomplishment of Rule 41(a)(1) however. With respect to "voluntary nonsuit" North Carolina followed the common law practice that a plaintiff could abandon his action without losing the right to relitigate at any time before verdict. The major thrust of Rule 41(a)(1) is to limit the time within which a plaintiff has the absolute right to dismiss his action without prejudice, which period is now any time before he rests his case. The provision for bringing a new action came from G.S. 1-25, repealed upon adoption of the new Rules of Civil Procedure.

The pertinent part of G.S. 1-25 provided:

> "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, . . . the plaintiff . . . *may commence a new action within one year after such nonsuit.* . . ." (Emphasis added.)

[2] It was the opinion of writers at the time of the adoption of Rule 41 that the provisions of that rule follow G.S. 1-25 without change, and the wording of the rule would so indicate. See Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Intra. L. Rev. 1 (1969). Professor Sizemore was a member of the drafting committee for the North Carolina Rules of Civil Procedure. See also, Smith, Trial Under the New Rules, 5 Wake Forest Intra. L. Rev. 138 (1969); McIntosh,

N. C. Practice and Procedure, § 1647 (Phillips Supp. 1970). The key words of G.S. 1-25 and Rule 41 on relitigation are the same: The plaintiff may commence a new action "within one year after such dismissal (nonsuit)." These words do not mean what Transportation Company ascribes to them. It has long been held that G.S. 1-25 did not apply when the party would not otherwise be barred from his right of action by the lapse of time prescribed by the statute of limitation relating to the cause of action. *Lumber Co. v. Hayes,* 157 N.C. 333, 72 S.E. 1078 (1911); *Grimes v. Andrews,* 170 N.C. 515, 87 S.E. 341 (1915); *Bradshaw v. Bank,* 172 N.C. 632, 90 S.E. 789 (1916); *Summers v. R. R.,* 173 N.C. 398, 92 S.E. 160 (1917); *Van Kempen v. Latham,* 201 N.C. 505, 160 S.E. 759 (1931). When the General Assembly adopted the provisions of G.S. 1-25 into Rule 41(a)(1), it is our opinion that it adopted also that body of case law interpreting G.S. 1-25, the effect being that it is an extension of time beyond the general statute of limitation rather than a restriction upon the general statute of limitation. In other words, a party always has the time limit prescribed by the general statute of limitation and in addition thereto they get the one year provided in Rule 41(a)(1). But Rule 41(a)(1) shall not be used to limit the time to one year if the general statute of limitation has not expired. This assignment of error of Transportation Company is denied.

Transportation Company also assigned as error several portions of the charge of the trial judge. We have reviewed each of these assignments of error and find them to be without merit. The charge, when read in context and as a whole, is free from prejudicial error in our opinion.

We therefore affirm that portion of the judgment which awarded damages to the plaintiff against Transportation Company.

We remand to the Superior Court of Pasquotank County for a retrial as to the relative rights between Transportation Company and Coach Company in accordance with the rules of law stated in the opinion of Sharp, J., in the *Mann* and *Tillett* cases.

Affirmed in part.

Reversed and remanded in part.

Judges PARKER and VAUGHN concur.

IN THE MATTER OF THE WILL OF ETHEL E. HERRING, DECEASED

No. 734SC120

(Filed 12 September 1973)

1. **Rules of Civil Procedure § 59— motion to set aside verdict and for new trial — review**

Where no question of law or legal inference is involved, a motion to set aside the verdict is addressed to the sound discretion of the trial court and its ruling is not subject to review in the absence of an abuse of discretion, but when a judge presiding at a trial grants or refuses to grant a new trial because of some question of law or legal inference which the judge decided, the decision may be appealed and the appellate court will review it.

2. **Appeal and Error § 62; Rules of Civil Procedure § 59— new trial for errors of law — failure to specify errors — result**

Where the trial court erred in setting aside the verdict and ordering a new trial for errors of law committed at trial without specifying the errors upon which his action was based, the court on appeal would ordinarily reverse the order and remand the case for entry of judgment on the verdict; however, where the ends of justice require, the court will order the verdict rendered to be set aside and a new trial had.

3. **Rules of Civil Procedure § 59; Wills § 23— probate of lost holographic will — error in instructions — new trial ordered**

In a proceeding to probate an alleged lost holographic will of testatrix, the trial court incorrectly instructed the jury on the quantum of proof required to show the existence of a lost instrument; therefore, since the trial court's order setting aside the verdict may not be affirmed because of errors appearing on the face of the record, and since to reverse and remand the case for entry of judgment on the verdict rendered would invite an appeal by the caveators which could only result in a new trial, and since the ends of justice require a new trial, the order appealed from is vacated and a new trial ordered.

APPEAL by propounder from *Peel, Judge,* 28 August 1972 Session of Superior Court held in SAMPSON County.

This is a civil proceeding, instituted before the Clerk of Superior Court of Sampson County, to probate in solemn form an alleged lost holographic will of Ethel E. Herring who died on 20 March 1969. The respondents, Robert Herring, Martha H. Lowder, Ellen H. Smith, James Herring, A. Whitfield Herring, Mary H. Johnston and Tabitha Herring (caveators) filed an answer denying the material allegations of the petition; whereupon, by order of the clerk, the case was transferred to the civil

issue docket of the superior court for trial. The following issues were submitted to and answered by the jury as indicated:

"1. Was there a paper writing containing the language which is on propounders' exhibit 3, including Ethel Herring's name, and was the said paper writing found among her valuable papers and effects after her death, as alleged by the propounders?

ANSWER: Yes.

2. If so, was said paper writing and every part thereof in the handwriting of the deceased Ethel Herring, and was it her intention that the said paper writing should be operative as her last will and testament?

ANSWER: Yes.

3. If so, has the said paper been lost or destroyed since the death of Ethel Herring, as alleged by the propounders?

ANSWER: Yes.

4. Is said paper writing the valid and last will and testament of said Ethel Herring?

ANSWER: Yes."

Upon rendition of the verdict, the caveators moved, pursuant to G.S. 1A-1, Rule 59, for a new trial (1) "because of the insufficiency of the evidence to justify a verdict and also on the basis that the evidence of testamentary intent was not present" and (2) pursuant to Rule 59(a)(8), for "error in law during the trial, objected to by the caveators or respondents."

On 15 September 1972, the trial judge entered an order in pertinent part as follows:

"[T]he court, being of the opinion that the verdict of the jury should be set aside as a matter of law for the following reasons:

(a) That Nello L. Martin, Administrator DBN, was appointed to said office on August 28, 1972, and was served a citation in the cause on August 28, 1972, but that said Administrator, who was a necessary party, under the facts of this case did not have as a matter of law ample time within which to appear, file pleadings and adequately participate in the trial.

(b) That errors of law were committed by the Court during the trial which were materially prejudicial to the caveators.

IT IS NOW ORDERED by the Court *upon its own motion* that the verdict herein rendered as aforesaid, for the reasons above set out, be and the same is hereby set aside and a new trial granted.

By stipuation of the parties, this Order is signed more than ten days subsequent to the end of the August 28, 1972, Session of the Sampson County Superior Court, and is also signed out of the County." (Emphasis ours.)

The propounder appealed.

Chambliss, Paderick & Warrick by Benjamin R. Warrick for propounder appellant.

Warren & Fowler by Miles B. Fowler for caveator appellees.

HEDRICK, Judge.

The only exception is to the order setting aside the verdict and granting a new trial. Therefore, our review is limited to the question of whether error appears on the face of the record.

A new trial may be granted to all or any of the parties and on all or part of the issues for an error in law occurring at the trial and objected to by the party making the motion. G.S. 1A-1, Rule 59(a)(8). G.S. 1A-1, Rule 59(d) provides:

"Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

[1] Where no question of law or legal inference is involved, a motion to set aside the verdict is addressed to the sound discretion of the trial court and its ruling is not subject to review in the absence of an abuse of discretion. *Pruitt v. Ray,* 230 N.C. 322, 52 S.E. 2d 876 (1949); *Goodman v. Goodman,* 201 N.C. 808, 161 S.E. 686 (1931); *Glen Forest Corp. v. Bensch,* 9 N.C. App. 587, 176 S.E. 2d 851 (1970). But when a judge presiding at a trial grants or refuses to grant a new trial because of some question of law or legal inference which the judge decides, the decision may be appealed and the appellate court will review

it. *McNeill v. McDougald,* 242 N.C. 255, 87 S.E. 2d 502 (1955); *Akin v. Bank,* 227 N.C. 453, 42 S.E. 2d 518 (1947).

The order appealed from, setting aside the verdict and granting a new trial *for errors of law committed during the trial,* clearly was made on the court's own initiative and while the record seems to indicate the parties stipulated that the order could be signed out of the county and more than ten days "subsequent to the end of the August 28, 1972, Session of the Sampson County Superior Court," there is nothing in the record to show that the order was entered after "notice to the parties and hearing" as required by Rule 59(d). Moreover, the caveators' motions, made in apt time, have not yet been ruled on.

[2] We point out that neither the caveators' motion for a new trial under Rule 59(a)(8), nor the court's order for a new trial entered on its own initiative upon the same grounds [Rule 59(a)(8)], specifies the errors of law committed during the trial which were prejudicial to the caveators. Obviously, without more specificity, the appellate court would be forced to embark on a voyage of discovery through an uncharted record to find the errors of law referred to in the order. *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373 (1954); *Akin v. Bank, supra; Jenkins v. Castelloe,* 208 N.C. 406, 181 S.E. 266 (1935); *Powers v. City of Wilmington,* 177 N.C. 361, 99 S.E. 102 (1919).

Since the trial court erred in setting aside the verdict and ordering a new trial for errors of law committed at trial without specifying the errors upon which his action was based, we would usually reverse the order and remand the case for entry of judgment on the verdict rendered. Then the caveators, as the parties aggrieved, would have the right to appeal to this court for hearing only upon assignments of error in matters of law preserved, assigned and relied upon by them. *Watkins v. Grier,* 224 N.C. 334, 30 S.E. 2d 219 (1944).

However, where the ends of justice require, this court will order the verdict rendered to be set aside and a new trial had, to the end that the whole case may be properly developed on a new trial in accordance with the usual course and practice. *Watkins v. Grier, supra; Jernigan v. Neighbors,* 195 N.C. 231, 141 S.E. 586 (1928); 1 Strong, N. C. Index 2d, Appeal and Error § 62.

[3] It is apparent from a review of the court's charge that the court incorrectly instructed the jury that the quantum of

evidence necessary for the propounder to prove the existence of the alleged lost will was by the greater weight of the evidence. The proper quantum of proof to show the existence of a lost instrument is proof which is clear, strong and convincing. See *Hewett v. Murray,* 218 N.C. 569, 11 S.E. 2d 867 (1940); 57 Am. Jur., Wills, § 568, § 981; 30 Am. Jur. 2d, Evidence, § 1167; Annot., 41 A.L.R. 2d 393.

Therefore, since the order appealed from may not be affirmed because of errors appearing on the face of the record, and since to reverse and remand the case for the entry of judgment on the verdict rendered would invite an appeal by the caveators which could result only in a new trial, and since in our opinion the ends of justice require a retrial, we vacate the order appealed from, set aside the verdict rendered, and order a new trial; so that the whole case may be developed in accordance with the usual course and practice.

New trial.

Chief Judge BROCK and Judge VAUGHN concur.

FORSYTH COUNTY, PLAINTIFF APPELLEE v. R. L. YORK, DEFENDANT APPELLANT

No. 7321SC587

(Filed 12 September 1973)

1. **Municipal Corporations § 31— failure to comply with zoning ordinance — no issue of fact — summary judgment proper**

Where the zoning ordinance in question required that a special permit be secured by anyone wishing to convert one prior nonconforming use to another or to maintain a mobile home on the property, defendant admitted he converted an automobile repair and used parts business into an agricultural implement sales operation and that he placed a mobile home on the premises, and defendant failed to obtain a permit for either activity, there was no disputable issue with respect to the fact of a violation of the applicable zoning provisions, and the trial court properly entered summary judgment against defendant; furthermore, by virtue of his noncompliance with the permit requirements, defendant had no standing to argue that prior nonconforming uses existed and could be continued or to raise the constitutionality of any of the zoning provisions.

2. **Municipal Corporations § 31— denial of mobile home permit — failure of landowner to seek review — bar to subsequent challenge of ordinance**

Where defendant was denied a mobile home permit in 1969 and 1972 but he did not seek court review of the denials, even though he could have raised the constitutionality of the zoning ordinance in superior court, defendant may not now challenge the validity of the ordinance he allegedly violated in maintaining a mobile home on the zoned property without a permit.

APPEAL by defendant from *Armstrong, Judge,* 12 March 1973 Session of Superior Court held in FORSYTH County.

Plaintiff is a governmental subdivision of the State of North Carolina and pursuant to G.S. 153-266.10 has adopted zoning ordinances and resolutions applicable to land use within Forsyth County but outside the jurisdiction of municipalities. Defendant, a resident of Forsyth County, owns or controls the property which is zoned R-6, suburban residential, and which is involved in this dispute. Subsection 4 of the Forsyth County Zoning Resolution entitled "Conversion of a Non-Conforming Use" provides in pertinent part:

> "a. A special use permit may be authorized for the conversion of non-conforming use to another use which in the judgment of the Board of Adjustment is less intensive in character or is essentially of the same character as the original non-conforming use. . . ."

The ordinance also provides that the use of a mobile home lawfully existing outside a mobile home park at the time of the adoption of the ordinance may be continued on certain terms and conditions but requires that a special use permit be obtained as a condition of such nonconforming use. *See* Section VII, Conditional Uses and Table of Conditional Uses Requiring Special Use Permits which also refers to Section XI, Non-Conforming Uses. Plaintiff brought an action against defendant for allegedly violating the ordinance by maintaining, without having first obtained special permits, a mobile home and an agricultural implement sales and storage business on the premises. Defendant admitted that he lacked the requisite permits and that there was a mobile home and farm equipment business on the property at the time the suit was commenced. On the basis of the pleadings and additional affidavits filed by the parties, the trial court granted plaintiff's motion for summary judgment. Judgment was entered enjoining defendant from continuing the offending uses. Defendant appealed.

P. Eugene Price, Jr., and Chester C. Davis for plaintiff appellee.

Randolph and Randolph by Doris G. Randolph for defendant appellant.

VAUGHN, Judge.

[1] A motion for summary judgment shall be granted when the evidence reveals no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897; *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823. Defendant contends that there were issues of material fact as to whether (1) the property was being used for business purposes at the time of the enactment of the zoning ordinance on 3 April 1967 and (2) a mobile home was in use on the property at that time. Defendant acquired the property in 1969 and contends that he and his predecessor in title continued the nonconforming uses from prior to the adoption of the ordinance to the institution of suit. Defendant also asserts that selected portions of the ordinance are unconstitutional and thus render a verdict against him improper as a matter of law. The issues of fact contended for by defendant are irrelevant. The zoning ordinance which the parties have stipulated was properly before the trial court requires that a special permit be secured by anyone wishing to convert one prior nonconforming use to another or to maintain a mobile home on R-6 property. Defendant admits he converted an automobile repair and used parts business into an agricultural implement sales operation and that he placed a mobile home on the premises. Because defendant failed to obtain a permit for either activity, there is no disputable issue with respect to the fact of a violation of the applicable zoning provisions. Further, by virtue of his noncompliance with the permit requirements, defendant has no standing to argue that prior nonconforming uses exist and may be continued or to raise the constitutionality of any of those provisions.

Defendant argues that under *Town of Hillsborough v. Smith,* 276 N.C. 48, 170 S.E. 2d 904, he is not required to secure the necessary permits in order to prevent a judgment against him as a matter of law. We disagree. In that case the town was seeking to restrain a builder from constructing buildings for which he had received a building permit prior to the enactment of a zoning ordinance. The zoning ordinance did not authorize

the Board of Adjustment to issue a nonconforming use permit for structures upon which substantial work had not been begun before the adoption of the zoning restrictions, and it also prohibited the making of any exceptions to the above rule. Because Smith had not completed any substantial construction on the buildings, he was not entitled to a permit, and thus an application therefor would have constituted little more than a useless gesture. In the present case there is no similar indication that defendant would have been denied the special permits under all circumstances. Defendant thus falls within the purview of *Garner v. Weston,* 263 N.C. 487, 139 S.E. 2d 642, where suit was brought against Weston for building a trailer park without securing a permit as required by the zoning ordinance. The trial court, in effect, determined that Weston could not defend on the ground he was in fact entitled to a nonconforming use exception unless application for a permit had been made. In sustaining a judgment for plaintiff, the Supreme Court observed, "The court found the zoning ordinance . . . made provision for a hearing before the Board of Adjustment upon application for a permit . . . but the defendants have not applied for such permit and hence have not exhausted their administrative remedies."

Without regard, therefore, to the use being made of the property at the time of the adoption of the ordinance, the ordinance requires special use permits in order to change one nonconforming use to another and to maintain a mobile home in an area where they are otherwise forbidden. Since defendant admits the change of use, the maintenance of the mobile home, and lack of the required permits, no issue as to a material fact exists and summary judgment was proper.

[2] This result is not altered by the fact defendant was denied a mobile home permit in 1969 and 1972. G.S. 153-266.17 provides that "every decision of the [Board of Adjustment] shall be subject to review by the superior court by proceedings in the nature of certiorari." Upon rejection of his application, defendant did not seek court review of the denials, even though he could have raised the constitutionality of the ordinances in superior court. Our Supreme Court has held that the above provision prevents collateral attacks on decisions of the Board of Adjustment. *Durham County v. Addison,* 262 N.C. 280, 136 S.E. 2d 600. Since in 1969 and 1972 defendant failed to exhaust his statutory remedies and since the record does not indicate those remedies were

in fact illusory, he may not now challenge the validity of the zoning ordinance he allegedly violated in an effort to avoid a summary judgment.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

HARRY SCHAFRAN v. A & H CLEANERS, INC.

No. 7311SC481

(Filed 12 September 1973)

1. **Bills and Notes § 20— action to recover loans — sufficiency of evidence and findings**

In an action to recover for loans allegedly made by plaintiff to defendant, the trial court's findings were supported by competent evidence and were sufficient to support the court's judgment granting plaintiff recovery upon two of the loans for which he sued.

2. **Evidence § 57— accountant's summary of findings — admission for illustration — harmless error**

In an action to recover for loans allegedly made by plaintiff to defendant, the admission for illustrative purposes of a CPA's memorandum summarizing his findings in a study of the financial records of plaintiff and defendant, if erroneous, was not prejudicial to defendant in this trial before a judge without a jury, since it is presumed that the judge disregarded any incompetent evidence that may have been admitted.

APPEAL by defendant from *Braswell, Judge,* 11 December 1972 Civil Session of HARNETT Superior Court.

Plaintiff instituted this action to recover certain sums of money allegedly owing him by defendant. In his complaint, plaintiff set forth two causes of action, alleging that defendant owed him (1) $24,000, representing 24 months salary at $1,000 per month for serving as an officer of defendant, and (2) $19,046.52 for loans made by plaintiff to defendant. In its answer defendant denied owing plaintiff anything.

Jury trial was waived. Following a trial at which both parties introduced evidence, the court entered judgment setting forth findings of fact and conclusions of law determining that plaintiff's first cause of action should be dismissed with preju-

dice but that plaintiff is entitled to recover $9,000 plus interest and costs on his second cause of action. Defendant appealed.

Bryan, Jones, Johnson, Hunter & Greene by James M. Johnson and Woodall & McCormick by Edward H. McCormick for plaintiff appellee.

Pearson, Malone, Johnson & DeJarmon by W. G. Pearson II and C. C. Malone, Jr., for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the court to allow his motions for nonsuit interposed at the conclusion of plaintiff's evidence and renewed at the close of all the evidence. This assignment has no merit.

Under the new Rules of Civil Procedure, the term "nonsuit" has been eliminated in civil actions. In nonjury trials, the former motion for nonsuit has been replaced by the motion for a dismissal. G.S. 1A-1, Rule 41(b). Substantially the same question is presented by the present motion as was by the former and in order to consider this appeal on its merits, we will treat the motion for nonsuit as a motion for dismissal.

In *Knitting, Inc. v. Yarn Co.*, 11 N.C. App. 162, 163, 180 S.E. 2d 611, 612 (1971), this court said: "In ruling on a motion to dismiss under Rule 41(b), applicable only 'in an action tried by the court without a jury,' the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover. *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E. 2d 113 (1970)."

At the trial of the instant case, the alleged loans made by plaintiff to defendant were represented by four exhibits introduced by plaintiff. Exhibit 1 was a check for $5,000, drawn by plaintiff on Southern National Bank, Lillington, N. C., dated 26 March 1968, payable to defendant. Exhibit 2 was a check for $5,342.50, drawn by plaintiff on said bank, dated 7 May 1970, payable to the bank "For A & H Cleaners Note #10896, Prin. 5,300, Int. 42.50." Exhibit 3 was a check for $4,746.52, drawn by plaintiff on said bank, dated 11 November 1967, payable to Albert Coates, Inc.; plaintiff testified this check was for the purchase price of a station wagon which plaintiff bought

for defendant. Exhibit 4 was a check for $4,000, drawn by plaintiff on the National Bank of Sanford, dated 30 March 1967, payable to defendant. Plaintiff's Exhibit 5 was Southern National Bank of North Carolina note #10896, referred to in Exhibit 2, said note bearing date of 3 January 1970, in amount of $25,562.50, with defendant as maker, showing a balance of $5,300 and assignment to plaintiff dated 7 May 1970.

In its judgment, the trial court found as a fact that plaintiff made to or for the benefit of defendant loans or advancements in the amounts set forth in plaintiff's Exhibits 1, 2, 3 and 4, and on or about the dates specified therein. The court further found that plaintiff failed to show that the loans or advancements represented by Exhibits 2 and 3 are due plaintiff. The court found that plaintiff had carried the burden of proving the indebtedness totaling $9,000 represented by Exhibits 1 and 4 and rendered judgment for that amount.

[1] We hold that the court correctly overruled defendant's motion for dismissal and that the facts found are supported by competent evidence and are sufficient to support the judgment.

Defendant assigns as error the admission into evidence of plaintiff's Exhibit 6 for illustrative purposes. This assignment has no merit.

[2] Plaintiff called as a witness David Matthews, a certified public accountant, who gave testimony regarding information obtained by him pursuant to a study of financial records of plaintiff and defendant. Plaintiff's Exhibit 6 was a two-page, eight-column memorandum prepared by the witness setting forth information which the witness considered a significant summary of his findings. The witness gave oral testimony with respect to the information set forth in the exhibit. On objection by defendant, the court refused to admit the exhibit as substantive evidence but admitted it to illustrate the testimony of the witness.

Assuming, *arguendo,* that the exhibit was not competent for any purpose, we do not think its admission into evidence would entitle defendant to a new trial. In a trial before the judge without a jury, the ordinary rules as to the competency of evidence which are applicable in a jury trial are to some extent relaxed, since the judge with knowledge of the law is able to eliminate incompetent testimony; if incompetent evidence is admitted, the presumption arises that it was disregarded and

did not influence the judge's findings. *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962); *Trust Co. v. Wilder*, 255 N.C. 114, 120 S.E. 2d 404 (1961); *Construction Company v. Housing Authority*, 1 N.C. App. 181, 160 S.E. 2d 542 (1968). There was ample competent evidence to support the court's findings and conclusions and there is no indication that the court was influenced by Exhibit 6. The assignment of error is overruled.

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

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. JOE LEWIS MOORE

No. 7318SC611

(Filed 12 September 1973)

1. **Robbery § 5— armed robbery — intent permanently to deprive owner of property — instructions**

The trial court in an armed robbery case adequately instructed the jury as to the specific intent with which the property must have been taken where the court instructed the jury that in order to find defendant guilty it must find beyond a reasonable doubt that defendant took the property "knowing that he at the time was not entitled to take the money or the watch and intending at the time to deprive Anderson of the use of his money and watch permanently."

2. **Criminal Law § 113— necessity for instruction on alibi**

The trial court erred in failing to instruct the jury that the defendant, who relied on an alibi, did not have the burden of proving it, although defendant failed to request such instruction, where defendant's trial occurred prior to 12 July 1973, the date of the opinion of *State v. Hunt*, 283 N.C. 617.

APPEAL by defendant from *Crissman, Judge*, 26 February 1973 Criminal Session of Superior Court held in GUILFORD County.

Defendant was indicted for the armed robbery of one Anderson. He pled not guilty. Anderson testified that defendant,

whom he had previously known, was the person who, assisted by two others, assaulted him on McCulloch Street in Greensboro, N. C., at about 5:15 p.m. on 5 December 1972, threw him down, held a knife to his throat, threatened to cut him, ripped open his pants pocket, took his wallet containing $415.00, and then forced him into a nearby house, where one of defendant's companions went through Anderson's pockets and took his watch. Defendant denied that he had ever taken anything from Anderson or ever held a knife to his throat and testified that he did not know Anderson and had never seen him until 12 December 1972, when he saw Anderson in a patrol car. Defendant testified that on 5 December 1972 he worked all day at his job as a cement finisher for a construction company, that his boss picked him up in the morning, that they worked until about 5:00, and that his boss took him back to his home, which is about a mile from McCulloch Street, where he arrived about 5:30.

The jury found defendant guilty as charged. From judgment imposing a prison sentence, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Sidney S. Eagles, Jr., for the State.

Wallace C. Harrelson, Public Defender for the Eighteenth District, for defendant appellant.

PARKER, Judge.

[1] Defendant assigns as error that the court failed to instruct the jury adequately as to the specific intent with which the property must have been taken before he could be found guilty of robbery. In this connection the court instructed the jury that in order to find defendant guilty they were required to find from the evidence beyond a reasonable doubt that he took the property "knowing that he at the time was not entitled to take the money or the watch and intending at the time to deprive Anderson of the use of his money and his watch permanently." Under the evidence in this case we find the instruction adequate. "In robbery, as in larceny, the taking of the property must be with the felonious intent *permanently* to deprive the owner of his property." *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194. Under the instruction here given the jury was required to so find before it could find defendant guilty.

[2] Defendant also assigns error to the court's charge to the jury as to his defense of alibi. In this connection the court cor-

rectly recapitulated defendant's evidence and gave his contention that he was not and could not have been on McCulloch Street at the time the State's witness testified the robbery had been committed. The court also properly instructed the jury that they should consider defendant's evidence along with all other evidence in arriving at their verdict and that the State had the burden of proving defendant's guilt beyond a reasonable doubt. However, nowhere in the charge did the court instruct the jury that the defendant, who relied on an alibi, did not have the burden of proving it. In this, defendant suffered prejudicial error. *State v. Miller,* 10 N.C. App. 532, 179 S.E. 2d 1.

It is true that in trials commenced after 12 July 1973, the date of the filing of the opinion of our Supreme Court in *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513, when a defendant offers evidence of alibi the court is not required to instruct the jury as to the legal principles applicable in their consideration of such evidence unless such an instruction is requested by the defendant. However, defendant's trial in the present case occurred prior to the decision in *State v. Hunt,* and his failure to request the correct instruction cannot be held to his prejudice on the present appeal. Moreover, "[w]hen an instruction as to the legal effect of alibi evidence is given, whether by the court of its own motion or in response to request, such statement must be correct." *State v. Hunt, supra.*

For failure of the court to instruct the jury that the defendant, who relied on an alibi, did not have the burden of proving it, defendant is entitled to a

New trial.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. RONALD F. JACKSON

No. 7320SC590

(Filed 12 September 1973)

Criminal Law § 97— denial of motion to reopen case — misapprehension of law

The trial court in an armed robbery prosecution erred in the denial of defendant's motion to reopen the case in order to present the testimony of additional alibi witnesses where the trial court did not

make the ruling in the exercise of its discretion but did so under the misapprehension that some rule of law prevents a party from using more than three witnesses to prove any particular point.

APPEAL by defendant from *Chess, Judge,* 12 March 1973 Session of Superior Court held in UNION County.

Defendant was indicted for the armed robbery of Bill Squires, the indictment charging that the offense occurred in Union County, N. C., on 30 January 1973. He pled not guilty. At the trial Squires and another witness for the State each identified defendant as one of the two men who came to the service station and grocery store operated by Squires which is located on Highways 16 and 74 in Union County, N. C., at about 3:20 p.m. on the afternoon of 30 January 1973 and there held the two witnesses at gunpoint while taking money from the cash register. Defendant testified that he had not come to Union County at any time during that day, but on the contrary had been working in Bennettsville, South Carolina, during the entire day. He also presented as witnesses his brother, his employer, and an acquaintance, each of whom testified to having seen the defendant in Bennettsville at various times during the afternoon of 30 January 1973. The jury found defendant guilty as charged. From judgment imposing a prison sentence, defendant appealed.

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

Paul L. Whitfield and David R. Badger for defendant appellant.

PARKER, Judge.

The record indicates that trial of this case commenced on the afternoon of 12 March 1973 and that presentation of evidence by the State and defendant and argument of counsel to the jury was completed on that day. Upon convening of court on the following morning and prior to the court's instructing the jury, defendant's counsel moved in the absence of the jury to reopen the case in order that he might present two additional witnesses who had not been present on the preceding day and who would testify that defendant was in Bennettsville from 2:30 to 4:00 o'clock on the afternoon of the robbery. The trial judge denied the motion, stating that defendant "already had three or four witnesses, including himself, to testify that he

was there; and under our rules you can only use three witnesses to prove any particular point."

"It is well settled that it is within the discretion of the trial judge to reopen a case and to admit additional evidence after both parties have rested and even after the jury has retired for its deliberations." *State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206. Accordingly, this Court has found no error when the trial judge *in the exercise of his sound discretion* has either granted a motion to reopen a case, *State v. Brown,* 1 N.C. App. 145, 160 S.E. 2d 508, or has refused to grant such a motion, *State v. Stack,* 12 N.C. App. 101, 182 S.E. 2d 633. In the present case, however, the trial judge did not deny defendant's motion in the exercise of his discretion but did so under the misapprehension that some rule of law prevents a party from using more than three witnesses to prove any particular point. While undoubtedly it is within the sound discretion of the trial judge in any case to require the parties to move expeditiously in the presentation of their evidence and to refrain from needlessly consuming the time of the court by presenting an excessive number of witnesses whose testimony would be merely cummulative, there is no rule which limits a party to no more than three witnesses to prove a particular point.

While it was discretionary with the trial judge to grant or deny defendant's motion to reopen the case in order to present the testimony of the additional witnesses, where, as here, the record discloses that the trial court did not make its ruling in the exercise of its discretion but did so under a misapprehension of law, the ruling is reviewable on appeal. 1 Strong, N. C. Index 2d, Appeal and Error, § 54. The ruling here complained of was erroneous, and we are unable to determine that the error caused defendant no prejudice. The point which defendant sought to prove by the additional witnesses related to his alibi and was crucial to his defense.

We do not discuss appellant's remaining assignments of error, which present questions which may not arise upon a new trial. For the error above noted, defendant is entitled to and is awarded a

New trial.

Judges CAMPBELL and MORRIS concur.

EULA S. BOWES v. MELLIE LEWIS BOWES

No. 7317DC236

(Filed 12 September 1973)

Appeal and Error § 16— jurisdiction of trial court pending appeal

Where defendant appealed from a judgment granting plaintiff a divorce from bed and board entered on a jury verdict of abandonment and retaining for determination upon further hearing the matters of child custody, child support, permanent alimony and counsel fees, the trial court had no jurisdiction to hold hearings and enter judgments providing for child custody, child support, alimony and counsel fees while defendant's appeal was pending.

APPEAL by defendant from *Clark, Judge,* 28 August 1972 Session of District Court held in ROCKINGHAM County.

On 28 September 1971, plaintiff wife filed a complaint alleging in substance that plaintiff and defendant husband were residents of Rockingham County; that plaintiff and defendant had been lawfully married since 3 August 1940; that three children were born of the marriage, but that at the time the complaint was filed, only one of the children, Jennifer Bowes, was a minor child; that on 29 March 1971, the defendant husband abandoned the plaintiff; that defendant was the supporting spouse and plaintiff the dependent spouse; and that the best interests of Jennifer Bowes would be served by placing the child in the plaintiff's custody. Plaintiff prayed that the court enter an order granting her a divorce from bed and board, custody of the minor child of the marriage, child support, permanent alimony and attorney fees. The defendant husband answered, denying the material allegations of the complaint.

Thereafter, the cause came on for trial by jury on the issue of abandonment. The jury answered the issue of abandonment against the defendant husband and returned a verdict for the plaintiff. On 30 August 1972, Judge Clark entered a judgment on the verdict that the plaintiff wife be awarded a divorce from bed and board from the defendant husband, and that ". . . the matters of child custody, child support, permanent alimony and attorney fees be and are hereby retained for determination upon further hearing at this Session of Rockingham District Court . . ." On 1 September 1972, defendant filed notice of appeal, and Judge Clark entered appeal entries allowing defendant and plaintiff extensions of time to serve the case and countercase on appeal.

Julius J. Gwyn for plaintiff appellee.

Harry J. O'Connor, Jr., and Donald K. Speckhard, for defendant appellant.

MORRIS, Judge

Defendant gave notice of appeal and the court entered appeal entries as to the judgment of 30 August 1972, granting plaintiff divorce *a mensa et thoro,* entered on the jury verdict of abandonment. On appeal, however, defendant does not bring forward any exception or assignment of error with respect to this judgment, nor does the record contain any assignment of error as to this judgment.

The appeal itself, however, is an exception to the judgment and to any matter appearing on the face of the record proper. *Dilday v. Board of Education,* 267 N.C. 438, 148 S.E. 2d 513 (1966). Prejudicial error does not appear.

Pending the appeal from the judgment entered 30 August 1972, the court held two hearings in this action. The first resulted in a judgment awarding plaintiff custody of the minor child and providing for child support, alimony, and counsel fees. The second resulted in a judgment modifying the alimony award. Defendant attempts to appeal from these judgments. The court had no jurisdiction to hold hearings and enter judgments pending the appeal. *Wiggins v. Bunch,* 280 N.C. 106, 184 S.E. 2d 879 (1971); *Pelaez v. Carland,* 268 N.C. 192, 150 S.E. 2d 201 (1966). See also *Upton v. Upton,* 14 N.C. App. 107, 187 S.E. 2d 387 (1972). We, therefore, choose to treat the purported appeal as a petition for a writ of certiorari which we have allowed. Because of the lack of jurisdiction in the trial court, the two judgments are vacated and the cause remanded for further proceedings.

The result of the foregoing is this:

Judgment dated 30 August 1972, affirmed.

Judgment dated 1 September 1972 and Order dated 19 October 1972 modifying the judgment of 1 September 1972, vacated and cause remanded for further proceedings.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. ANTHONY STANBACK

No. 7318SC617

(Filed 12 September 1973)

1. **Narcotics § 4— possession and distribution of marijuana — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issues of defendant's guilt of possession of marijuana with intent to distribute and distribution of marijuana where it tended to show that defendant had promised to sell marijuana to a State's witness, that defendant and the witness drove together from defendant's apartment to another apartment, that the witness gave defendant $20 for an ounce of marijuana, that defendant entered the apartment and returned with a plastic bag of vegetable matter which he gave the witness, and that the vegetable matter was analyzed and determined to be marijuana.

2. **Criminal Law § 7— entrapment — giving defendant opportunity to commit crime**

The trial court did not err in failing to charge the jury on entrapment in a prosecution for possession and distribution of marijuana where the evidence tended to show that an undercover agent of the police department went to defendant's apartment seeking to buy marijuana which defendant had promised to sell him the previous day, that the agent gave defendant $20 for an ounce of marijuana, and that the officer and defendant rode together to another apartment where defendant obtained marijuana which he gave to the agent, since the evidence shows that the police did nothing more than afford defendant the opportunity to voluntarily commit a crime which defendant conceived in his own mind.

APPEAL by defendant from *Crissman, Judge,* 9 April 1973 Session of Superior Court held in GUILFORD County.

Defendant, Anthony Stanback, was charged in a two count bill of indictment, proper in form, with feloniously possessing more than five grams of a controlled substance, to wit: marijuana, and with feloniously distributing a controlled substance, to wit: marijuana, to Jerome White. Defendant pleaded not guilty and only the State offered evidence at the trial.

The defendant was found guilty as charged and from a judgment imposing a prison sentence of three years, he appealed.

Attorney General Robert Morgan and Associate Attorney Henry E. Poole for the State.

Lee, High, Taylor, Dansby & Stanback by Herman L. Taylor for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motions for judgment as of nonsuit. The evidence when considered in the light most favorable to the State tends to show the following:

On the night of 7 December 1972, Jerome White, an undercover agent of the Greensboro Police Department, went to the apartment of defendant seeking to purchase some marijuana which the defendant had promised to sell to Officer White the previous day. Defendant stated that he did not have "anything on him there at the house, but he do know where he could get some." Defendant then asked White how much he wanted and when White stated "one ounce," the defendant informed him that this would cost twenty dollars. After his brief conversation, White gave defendant the twenty dollars. Defendant and White went together in defendant's car to an apartment in another part of the City. While White waited in the automobile, Stanback went into an apartment and returned in about five minutes. White testified, "When he got back to the car, he handed me a plastic bag containing green vegetable material. I did not have a conversation with him at that time. * * * There were contents in the bag. It was a green vegetable-like material, seemed to be ground in a course type form."

After the purchase of the marijuana, defendant and White returned to defendant's apartment where, according to Officer White, defendant made the following statement: "Anytime you need anything, an ounce or a lid or a pound, I can get it for you." White gave the defendant five dollars more as a "tip." The contents of the bag delivered to White by the defendant were subsequently analyzed and identified as marijuana.

In our opinion the evidence offered by the State was sufficient to require the submission of the case to the jury and to support the verdict. This assignment of error is overruled.

[2] Next, the appellant asserts the court committed prejudicial error in failing to charge the jury on the law of entrapment. In order for the defense of entrapment to be available to defendant there must be an intent to commit a crime and such intent must originate from the inducements of a law officer or his agent and not in the mind of the defendant. *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191; *State v. Yost,* 9 N.C. App. 671, 177 S.E. 2d 320. In the instant case the evidence demonstrates the fact that the police of Greensboro did noth-

ing more than afford defendant an opportunity to voluntarily commit a crime which defendant conceived in his own mind. Such police action did not involve persuasion, fraud, or trickery but rather merely provided defendant with an exposure to temptation and thus there was no prejudicial error in the failure of the trial judge to instruct on the defense of entrapment.

No error.

Chief Judge BROCK and Judge BALEY concur.

HIRAM WATSON v. CHARLIE H. FULK

No. 7321DC553

(Filed 12 September 1973)

Fiduciaries— tobacco raised by joint effort — proceeds from sale held by fiduciary — accounting required

Where the evidence tended to show that plaintiff and defendant agreed to raise tobacco on defendant's land, sharing expenses and profits equally, plaintiff performed his obligation, defendant sold the tobacco for more than $6000.00, and defendant unilaterally determined that plaintiff was entitled to only $1065.21 as his share of the profits, defendant acted in a fiduciary capacity with respect to the plaintiff and had a duty to account to him for his actions; therefore, the trial court erred in directing verdict for defendant.

APPEAL by plaintiff from *Henderson, Judge,* 5 February 1973 Session of District Court held in FORSYTH County.

This is an action for an accounting and the recovery of any sums found to be due upon such accounting.

Plaintiff alleges in his complaint that he entered into an oral agreement with the defendant to raise tobacco upon the defendant's land with each party providing an equal share of the labor, paying one-half of the expenses, and receiving one-half of the profits from the sale of the tobacco crop. He claims that he has performed his obligations under the agreement and that the defendant has sold the crop and refused to make an accounting.

In his answer defendant admits the agreement with the plaintiff to share expenses and profits and asserts that he has

paid plaintiff his fair share of the proceeds from the sale of the tobacco.

The evidence presented by the plaintiff, in substance, tends to show the following: He and his wife and the three oldest children worked on defendant's farm assisting in raising five acres of tobacco. He furnished a tractor, helped prepare the soil, applied fertilizer, pulled the plants, set out the crop, plowed the land, pulled the tobacco, placed it in the barn, and, in general, contributed materially to the production of the tobacco crop. After the crop was harvested, the defendant sold the tobacco and has paid the plaintiff $1,065.21 as his share of the profits. Plaintiff was dissatisfied with this settlement and requested a statement of the income from the various sales and a list of the expenses incurred, but he has not been able to obtain such an account. Plaintiff used the defendant as a witness, and defendant testified that he received "better than $6,000.00" from the sale of the tobacco, and, although requested, he had not furnished to plaintiff any bills or list of expenses incurred in connection with the production of the tobacco crop.

At the close of evidence for the plaintiff, defendant moved for a directed verdict pursuant to Rule 50(a) upon the ground that plaintiff had failed to state a claim upon which relief could be granted.

The trial court allowed the motion for a directed verdict, and plaintiff appealed.

Roberts, Frye & Booth, by Leslie G. Frye, for plaintiff appellant.

Wilson and Morrow, by John F. Morrow, for defendant appellee.

BALEY, Judge.

The evidence of the plaintiff when viewed in the light most favorable to him was sufficient for submission to the jury, and the action of the trial court in granting a directed verdict for the defendant must be held as error.

There is no dispute about the fact that the parties entered into a business relationship for the purpose of raising tobacco on the defendant's land. It was agreed that each party was to furnish an equal amount of the labor and to share expenses and profits equally. Plaintiff has presented evidence from

which a jury could conclude that he had performed his part of the agreement and was entitled to one-half of the proceeds from the sale of the tobacco less his one-half portion of the expenses incurred. The evidence further disclosed that defendant had possession of and sold the tobacco after it was harvested for the sum of more than $6,000.00 and had unilaterally determined that plaintiff was entitled to only $1,065.21 as his share of the profits.

It seems clear that this is a case in which plaintiff trusted the defendant to sell the tobacco, pay any expenses incurred from the proceeds of the sale, and make proper accounting to him for his portion of the profits. He reposed confidence in the defendant who had complete control and domination of their relationship. Defendant held the one-half portion of the proceeds from the tobacco crop in trust for the plaintiff and has refused to make an accounting to the plaintiff as beneficiary.

In *Abbitt v. Gregory,* 201 N.C. 577, 160 S.E. 896, the court in holding that the general manager of a corporation stood in a fiduciary relation to the stockholders stated:

> "The courts generally have declined to define the term 'fiduciary relation' and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of persons or property of either. . . . The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. 'It not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, . . . trustee and *cestui que trust,* but it extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.' 25 C.J., 1119."

201 N.C. at 598, 160 S.E. at 906. Later cases have reaffirmed the holding of *Abbitt. Link v. Link,* 278 N.C. 181, 192, 179 S.E. 2d 697, 704; *Vail v. Vail,* 233 N.C. 109, 114, 63 S.E. 2d 202, 206; *Bolich v. Insurance Company,* 206 N.C. 144, 152, 173 S.E. 320, 324. *See also* 5 Bogert, Trusts and Trustees 2d, §§ 481-82; Dobbs, Remedies, § 10.4, at 679-82.

It seems apparent that defendant has acted in a fiduciary capacity with respect to the plaintiff and has a duty to account to him for his actions. "All fiduciaries may be compelled by appropriate proceeding to account for their handling of properties committed to their care." *Lichtenfels v. Bank,* 260 N.C. 146, 148, 132 S.E. 2d 360, 362; *accord,* Dobbs, *supra,* § 4.3, at 252-53. *See also Parker v. Brown,* 136 N.C. 280, 48 S.E. 657, for application to an agricultural tenancy.

The appropriate method for determining the exact amount which may be due the plaintiff, if anything, is to require the defendant, who is in possession of the essential information, to render an accounting.

If there is no accounting of the expenses incurred, plaintiff has shown an income of at least $6,000.00 which is sufficient to support a jury verdict in his favor for not exceeding $3,000.00.

The motion of the defendant for a directed verdict should have been overruled.

New trial.

Chief Judge BROCK and Judge BRITT concur.

KARL ALLEN LUTES, EMPLOYEE v. EXPORT LEAF TOBACCO CO., EMPLOYER, LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 7321IC585

(Filed 12 September 1973)

Master and Servant § 65— hernia — no causal connection to accident

There was competent evidence to support a determination by the Industrial Commission that, although there was an "accident" within the meaning of the Workmen's Compensation Act while plaintiff was lifting pipe because his usual work routine had been interrupted, there was no causal connection between such "accident" and plaintiff's hernia.

APPEAL by plaintiff from the decision and award of the N. C. Industrial Commission filed 10 April 1973.

This is a proceeding under the Workmen's Compensation Act.

A claim was made by Karl Allen Lutes, employee of defendant corporation, for compensation under G.S. 97-2(18) a-e for a hernia allegedly sustained while working for defendant. This case was originally heard on 14 November 1972 before Deputy Commissioner Roney who filed an Opinion and Award denying the claim. Thereafter, plaintiff appealed to the Full Commission which adopted as its own the Opinion and Award of Deputy Commissioner Roney in its entirety. Deputy Commissioner Roney made findings of fact which are summarized as follows except where quoted:

1. On 1 May 1972 plaintiff was involved in an operation which entailed the installation of 1800 feet of four-inch pipe. The pipe, which came in twenty-five foot lengths, was unloaded at the loading dock by the shipper and "transferred therefrom by forklift to an area in which claimant could weld studs thereto prior to installation."

2. While engaged in this activity it became necessary for claimant to get between the pipe and the edge of the dock and lift and slide the pipe forward a short distance because of the inability of the forklift to reach a piece of pipe on the dock. This incident occurred at about 2:30 p.m.

3. "Prior to the end of the working day claimant noticed a dull toothache like pain and some swelling in his left lower abdomen."

4. "The lifting and sliding incident described in Finding of Fact No. 2 is the occurrence that claimant maintains was the cause of the hernia. Said occurrence was not accompanied by pain."

5. On 2 May 1972 plaintiff was examined in the emergency room of Forsyth Memorial Hospital and a left side inguinal hernia was discovered by the examining physician. On 9 May 1972 claimant was admitted to Forsyth Memorial Hospital and upon this admission Lutes related a history of having gotten out of bed on 1 May 1972 to discover a toothache-like pain and swelling in his left side. On 10 May 1972, a left inguinal hernioplasty was performed on claimant.

From the foregoing findings of fact Deputy Commissioner Roney concluded among other things that:

"The circumstances of being called upon to install 1,800 feet of 25′ x 4″ x ⅛″ pipe with studs for the first

time and of having to lift and slide a piece of this pipe because the forklift could not reach it were circumstances which constituted an interruption of claimant's usual routine of work, thereby establishing an accident. (Citation omitted.) Claimant failed to prove, however, that the occurrence of lifting and sliding, which was occasioned by having to work with the pipe and the inability of the forklift to reach the pipe, caused an injury which resulted in a hernia. (Citation omitted.)

* * *

Claimant's claim must fail because there has been a failure of proof that there was an injury by accident resulting in a hernia, that there was an injury accompanied by pain, and that the hernia did not preexist the lifting and sliding of the pipe."

From the decision denying recovery plaintiff appeals.

Billings and Graham by William T. Graham for plaintiff appellant.

Deal, Hutchins and Minor by Richard Tyndall and Walter W. Pitt, Jr., for defendant appellees.

HEDRICK, Judge.

G.S. 97-2(18) a-e provides that in all claims for compensation for hernia resulting from injury by accident, the claimant must prove to the satisfaction of the Commission:

a. That there was an injury resulting in a hernia;

b. That the hernia appeared suddenly;

c. That it was accompanied by pain;

d. That the hernia immediately followed an accident;

e. That the hernia did not exist prior to the accident for which compensation is claimed.

Failure to prove the existence of any one of the five elements of G.S. 97-2(18) a-e nullifies plaintiff's claim. *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289 (1957); *Faires v. McDevitt and Street Co.,* 251 N.C. 194, 110 S.E. 2d 898 (1959).

Plaintiff argues that since the Commission concluded that there was an accident within the meaning of the statute and

that since there was evidence the hernia appeared "suddenly" shortly thereafter, it was error for the Commission to find and conclude that the plaintiff did not suffer an injury by accident resulting in a hernia. This argument, and plaintiff's claim, must fail simply because the Commission found and concluded that there was no causal connection between the "accident" and the hernia. The findings of the Commission when supported by any competent evidence are binding on appeal. *Godwin v. Swift and Co.*, 270 N.C. 690, 155 S.E. 2d 157 (1967); *Enroughty v. Industries, Inc.*, 13 N.C. App. 400, 185 S.E. 2d 597 (1971), cert. denied, 280 N.C. 721, 186 S.E. 2d 923 (1972). In the present case the material findings and conclusions of the Commission are supported by plenary competent evidence.

The order appealed from is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

W. WARREN SPARROW, GUARDIAN AD LITEM FOR DAVID MICHAEL CHANDLER, MINOR v. FORSYTH COUNTY BOARD OF EDUCATION

No. 7321IC233

(Filed 12 September 1973)

State § 8— sudden stopping of school bus — driver struck by snowball — no negligence

The Industrial Commission did not err in its conclusion that the driver of a school bus was not negligent in suddenly stopping the bus, thereby causing injury to a passenger, when the driver was struck by a snowball thrown through an open window of the bus.

APPEAL by plaintiff from an opinion and award by the North Carolina Industrial Commission, filed 20 October 1972, which denied compensation to plaintiff.

The pertinent facts found by the Commission are as follows:

"On January 15, 1970, David Michael Chandler (hereinafter referred to as "Claimant") was a student attending Glenn Junior High School (hereinafter referred to as "school") in Forsyth County, North Carolina. Claimant

travelled to and from school as a passenger upon a state-owned vehicle, to wit a school bus operated by Mike Baugess (hereinafter referred to as "driver").

"Claimant and other students at school, before the hereinafter described injury to claimant occurred, were instructed by the principal of school to not engage in horseplay on the school bus and to remain seated while the school bus was in motion.

"Driver, before the hereinafter described injury to claimant occurred, had given instructions to claimant and the other student-passengers on his bus to not engage in horseplay and to remain seated while the bus was in motion.

"On January 15, 1970, school closed at 3:20 p.m. Claimant left school and proceeded to get onto the school bus operated by driver, taking a seat in the rear of the bus.

"Driver left school and proceeded to operate the bus on his regularly assigned route. The bus first stopped a short distance after it turned onto Wayside Drive and several student-passengers left the bus. Approximately three hundred yards further down the road, the bus made its second stop, at which time Mike Weaver, Ricky Weaver and Vickie Weaver left the bus. At this point, there were approximately 45 students remaining on the bus which had a capacity of carrying 67 students.

"While the bus was stopped for the Weaver children to get off, claimant stood up in the rear of the bus where he had been seated, preparatory to moving to the front of the bus to take a vacant seat. Claimant was approximately one-half mile from his home and was in a hurry to get off. Driver then placed the bus in first gear and proceeded to drive forward approximately 15 to 20 feet at approximately 5 to 7 miles per hour. As the bus was moving forward, claimant proceeded up the aisle unnoticed by driver. When claimant reached a point midway the bus, Mike Weaver, who had just left the bus, threw a snowball through the small open sliding window beside driver. The snowball whistled by in front of driver, partly hitting him and then splashing against the door to the right of driver.

"The occurrence of the snowball coming into the bus startled the driver and caused him to place his foot upon the brake pedal and bring the bus to a sudden stop. The

sudden stopping of the bus caused claimant to fall forward and hit his head and chest against the back of a seat and to continue falling until he hit the floor of the bus. The fall caused injuries to the claimant.

"After driver had stopped the bus, he engaged the emergency brakes, got off the bus and threw a snowball at Mike Weaver. Driver then returned to the bus and was advised by other student-passengers that claimant might be hurt, at which time driver asked claimant if he were injured, to which claimant replied that he didn't think so.

"Driver then drove the bus approximately one-half mile to the point where claimant left the bus for his home. At this time claimant was experiencing pain in his left shoulder and a severe headache, which persisted three months after the occurrence of the injury.

"At the time that driver placed his foot upon the brakes of the bus and brought the bus to a sudden stop, he acted as a person of ordinary care and prudence would have acted under similar circumstances. The snowball being thrown into the bus in front of the driver brought about a sudden emergency which caused the driver to quickly stop the bus. There was, therefore, no negligence on the part of the driver in stopping the bus suddenly."

Based upon its findings of fact the Commission concluded that there was no negligent act upon the part of the driver, and denied the claim.

Plaintiff appealed.

White & Crumpler, by G. Edgar Parker, for the plaintiff.

Attorney General Morgan, by Associate Attorney Kramer, for the defendant.

BROCK, Chief Judge.

Plaintiff assigns as error that the findings of fact of the Industrial Commission do not support its conclusion and opinion.

Under the evidence in this case the question of whether a person of ordinary prudence would have acted under the same or similar circumstances was to be determined by the finder

of the facts. In this case the Commission was the finder of the facts and its finding of fact supports its conclusion and opinion. The fact that subsequent to the stopping of the bus, the driver left the bus and threw a snowball at Mike Weaver is irrelevant to the sudden emergency that confronted him at the time the bus was brought to a sudden stop. The conduct of the driver after the sudden stop in no way contributed to plaintiff's injury.

Affirmed.

Judges MORRIS and VAUGHN concur.

LARRY EDWARD MANESS v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

— AND —

DANIEL ALEXANDER MANESS, JR. v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

No. 7319SC612

(Filed 12 September 1973)

Appeal and Error § 48; Automobiles § 45— damages action for negligent operation of vehicle — reference to liability insurance — error

The existence of insurance covering a defendant's liability in an action for damages by reason of defendant's negligence is wholly irrelevant to issues involved, and a reference indicating directly that defendant has liability insurance is prejudicial and should not be permitted over defendant's objection thereto; therefore, in an action for damages allegedly sustained as a result of defendant's negligent operation of a motor vehicle, defendant is entitled to a new trial where, during the selection of the jury, plaintiffs' counsel asked the prospective jurors, "Is there any member of the jury who feels that his liability insurance rates will go up if he returns a verdict against the defendants in this case?"

APPEAL by defendant from *Seay, Judge,* 19 February 1973 Session of Superior Court held in RANDOLPH County.

The minor plaintiff seeks to recover damages for personal injury alleged to have been sustained by the negligent operation of a motor vehicle in which he was riding as a passenger. The adult plaintiff, father of the minor plaintiff, seeks to recover

damages for the medical expenses incurred in the treatment of his son's injuries.

The jury answered the negligence issue in each case favorable to the plaintiff. It awarded $3,000.00 damages in the minor's case and no damages in the father's case.

By a separate appeal the plaintiff father seeks a new trial on the issue of damages only in his case.

Defendant, in his appeal, seeks a new trial on all issues in both cases.

Ottway Burton, for the plaintiffs.

Coltrane & Gavin, by W. E. Gavin, for the defendants.

BROCK, Chief Judge.

These cases have been tried before a jury three times. After the first trial, upon appeal by the plaintiffs, this Court ordered a new trial. *Maness v. Bullins,* 11 N.C. App. 567, 181 S.E. 2d 750 (1971). After the second trial, upon appeal by the plaintiffs, this Court ordered a new trial. *Maness v. Bullins,* 15 N.C. App. 473, 190 S.E. 2d 233 (1972). After the third trial, upon appeal by the defendants, it becomes necessary again to order a new trial. We indulge in the hope that the fourth trial will terminate this litigation and let the courts move on to less time worn controversies.

During the selection of the jury to hear the evidence in this case, Mr. Burton, counsel for plaintiffs, asked the prospective jurors the following question: "Is there any member of the jury who feels that his liability insurance rates will go up if he returns a verdict against the defendants in this case?" The trial judge instructed the jurors that they were not to consider the question or any feature of it in this case. At the earliest time available for such motion defendants moved for a mistrial. Their motion was denied and they assign this as error.

Such a question could only be calculated to instill in the minds of the jurors that defendants have adequate liability insurance to respond in damages. The existence of insurance covering a defendant's liability in an action for damages by reason of defendant's negligence is wholly irrelevant to the issues involved. Where reference is made indicating directly that defendant has liability insurance, it is prejudicial, and

should not be permitted over defendant's objection thereto. *Fincher v. Rhyne,* 266 N.C. 64, 145 S.E. 2d 316. The North Carolina courts have adhered to the rule that evidence or mention of insurance is not permitted. *Fincher v. Rhyne, supra.*

New trial.

Judges HEDRICK and BALEY concur.

DANIEL ALEXANDER MANESS, JR. v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

No. 7319SC614

(Filed 12 September 1973)

APPEAL by plaintiff from *Seay, Judge,* 26 February 1973 Session of Superior Court held in RANDOLPH County.

Ottway Burton for plaintiff appellant.

Coltrane and Gavin by W. E. Gavin for defendant appellees.

HEDRICK, Judge.

In this civil action plaintiff, Daniel Alexander Maness, Jr., father, seeks to recover from the defendants medical expenses incurred in the treatment of injuries allegedly sustained by his minor son, Larry Edward Maness, as a result of an automobile accident on 4 June 1966.

Our decision, filed simultaneously herewith, in the cases of *Larry Edward Maness v. Ronald Clyde Bullins* and *Clyde Columbus Bullins and Daniel Alexander Maness, Jr., v. Ronald Clyde Bullins and Clyde Columbus Bullins,* ordering a new trial on all issues, renders moot the questions raised on this appeal.

New trial.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. LINDA COLEMAN

No. 7319SC616

(Filed 12 September 1973)

Assault and Battery § 17— verdict of guilty as charged — no ambiguity

Where defendant was charged with assault with a deadly weapon inflicting serious injuries and the jury was permitted to consider four lesser included offenses as well as that charged, the verdict of "guilty as charged" was not ambiguous but related only to the offense alleged in the bill of indictment.

APPEAL by defendant from *Seay, Judge,* 12 March 1973 Session of Superior Court held in CABARRUS County.

Defendant was charged in a bill of indictment, proper in form, with the felony of assault with a deadly weapon inflicting serious injuries. The evidence tended to show there was an argument between defendant and one Martha Deese inside a bootleg joint in Concord, North Carolina, followed by a physical encounter outside the building. Defendant admitted that she stuck Deese several times with a knife. Her defense was that Martha Deese had "fumbled in her bosom" immediately prior to the assault, and that she anticipated she was about to produce a razor or its equivalent.

The case was submitted to the jury for its consideration of five possible verdicts: (1) guilty of assault with a deadly weapon inflicting serious injury; (2) guilty of assault inflicting serious injury; (3) guilty of assault in which she attempted to inflict serious injury; (4) guilty of a simple assault; and (5) not guilty. The jury returned a verdict of "guilty as charged." Defendant was sentenced to a term of not less than three nor more than five years.

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

Davis, Koontz & Horton, by Clarence E. Horton, Jr., for the defendant.

BROCK, Chief Judge.

Defendant assigns as error that the trial court accepted an ambiguous verdict of the jury and entered judgment thereon. Defendant argues that the case was submitted to the jury for a

consideration of four verdicts of guilty, and a verdict of "guilty as charged" is ambiguous because it does not specify to which of the four offenses it relates. Defendant cites *State v. Talbert,* 282 N.C. 718, 194 S.E. 2d 822, in support of her argument.

The opinion in Talbert, by its terms, relates only to prosecutions for homicide on a bill of indictment drawn in the words of G.S. 15-144. The opinion traces the history of the homicide statute and the reasons for requiring the jury to specify by its verdict the degree of homicide to which it relates. The rationale of Talbert does not support defendant's argument in this case.

The bill of indictment on which defendant was tried reads as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Linda Coleman late of the County of Cabarrus on the 30th day of September 1972 with force and arms, at and in the County aforesaid, did unlawfully, willfully and feloniously *commit and assault upon Martha Ann Deese, with a deadly weapon,* to wit, a knife, *inflicting serious injuries,* against the form of the statute in such case made and provided and against the peace and dignity of the State." (Emphasis supplied.)

As can be seen from a reading of the bill of indictment each element of the offense is alleged. Therefore nothing was left to conjecture when the verdict of "guilty as charged" was rendered. The alternate verdicts which the jury was permitted to consider constituted lesser included offenses of the one charged in the bill of indictment, but the allegations in the bill specifically describe the offense condemned by G.S. 14-32(b) and the verdict of "guilty as charged" related only to the offense alleged.

No error.

Judges HEDRICK and BALEY concur.

B. WALTON BROWN, ADMINISTRATOR OF THE ESTATE OF RONALD WILSON WALKER v. LUMBERMENS MUTUAL CASUALTY COMPANY

No. 7319SC610

(Filed 12 September 1973)

Insurance § 69— uninsured motorist provision — wrongful death claim barred — no recovery under provision

Where plaintiff instituted his action against defendant insurance company under an uninsured motorist endorsement on a policy more than two but less than three years after his cause of action for wrongful death arose, the trial court properly entered summary judgment for defendant since at the time plaintiff commenced his action, his claim against the uninsured motorist was already barred and he was no longer "legally entitled to recover" from the uninsured motorist— a prerequisite to recovery under the uninsured motorist endorsement.

APPEAL by plaintiff from *Godwin, Judge,* 9 April 1973 Session of Superior Court held in RANDOLPH County.

Plaintiff's intestate died on 26 April 1969 as result of injuries received on that date when the Chevrolet automobile he was driving skidded off the road and overturned. Plaintiff instituted this action on 25 April 1972 seeking to recover up to the policy limit of $10,000.00 from defendant insurance company under the provisions of the uninsured motorist endorsement to a policy of insurance issued by defendant to plaintiff's intestate's mother, who was owner of the Chevrolet. Plaintiff alleged that the fatal collision was caused by the negligence of an unknown driver of an unknown vehicle who, while attempting to pass the Chevrolet in a curve, collided with it and caused it to skid out of control.

Defendant admitted issuance of the policy with the uninsured motorist endorsement, but denied liability thereunder on the ground, among others, that this action was instituted more than two years after the accrual of the cause of action for wrongful death. Defendant also moved for summary judgment dismissing the action on that ground. The motion was allowed and plaintiff appealed.

Ottway Burton for plaintiff appellant.

Henson, Donahue & Elrod by Joseph E. Elrod III for defendant appellee.

PARKER, Judge.

By the "uninsured motorists" endorsement to the policy here sued upon the defendant agreed to pay, up to stated limits of liability, "all sums which the insured or his legal representatives shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of . . . bodily injury, sickness or disease, including death resulting therefrom, . . . sustained by the insured . . . caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile." Plaintiff's intestate comes within the policy definition of an "insured" and the hit-and-run automobile referred to in the complaint comes within the policy definition of an "uninsured automobile" with respect to the coverage afforded by the endorsement. Nevertheless, summary judgment dismissing plaintiff's action was proper.

The pleadings and record establish that this action was commenced more than two but less than three years after plaintiff's action for the wrongful death arose. By G.S. 1-53(4) an action to recover damages for wrongful death must be commenced within two years. Thus, at the time plaintiff instituted this action against defendant insurance company, his action against the uninsured motorist was already barred and he was at that time no longer "legally entitled to recover" from the uninsured motorist.

It is true, as plaintiff contends, that this action against defendant insurance company is upon contract and that G.S. 1-52(1) provides a three-year period of limitations for the commencement of such actions. This contention, however, misses the point. Summary judgment dismissing plaintiff's action was proper not because his contract action against defendant insurance company was barred, but because the admitted facts establish that at the time this action was instituted his claim was no longer within the coverage provided by the policy. The summary judgment dismissing plaintiff's action is

Affirmed.

Judges BRITT and MORRIS concur.

DEBORAH S. BROWN v. CHARLES W. BROWN, JR.

No. 7326DC542

(Filed 12 September 1973)

Divorce and Alimony §§ 16, 22— alimony and child support order — consideration of incompetent evidence

In this action for alimony, child custody and support and counsel fees, material findings of fact made by the court were not based on competent evidence where the court, in making such findings, considered plaintiff's unverified complaint as an affidavit, considered letters and statements not under oath, and considered statements made by counsel at the hearing.

APPEAL by defendant from *Abernathy, Judge,* 12 February 1973 Session, District Court, MECKLENBURG County.

This action was instituted on 17 December 1971. Plaintiff sought custody of the children born of the marriage between her and defendant, child support, alimony pendente lite, alimony and counsel fees. Various letters and affidavits were filed by plaintiff including her own affidavit. Defendant also filed various letters and affidavits, including his own affidavit. On 30 May 1972, defendant filed answer to plaintiff's complaint.

On 6 Ooctober 1972, Judge Griffin entered an order "that the parties and counsel appear before the undersigned Judge Presiding over the General Court of Justice of the Mecklenburg County District Court Division, at the October 9, 1972 Nonjury Civil Session at 3:30 o'clock p.m. on the 12th day of October in District Courtroom No. 4. At said time and place the undersigned judge will review the pleadings and will give the parties opportunity to present such oral testimony as they may deem necessary in order to bring this matter on for hearing."

The record then contains a motion of defendant that the matter be dismissed for failure of plaintiff to prosecute. This was filed 12 January 1973.

The matter was then calendared for hearing on 16 February 1973 before Judge Abernathy. During the course of the proceedings in the action, defendant's counsel had been forced to retire from the case because of his becoming a District Judge.

A proceeding was had before Judge Abernathy on 16 February 1973, and on 6 April 1973, he entered a judgment from which defendant appeals.

Hedrick, McKnight, Parham, Helms, Warley and Kellam, by Philip R. Hedrick, and Mercer J. Blankenship, Jr., for plaintiff appellee.

Edward T. Cook for defendant appellant.

MORRIS, Judge.

Plaintiff filed a motion to dismiss the appeal because of defendant's failure to comply with Rule 19(d). We are of the opinion that under the circumstances and the procedure followed in this matter, the defendant was not aware that he was narrating evidence but was narrating, in the only form possible, the actual proceedings at the hearing. The motion is, therefore, denied.

At the proceeding of 16 February 1973, the court ordered stricken from the record certain letters and statements not sworn to and left in the record certain letters and statements not sworn to. He examined orders which had been prepared and handed up to the presiding judge in previous hearings but not signed and not a part of the record. Although no one was sworn at the hearing, the record indicates there was testimony from counsel for the parties and from the parties themselves.

The judgment recites: "The case was tried upon affidavits pursuant to an order of court dated May ___, 1972, to which neither party objected." We find no such order in the record. The judgment further recites: "The court, having considered all of the competent evidence, including the affidavits filed by the plaintiff and the defendant and including the complaint of the plaintiff and the answer of the defendant, each of which was accepted as an affidavit and having heard the statements and arguments of counsel to the parties, makes the following findings of fact.":

It is clear from the record that plaintiff's complaint was not verified; and, therefore, could not be considered as an affidavit. It is also clear from the record that the court did not strike all letters and statements not under oath. The court states that he considered statements of counsel. It is obvious that some of the material findings of fact could not be based on competent evidence and could not support the judgment.

The matter must, therefore, be remanded for further proceedings and the judgment vacated.

Judgment vacated and cause remanded.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. MACK EDWARD JONES

No. 7319SC576

(Filed 12 September 1973)

Criminal Law § 102— reference to failure of defendant to take stand in jury argument — error

Where the prosecution in its argument to the jury stated, "Mack Jones is guilty, and if he was not guilty he would have taken the stand to deny it; instead he put his twelve-year-old son on the stand to lie for him," defendant is entitled to a new trial since the trial judge's subsequent instruction with respect to defendant's failure to take the stand was insufficient to cure the prejudicial effect of the argument.

ON *certiorari* to review trial before *McConnell, Judge,* August 1972 Session of Superior Court held in CABARRUS County.

Defendant was convicted of murder in the second degree. Defendant's wife was the victim of the homicide which occurred in the residence of defendant, his wife and children. Judgment was entered imposing a prison sentence of not less than twenty-five nor more than thirty years. We allowed defendant's petition for certiorari.

Attorney General Robert Morgan by Norman L. Sloan, Associate Attorney, for the State.

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

VAUGHN, Judge.

Defendant's assignments of error based on the failure of the court to grant his motions for nonsuit are without merit. The evidence was sufficient to go to the jury on the charge of murder in the second degree and fully supports the jury's verdict of guilty on that charge.

Defendant did not testify. The only witness for the defense was Frank Edward Jones, one of several children of defendant and deceased who were present in the home on the night of the homicide.

One of the privately employed attorneys for the prosecution made the following argument to the jury:

> "Mack Jones is guilty, and if he was not guilty he would have taken the stand to deny it; instead he put his twelve-year-old son on the stand to lie for him."

Defense counsel's objection was sustained. The court then instructed the jury as follows:

> "The Statute provides that the defendant has a right to choose whether or not he goes upon the stand and the fact that he does not go upon the stand shall not be considered by you against him."

The impropriety of the quoted argument by the prosecution is so elementary that it does not require discussion. It is error to comment on the failure of a defendant to testify. Here the argument not only violates this familiar rule, but it also contains the statement that if defendant were not guilty he would have taken the stand to deny guilt. This argument was obviously calculated to mislead the jury into the belief that they should consider defendant's silence at trial as a circumstance indicating guilt. Moreover, the statement ". . . he (defendant) put his twelve-year-old son on the stand to lie for him" was as offensive to the administration of justice in this case as was the first part of the argument. *See State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335. Although the judge, after objection, gave the quoted instruction we cannot hold that it was sufficient to cure the prejudicial effect of the argument and render it harmless, especially since the court did not instruct the jury that the argument they had just heard was improper and that it should be disregarded. *State v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537.

There must be a new trial because of the improper argument of the privately employed attorney for the prosecution.

New trial.

Judges CAMPBELL and BALEY concur.

COMMERCIAL CREDIT CORPORATION v. BOBBY JOE McCORKLE

No. 7326DC448

(Filed 12 September 1973)

1. **Rules of Civil Procedure § 56— summary judgment — denial of debt — issue of material fact**

Where a defendant denies the existence of the debt alleged, defendant's denial raises a genuine issue as to a material fact unless admissions by defendant clearly show that his denial of the debt is utterly baseless in fact.

2. **Bills and Notes § 20; Rules of Civil Procedure § 56— denial of debt — summary judgment on pleadings — error**

In this action to recover a sum allegedly due from defendant under a Transfer of Interest Agreement executed by defendant, the trial court erred in entering summary judgment for plaintiff upon a consideration of the pleadings alone where defendant admitted that he executed the Transfer of Interest Agreement but denied that he owed plaintiff a balance as alleged.

APPEAL by defendant from *Stukes, District Court Judge,* 12 March 1973 Session of District Court held in MECKLENBURG County.

Plaintiff instituted this action to recover the sum of $192.76, plus interest, which it alleged was due from defendant under a Transfer of Interest Agreement executed by defendant. Defendant admitted the execution of the transfer agreement but denied that he failed to make payments and denied that he owed plaintiff a balance as alleged. Thereafter, plaintiff filed a motion for summary judgment which was granted. Defendant appealed.

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

Joseph B. Roberts III for defendant.

BROCK, Chief Judge.

The record on appeal reflects that summary judgment was rendered upon a consideration of the pleadings alone. In the pleadings defendant denied the allegation of the amount alleged by plaintiff to be due under the contract. Plaintiff offered no supporting affidavits, depositions, or answers to interrogatories, but elected to stand upon its allegation in its complaint of a sum due which defendant denied. According to the stipulations

filed in this Court both the complaint and the answer were verified.

[1, 2] The trial court, upon motion for summary judgment under Rule 56, should not undertake to resolve an issue of credibility. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101. In this case plaintiff alleges defendant is indebted to plaintiff; defendant denies the allegation. Where a defendant denies the existence of the debt alleged, unless admissions by defendant clearly show that his denial of the debt is utterly baseless in fact, defendant's denial raises a genuine issue as to a material fact. Where a genuine issue as to a material fact is raised, summary judgment is improper. *See* G.S. 1A-1, Rule 56(c). In this case defendant's admission that he executed the Transfer of Interest Agreement does not render his denial of the debt to be baseless. From the pleadings alone it cannot be determined as a fact that defendant owes the plaintiff a sum of money in any amount.

Reversed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. J. W. PRIVETTE

No. 7320SC625

(Filed 12 September 1973)

Criminal Law § 91— motion to continue unsupported by affidavits — denial of motion — no error

Defendant failed to show that the trial court abused its discretion in denying his motion to continue or that he was prejudiced thereby where his motion was not supported by affidavits showing what efforts, if any, had been made to secure the presence of witnesses or showing why defendant had not conferred more with his attorney between the time of his appointment and the time of trial.

APPEAL by defendant from *McConnell, Judge,* 30 April 1973 Session of Superior Court held in UNION County.

Defendant was charged in a bill of indictment, proper in form, with the armed robbery of fifty-five dollars ($55.00) from Mrs. Edna McCain, the operator of a small store.

Defendant pleaded not guilty and was found guilty as charged. From a judgment imposing a sentence of twenty to twenty-five years, defendant appealed.

Attorney General Robert Morgan and Associate Attorney Emerson D. Wall for the State.

Clark, Huffman & Griffin by Bobby H. Griffin for defendant appellant.

HEDRICK, Judge.

Defendant was arrested on 15 March 1973 and was afforded a preliminary hearing on 10 April 1973, at which time counsel was appointed to represent him. Probable cause was found and defendant was bound over for trial at the next Session of Superior Court. The case was called for trial on 30 April 1973. Prior to pleading, defendant made a motion to continue on the grounds that: (1) Three of his witnesses were out of state and not available to testify and if present these witnesses would testify that defendant was not present in North Carolina at the time the crime was allegedly committed; and (2) Defendant had only one occasion to discuss these matters with his court appointed counsel.

Defendant's sole assignment of error is that the court erred in denying his motion to continue. A motion to continue is directed to the sound discretion of the trial court, *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1971); and such motion should not be granted unless the reasons therefor are fully established, *State v. Stepney, supra.*

Defendant's motion to continue was not supported by affidavits showing what efforts, if any, had been made to secure the presence of witnesses, nor does the record disclose why the defendant had not conferred with his attorney more during the interval between 10 April and 30 April 1973. In short, defendant has failed to show that the trial judge abused his discretion in denying the motion to continue or that he was prejudiced thereby.

Defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. TERRY LANCE DOBSON

No. 7319SC568

(Filed 12 September 1973)

APPEAL by defendant from judgment entered by *Johnston, Judge,* at 30 April 1972 Session of ROWAN County Superior Court.

The defendant was charged in three separate bills of indictment with (1) felonious larceny of an automobile, (2) with common law robbery, and (3) with felonious assault.

The defendant entered a plea of guilty to each of the charges. The trial judge questioned the defendant on oath pertaining to his plea of guilty to the three felonies, and, thereafter, upon substantiating evidence, adjudicated that the defendant entered the pleas freely, understandingly and voluntarily without any undue influence, compulsion or duress and without promise of any leniency. The defendant was represented by counsel.

From judgment of imprisonment entered upon the pleas, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

Carlton, Rhodes and Thurston by Gary C. Rhodes for the defendant appellant.

CAMPBELL, Judge.

We have carefully reviewed the record in this case and find no prejudicial error.

No error.

Judges VAUGHN and BALEY concur.

State v. Jackson; State v. Grant

STATE OF NORTH CAROLINA, PETITIONER v.
TED JACKSON, RESPONDENT

No. 7329SC599

(Filed 12 September 1973)

ON *certiorari* to review order of *Thornburg, Judge,* entered at the 23 January 1973 Session of POLK Superior Court.

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

Wm. A. McFarland for defendant appellee.

BRITT, Judge.

After careful consideration of the record and briefs, we conclude that the writ of certiorari filed in this cause on 18 April 1973 was improvidently allowed.

Dismissed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES EARL GRANT, JR., 72-CR-1180; CHARLES PARKER, 72-CR-1187; THOMAS JAMES REDDY, 72-CR-1188

No. 7326SC631

(Filed 19 September 1973)

1. **Constitutional Law § 29; Jury § 5— jury selection — no denial of constitutional rights**

There was no violation of any of the constitutional rights of the defendants in the jury selection process where defendants presented no evidence which demonstrated any discrimination against them by reason of race, economic status, or age group, and there was no evidence of any arbitrary or systematic exclusion from the jury of any segment of the citizenship of the county.

2. **Jury § 7— denial of challenge for cause — review**

Trial court's decision refusing to permit defendants to challenge two jurors for cause was final and not subject to review on appeal where it was unaccompanied by any error of law; moreover, defendants

were not prejudiced by the denial since both of the jurors challenged for cause were eventually excused by peremptory challenges and did not serve.

3. **Criminal Law § 21— no preliminary hearing as matter of right**

A preliminary hearing is not an essential constitutional step in a criminal process before there can be prosecution under a valid bill of indictment.

4. **Arson § 3; Criminal Law § 33— meetings of defendants — proceedings at meetings — competency of evidence in arson trial**

In a prosecution for the felonious burning of a barn, testimony that prior to the time of the alleged crime defendants met together and discussed the problems of black people in their city and the use of "revolutionary tactics" to deal with those problems, that at those meetings defendants smoked marijuana and that they conducted instruction sessions in the use of firearms and firebombs commonly identified as "Molotov Cocktails" was properly admitted since it showed motive and intent.

5. **Criminal Law § 85— specific character traits of defendant — evidence inadmissible**

Trial court properly sustained objection to an inquiry about specific character traits of defendant and directed the jury to disregard the answer of the witness.

6. **Criminal Law § 85— evidence of defendant's character — limitation not prejudicial**

Where a character witness for defendant was not permitted to elaborate at length upon his opportunities to observe defendant and know his character, but several witnesses were permitted to testify that defendant's character was good, defendant was not prejudiced even if the examination of the witness was improperly limited.

7. **Criminal Law § 88— cross-examination to show bias — no error**

Trial court did not err in allowing the solicitor to ask questions intended to point out the bias of the witnesses.

8. **Criminal Law § 87— leading questions by solicitor — no error**

Trial court did not abuse its discretion or defeat the purpose of sequestration of the State's witnesses where the court allowed leading questions to be put to the witnesses.

9. **Criminal Law § 43— motion picture of burning stable — admissibility**

In a prosecution for the felonious burning of a stable where a witness testified that a motion picture fairly and accurately depicted the fire but that it was not identical to what he saw because it appeared to have been taken about two minutes before he arrived at the stable, the film was properly authenticated and admitted into evidence.

10. **Criminal Law § 169— failure of defendant to argue objection — no prejudice**

Defendant was not prejudiced where his counsel objected to the questioning of a witness, requested permission to present his argument

in the absence of the witness, was denied his request and therefore made no argument.

11. Criminal Law § 99— expression of opinion on evidence

The trial court did not express an opinion in violation of G.S. 1-180 by several times sustaining objections to defendants' questions and saying to defense counsel, "He has answered your question."

12. Criminal Law § 9— aiding and abetting — sufficiency of instruction

Trial court's instructions that "to find defendant . . . guilty of felonious burning because of aiding and abetting, the State must prove beyond a reasonable doubt . . . that, if he was not actually on the scene, as the evidence tends to show, that he shared the criminal purpose of the other persons and, to their knowledge, was aiding them or was in a position to aid them at the time the crime was committed," and that defendant "must aid or actively encourage the person or persons committing the crime or in some way communicate to this person or persons his intention to assist in its commission" were proper statements of the law.

13. Criminal Law § 116— charge on defendant's failure to testify — no error

In the absence of a request from the defendant it is preferable for the court to omit any reference or implication concerning the failure of the defendant to testify; however, the court's reference in this case, even if technically erroneous, was harmless error beyond a reasonable doubt.

14. Criminal Law § 113— alibi instruction — sufficiency as to one defendant — necessity as to another defendant

Trial court's instruction with respect to alibi of one defendant was proper, but a second defendant who merely denied his presence at the crime scene, yet introduced no evidence as to his whereabouts at the time of the alleged crime, was not entitled to an alibi instruction.

15. Criminal Law § 114— jury instructions — no expression of opinion

Though the trial judge devoted more time to the State's evidence than to that of defendants, he did so because the State presented far more evidence, and his summary of the evidence was fair, accurate, and showed no bias in favor of either the State or the defendants.

16. Criminal Law § 138— severity of sentence — consideration of defendants' backgrounds proper

Trial court's sentencing procedure for defendants was proper where, prior to sentencing, the judge requested and was given information concerning the personal history and background of each defendant in an effort to arrive at a sentence which would punish defendant for his wrongful conduct, deter others from committing future crimes, and afford the defendant an opportunity for rehabilitation.

On *certiorari* granted upon petition of defendants to review trial before *Snepp, Judge,* 10 July 1972 Session of Superior Court held in MECKLENBURG County.

Defendants, James Earl Grant, Jr., Thomas James Reddy, and Charles Parker, were charged in separate bills of indictment, proper in form, with the felonious burning of a barn at the "Lazy B Riding Stables" in Charlotte, North Carolina on 24 September 1968.

Prior to the call of the cases for trial, defendants Grant and Reddy made the following motions: (1) Motion to quash bill of indictment because the grand jury was selected in a manner which excluded members of defendants' race and economic class and young persons between the ages of 18 and 21 and failed to represent a cross-section of the community in violation of rights secured to defendants by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 19, of the Constitution of the State of North Carolina. (2) Motion to quash venire of petit jurors for the same reasons set out above. (3) Motion to dismiss indictment, grant a preliminary hearing, and restrain the prosecution from proceeding to trial until such preliminary hearing was had and determined. (4) Motion for production of all the State's evidence and witnesses for examination and interview by the defendants. Defendant Parker joined in the latter two motions.

These motions were considered at pretrial hearings on July 6, 7 and 10 when testimony was heard particularly with respect to the procedure employed in determining the jury list from which both the grand jury and petit jury were selected. The court found extensive facts concerning the procedure utilized by the 1972-73 Jury Commission of Mecklenburg County, which was composed of two black citizens and one white citizen, and determined that defendants had shown no systematic exclusion of members of any race, economic status, or age group from the jury list and that there was no discrimination in the selection of members of the grand jury or petit jury which violated any of defendants' constitutional rights. The motions of defendants to quash the indictments, to quash the venire of petit jurors, and to grant a preliminary hearing were denied. The motion for production of evidence was granted in large part, and the State was required to furnish counsel for defendants copies of any written or recorded statements and the substance of any oral statements of State's witnesses, copies of any scientific or other tests intended to be offered in evidence, copies of any investigation reports by any agent of the

government, copies of any prior conviction record of any of State's witnesses, and any information in possession of the State which might be exculpatory of the defendants, and defendants were permitted to inspect any physical evidence which the State intended to introduce at the trial.

On 10 July 1972 upon motion of the State and without objection from defendants the cases against all defendants were consolidated for trial. Each defendant entered a plea of not guilty, and the case was tried before a jury.

The State presented evidence which tended to show the following:

A group of young black men known as "The United Souls" met upon several occasions in September 1968 at the Tenth Street Recreation Center in Charlotte, which was operated by defendants, T. J. Reddy and Charles Parker. During these meetings the group discussed the problems of black people in Charlotte, distributed pamphlets, went out to Gold Mine Road to engage in target practice with rifles furnished by the defendant Grant, and received instruction and demonstrations in the use of firebombs known as "Molotov Cocktails." The State's witnesses testified that Grant told them that he had a Ph.D. in chemistry and could make firebombs. The witness Hood saw Grant bring one of the firebombs out of the bathroom and saw it later thrown by defendant T. J. Reddy when it exploded out in a field.

On 24 September 1968 at about 7:00 p.m., defendants and the State's witnesses Hood and Washington and one Clarence Harrison met at the Tenth Street Recreation Center. Reddy and Parker reported that the Lazy B Stables had refused to rent horses to them because they were black. It was then decided to go out to the Lazy B Stables and burn the barn. Reddy drew a map of the premises showing the location of the house and barns. Grant mixed chemicals in the bathroom, poured them into beer bottles, inserted rags in the top for use as wicks, and prepared them as firebombs. Reddy carried a gasoline can, and Parker had two of the beer bottle firebombs filled with liquid. Grant furnished rifles to Hood, Washington, and Harrison who were to act as lookouts. When they were prepared, they proceeded to the Lazy B Stables area in two cars. Reddy, Parker, Washington and Hood rode in Reddy's green Falcon and Grant and Clarence Harrison rode in a white Mercury. They parked in a private parking lot in the vicinity

of the Lazy B Riding Stables. Grant did not get out of the car. Reddy and Parker picked up the cans and bottles and Reddy directed Hood and Washington to take lookout positions. Shortly after Reddy and Parker went toward the Lazy B barn the State's witness Washington saw Reddy with the gasoline can sprinkling the contents on the straw in the barn. He saw Parker light the wick in the beer bottle firebomb and throw it. Both Hood and Washington testified that they saw flames coming from the barn and they all ran toward the parking lot where Grant was waiting for them. Grant made some comment about the fact that it was a good job. The Lazy B Riding Stables' barn and contents were totally destroyed resulting in the death of fifteen horses.

Defendant Reddy testified and denied participation in the crime. The defendant Grant introduced evidence tending to establish an alibi. Parker presented no evidence. The jury found Reddy, Grant and Parker guilty as charged. From sentences of twenty-five years imprisonment for Grant, twenty years imprisonment for Reddy, and ten years imprisonment for Parker, the defendants filed notice of appeal.

Certiorari was granted to allow sufficient time to perfect appeal.

Attorney General Morgan, by Assistant Attorney General Magner and Associate Attorney Heidgerd, for the State.

Chambers, Stein, Ferguson & Lanning, by James E. Ferguson II; and William H. Allison, Jr., for defendant appellants.

BALEY, Judge.

Defendants have filed numerous exceptions and assignments of error in a voluminous record. Their dissatisfaction with their trial falls generally into the following categories:

1. In the selection of the jury including the method of securing the jury list from which both the grand jury and petit jury are chosen and challenges for cause during the *voir dire.*

2. Violation of constitutional rights by securing an indictment without first granting a preliminary hearing.

3. Rulings concerning admission or exclusion of evidence.

4. Objections to the charge.

5. Improper sentencing procedure.

6. General hostility of the trial court during conduct of the trial.

[1] First, selection of the jury. The trial court made a thorough investigation of the procedure employed in compiling the jury list in Mecklenburg County and concluded that it represented a fair cross-section of the population in the county. No evidence was presented by the defendants which demonstrated any discrimination against them by reason of race, economic status, or age group, and there was no evidence of any arbitrary or systematic exclusion from the jury of any segment of the citizenship of the county.

There appears to be no violation of any of the constitutional rights of the defendants. *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768.

[2] Defendants Grant and Reddy maintain that on two occasions on *voir dire* the trial court erroneously refused to permit them to challenge jurors for cause. G.S. 9-14 provides: "The presiding judge shall decide all questions as to the competency of jurors."

This statute has been interpreted to mean that the decision of the judge is final and not subject to review on appeal unless accompanied by some imputed error of law which does not here appear. *State v. Suddreth,* 230 N.C. 239, 52 S.E. 2d 924; *State v. Gibbs,* 5 N.C. App. 457, 168 S.E. 2d 507.

Both of the jurors challenged for cause were eventually excused by peremptory challenges and did not serve. While Grant and Reddy had exhausted their peremptory challenges, the defendant Parker still had peremptory challenges remaining when the jury had been selected. Under the evidence in this case, we can perceive no prejudicial error.

[3] The argument advanced by defendants that a preliminary hearing is an essential constitutional step in the criminal process before there can be prosecution under a valid bill of indictment has been rejected in a long line of North Carolina cases the most recent of which are *State v. Harrington,* 283 N.C. 527, 196 S.E. 2d 742 (1973); and *State v. Thornton,* 283 N.C. 513, 196 S.E. 2d 701 (1973). *See also Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740, *cert. denied,* 390 U.S. 1030, 20 L.Ed. 2d 288, 88 S.Ct. 1423. This assignment of error is overruled.

[4] The third category relates to a wide variety of rulings concerning the introduction of evidence. Defendants strenuously object to any testimony concerning prior meetings of the "United Souls" and any discussions indicating the temperament and intent of the membership of this group of young black men. State's witnesses were permitted to testify that defendants met together in the Tenth Street Recreation Center and discussed the problems of black people in Charlotte and the use of "revolutionary tactics" to deal with these problems; that at these meetings defendants smoked marijuana and conducted instruction sessions in the use of firearms and firebombs commonly identified as "Molotov Cocktails." This evidence was properly admitted because it shows motive and intent. It indicates that defendants were so concerned about racial prejudice that they were willing to consider violent methods of retaliating against it. "The existence of a motive is . . . a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible where the doing of the act is in dispute." 1 Stansbury, N. C. Evidence (Brandis rev.), § 83, at 254; *accord, State v. Church,* 231 N.C. 39, 55 S.E. 2d 792; *State v. Walker,* 6 N.C. App. 740, 171 S.E. 2d 91; *see State v. Wilcox,* 132 N.C. 1120, 1144, 44 S.E. 625, 633.

In *State v. Green,* 92 N.C. 779, 783, the court in a felonious burning case stated the rule:

> "For 'where it is shown that a crime has been committed, and the circumstances point to the accused as the perpetrator, facts tending to show a motive, although remote, are admissible in evidence.' "

Evidence of prior meetings and conduct at such meetings of those accused of committing a crime has been held admissible, *State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633, even though such evidence may disclose the commission of another offense. *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47. Any reference to marijuana in the present case was irrelevant and mentioned only in passing and could not have affected the outcome of the trial. *State v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39.

[5, 6] At one point in the trial a character witness for the defendant Grant was asked if he had ever known Grant to engage in any violent activity. The witness actually answered in the negative before the court ruled upon the State's ob-

jection. The court properly sustained objection to this inquiry about specific traits of character of defendant Grant and directed the jury to disregard the answer of the witness. *State v. McKissick,* 271 N.C. 500, 157 S.E. 2d 112; *State v. Sentelle,* 212 N.C. 386, 193 S.E. 405. Upon another occasion a character witness for defendant Reddy was not permitted to elaborate at length upon his opportunities to observe Reddy and know his character; however, he and other witnesses were permitted to testify that Reddy's character was good. If the examination of this witness was improperly limited it could not have been prejudicial.

[7] Defendants contend that the trial court should have sustained their objections to a number of questions which the Solicitor asked during cross-examination of their character witnesses. These questions were not repetitious or argumentative, and they were intended to point out the bias of the witnesses. A cross-examiner may ask a wide range of questions to demonstrate the bias of the witness or to test his memory. *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864; 1 Stansbury, *supra,* § 42.

[8] Before any testimony was heard the court granted defendants' motion that the State's witnesses, Hood and Washington, be sequestered. Defendants contend that the purpose of such sequestration was to prevent one witness from patterning his testimony after that of the other, and that purpose was defeated if the examining attorney for the State was permitted to suggest an answer to the witness by means of leading questions. This argument has some validity, and it may well be that a judge should be especially reluctant to allow leading questions when the witness has been sequestered. Nevertheless, the allowance of leading questions is a matter within the discretion of the trial court. *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6. The use of occasional leading questions can save much time for the court without diminishing the accuracy of the witness's testimony. Therefore, instead of banning such questions entirely, the courts permit the trial judge to accept those which are harmless and exclude those which are dangerously suggestive. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; *State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5.

[9] Defendants assign as error the admission of a motion picture of the burning stable. The owner of the stable testified that it fairly and accurately depicted the fire, but that it was

not exactly identical to what he saw because it appeared to have been taken about two minutes before he arrived at the stable. This testimony was sufficient to authenticate the film. The admissibility of motion pictures is governed by the same rules that control the admission of photographs. *State v. Strickland,* 276 N.C. 253, 173 S.E. 2d 129. A photograph "will not necessarily be excluded because it is not an exact reproduction," if it is a fair and accurate portrayal of the scene. 1 Stansbury, *supra,* § 34, at 95-96; *see State v. Shepherd,* 220 N.C. 377, 17 S.E. 2d 469.

[10] Upon one occasion when the solicitor was examining the witness Hood, there was an objection by counsel for the defendants and a request to be permitted to present his argument in the absence of the witness, believing that if Hood heard the argument it would suggest answers to subsequent questions. The court denied counsel's request, and rather than educate Hood, defense counsel made no argument. The question to which objection was made concerned the definition of a "Molotov Cocktail." Defendants have not shown that the failure to permit argument of counsel upon this relatively minor point in the absence of the witness could have affected the result of the trial. *State v. Rainey, supra.*

[11] Defendants argue that the trial judge expressed an opinion in favor of the State, in violation of G.S. 1-180 by several times sustaining objections to defendants' questions and saying to defense counsel, "He has answered your question." This argument is unconvincing. "He has answered your question" was not in any way a disparaging or critical remark but merely a statement of fact. Every time the judge used this expression, defense counsel had been engaging in repetitious questioning.

The fourth major group of assigned errors concerns the charge of the court. Defendants contend that the instructions of the court with respect to the defendant Grant on the question of aiding and abetting and on the defense of alibi were insufficient. They assert that the comment of the court upon defendant Parker's failure to offer any evidence was prejudicial. They argue that the court in summarizing the contentions of the State over-emphasized the State's evidence and minimized the contentions and evidence of the defendants to defendants' prejudice. They challenge the instructions concerning testimony of an accomplice and the definition of reasonable doubt.

[12] The court instructed the jury that "to find the defendant Grant guilty of felonious burning because of aiding and abetting, the State must prove beyond a reasonable doubt . . . that, if he was not actually on the scene, as the evidence tends to show, that he shared the criminal purpose of the other persons and, to their knowledge, was aiding them or was in a position to aid them at the time the crime was committed." He also charged that to be guilty as an aider or abettor, a defendant "must aid or actively encourage the person or persons committing the crime or in some way communicate to this person or persons his intention to assist in its commission." These are correct statements of the law. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866; *State v. Sellers,* 266 N.C. 734, 147 S.E. 2d 225; *State v. Ham,* 238 N.C. 94, 76 S.E. 2d 346; 2 Strong, N.C. Index 2d, Criminal Law, § 9 at 491, 493.

In *State v. Price, supra* at 158, 184 S.E. 2d at 869, the court states:

> "One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator."

According to the evidence for the State the defendant Grant in addition to fitting almost exactly the above statement of the law from *Price* prepared the firebombs and delivered them to the actual perpetrators.

[13] The excerpt from the charge about which defendant Parker complains is as follows:

> "The defendant Parker, as is his right, did not introduce evidence. He contends that he ought to be found not guilty on the basis of the other evidence, both that of the State and the other defendants."

In the absence of a request from the defendant it is preferable for the court to omit any reference or implication con-

cerning the failure of the defendant to testify. It is difficult, however, to see how the implication in this case could have been prejudicial. The jury did not convict Parker and acquit the other defendants; it convicted them all. If the jury believed the testimony of the two State's witnesses who stated that they acted as lookouts and saw the actual burning of the barn, conviction of all three defendants was almost certain to follow; if the jury did not believe these witnesses, all three would have been acquitted. "Even if it be conceded *arguendo* that the charge was technically erroneous, in our opinion it was harmless error beyond a reasonable doubt." *State v. Bryant,* 283 N.C. 227, 234, 195 S.E. 2d 509, 513; *see Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).

[14] On the issue of alibi the court charged as follows: "[I]f, upon considering all of the evidence in the case, including the evidence with respect to alibi, you have a reasonable doubt as to the defendant Grant's presence at or participation in the crime charged, you must find him not guilty." Grant contends that this instruction was erroneous, and that the court should have said: "If, upon consideration of the evidence relating to alibi, you have a reasonable doubt as to Grant's guilt, you should return a verdict of not guilty." This seems to be a distinction without a difference; either of the two charges would appear to state accurately the law relating to alibi. The instruction actually given is substantially equivalent to that approved in *State v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175. Defendant Reddy contends that he also was entitled to an instruction on alibi, because he testified that he was not at the Lazy B Riding Stables on the night of the crime. Reddy did not remember where he had been that night and offered no witnesses to testify that he had been somewhere else. A defendant who merely denies that he was at the scene of the crime, without producing any evidence to show that he was at any other place, is not entitled to an alibi instruction. *State v. Green,* 268 N.C. 690, 151 S.E. 2d 606.

No set formula is required for defining reasonable doubt. Under the standards set forth in *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, the definition used by the trial court was satisfactory.

The language used by the court in its instruction on accomplice testimony has been approved almost verbatim in *State v. Mitchell,* 1 N.C. App. 528, 162 S.E. 2d 94.

[15] With respect to the comparative attention accorded by the court to the evidence for the State and that for the defendants in its summary to the jury, we find no error. The court summarized the evidence fairly and accurately showing no bias in favor of either the State or the defendants. The fact that more time was devoted to the State's evidence than to that of the defendants was to be expected since the State presented far more evidence. *State v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668; *State v. Crutchfield,* 5 N.C. App. 586, 169 S.E. 2d 43.

[16] Next, the defendants complain of the severity of the sentences which were imposed upon them and assert that the trial judge used the educational level attained by the respective defendants as a standard for determining their sentences. They contend they were punished for their level of education rather than their crime. We find no support in the record for this novel contention of the defendants and hold it without merit.

Prior to sentencing the defendants the judge requested and was provided with information concerning the personal history and background of each of the defendants. This included their age, education and experience. He commented from the bench that in sentencing he gave consideration to the personality and background of each individual defendant in an effort to arrive at a sentence that would punish the defendant for his wrongful conduct, deter others from committing future crimes, and afford the defendant an opportunity for rehabilitation Such a careful and systematic approach to sentencing deserves to be encouraged, not hindered. But if defendants can obtain new trials or reduced sentences by sifting through the personal information furnished to the judge and picking out chance correlations with the severity of their sentences, judges will be discouraged from seeking out such personal information and attempting to impose a sentence that is appropriate to the individual. Such a result would not be in the interest of the administration of justice.

Finally, defendants contend that the atmosphere at their trial was one of hostility; that their case was treated by the court and prosecution in a special way because of its racial or political overtones, and that to remedy this the case should also receive special treatment on appeal. An examination of the record does not support defendants' contention that the court was hostile to them. The trial judge maintained a scrupulous

neutrality at all times. While the cold record cannot convey the tension existing at trial, it is obvious that this is a criminal case of a nature which would attract public attention. It was necessary for the court to maintain discipline and decorum in the courtroom and its environs. The action of the court in prohibiting picketing, parading, and congregating in and around the courthouse and in requiring spectators to submit to a search for weapons before entering the courtroom was entirely proper. There may be a few minor errors in the trial, but no human being could preside over pretrial hearings and a six-day trial involving hundreds of legal questions to be ruled on instantaneously without making a single mistake. Defendants cannot expect the impossible—a perfect trial. *Lutwak v. United States*, 344 U.S. 604, 97 L.Ed. 593, 73 S.Ct. 481. What they are entitled to expect is a trial that is fair and free from prejudicial error. This they received, and their convictions should be affirmed.

We do not deem it necessary to catalogue and discuss individually all the exceptions brought forward by the defendants. Suffice it to say that we have examined each of them and find no error sufficiently prejudicial to warrant a new trial.

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. GWENDOLYN GILL KEITT AND DANNY EDWARD COBB

No. 7318SC602

(Filed 19 September 1973)

1. **Criminal Law § 92— joint trial — denial of motion to sever**

The trial court did not err in the denial of defendants' motions for separate trials on charges of possession of heroin where the offenses were tied together in time, place and circumstances. G.S. 15-152.

2. **Criminal Law § 158— transcript filed as exhibit in appellate court — conclusiveness of record**

The appellate court cannot consider a purported "transcript of proceedings" upon defendants' motion to suppress evidence which was filed by defendants as an exhibit in the appellate court since the court is bound by the record as certified and can judicially know only what appears of record.

3. Criminal Law § 84; Searches and Seizures § 1— pretrial motion to suppress — hearing — no right to further hearing at trial

Where defendants were sufficiently heard on their pretrial motions to suppress evidence obtained by a search and seizure, they were not entitled to a further *voir dire* hearing when they objected to the evidence at the trial.

4. Searches and Seizures § 3— search pursuant to warrant — admissibility of evidence

Heroin obtained in a search pursuant to a warrant was properly admitted in evidence where the record reveals that there was a hearing on defendants' motions to suppress such evidence, the search warrant and supporting affidavit were sufficient to meet the requirements of law, and the order of the trial judge contains sufficient findings to hold the heroin admissible.

5. Criminal Law § 80; Evidence § 29— admissibility of motel registration folio

In a prosecution for possession of heroin found in a motel room, a sufficient foundation was laid for the admission in evidence of a motel registration folio.

6. Criminal Law § 34— trial for possession of heroin — arraignment on other charges — harmless errror

In this joint trial of two defendants for possession of heroin, the trial court erred in arraigning one defendant in the presence of the jury on charges of possession of marijuana and possession of methadone and in then withdrawing those charges from consideration after the trial had begun, since the jury was informed that one defendant had been indicted for offenses other than the offense for which he was on trial; however, such error was harmless beyond a reasonable doubt in light of the State's strong, convincing and uncontradicted evidence of defendants' guilt.

APPEAL by defendants from *Crissman, Judge,* 26 February 1973 Session of GUILFORD Superior Court (Greensboro Division).

Separate indictments charged that on or about 31 July 1972 defendants "did unlawfully, wilfully and feloniously possess a controlled substance, to wit: Heroin which is included in Schedule I of the North Carolina Controlled Substances Act." They pleaded not guilty.

Evidence presented by the State tended to show:

At approximately 6:30 p.m. on 31 July 1972, Officer Heffinger of the Greensboro Police Department went to the vicinity of the Ramada Inn located on Seneca Road in Greensboro. He concealed himself inside a large garbage transport some 50 to 70 yards north of Room 228 of said Inn from which position he was able to, and did, watch Room 228 with binoculars. The

watched room was on the second floor and the outside door of the room opened onto a balcony walkway in full view of the officer. Mr. Heffinger observed a 1972 white over blue Plymouth drive up to the Inn, the vehicle being operated by defendant Cobb with defendant Keitt as a passenger in the right front seat. After parking the car, defendant Cobb got out, walked up to the front of Room 228 with a key in his hand, and after looking in several directions, unlocked and opened the door to the room. He then returned to the railing of the walkway, looked down at the car he had just parked, and gave a "come on" hand signal.

Defendant Keitt proceeded to get out of the car, went to Room 228, and with defendant Cobb entered the room. About five minutes later defendant Cobb emerged from the room onto the walkway, looked in several directions, and then looked back into the room. Immediately thereafter defendant Keitt came out of the room, went down to the car, opened the trunk, removed a sizeable bag from the trunk and carried it up and into Room 228 where she rejoined defendant Cobb. Officer Heffinger continued to observe the outside of the room and the area for some five or ten minutes after which he left.

Later that night Mr. Heffinger, clothed with a search warrant and accompanied by other officers, returned to the Ramada Inn. Around 10:40 p.m. the officers stopped the Plymouth automobile, then driven by defendant Keitt and occupied by defendant Cobb, as it was entering the Inn premises from Seneca Road. After serving the search warrant on defendant Cobb, the officers searched the car and found a key to Room 228 on the front seat. The officers, together with defendants, proceeded to Room 228 where police opened the door with the key, and they and defendants entered the room. With defendants present, the officers searched the room. In a corner at the end of the room farthest from the front door, they found a plastic bag similar to the one Mr. Heffinger had seen defendant Keitt remove from the car trunk and carry to the room earlier that evening. A man's shirt was on top of the bag.

In the plastic bag the officers found various items of women's clothing and also a brown paper bag smaller than the plastic bag. In the paper bag they found ten bindles of small glassine bags, each bindle containing fifteen glassine bags with a rubber band around each bindle. The glassine bags contained a white powder substance later identified as heroin. In the bot-

tom of the plastic bag, the officer found a St. Louis Children's Hospital visiting card with defendant Keitt's name thereon as parent. A latent fingerprint, later identified as defendant Keitt's, was lifted from one of the glassine bags. The Ramada Inn records revealed that on 31 July 1972, Room 228 was registered in the name of "Mr. and Mrs. Cobb."

Defendants offered no evidence.

A jury found defendants guilty as charged and from judgments imposing prison sentences of five years as to defendant Cobb and three years as to defendant Keitt, defendants appealed.

Attorney General Robert Morgan by William F. Briley, Assistant Attorney General, for the State.

Lee, High, Taylor, Dansby & Stanback by Herman L. Taylor, for defendant Gwendolyn Gill Keitt.

Frye, Johnson & Barber by Walter T. Johnson, Jr., for defendant Danny Edward Cobb.

BRITT, Judge.

[1] Defendants assign as error the denial of their motions to be tried separately. This assignment has no merit. The two defendants were charged with identical offenses that were connected and tied together in time, place and circumstances. The consolidation for trial of the cases charging them with possession of heroin under the facts appearing is fully authorized by the statutory and case law of our State. G.S. 15-152; *State v. Yoes, et al.*, 271 N.C. 616, 157 S.E. 2d 386 (1967); *State v. Walker, et al.*, 6 N.C. App. 447, 170 S.E. 2d 627 (1969).

Defendants assign as error the denial of their motions to suppress evidence obtained pursuant to a search of the automobile and the motel room and the admissions of the fruits of the search into evidence. This assignment has no merit.

The record reveals: Upon the call of the cases for trial on 26 February 1973, before arraignment of defendants and in the absence of prospective jurors, defendants made several motions including a motion "to suppress any evidence in the cases seized pursuant to a search warrant." On 27 February 1973 the court resumed its sitting. Defendants were arraigned and pleaded not guilty. Also on 27 February 1973, the court entered an order

(briefly summarized) reciting that defendants' motions to suppress evidence came on to be heard; the court found as facts that the court was presented with a search warrant issued at 9:25 p.m. on 31 July 1972 authorizing a search of defendant Cobb's person, Room 228 of the Ramada Inn, and a 1972 Plymouth bearing N. C. license number 6289-C, that the search warrant was fully supported by an affidavit, that defendants offered no evidence at the voir dire, that defendant Keitt had no proprietary interest in Room 228 and the search warrant was not directed at her or her property; and the court concluded that the search warrant was proper "in form and content" and that defendants' motions to suppress were denied. The affidavit to obtain a search warrant and the search warrant are included in the record.

[2] Defendants argue that the court did not conduct a hearing on their motions to suppress evidence and they have filed as an exhibit what purports to be the court reporter's "transcript of proceedings." We must reject the argument and exhibit. It is well settled in this jurisdiction that the record as certified imports verity and the Court of Appeals is bound thereby. 3 Strong, N. C. Index 2d, Criminal Law, § 158, p. 107. This court is bound by the record as certified and can judicially know only what appears of record. *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477 (1968).

[3, 4] The certified record before us reveals that there was a hearing on defendants' motions to suppress evidence. The search warrant and the affidavit supporting the same are sufficient to meet the requirements of law, and the order of the trial judge contains sufficient findings to hold the evidence admissible. Having been sufficiently heard on their motions to suppress, defendants were not entitled to a further voir dire hearing when they objected to the evidence at trial. See *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674 (1966); *State v. Thompson,* 15 N.C. App. 416, 190 S.E. 2d 355 (1972), cert. den. 282 N.C. 307, 192 S.E. 2d 197 (1972). The assignment of error is overruled.

[5] Defendants assign as error the admission into evidence of State's Exhibit 2 which purported to be a Ramada Inn registration folio for the dates 30 and 31 July 1972. This assignment is without merit. In 1 Stansbury's N. C. Evidence, Brandis Revision, § 155, p. 523, it is said: "If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is

familiar with them and the system under which they were made, they are admissible." In *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 686, 61 S.E. 2d 895, 897 (1950), the court, after stating the quoted rule, said: "This rule applies to original entries made in books of account in regular course by those engaged in business, when properly identified, though the witness may not have made the entries and may have had no personal knowledge of the transactions." We hold that sufficient foundation was laid for the introduction of the exhibit into evidence.

Defendants assign as error the denial of their motions for nonsuit. We hold that the evidence was more than sufficient to survive the motions and the assignment is without merit.

[6] Defendants assign as error the action of the court in consolidating two other cases against defendant Cobb with the trial of the two cases at hand and then withdrawing those cases from consideration after the trial had begun. This assignment has merit.

The record reveals that in addition to the possession of heroin case, defendant Cobb was charged also in two indictments with possession of marijuana and methadone, all on 31 July 1972. Prior to arraignment and in the absence of prospective jurors, defendants moved for severance of the four cases but the court denied the motions and allowed the State's motion to consolidate all cases for trial. Thereafter, defendants were arraigned not only on the heroin possession charges but defendant Cobb was arraigned also on the two indictments charging him with possession of marijuana and methadone. Defendants pleaded not guilty to all charges. While the first witness for the State was testifying, the court, in the absence of the jury, determined that since defendant Keitt was not connected with the marijuana and methadone cases, those cases should be tried separately. The court then modified its former ruling and denied the State's motion to try the heroin cases with the other two cases.

In *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), opinion by Chief Justice Bobbitt, the court reversed a long line of cases and held that for purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been indicted or is under indictment for a criminal offense other than the offense for which

he is on trial. However, the court further held that the circumstances of the particular case will determine whether a defendant will be awarded a new trial for having had to answer on cross-examination that he is currently under indictment for other crimes.

It appears to us that the principle laid down in *Williams* would apply also to the action of the court complained of here. We think the arraignment of a defendant in the presence of the jury on two untried charges, and then postponing the trial of those charges, could have an effect just as harmful, if not more so, as cross-examining a defendant with respect to untried charges. Nevertheless, under the circumstances of the cases at bar, we do not think defendants are entitled to a new trial. The evidence against defendants was strong and convincing, uncontradicted except for the presumption of innocence raised by the pleas of not guilty. In *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171 (1963), it was held that unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. We think the same rule would apply to the action complained of here and that although the action was erroneous, it was harmless beyond a reasonable doubt. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972).

A careful consideration of the record impels us to conclude that defendants received a fair trial free from error sufficiently prejudicial to warrant a new trial.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. PATRICK J. WALSH, GARY L. PETERSON AND RUTH ANN QUINN

No. 7312SC264

(Filed 19 September 1973)

1. Searches and Seizures § 3— search warrant — description of premises — wrong address

Although the address listed in the search warrant differed from the address of the house actually searched and there was an identical house, except for the color of the trim, some 50 feet away on the same

street as the house that was searched, the warrant described the premises to be searched with reasonable certainty where they were described as "A white stucco house with white column, with concrete white front porch, with white frame roof with red brick fence in front of house," particularly since the warrant was issued upon the affidavit of the executing officer who had been to the premises and had prior knowledge as to the place intended in the warrant.

2. **Criminal Law § 99— no expression of opinion by court**

In this prosecution for possession of LSD, the trial court did not favor the State in his discretionary rulings or otherwise aid the State in the prosecution of the case by remarks during the trial.

3. **Narcotics § 3— possession of narcotics — testimony that bottle exploded — harmless error**

In this prosecution for possession of LSD and marijuana, defendants were not prejudiced by the erroneous admission of testimony that a bottle exploded two days after it was seized from defendants' residence.

4. **Narcotics § 3— weighing marijuana in jury's presence**

In a prosecution for possession of marijuana with intent to distribute, the trial court did not err in permitting a State's witness to weigh a bag containing marijuana on a set of scales in the presence of the jury.

5. **Criminal Law § 64; Narcotics § 3— under influence of drugs — opinion by lay witness**

In a prosecution for possession of LSD and marijuana, the trial court properly allowed an officer to give opinion testimony that one defendant was under the influence of marijuana at the time narcotics were seized from defendants' residence.

6. **Criminal Law § 85— defendant's reputation in military community — admission for impeachment**

Where defendant testified in his own behalf in a prosecution for possession of narcotics, the trial court properly allowed defendant's army supervisor to testify that defendant's reputation in the military community was not good for the purpose of impeaching defendant's testimony.

7. **Narcotics § 4.5— instructions on possession — knowledge and control**

In a prosecution for possession of narcotics wherein defendants contended narcotics found in their residence belonged to another and were there without their consent, the trial court did not err in failing to charge that consent is a necessary element of criminal possession of narcotics where the court properly charged that possession of a substance exists if one has knowledge and power to control the substance, and that the discovery of narcotics on premises under the control of the accused raises an inference of knowledge and possession.

APPEAL by defendants from *Clark, Judge,* 23 October 1972 Session of Superior Court held in CUMBERLAND County. Argu-

ment on appeal in this case was continued to the week of 21 August 1973 because of illness of counsel for one of the defendants.

Defendants Patrick J. Walsh (Walsh) and Gary L. Peterson (Peterson) were charged in separate bills of indictment with the felony of possession of LSD, and possession of marijuana with intent to distribute. Defendant Ruth Ann Quinn was charged in a bill of indictment with the felony of possession of marijuana with intent to distribute.

Evidence presented by the State tended to show that on 9 June 1972, Detective Samuel White of the Fayetteville Police Department received information from a confidential informant regarding illegal possession of marijuana in a house on Pamalee Drive in Fayetteville, North Carolina. Detective White, accompanied by the informant and Officers Davis and Nichols of the Inter-Agency Bureau of Narcotics and Dangerous Drugs, drove to Pamalee Drive, where the informant pointed out the house in question. A second trip was later made by the officers to ascertain the street address and an adequate description of the house for search warrant purposes. Relying upon the informant as he had done in the past, and coupling this information with his own observations, Detective White procured a search warrant for the house on 1455 Pamalee Drive, Fayetteville, North Carolina, described as follows: "A white stucco house with white column, with concrete white front porch, with white frame roof with red brick fence in front of house."

Armed with the search warrant, Detective White and Officers Davis, Nichols, and Engleke, returned to the house pointed out by the informant. The officers went to the rear of the house, knocked, identified themselves as officers armed with a warrant, and forced their way into the dwelling. The three defendants and others in the kitchen at the time the officers entered, fled into the front room where other individuals were gathered. Detective White, pursuing the defendants, entered the front room and placed all individuals under arrest. Upon entering the front room, White noted the presence of eleven bags of green vegetable matter (later stipulated to be marijuana) under a coffee table. A further search produced a plastic bag containing six yellow pills with black dots on them (later stipulated to be LSD) from the freezer compartment of the refrigerator. Miscellaneous items of personal property belonging to defendants Peterson and Walsh were found in the house.

Defendants' evidence tended to show that defendants Peterson and Walsh lived at 1463 Pamalee Drive; that defendant Ruth Ann Quinn testified that she was not well acquainted with defendants Peterson and Walsh before the night of the raid; that defendant Quinn did not own nor know of the presence of the marijuana seized as evidence; that defendant Walsh knew of the presence of the drugs in the house, but that they were in the possession of and belonged to one Gary Adams, an AWOL who was staying in the house at the time of the raid.

Defendants were found guilty as charged.

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

Donald W. Grimes, Assistant Public Defender, Twelfth District, for defendants Patrick J. Walsh and Gary L. Peterson.

Carl A. Barrington, Jr., for defendant Ruth Ann Quinn.

BROCK, Chief Judge.

[1] Defendants' first assignment of error is that the search warrant was fatally defective, and that evidence seized thereunder should be suppressed.

G.S. 15-26 sets forth the required contents of a search warrant. G.S. 15-26(a) states: "The search warrant must describe with reasonable certainty the person, premises, or other place to be searched and the contraband, instrumentality, or evidence for which the search is to be made."

Defendants place great emphasis upon the fact that the address of the house described in the warrant differs from the address of the house actually searched, and that the house searched has a different color trim from an otherwise identical house fifty feet away on Pamalee Drive. Defendants are requiring exactness in the description of the premises, whereas the statute only requires a description with *reasonable certainty.*

"In determining whether a search warrant describes the premises to be searched with sufficient particularity, it has been said that the executing officer's prior knowledge as to the place intended in the warrant is relevant. This would seem to be especially true where the executing officer is the affiant on whose affidavit the warrant had issued, and where he knows that the judge who issued the warrant intended the building described

in the affidavit." 68 Am. Jur. 2d, Search and Seizure, § 74, p. 729.

This assignment of error is overruled.

[2] Defendants' second assignment of error embraces numerous exceptions which allege bias and prejudice on the part of the trial judge. In substance they allege that the trial judge favored the State in his discretionary rulings and otherwise aided the State in the prosecution of the case.

"Remarks of the court during the trial will not entitle defendant to a new trial unless they tend to prejudice defendant, the remarks to be considered in the light of the circumstances under which they were made; defendant has the burden of showing prejudice, and a bare possibility that they were prejudicial is insufficient." 2 Strong, N. C. Index 2d, Criminal Law § 99, p. 635.

Defendants' exceptions have failed to show prejudice. This assignment of error is overruled.

[3] Defendants assign as error the denial of defendants' motion to strike the testimony of Officer Nichols regarding a bottle which exploded two days after it was seized at Pamalee Drive. Defendants contend this testimony served to create an impression in the minds of the jury that the defendants were dealing with explosive materials, and that this evidence had no connection with a drug offense prosecution.

"Where there is abundant evidence to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." 3 Strong, N. C. Index 2d, Criminal Law § 169, p. 135.

The record on appeal further discloses that defendants did not object to the question; that the witness' answer was responsive, and that thereafter defendants moved to strike the answer. Objection must be interposed to an improper question without waiting for an answer, and, if objection is not made in that time, motion to strike the responsive answer is addressed to the discretion of the trial court, except where evidence is rendered incompetent by statute. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839. This assignment of error is overruled.

[4] The defendant next assigns as error that the trial judge permitted the State's witness to weigh the contents of State's exhibit #29 on a set of scales in the presence of the jury. State's exhibit #29 was a bag containing marijuana. Obviously, the witness would have been permitted to testify that he had weighed the bag and to give its weight. We see no merit in defendant's argument that the act of weighing it should have not been permitted in the presence of the jury.

[5] Defendants next assign as error the Court's failure to strike the opinion testimony of Officer Engleke that defendant Walsh was under the influence of marijuana at the time of the raid. A lay witness may state his opinion as to whether a person is under the influence of drugs when he has observed the person and such testimony is relevant to the issue being tried. *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49; *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405. This assignment of error is overruled.

[6] Defendants assign as error the admission of testimony of a rebuttal witness called by the State. The rebuttal witness, Sergeant Taylor, the immediate supervisor of defendant Walsh at Fort Bragg, testified that the reputation of Walsh in the military community was not good.

The defendant Walsh elected to testify in his own behalf. By doing so, he subjected himself to impeachment by evidence of bad character just as any other witness. The evidence of defendant's character goes to his credibility and is not substantive evidence of guilt or innocence. Stansbury, N. C. Evidence, Brandis Revision, § 108. This assignment of error is overruled.

[7] Defendants' final assignment of error alleges prejudicial omissions in the charge to the jury. Defendants contend that both knowledge and consent are necessary elements of criminal possession of controlled substances, and that defendants failed to give such consent to Gary Adams, the alleged sole owner and controller of the contraband.

The trial court instructed the jury that possession of a controlled substance exists if one has knowledge and power to control that substance. The trial court then delineated actual and constructive possession of property, and then instructed the jury that when one occupies a house, either alone or together with others as a tenant and as such has control over the premises, this fact in and of itself gives rise to the inference of both

knowledge and control. This principle was clearly enunciated in *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706, as follows: "Where such materials (narcotics) are found on the premises under the control of the accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession."

We find no prejudicial error in the charge.

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

No error.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. ROBERT LEE NEAL, AND EUGENE DAVIS

No. 7319SC604

(Filed 19 September 1973)

1. **Constitutional Law § 32; Criminal Law § 66— photographic identification — no right to counsel**

   A pretrial photographic identification of defendants by the prosecuting witness did not constitute a lineup entitling defendants to have counsel present.

2. **Criminal Law § 66— identification of defendants — observation at crime scene as basis**

   Where the identifying witness picked up the defendants in his cab, drove them for a short while before and after the robbery, and subsequently made an out-of-court photographic identification of defendants, the witness's in-court identification of defendants was based upon his impression formed at the time of the robbery and was not tainted by the photographic identification.

3. **Criminal Law § 66— photographic identification of defendants — no suggestiveness**

   Where the identifying witness was given a stack of ten photographs, four of which were photographs of the two defendants, the identification procedure was not so suggestive as to give rise to a substantial likelihood of irreparable misidentification.

4. **Criminal Law § 162— objection to evidence — failure to make motion to strike**

   Where inadmissibility of evidence becomes apparent upon the answer rather than the question itself, objection may be made as

soon as the inadmissibility becomes known, and it should be made in the form of a motion to strike; failure to make a motion to strike precludes defendant from raising the question of admissibility on appeal.

5. **Robbery § 3— armed robbery — admission of knife not used in robbery**

In light of other evidence of defendants' guilt, they were not prejudiced by the introduction into evidence of a knife found on the person of one defendant but not used in the commission of the crime charged.

6. **Robbery § 4— robbery of cab driver at knife point — sufficiency of evidence**

Evidence in an armed robbery case was sufficient to be submitted to the jury where it tended to show that the victim picked up defendants in his cab and that they robbed him of $62 at knife point.

7. **Criminal Law § 163— exception to charge — form**

Exceptions to the trial court's charge which do not comply with Court of Appeals Rule 19(d) are not considered by the court on appeal.

8. **Constitutional Law § 36; Robbery § 6— armed robbery — no cruel and unusual punishment**

Sentences within the statutory limits for armed robbery were not cruel and unusual.

ON *certiorari* to review the order of *McConnell, Judge,* at the 12 December 1972 Session of CABARRUS Superior Court.

Defendants in this case were indicted for the armed robbery of one Gary Dry and one Terry Simpson. The cases were consolidated without objection and were tried before a jury at the 12 December 1972 Criminal Session of Cabarrus County Superior Court. Both defendants pleaded not guilty to both counts and were convicted of the armed robbery of Dry but not of Simpson.

State's evidence consisted of the following testimony:

Gary Dry testified that the two defendants were passengers in his cab around 4:00 or 5:00 p.m. on the day of the robbery and that they robbed him of $62 at knife point. Following a voir dire examination, Dry was permitted to testify that he recognized the defendants in the courtroom as his assailants.

Police Officer J. W. Yates testified as to the account Dry gave him of the robbery. He was allowed over objection to testify that Dry said one of the defendants severed the cord on the microphone on the cab's radio and threw it out the window.

He further testified that when he and Dry returned to the scene of the robbery, they discovered the microphone in the bushes eight to ten feet from the side of the road with a portion of apparently severed cord attached.

The State rested its case, and defendants' motion to dismiss was overruled.

In an attempt to establish an alibi for both defendants, the defense presented the following testimony:

Coy Blackman and Roosevelt Parks testified that they were with both defendants around 4:30 or 5:00 on the afternoon of the robbery and that they drove them to Fisher Town.

Defendant Davis then took the stand and testified that Blackman took Neal and him to Fisher Town and that they were in Fisher Town together until about 11:30 p.m. shooting pool and drinking beer. At about 11:30 they went to a taxi stand to get a ride home, and while they were waiting for a taxi, the North Kannapolis police arrested them for public drunkenness. They were taken back to Kannapolis and put in the local jail. At about 6:00 a.m. the next morning Officer Yates and another officer arrested both defendants (in jail) for armed robbery.

The State's rebuttal evidence: Officer Yates returned to the stand and testified that he arrested both defendants at 8:13 p.m.

The motion of each defendant to dismiss was renewed and overruled.

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

Johnson and Jenkins, by Cecil R. Jenkins, Jr., for defendant appellants.

MORRIS, Judge.

[1] Appellants contend that the trial court erred in allowing an in-court identification of defendants because it was tainted by an illegal out-of-court identification. Specifically, they contend that the photographic identification of defendants by the prosecuting witness prior to trial constituted a lineup and that defendants were entitled to have counsel present. Such contention is untenable.

"A suspect has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether he is at liberty or in custody at the time. *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744 (1970). Such pretrial identification procedure is not a critical stage of the proceeding as delineated in *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967), and *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967)." *State v. Stepney,* 280 N.C. 306, 313, 185 S.E. 2d 844 (1972).

[2] In addition, appellants contend that the photographic identification was so suggestive as to render invalid the in-court identification. It is well established that a conviction based on an in-court identification following a pretrial photographic identification will be set aside only if the photographic identification procedure is so suggestive as to give rise to a substantial likelihood of irreparable misidentification. *Simmons v. U.S.,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968); *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970). In the case *sub judice* the identifying witness, Yates, testified that he picked up the defendants in his cab around 4:00 or 5:00 p.m. and drove them for a short while before and after the robbery. At the police station he was given a stack of ten photographs, four of which were photographs of the two defendants. Following a voir dire examination of Yates, the trial court found that his in-court identification was based upon his impression formed at the time of the robbery and was not tainted by the photographic identification.

[3] We believe the trial court's finding was correct. In *State v. McPherson, supra,* it was held that placing two photographs of defendants in a stack of seven or eight to be examined was not so impermissibly suggestive as to render invalid an in-court identification where the victim had ample opportunity to see his assailants in good light at the time of the robbery. In *U.S. v. Cunningham,* 423 F. 2d 1269 (4th Cir. 1970), it was held not to be impermissibly suggestive when 14 photographs were shown, and seven of them depicted defendants. In *Simmons v. U.S., supra,* six of an undisclosed total of photographs were of one defendant, and the procedure was held not to be suggestive. The identification here is no more suggestive than was that of the *McPherson, Cunningham* and *Simmons* cases, *supra.*

[4] Appellant contends that the court erred in allowing Officer Yates to testify regarding the microphone on the cab's radio. Although this evidence may have been in fact inadmissible, appellant is precluded from raising the point on appeal, for he made no motion to strike the answer given by Officer Yates. The record does not show the question in response to which Officer Yates offered the testimony; rather, it shows that counsel's objection was made after the answer.

In cases where inadmissibility becomes apparent upon the answer rather than the question itself, the objection may be made as soon as the inadmissibility becomes known, and it should be made in the form of a motion to strike. *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17 (1971). Failure to interpose a timely objection in the form of a motion to strike constitutes waiver of the exception and cannot be considered on appeal. *State v. Dickens,* 11 N.C. App. 392, 181 S.E. 2d 257 (1971); *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599 (1966).

[5] Appellants also contend that they were prejudiced by the introduction of State's Exhibit No. 2, a knife found on the person of defendant Neal but not used in the commission of the felony. This knife was a relatively insignificant part of the State's case, and, in our opinion, appellants were not injured by its introduction in light of the other evidence of their guilt. This result is consistent with the holding of the Supreme Court in *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235 (1971).

[6] Appellants further assign as error the failure of the trial court to dismiss the cases. It is true that no evidence was introduced concerning the robbery of Terry Simpson; however, the point is moot since there was no conviction in those cases. There was no error in the court's failure to dismiss the cases involving the robbery of Gary Dry. When taken in the light most favorable to the State, the evidence presented was clearly sufficient to get to the jury.

[7] Appellants have excepted in their fifth through ninth assignments of error to the trial court's charge to the jury. This court has said in interpreting Rule 19(d) of the Rules of Practice in the Court of Appeals of North Carolina:

> "Assignments 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 to the exception number and the page number of the record where the exception appears . . . will not present the alleged error for review. (Citations omitted.)" *State v. Brown,* 9 N.C.App. 534, 538, 176 S.E. 2d 907 (1970).

Appellants have not complied with Rule 19(d) relative to their exceptions to the trial court's charge — which we find to be without prejudicial error — and those exceptions will not be discussed.

[8] The sentences of defendants cannot be considered cruel and unusual punishment, for they are within the limits established by G.S. 14-87. Since *State v. Manuel,* 20 N.C. 144 (1838), the appellate courts of this State have held that when punishment does not exceed the limit fixed by statute, it cannot be considered cruel and unusual in a constitutional sense. Accord *State v. Powell,* 6 N.C. App. 8, 169 S.E. 2d 210 (1969); *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410 (1971).

We have reviewed all of defendants' assignments of error, and in our opinion no error has been made sufficiently prejudicial to warrant a new trial.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ROY ROGERS HUBBARD

No. 7320SC626

(Filed 19 September 1973)

1. **Constitutional Law § 29; Grand Jury § 3; Jury § 7— jury lists — absence of persons 18 to 21 years old**

The absence from the jury lists of the names of persons between the ages of 18 and 21 during the period from 21 July 1971, the effective date of the amendment of G.S. 9-3 lowering the age requirement for jurors from 21 years to 18 years, and 15 September 1971, the date of defendant's trial, did not constitute systematic exclusion of such age group from jury service.

2. **Criminal Law § 66— identification testimony — failure to hold voir dire**

Failure of the trial court to conduct a *voir dire* examination following defendant's objection to identification evidence did not render

such evidence inadmissible where defendant did not request a *voir dire* examination of the identifying witness, there was no evidence at trial of any lineup or photographic identification, and the evidence is clear and convincing that the in-court identification originated with the witness's observation of defendant at the time of the crime.

3. **Criminal Law § 114— statement that evidence "tends to show" — no expression of opinion**

A statement in the charge that a party has offered evidence which "tends to show" is not an expression of opinion that the evidence established such or should be believed.

4. **Criminal Law § 113— joint trial — use of "either or both" in charge**

The trial court did not err in using the disjunctive "either or both" in reference to the guilt of the two defendants where each use of the disjunctive was followed by a specific instruction referring to each defendant by name.

5. **Robbery § 5— failure to instruct on larceny**

The trial court in an armed robbery prosecution was not required to instruct the jury on the lesser included offense of larceny where the State's uncontradicted evidence tended to show that defendants took property from the person of the victim with the use of firearms.

ON *certiorari* to review judgment of *Gambill, Judge,* 13 September 1971 Criminal Session of ANSON County Superior Court.

Defendant was indicted, along with a codefendant not involved in this appeal, on two counts of armed robbery and counts of kidnapping and felonious breaking and entering. Defendant pled not guilty to all counts and was convicted by a jury on all counts.

At the beginning of the trial, defendant's attorney moved that the indictment be quashed on the basis that defendant was 20 years old, and that all persons 18, 19 and 20 years old were systematically excluded from the jury list. The motion was denied.

The uncontradicted evidence of the State tended to show the following:

The prosecuting witness, Baxter McRae, returned to his home in Peachland to discover that the defendant Hubbard and his accomplice Sturdivant had entered his home and were waiting for him, armed with a "snub-nosed 38." Following a series of threats to the person of McRae and to the safety of his wife, the discharge of the 38 and a series of questions concerning the

amount of cash available to McRae, the defendants took $62 from McRae's person at gun point and drove to Wadesboro with him and forced him to withdraw $27,000 from his bank account. McRae thereupon picked up defendant Hubbard in his pickup truck, gave him the money in a brown paper bag, and drove him out of town to a point in the country where McRae was tied up and abandoned, and the defendants attempted to escape in a blue 1966 Plymouth.

A State Highway Patrolman testified that a blue 1966 Plymouth was reported leaving the scene where the pickup truck had been abandoned. He further testified that he chased the car and apprehended Hubbard, who had on his person a brown paper bag containing the $27,000 withdrawn from the bank by McRae.

We granted defendant's petition for certiorari in lieu of appeal, the maximum time for perfecting his appeal and docketing the record having expired.

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

Jones and Drake, by Henry T. Drake, for defendant appellant.

MORRIS, Judge.

[1] Appellant's first assignment of error is that persons 18, 19 and 20 years of age were systematically excluded from the jury lists. North Carolina amended its statutes effective 21 July 1971 to provide that all persons 18 years of age and older are to be included on the jury lists. G.S. 9-3. Defendants were tried in the Anson County Superior Court on 15 September 1971.

However, appellant's position is unsound in light of the holding of the Supreme Court of North Carolina in *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972), where the defendant was likewise tried after the enactment of G.S. 9-3 as amended. Citing G.S. 9-2—which provides that the jury commissioners are to begin preparation of a new jury list "at least thirty days" prior to 1 January 1972—the Supreme Court held that:

> "The absence from the jury list of the names of persons between the ages of eighteen and twenty-one for the short period of time here complained of is not unreasonable, and

does not constitute systematic and arbitrary exclusion of this age group from jury service." *Id.* at 37.

The case *sub judice* is indistinguishable on the facts from *Cornell, supra.* This assignment of error is overruled.

[2] Appellant further contends that failure of the trial judge to conduct a voir dire examination following his objection to identification evidence rendered such evidence inadmissible. We do not agree. Nowhere in the record does it appear that the defendant requested a voir dire examination of the identifying witness.

> "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." (Emphasis added.) *State v. Accor* and *State v. Moore,* 277 N.C. 65, 79, 175 S.E. 2d 583 (1970).

In *State v. Stepney,* 280 N.C. 306, 314, 185 S.E. 2d 844 (1971), Justice Huskins, speaking for a unanimous court as to this question, and after quoting the above from *State v. Accor* and *State v. Moore, supra,* said:

> "It is apparent from the foregoing decisions that the better procedure dictates that the trial judge, even upon a general objection only, should conduct a voir dire in the absence of the jury, find facts, and thereupon determine the admissibility of in-court identification testimony. *State v. Blackwell, supra* (276 N.C. 714, 174 S.E. 2d 534). Failure to conduct the voir dire, however, does not necessarily render such evidence incompetent. Where, as here, the pretrial viewing of photographs was free of impermissible suggestiveness, and the evidence is clear and convincing that defendant's in-court identification originated with observation of defendant at the time of the robbery and not with the photographs, the failure of the trial court to conduct a voir dire and make findings of fact, as he should have done, must be deemed harmless error. *State v. Williams, supra* (274 N.C. 328, 163 S.E. 2d 353). A different result could not reasonably be expected upon a retrial if all evi-

dence of pretrial photographic identification were excluded." *Id.* at 314.

In this case, there had been no evidence of a lineup or photographic identification, nor was there any later evidence as to that. The prosecuting witness testified that he was in the presence of the defendant for over two hours and had ample opportunity to observe him. A part of that time defendant had a nylon stocking over his face, but for a part of the time his face was unmasked and the witness was in an automobile or pickup truck with him for the greater part of the time. Additionally, there was other clear evidence of identification. No possible prejudice could have resulted to defendant by the court's failure to conduct a voir dire examination.

[3] Appellant excepts to the charge of the trial court in that it amounts to a comment on the evidence. The record does not support this position. A statement that a party had offered evidence which "tends to show" is not an expression of opinion that the evidence established such or should be believed. *Thompson v. Davis,* 223 N.C. 792, 28 S.E. 2d 556 (1943).

[4] Appellant further excepts to the charge in that the expression "either or both" is used repeatedly in reference to the guilt of the two defendants. While it is error to instruct the jury in the disjunctive when joint defendants are tried together, *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230 (1969); *State v. Doss,* 5 N.C. App. 146, 167 S.E. 2d 830 (1969), the record in the case *sub judice* reveals that each use of the disjunctive "either or both" is followed by a specific instruction referring to each defendant by name. Defendant cannot be permitted to select portions of the charge—even though objectionable when standing alone—and assign errors to them if those portions can be readily explained by reference to the charge in its entirety, and the charge in its entirety appears to be without prejudicial error. *In re Mrs. Hardee,* 187 N.C. 381, 121 S.E. 667 (1924); *Acceptance Corp. v. Edwards,* 213 N.C. 736, 197 S.E. 613 (1938).

[5] There was no error on the part of the trial court in failing to instruct the jury on the lesser included offense of larceny. It is well settled that an indictment for robbery with firearms will support a conviction of larceny, and when there is evidence of defendant's guilt of larceny it is error for the court to fail to submit the question to the jury. *State v. Wenrich,* 251 N.C. 460, 111 S.E. 2d 582 (1959); *State v. Davis,* 242 N.C. 476, 87

S.E. 2d 906 (1955). It is equally well settled, however, that where all the evidence shows that property was feloniously taken from the person of the prosecuting witness by the use of a dangerous weapon, the court is not required to submit the question of defendant's guilt of lesser degrees of the crime. *State v. Fletcher,* 264 N.C. 482, 141 S.E. 2d 873 (1965); *State v. Wenrich, supra.* Here the State's evidence was uncontradicted, and it tended to show that the defendants did in fact take property from McRae's person with the use of firearms.

Appellant's final exception to the trial court's accepting the verdict is without merit and overruled.

In defendant's trial in the Superior Court, we find no prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. MIAMI ARELLIA HAMILTON

No. 7320SC647

(Filed 19 September 1973)

1. **Homicide § 30— submission of first degree murder — error cured by verdict of second degree murder**

Any error in the submission of the question of guilt of first degree murder was cured when the jury found defendant guilty of the lesser offense of second degree murder.

2. **Homicide § 4— premeditation and deliberation**

Premeditation and deliberation may be present even though the defendant is angry at the time of the killing if he acts in the furtherance of a fixed design to kill.

3. **Homicide § 21— first degree murder — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of first degree murder where an eyewitness testified that the victim was in the kitchen of his home cooking biscuits when defendant entered the kitchen and angrily asked the victim where he was last night, that defendant picked up a knife from the kitchen table and started striking at the victim, that the witness restrained defendant but released her when she threatened to cut him, and that defendant then stabbed the victim to death, since the jury could reasonably have concluded that defendant had formed a fixed design to kill the victim before she entered the kitchen.

4. **Criminal Law § 88— cross-examination — past employment practices of witness**

In this homicide prosecution, the trial court did not err in refusing to permit inquiry into the past employment of the State's chief witness after conducting a *voir dire* hearing and ruling that such information was of limited relevance and dealt with matters collateral to the main issue in the trial.

5. **Criminal Law § 43— gruesome photographs**

If photographs are duly authenticated and portray conditions observed by witnesses who use them to illustrate their testimony, they are admissible in evidence even though they may depict gruesome and revolting scenes.

6. **Criminal Law § 114— no expression of opinion in charge**

The trial court in this homicide prosecution did not express an opinion on the evidence in summarizing the evidence for the jury. G.S. 1-180.

APPEAL by defendant from *McConnell, Judge,* 19 February 1973 Session of Superior Court held in UNION County.

Defendant was charged in a bill of indictment with the first degree murder of Fred Ledbetter on 14 October 1972. She entered a plea of not guilty but was convicted by the jury of murder in the second degree. From a judgment imposing a sentence of fifteen to twenty years imprisonment, defendant appeals.

Attorney General Morgan, by Assistant Attorney General Charles M. Hensey, for the State.

Chambers, Stein, Ferguson & Lanning, by James C. Fuller, Jr., for defendant appellant.

BALEY, Judge.

Defendant contends that the State introduced no evidence of first degree murder and that it was error for the court to permit the jury to consider first degree murder as a possible verdict.

[1] Defendant was found guilty of the lesser offense of murder in the second degree and any error which might have occurred by the submission of the issue for the greater offense was thereby cured. *State v. Parks,* 14 N.C. App. 97, 187 S.E. 2d 462 (1972).

[2] Nevertheless, an examination of the State's evidence shows that it was sufficient to support a conviction of first degree

murder. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393. Premeditation means " 'thought beforehand for some length of time, however short.' " *State v. Perry,* 276 N.C. 339, 346, 172 S.E. 2d 541, 546. " 'Deliberation means . . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design . . . and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' " *Id.* The requirement of a cool state of blood does not mean that the defendant must be calm or tranquil. Premeditation and deliberation may be present even though the defendant is angry at the time of the killing, if he acts in the furtherance of "a fixed design to kill." 4 Strong, N. C. Index 2d, Homicide, § 4, p. 196; *accord, State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769, *cert. denied,* 368 U.S. 851. It is not necessary, and usually is not possible, for the State to prove premeditation and deliberation directly; they must be inferred from the circumstances. *State v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590.

[3] In the present case, George Eddie, who was visiting at Fred Ledbetter's house when the killing occurred, was a witness for the State. According to his testimony, defendant came into the kitchen while Ledbetter was cooking biscuits, and angrily asked him: "Where were you last night?" She spotted a knife on the kitchen table, picked it up, and started striking at Ledbetter. George Eddie then grabbed defendant and pulled her down across his lap, but he had to release her when she threatened to cut him. When Eddie released her, she went after Ledbetter again and stabbed him to death. During this time Ledbetter was not threatening defendant or doing anything that would offend her, but was merely standing still, with his back to a wall and his hands at his sides.

From this evidence the jury could reasonably have concluded that before entering Fred Ledbetter's kitchen defendant had formed a fixed design to kill him, and that while in the kitchen, she purposefully carried out that plan. This would have constituted first degree murder. Since, when viewed in the most favorable light for the State, the evidence would have supported a conviction of first degree murder, it is clear that this issue was properly submitted to the jury.

[4] The next assignment of error brought forward by defendant concerns the refusal of the trial court to permit inquiry into the past employment history of the State's witness, George Eddie. After conducting a *voir dire* hearing the court ruled that this information was of limited relevance and dealt with matters collateral to the main issue in the trial. In cross-examination a trial judge has discretion to exclude questions that are "of only tenuous relevance," as well as those which are irrelevant. 1 Stansbury, N. C. Evidence (Brandis rev.) § 35, at 108; *see State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20; *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227.

[5] The third assignment of error relates to the alleged improper admission of photographs. If photographs are duly authenticated and portray conditions observed by witnesses who use them to illustrate their testimony, they are admissible in evidence even though they may depict gruesome and revolting scenes. *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65; *State v. Chance, supra.*

[6] Defendant's last assignment of error asserts that the charge of the court in summarizing the evidence for the jury was weighed in favor of the State to such a degree that it constituted an expression of opinion in violation of G.S. 1-180. The State presented a great deal more evidence than the defendant and it is to be expected that more time would be required for summary. There is no validity to the contention that there was any indication of prejudice against the defendant in the charge of the court. It was presented fairly and impartially and showed no bias toward either side. *State v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668; *State v. Crutchfield,* 5 N.C. App. 586, 169 S.E. 2d 43.

The credibility of witnesses is a matter for the twelve. Here the defendant claimed self-defense. An eyewitness to the crime told a different story. The jury chose to believe the evidence for the State.

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. ALVIN LEE HUDSON

No. 7322SC672

(Filed 19 September 1973)

1. **Criminal Law § 97— permitting State to reopen case**

In a prosecution for breaking and entering and larceny, the trial court did not err in allowing the State to reopen its case after the State had rested and defendant had moved for nonsuit in order to present evidence as to the ownership of the stolen property.

2. **Criminal Law §§ 79, 104— motion for nonsuit — consideration of accomplice testimony**

The trial court could give the testimony of an accomplice equal weight with other evidence in ruling on defendant's motions for nonsuit.

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

The State's evidence, including the testimony of an accomplice, was sufficient for the jury in a breaking and entering and larceny prosecution.

4. **Burglary and Unlawful Breakings § 7— failure to submit nonfelonious breaking and entering — disbelief of part of testimony**

The trial court in a prosecution for felonious breaking and entering did not err in failing to submit an issue of nonfelonious breaking and entering on the ground that the jury could have disbelieved testimony by defendant's accomplice as to the felonious intent of the breaking and entering, since the mere contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense where there is no conflict in the evidence.

APPEAL from *Collier, Judge,* 26 February 1973 Session of DAVIDSON Superior Court.

In a bill of indictment, proper in form, defendant was charged with (1) felonious breaking and entering and (2) larceny. He entered a plea of not guilty as to each count, was found guilty as charged and from judgment imposing prison sentences, he appealed.

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

Legal Aid Society of Forsyth County by David B. Hough for the defendant.

BRITT, Judge.

Defendant's first assignment of error is to the court's failure to grant his motion for nonsuit made at the close of the State's evidence, the court's allowance of the State to reopen its case after his motion, and the court's failure to grant his motion for nonsuit renewed at the conclusion of all the evidence.

The evidence considered in the light most favorable to the State, tended to show: On the night of 31 December 1971 defendant, together with Walter Morton and Donna Gregson, who gave testimony, went to the residence of Wilmer Mizell in Davidson County in a 1971 pickup truck. The truck was backed into the driveway of the residence and defendant went to the front door and knocked to see if anyone was at home. There being no answer the three went to the back of the house where defendant picked up a piece of "stove wood" and broke a window of the back door. Defendant then opened the door and the three entered the home. Donna Gregson removed a radio from the house to the truck and then stayed with the truck to act as a lookout. Defendant removed a radio and a clock from the house and, with Morton's help, removed a stereo. Morton removed a television set by himself. All of these items were placed in the back of the truck, covered, and driven to Red's Package Store which was north of the Mizell home on Highway 52. There the three met Bill Gray Southern to whom they sold the goods for $85, defendant receiving the money.

The foregoing was shown by the testimony of Lt. Bobby Beck, Donna Gregson, and Sgt. Glenn Eppley after which the State rested. Defendant then moved for nonsuit on the ground that there was a fatal variance between the evidence and indictment in that there was no showing that the property alleged to have been stolen was the property of Wilmer Mizell. The judge deferred ruling on defendant's motion until after lunch and a recess was called. When court reconvened the State moved to reopen its case for the specific purpose of showing the ownership of the property in question. Over defendant's objection, the State was allowed to reopen its case and call James H. McAlpine, father-in-law of Mr. Mizell, whose testimony tended to show that the items in question belonged to Mr. Mizell. Defendant renewed his motion for nonsuit at this point and again at the close of all the evidence; the motions were overruled.

[1] Defendant contends first that it was error to permit the State to reopen its case. The contention has no merit. Judge Mor-

ris covered this point succinctly in *State v. Brown*, 1 N.C. App. 145, 149, 160 S.E. 2d 508, 512 (1969) when she said:

> "The general rule followed in the majority of jurisdictions is stated in 53 Am. Jur., Trial, § 128, p. 112, as follows:
>
> 'The trial judge possesses wide discretionary powers relative to the reopening of a criminal case for the introduction of further evidence after the parties have rested. In his discretion, a criminal case may be reopened for the reception of additional evidence after the case has been submitted to the jury and before their retirement to deliberate on their verdict, and according to the weight of authority, it lies within the sound discretion of the trial court to reopen a criminal case for the reception of additional evidence even after the jury has retired to deliberate on their verdict.' The North Carolina Supreme Court adheres to this rule and has stated that the trial court has discretionary power to permit the introduction of additional evidence after a party has rested, *State v. Coffey*, 255 N.C. 293, 121 S.E. 2d 736, and even after the argument has begun. *State v. Jackson*, 265 N.C. 558, 144 S.E. 2d 584. As stated in *State v. Jackson, supra*, 'The trial court had discretionary power to permit the introduction of additional evidence after both parties had rested and arguments had been made to the jury.' "

The record in the instant case fails to disclose that the trial judge abused his discretion in permitting the State to reopen its case.

[2] Defendant's second contention on the motions for nonsuit is that the court, in passing upon the sufficiency of the evidence, could not consider the testimony of the accomplice Donna Gregson whose testimony was the only evidence connecting defendant to the actual breaking and entering. This contention has no merit.

In *State v. Church*, 265 N.C. 534, 536, 144 S.E. 2d 624, 625 (1965), we find: "Upon a motion for judgment of nonsuit the evidence offered by the State must be taken in the light most favorable to the State and conflicts therein must be resolved in the State's favor, the *credibility and effect of such evidence being a question for the jury. State v. Thompson*, 256 N.C. 593, 124 S.E. 2d 728; *State v. Roop*, 255 N.C. 607, 122 S.E. 2d 363; *State v. Bass*, 255 N.C. 42, 52, 120 S.E. 2d 580." [Emphasis added.] We conclude that in ruling on the motions for nonsuit

the court could give the testimony of the accomplice equal weight with other evidence. The weight to be given the testimony of an accomplice in determining the guilt of a defendant is a matter for the jury under proper instructions, and the court provided proper instructions in this case.

[3] We hold that the court properly ruled that the evidence was sufficient to withstand the motions for nonsuit after the State introduced the testimony of Mr. McAlpine.

[4] Defendant assigns as error the failure of the court to instruct the jury as to lesser offenses included within the crime of felonious breaking and entering. On this assignment, defendant contends that the jury could have disbelieved the witness Donna Gregson as to the felonious intent of the breaking and entering and could have found him guilty of nonfelonious breaking and entering. The assignment is without merit.

In *State v. Gurkin,* 8 N.C. App. 304, 306, 174 S.E. 2d 20, 22 (1970), this court said: "Where there is no conflict in the evidence the mere contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense. *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545." In the instant case there is no conflict of theories in the State's evidence and the evidence of defendant consisted only of an alibi. Therefore, there is no evidence of any offense other than that charged on and the rule stated in *Gurkin* applies here. We hold that the court did not err in failing to charge on lesser included offenses.

We have considered the other assignments of error asserted by defendant and find them to have no merit. They too are overruled.

No error.

Chief Judge BROCK and Judge BALEY concur.

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY v. SMITH DRY CLEANERS, INC.

No. 7321DC461

(Filed 19 September 1973)

1. **Bailment § 3— damages to property by bailee — proof required**

In order to recover from a bailee for damages to property during its possession by the bailee, the bailor's evidence must tend to establish a damaged condition which did not exist when the property was delivered to the bailee.

2. **Bailment § 3— shrinkage from dry cleaning — failure to show length when delivered to cleaner**

In an insurer's action to recover for damages to insured's curtains and bedspread by shrinkage when they were dry cleaned by defendant, plaintiff insurer's evidence was insufficient for the jury where no evidence was offered as to the length of the materials at the time they were delivered to defendant.

APPEAL by plaintiff from a judgment entered by *Henderson, District Court Judge,* on 14 February 1973 in District Court held in FORSYTH County.

Plaintiff, the insurer on a homeowner's insurance policy carried for O. E. Wagoner and wife, Shirley Wagoner, seeks to recover under its subrogation rights for amounts paid the Wagoners for damage done to personal property within their home.

Sometime during the month of December, 1971, the Wagoners had a problem with their furnace which resulted in smoke and soot damage to their home. Plaintiff made arrangements to have the damage to the home repaired by a firm named Serve-Pro, Inc. Serve-Pro handled the cleaning of the walls and woodwork and also removed the living room draperies, a bedspread, bedroom draperies and two pillows which it delivered to the defendant for cleaning. They later picked up the above-mentioned items from the defendant and returned them to the Wagoners' home.

When Serve-Pro returned the living room draperies to the Wagoners' home, they replaced the metal pins which connect the draperies to the rod and rehung the draperies. At this time, the Wagoners noticed the draperies, though clean, were shorter some four or five inches and no longer came down to the floor. The bedspread was also shorter by approximately

six to eight inches, and the two white pillows still looked dirty, though they had not shrunk. The bedroom draperies were approximately four to six inches longer in places than they were in others.

The plaintiff paid the insureds the sum of $661.38 on the damage to the insureds' property.

At the close of plaintiff's evidence the trial judge directed a verdict for defendant. Plaintiff appealed.

Womble, Carlyle, Sandridge and Rice, by Allan E. Gitter and William F. Womble, Jr., for plaintiff.

Graves and Nifong, by Norman L. Nifong, for defendant.

BROCK, Chief Judge.

"A prima facie case of actionable negligence, requiring submission of the issue to the jury, is made when the bailor offers evidence tending to show that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition." *Insurance Company v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416.

Clearly the plaintiff's evidence tends to establish the first two requisites, i.e., (1) that the property was delivered to defendant, and (2) that defendant accepted it and thereafter had possession and control of it. However, plaintiff's evidence on the third requisite (that defendant returned the property in a damaged condition) is deficient.

[1] The damaged condition which plaintiff's evidence must tend to establish is a damaged condition which did not exist when the property was delivered to the defendant. Obviously, defendant should not be held liable for a damage which was in existence when the property was delivered to him. Therefore, it is incumbent upon plaintiff to show the condition of the property, with respect to the damage claimed, at the time it was delivered and accepted by defendant.

[2] Plaintiff offered no evidence of the length of the materials at the time they were delivered by Serve-Pro to defendant. Apparently, plaintiff was relying upon defendant's answer to two of its interrogatories to establish the condition of the ma-

terials at the time of delivery to defendant. Interrogatories numbers three and five and defendant's answers are as follows:

"3. Question: When you received the above items, describe their condition as you saw them?

Answer: The items were visibly okay, however, no measurements were taken and there could have been smoke and heat damages.

"5. Question: If you observed the aforesaid items after they were dry cleaned, please describe their condition in detail?

Answer: They were in good condition."

These interrogatories and answers fall short of constituting evidence of the length of the materials at the time they were delivered to defendant by Serve-Pro. Since the evidence is silent as to the length of time the materials were in the exclusive possession and control of Serve-Pro, there is no inference that the materials were in the same condition and the same length when Serve-Pro delivered them to defendant as they were when removed from the Wagoners' home. In fact, there is no direct evidence concerning the length of the materials immediately prior to their removal from the Wagoners' house by Serve-Pro.

In our opinion, plaintiff's evidence is not sufficient to justify or require submitting the case to the jury. The directed verdict for defendant is

Affirmed.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. JIMMY COLLINS

No. 7320SC643

(Filed 19 September 1973)

Criminal Law § 5— defense of unconsciousness — instructions

In this trial of defendant upon two charges of assault upon a law officer, the trial court properly instructed the jury on defendant's defense of unconsciousness brought on by the use of alcohol, drugs, or both.

APPEAL by defendant from *McConnell, Judge,* 5 March 1973 Session of Superior Court held in RICHMOND County.

Defendant was charged in two bills of indictment: (1) in case number 73CR471 with an assault with a firearm upon Cleavon B. Gainey, a law enforcement officer in performance of his duties, and (2) in case number 73CR472 with an assault with a firearm upon Grady Cockman, a law enforcement officer in performance of his duties. The two cases were consolidated for trial.

Upon motion of defendant, defendant was committed on 25 January 1973 to the State Hospital for observation to determine whether he was mentally competent to plead to the charges against him and to stand trial. After observation and evaluation defendant was found competent and was returned to Richmond County. Upon his arraignment at trial he entered a plea of "Not guilty by reason of temporary insanity."

The State's evidence in case number 73CR471 tended to show the following: Deputy Sheriff Gainey was on duty as jailer at the Richmond County Jail on 15 January 1973, when the defendant entered the jail office at about 7:30 p.m. with a shotgun. When Deputy Gainey started to get up from his chair defendant pointed the shotgun at him and said: "Don't. You turn them out, all of them." Deputy Gainey said "okay" and started to the rear of the jail. The door which opened into the next room was solid steel and as Deputy Gainey went into the next room he slammed the steel door shut and locked it.

The State's evidence in case number 73CR472 tended to show the following: Deputy Sheriff Cockman was on duty on 15 January 1973. At about 7:30 p.m. he drove his patrol car to the county jail lot to fill it with gas. As he drove up defendant pointed a shotgun at him and ordered him out of his car. As Deputy Cockman was getting out of his car an A.B.C. officer drove into the county jail yard. Defendant said, "Too damn late now," turned and ran away. Defendant was apprehended about two hours later.

Defendant's evidence consisted of his own testimony which tended to show the following: Defendant had been drinking and taking "speed" pills all week and on the day in question. Defendant had used alcohol all of his life and had used drugs for six or seven years, and had been hospitalized the previous

summer for an overdose of "speed." Defendant did not recall any of the incidents at the jail and did not know what he was doing on the night in question. The first thing defendant remembered was that the next morning he was in a padded cell.

The jury found defendant guilty as charged in both cases.

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

Pittman, Pittman & Guice, by Zoro J. Guice, Jr., for the defendant.

BROCK, Chief Judge.

There was no question of identification of defendant. Both of the deputies who were assaulted had known defendant for several years. Defendant's sole defense was stated in his plea: temporary insanity. However, he offered absolutely no evidence of insanity, temporary or otherwise. At best, his evidence tended to show a temporary amnesia brought about by consumption of alcohol or "speed" pills, or both.

By his evidence, defendant relied upon a showing of lack of criminal intent because of his lack of consciousness brought on by his indulgence in alcohol or drugs, or both. This feature of the case was clearly explained to the jury by the trial judge, and defendant was given every advantage to which he was entitled. Obviously, the jury rejected defendant's contention.

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

No error.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. WILLIE PERRY AND JAMES PERRY

No. 7320SC644

(Filed 19 September 1973)

Criminal Law §§ 89, 162— statement admitted for corroboration — general objection — portions competent for corroboration

Although an accomplice's written statement which was admitted for the purpose of corroboration contained additional evidence going beyond the testimony of the accomplice, defendants' objection to the statement *en masse* was properly overruled where portions of the statement were competent as corroborating evidence and defendants failed to point out those portions of the statement which did not corroborate the witness.

APPEAL by defendants from *McConnell, Judge,* 19 February 1973 Criminal Session, UNION Superior Court.

By indictment proper in form, defendants Willie Perry and James Perry, together with one David Patterson, were charged with the armed robbery of Adam Thompson on 5 December 1972, taking from Thompson the sum of $387.00. Defendants Perry were tried together, pleaded not guilty, and Patterson was called as witness for the State.

A jury found defendants guilty as charged and from judgments imposing prison sentences of 20-25 years as to defendant Willie Perry and 15-20 years as to defendant James Perry, defendants appealed.

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

Joseph P. McCollum, Jr., for appellant James Perry.

Griffin & Humphries by James E. Griffin and Charles D. Humphries for appellant Willie Perry.

BRITT, Judge.

By their first assignment of error, defendants contend the court erred in admitting for purpose of corroboration a written statement made by State's witness Patterson shortly after he was arrested, arguing that portions of the statement did not corroborate, but, in fact, contradicted the witness.

Where the credibility of a witness has been put in issue by cross-examination, testimony of prior consistent statements made by the witness are competent for the purpose of corroboration. *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965); *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354 (1963). Slight variance between the prior statements and the witness' testimony does not render the corroborating evidence incompetent, but merely goes to its weight, it being for the jury to determine whether the testimony does in fact corroborate the witness. 2 Strong, N.C. Index 2d, Criminal Law, § 89, p. 615.

While the statement introduced in the case at bar was corroborative in several respects, the statement contained portions detrimental to defendants not covered by the witness' testimony. In *State v. Brooks, supra,* p. 189, Justice Sharp, writing for the court, said:

> "If a prior statement of a witness, offered in corroboration of his testimony at the trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce this 'new' evidence under a claim of corroboration. Neither may the State impeach or discredit its own witness by introducing his prior contradictory statements under the guise of corroboration. (Citations.)
>
> * * * *
>
> "Where portions of a document are competent as corroborating evidence and other parts incompetent, it is the duty of the party objecting to the evidence to point out the objectionable portions. Objections to evidence *en masse* will not ordinarily be sustained if any part is competent. (Citations.)"

The record discloses that defendants did not point out those portions of the statement which did not corroborate the witness but objected to the statement *en masse.* The assignment of error is overruled.

The remaining assignments of error brought forward and argued in defendants' brief pertain to the court's charge to the jury. We have carefully reviewed the charge, with particular reference to the portions excepted to, but conclude that when the charge is considered in its entirety it complies with the statute and is free from prejudicial error. G.S. 1-180; *State v. Moore,* 197 N.C. 196, 148 S.E. 29 (1929).

In the trial of this cause, we find

No error.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. DON ELAM

No. 7320SC632

(Filed 19 September 1973)

1. Searches and Seizures § 3— sufficiency of affidavit to support warrant

An affidavit stating that a confidential informer told affiant that defendant had a quantity of marijuana on his property, that affiant believed the confidential source of information to be true and reliable, that affiant had determined through investigation that the information from the confidential source was accurate, and that an SBI agent, who had obtained his information from a source who had given information leading to a past arrest, told affiant that defendant was a dealer of marijuana was sufficient to establish probable cause to issue a search warrant as required by G.S. 15-26(b).

2. Constitutional Law § 31; Criminal Law §§ 42, 91— pretrial examination of evidence — continuance — motions properly denied

Trial court did not abuse its discretion in refusing to allow defendant to examine, before trial, the State's chemist and evidence and in refusing to grant a continuance to allow such examination where bills of indictment were returned against defendant at the 21 August 1972 session of court, the cases were calendared to be tried on 12 February 1973, but defendant did not request an examination until 1 February 1973. G.S. 15-155.4.

3. Narcotics § 4.5— manufacture of marijuana with intent to distribute — instructions — no prejudice to defendant

G.S. 90-95(a)(1) makes the manufacturing of marijuana a felony, regardless of the quantity manufactured or the intent of the offender; therefore, instruction by the trial judge to the effect that defendant was charged with manufacturing marijuana with intent to distribute and to find defendant guilty of that charge the jury must find that defendant manufactured marijuana with intent to distribute, if erroneous, did not prejudice defendant but imposed a greater burden on the State than was necessary.

APPEAL by defendant from *McConnell, Judge,* 12 February 1973 Criminal Session of UNION Superior Court.

Upon pleas of not guilty defendant was tried on bills of indictment charging felonious possession of marijuana and felonious manufacture of marijuana under G.S. 90-95(a)(1).

Evidence for the State, presented on voir dire in the absence of the jury and at trial, briefly summarized, tended to show: For about two months prior to the date of the alleged offenses, defendant had lived on his uncle's farm in the Waxhaw community of Union County, in order to protect the property from vandalism. John Mayberry, a Union County deputy sheriff, and B. M. Lea, a special agent of the State Bureau of Investigation, received a tip from a confidential informer that defendant was growing marijuana on the property aforesaid and also had marijuana in a barn on the property. Mayberry obtained a search warrant from a local magistrate and a search revealed marijuana growing on the farm and marijuana seed in the barn.

Defendant was found guilty of both charges and appeals from judgment imposing a suspended sentence on the possession charge and an active sentence of one year on the manufacturing charge.

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

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

BRITT, Judge.

[1] Defendant first assigns as error the failure of the trial court to suppress evidence seized under the search warrant, contending that the affidavit upon which the search warrant was issued, was insufficient to establish probable cause. The affidavit, in pertinent part, reads:

> "* * * Confidential source of information to Affiant [John Mayberry] that Don Elam has on the property & curtilage described above a quantity of marijuana. Affiant believes the confidential source of information to be true and reliable. Further affiant has determined through investigation that the information from the confidential source of information to be accurate. The source of information stated to affiant that he had observed a great deal

of trafficking in and out of the above described premises. The source of information states he knows of his own knowledge that the above named subject has growing on the above described premises marijuana. The source of information further states that Don Elam has inside the above described dwelling structure marijuana. The source of information stated that Don Elam has on the above described premises a quantity of marijuana at this time. That he further has marijuana growing on the premises at this time.

"Affiant further states the S/A B. M. Lea of the SBI advised him that the above named subject is dealer of marijuana. S/A Lea advised affiant that he had obtained this information from a confidential source of information who had given information in the past which led to the arrest and conviction of Rodney McCain. S/A Lea further stated to affiant that he believes his information to be true and accurate."

Having applied the tests of sufficiency as set forth by the United States Supreme Court in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969); and *United States v. Harris,* 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971), in applying the Fourth Amendment to the Federal Constitution and as adopted by our State courts in *State v. Shirley,* 12 N.C. App. 440, 183 S.E. 2d 880 (1971), cert. den. 279 N.C. 729, 184 S.E. 2d 885 (1971); *State v. Flowers,* 12 N.C. App. 487, 183 S.E. 2d 820 (1971), cert. den. 279 N.C. 728, 184 S.E. 2d 885 (1971); *State v. Foye,* 14 N.C. App. 200, 188 S.E. 2d 67 (1972); *State v. McKoy,* 16 N.C. App. 349, 191 S.E. 2d 897 (1972), cert. den. 282 N.C. 584, 193 S.E. 2d 744 (1973); *State v. Shanklin,* 16 N.C. App. 712, 193 S.E. 2d 341 (1972), cert. den. 282 N.C. 674, 194 S.E. 2d 154 (1973); *State v. McCuien,* 17 N.C. App. 109, 193 S.E. 2d 349 (1972); and *State v. Ellington,* 18 N.C. App. 273, 196 S.E. 2d 629 (1973), we conclude the affidavit was sufficient to establish probable cause to issue a search warrant as required by G.S. 15-26(b).

[2] By his second assignment of error defendant contends that he was denied due process of law when the trial court refused to allow him to examine, before trial, the State's chem-

ist and evidence, and refused to grant a continuance to allow such examination; that these actions violated the provisions of G.S. 15-155.4 and constituted an abuse of the court's discretion. We find no merit in this assignment.

G.S. 15-155.4 provides that in all criminal cases before the superior court, the assigned judge shall, for good cause shown, order the State to produce evidence and permit expert witnesses to be examined by the defendant. The statute also provides in pertinent part as follows:

> "Prior to issuance of any order for the inspecting, examining, copying or testing of any exhibit or the examination of any expert witness under this section the accused or his counsel shall have made a written request to the solicitor or other counsel for the State for such inspection, examination, copying or testing of one or more specifically identified exhibits or the examination of a specific expert witness and have had such request denied by the solicitor or other counsel for the State or have had such request remain unanswered for a period of more than 15 days."

The alleged offenses occurred on 7 July 1972, warrants were served on defendant on that date, he was given a preliminary hearing on 31 July 1972, and bills of indictment were returned at the 21 August 1972 session of the court. The record indicates that on Thursday, 1 February 1973, after these cases had been calendared to be tried on 12 February 1973, defendant's counsel (of Charlotte, N. C.) wrote a letter addressed to Solicitor Carroll Lowder, Union County courthouse, Monroe, N. C., requesting the solicitor, pursuant to G.S. 15-155.4, to produce for counsel's "inspection, examination and testing" all exhibits intended to be used in the trial of defendant, the exhibits to include any allegedly criminal substance seized from defendant or in the search of his premises. The letter also requested the solicitor to produce for purpose of examination by defendant before the Clerk of Superior Court of Union County any expert witnesses which the State proposed to call at the trial, and particularly any chemist proposed to be called to identify any seized material.

Before pleading to the bills of indictment, defendant moved for an order requiring the solicitor to comply with G.S. 15-155.4 and for a continuance of the trial. The solicitor opposed the

motion for continuance but agreed for counsel to talk to the chemist and examine the evidence proposed to be used at trial. The court denied defendant's motion.

The record indicates that although defendant's present counsel was not employed until 1 February 1973, defendant had been represented by privately employed counsel from the time of his indictment. We think defendant "slept on his rights" under G.S. 15-155.4 and that the trial court did not abuse its discretion in denying defendant's motion for a continuance.

Defendant assigns as error the denial of his motions to dismiss interposed at the conclusion of the State's evidence and renewed at the conclusion of all the evidence. We hold that the evidence was sufficient to survive the motions.

[3] Defendant assigns as error portions of the court's instructions to the jury relating to the manufacturing of marijuana charge. The court instructed the jury to the effect that defendant was charged with manufacturing marijuana *with intent to distribute* and to find defendant guilty of that charge the jury must find that defendant manufactured marijuana with intent to distribute.

G.S. 90-95(a)(1) provides that it shall be unlawful for any person "To manufacture, distribute or dispense or possess with intent to distribute a controlled substance listed in any schedule of this Article." Defendant contends the clause "with intent to distribute" relates to the word "possess" which it follows and that the statutes do not create an offense of manufacturing with intent to distribute. Assuming, *arguendo,* the court erred in the instructions complained of, we can perceive no prejudice to defendant. In fact, the court imposed a greater burden on the State than appears to have been necessary. Clearly the statute does not create more than one grade of the offense of manufacturing marijuana as is true with the offense of possession of marijuana. We think the statutes make the manufacturing of marijuana a felony, regardless of the quantity manufactured or the intent of the offender. This differs from the offense of possession of marijuana in that in specified cases simple possession constitutes a misdemeanor while possession for purpose of distribution is made a felony.

Defendant relies on our opinion in *State v. McGee,* 18 N.C. App. 449, 197 S.E. 2d 63 (1973). We find no difficulty in

distinguishing the two cases. In *McGee* we felt that the erroneous jury instruction made it unduly difficult for the jury to find the defendant guilty of misdemeanor possession of marijuana as opposed to felonious possession. In the instant case, finding defendant guilty of a misdemeanor was not an alternative. Since the error complained of was not prejudicial to defendant, the assignment is overruled.

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

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. FRED CARROLL CRISP III AND CAROLYN FRANCES MOTTINGER

No. 7320SC552

(Filed 19 September 1973)

Searches and Seizures § 3— search warrant — insufficient affidavit — evidence seized inadmissible

In a prosecution for possession of marijuana with intent to distribute, the affidavit was insufficient to support issuance of a search warrant where it detailed no underlying facts and circumstances from which the issuing officer could conclude that any illegal possession or sale of narcotic drugs had occurred or was occurring on the premises to be searched, but implicated those premises solely as a conclusion of the affiant; therefore, evidence obtained as a result of the search under the warrant was inadmissible.

APPEAL from *Chess, Special Judge,* 12 March 1973, Special Session, UNION County Superior Court.

The defendants were tried and convicted of the felony of possessing marijuana with intent to distribute same. From a judgment entered thereon, which was suspended upon certain conditions, the defendants appealed.

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

Casey and Daly, P.A., by George S. Daly, Jr., and W. G. Jones for the defendants.

CAMPBELL, Judge.

The defendants assert that the marijuana found in the home where they resided was illegally obtained by an inadequate search warrant. The search warrant was issued upon an affidavit of Deputy Sheriff Roy Chaney. Deputy Sheriff Chaney testified that he did not acquaint the magistrate who issued the search warrant with any information other than as contained in the affidavit.

The question presented therefore is whether the affidavit to obtain a search warrant was adequate. If it was not adequate, then the search warrant was improperly issued and the evidence obtained thereby would be incompetent. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968); *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

The affidavit in question reads as follows:

"Roy Chaney, Deputy Sheriff, Union County, NC; being duly sworn and examined under oath, says under oath that he has probable cause to believe that Chip Chrisp [*sic*] has on his premises certain property, to wit: Marijuana, Herion, [*sic*] LSD and any other Controlled sub. the possession of which is a crime, to wit: Possession of Controlled Substances, 12-19-72, Rt 2 Marshville, NC. The property described above is located on his premises described as follows: one story whitee [*sic*] frame house, first house on right on RPR 1629 headed North, off of RPR 1627 toward NC 218. The facts which establish probable cause for the issuance of a search warrant are as follows: on 12-19-72 Deputy Roy Chaney, Union County Sheriff Dept. stopped Dana Michael Conlon for improper Equopment, [*sic*] to wit: no lights on vehicle, and after placing Dana Michael Conlon in his, Deputy Chaney's vehicle, he smelled the strong odor of what he believes to be Marijuana. Upon searching Dana M. Conlon, deputy Chaney found over five grams of Marijuana, and upon searching the vehicle that Dana M. Conlon was operating, deputy Chaney found over five more grams of Marijuana. Further investigation by deputy Chaney revealed that Dana M. Conlon has been living at the above location for the passed [*sic*] three or four months. During the passed [*sic*] three or four months deputy Chaney has been observing

heavy traffic eterning [*sic*] and leaving the above described location. Deputy Chaney states also, that various vehicles, cars and trucks, are in and out at various times of the day and night. But mostly at night. After stopping Dana M. Conlon and finding Controlled Substances on his person and in his vehicle, and after personally observing the various traffic in and out of the above described location, it is the belief of this affiant that drugs are being contained in the above location.

s/ ROY CHANEY
Signature of Affiant

Sworn and subscribed to before me
this 19 day of December, 1972.

s/ BETTY R. BOSHNYAK
Magistrate"

We do not think the affidavit was sufficient and adequate to justify the issuance of the search warrant.

A search warrant may be issued only upon a finding of probable cause for the search. This means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the object sought and that such object will aid in the apprehension or conviction of the offender. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). The affidavit must contain some of the underlying circumstances from which the issuing magistrate can determine the probable cause. The affidavit in this case is fatally defective. It details no underlying facts and circumstances from which the issuing officer could find that probable cause existed to search the premises described. The affidavit implicates those premises solely as a conclusion of the affiant. Nowhere in the affidavit is there any statement that marijuana was ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of any illegal drug in the dwelling. The inference the State seeks to draw from the contents of this affidavit does not reasonably arise from the facts alleged. Nothing in the affidavit in the instant case affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic

drugs had occurred or was occurring on the premises to be searched.

We think this case is controlled by *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972).

The evidence obtained as a result of the search warrant was inadmissible in the trial below.

New trial.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN LEWIS DAVIS

No. 7322SC594

(Filed 19 September 1973)

Criminal Law § 138— revocation of probation — no credit for time spent on parole

While the defendant on parole may have been under supervision of the rules and regulations of the Board of Paroles and the Department of Correction, nevertheless, he was "at liberty," and defendant was not entitled to any credit on his sentence for time spent on parole. G.S. 15-196.1; G.S. 148-61.1

APPEAL from *Rousseau, Judge*, 23 April 1973 Session, IREDELL County Superior Court.

The defendant filed a motion in the Superior Court of Iredell County to obtain credit on a prison sentence for time while he was on parole from 21 October 1971, until 22 March 1973. Judge Rousseau denied the credit and dismissed the petition and motion. The defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General John R. B. Matthis, for the State.

Warren A. Winthrop for the defendant appellant.

CAMPBELL, Judge.

In August 1968 the defendant was sentenced to two years' imprisonment upon three charges of larceny which were con-

solidated for the purpose of the judgment. This sentence was suspended, and the defendant was placed upon probation for a period of three years. The defendant thereafter violated the terms of probation, and on 18 February 1971 the probation was revoked and the two years' active sentence placed into effect. In October 1971, the defendant was placed on parole and remained on parole until March 1973, when he was recommitted to the North Carolina Department of Correction to serve the remainder of his sentence. On 4 April 1973, the defendant filed a petition and motion for credit for the time he was on parole, namely, from 21 October 1971 until 22 March 1973.

The defendant relies upon North Carolina G.S. 15-196.1 which provides:

> "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."

The defendant argues that while he was on parole he was under supervision of the parole department and that this was tantamount to being in custody and confinement.

North Carolina G.S. 148-61.1 provides in part:

> "(a) . . . The time a parolee is at liberty on regular parole shall not be counted as any portion or part of the time served on his sentence, . . ."

We find no North Carolina case on the subject, but the federal courts have invariably held that time spent on parole is not to be credited on an active sentence. *Ham v. North Carolina,* 471 F. 2d 406 (4th Cir. 1973); *Hamrick v. Peyton,* 349 F. 2d 370 (4th Cir. 1965); *Hodge v. Markley,* 339 F. 2d 973 (7th Cir. 1965).

While the defendant on parole may have been under supervision of the rules and regulations of the Board of Paroles and the Department of Correction, nevertheless, he was "at liberty," and the defendant was not entitled to any credit on his prison sentence. The order of Judge Rousseau denying the motion and dismissing the petition was in all respects correct.

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. WINFRED EUGENE SCOTT

No. 7319SC557

(Filed 19 September 1973)

APPEAL by defendant from *Seay, Judge,* 5 March 1973 Session of Superior Court held in RANDOLPH County.

Defendant was charged with operating a motor vehicle upon the public highways while under the influence of intoxicating liquor in violation of G.S. 20-138. He was tried and found guilty in the District Court. Upon his appeal he was tried de novo in the Superior Court and again found guilty. An active sentence of six months was imposed. Defendant appealed to this Court.

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

Ottway Burton for the defendant.

BROCK, Chief Judge.

With considerable tenacity, defendant has brought forward seventeen exceptions grouped in five assignments of error. We have carefully considered each and find that they present no new or novel question. We feel, therefore, that a seriatim discussion would serve no useful purpose.

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

No error.

Judges MORRIS and PARKER concur.

JEAN H. WILLIAMS AND HAROLD S. ROSE AND WIFE, RITA ROSE v. THE TOWN OF GRIFTON, A MUNICIPAL CORPORATION, AND IN RE: ANNEXATION ORDINANCE ADOPTED BY THE TOWN OF GRIFTON, A NORTH CAROLINA MUNICIPAL CORPORATION, ON JULY 27, 1972 (72 CVS 1511)

— AND —

HOWARD L. PARKER AND KENNETH CARTER AND AL BREMER v. THE TOWN OF GRIFTON, A MUNICIPAL CORPORATION, AND IN RE: ANNEXATION ORDINANCE ADOPTED BY THE TOWN OF GRIFTON, A NORTH CAROLINA MUNICIPAL CORPORATION, ON JULY 27, 1972 (72 CVS 1512)

No. 733SC391

(Filed 26 September 1973)

1. **Appeal and Error § 45— abandonment of exceptions**

Exceptions not brought forward and discussed in the brief are deemed abandoned. Court of Appeals Rule 28.

2. **Constitutional Law § 8; Municipal Corporations § 2— annexation statutes — no delegation of legislative power**

The statutes providing for the annexation of territory by municipalities having a population of less than 5,000 do not constitute an unlawful delegation of legislative power in violation of Article VIII of the N. C. Constitution. G.S. 160-453.1 through G.S. 160-453.12.

3. **Municipal Corporations § 2— annexation without consent — due process**

Residents of an annexed area were not deprived of their property without due process of law by the fact that the area was annexed and their property was made subject to city taxes without their consent. Article I, Sec. 17 of the N. C. Constitution; Fourteenth Amendment to the U. S. Constitution.

4. **Municipal Corporations § 2— reasons for annexation**

The stated reasons of a town board in annexing territory—(1) essentially all of the town's desirable building sites are exhausted; (2) the tax base is unable to provide the kind of services people need; and (3) many interested people are unable to participate in town government—do not violate the intent and spirit of G.S. 160-453.1; furthermore, the statute does not make it incumbent upon the municipality to justify annexation other than to the extent of its ability to serve the areas to be annexed.

5. **Municipal Corporations § 2— annexation — extension of police protection**

The evidence was sufficient to support the court's finding that a town's report on the extension of police protection to an area to be annexed showed that on the date of annexation police protection would be provided to the annexed area on substantially the same

basis as such protection was previously provided within the remainder of the town, although no additional policemen would be provided.

6. **Municipal Corporations § 2— annexation — fire protection — water pressure**

The evidence was sufficient to support the court's determination that proposed fire protection to one area to be annexed would be provided on substantially the same basis as such protection is provided within the remainder of the municipality, although the proposed water lines will not furnish as much water pressure as is recommended by the National Board of Fire Underwriters.

7. **Municipal Corporations § 2— character of area to be annexed — sufficiency of evidence to support findings**

The evidence was sufficient to support the court's findings that more than one-eighth of the external boundary of an area to be annexed coincides with the present municipal boundary, that 65% of the total number of lots and tracts in the area are used for residential purposes, and that 80% of the total of residential and undeveloped acreage consists of lots and tracts five acres or less in size.

8. **Municipal Corporations § 2— action to invalidate annexation — sufficiency of petition**

Petition to have an annexation ordinance declared invalid sufficiently set out petitioners' exceptions to the annexation procedure to comply with G.S. 160-453.6(b) and to survive a motion for judgment on the pleadings.

9. **Trial § 58— nonjury trial — admission of hearsay evidence — presumption that court considered only competent evidence**

In this proceeding to invalidate an annexation ordinance, the trial court did not commit prejudicial error in the admission of affidavits of petitioners' attorneys which contained hearsay evidence where the matter was heard by the court without a jury and there is no indication in the judgment that the court relied on any evidence contained in the affidavits.

10. **Municipal Corporations § 2— character of area to be annexed — unrecorded subdivision map**

Where a map of a subdivision of an undeveloped tract of land in an area to be annexed had not been recorded in the office of the Register of Deeds, the municipality properly considered the tract as farmland and not as separate lots in determining the character of the land to be annexed under G.S. 160-453.4, notwithstanding the map had been filed in the office of the county tax collector.

11. **Municipal Corporations § 2— annexation — fire protection — insufficiency of water pressure**

The evidence was sufficient to support the court's determination that the proposed fire protection for one area to be annexed was inadequate in that there will be a deficiency in water pressure as compared to the water pressure in most areas of the municipality prior to annexation.

APPEAL by plaintiff petitioners in each case and by the defendant respondent in each case from judgment of *Rouse, Judge,* Superior Court, entered 11 January 1973.

Petitioners, landowners in Pitt County, instituted this action seeking to declare a municipal bond issue void and to enjoin the sale of the bonds. They further sought to have the annexation ordinance adopted by the Board of Commissioners of the Town of Grifton declared unconstitutional.

The petitioners are two groups of landowners each group owning tracts of land sought to be annexed by the Town of Grifton. Prior to the proposed annexation, the residents of Grifton approved a sanitary sewer and water bond issue totaling $700,000.

Petitioners complained that the bond issue was invalid in that the Board and Mayor issued misleading statements in connection with the issue, viz: that the debt retirement would be borne principally by the residents of the proposed annexed areas on which tax values were high and that the purpose for the proposed annexation was to increase Grifton's tax base. Petitioners further complain that they had no legal right to oppose either annexation or the bond issue, since they were not residents of the Town of Grifton, and it was not until the adoption on 27 July 1972 of the annexation ordinance that their right to protest these proceedings arose.

Petitioners further complained that the Town Board in adopting the annexation ordinance failed to comply with G.S. 160-453.4 (re: the character of the area to be annexed) and G.S. 160-453.5 (re: procedure for a public hearing).

On 1 September 1972 a temporary restraining order was issued by Judge Rouse enjoining the Town from proceeding with the annexation until the court could review the ordinance pursuant to G.S. 160-453.6.

In the Superior Court review, the cases were consolidated and the Town of Grifton moved for judgment on the pleadings on the grounds that contentions of the petitioners had been adversely ruled upon by the Appellate Courts of North Carolina, and that petitioners failed to comply with G.S. 160-453.6 inasmuch as they did not specifically state their exceptions to the actions of the Town Board. The motion was allowed with

respect to the bond issue and denied with respect to the failure to set out exceptions with particularity. The annexation plan was remanded to the Town Board in order that it be brought into compliance with G.S. 160-453.4 relative to boundaries of the annexed areas and G.S. 160-453.3 relative to the fire plan.

The petitioners in each case and the defendant Town of Grifton appealed.

Wallace, Langley, Barwick and Llewellyn, by F. E. Wallace, Jr., and Owens, Browning, and Haywood, by Mark W. Owens, Jr., for petitioners.

Gaylord and Singleton, by L. W. Gaylord, Jr., for respondent.

MORRIS, Judge.

So many of the facts as are necessary for decision in this matter will be set out in the discussion of each appeal.

Petitioners' Appeal

Petitioners reside in two subdivisions. The petitioners residing in Country Club Hills are 104 in number. We will hereafter refer to Country Club Hills as Tract No. 1. Petitioners residing in Forest Acres are 85 in number. We will hereafter refer to Forest Acres as Tract No. 2. It appears from the record that the subdivision Forest Acres is interchangeably referred to as Forest Hills and Forest Acres. We have used Forest Hills where used in the record. However, the two designations refer to the one subdivision, Forest Acres.

The Town of Grifton is a municipality with a population of less than 5,000 persons. On 9 May 1972, its governing board adopted a resolution to consider the annexation of Tract No. 1 and Tract No. 2. Notice of a public hearing was given as required by statute and 14 days prior to the hearing to be had on 14 June 1972, the Town filed in the Clerk's office a report setting forth its plans for extension of services to the two areas to be annexed. At the public hearing the report was explained and everyone present given an opportunity to be heard. On 27 July 1972, at a special meeting of the governing board, an ordinance was adopted annexing the areas and extending the town limits to include the areas. Effective date of the ordinance was 15 June 1973. Within 30 days of the adoption of the

ordinance petitioners filed the petitions seeking review of the action taken by the governing board, and attacking the legality of and authority of the Town of Grifton to issue the bonds.

Petitioners contend that G.S. 160-453.1 through and including G.S. 160-453.12 is unconstitutional for that the statute undertakes to delegate supreme legislative power to a muncipal governing body and deprive petitioners of their property without due process of law in that the annexation will result in imposition of taxes and assessments arising out of the issuance of bonds voted by the Town on 11 December 1971.

[1] Nowhere in petitioners' brief do they refer to the exceptions or assignments of error to which their arguments refer. Rule 28, Rules of Practice in the Court of Appeals of North Carolina, specifically provides: that the brief of appellant "shall contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." It is obvious that appellants have made no effort to comply with this rule. In particular, we find no discussion at all with respect to assignments of error Nos. 3 and 4. These are, therefore, deemed abandoned. Because of the importance of the case, we do not dismiss the appeal of petitioners. We find it necessary, however, to discuss the questions involved in the same general order as petitioners have in their brief.

[2] The Supreme Court of North Carolina has held specifically that the legislature may without violating the State or Federal Constitution delegate to a municipality the authority to implement a plan of annexation. *In Re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795 (1961). Although the statutes involved in this case were G.S. 160-453.13, et seq., (dealing with municipalities of population of 5,000 or more) there is little doubt that the court would uphold G.S. 160-453.1 through 160-453.12 (municipalities of population of less than 5,000) on the same basis. In that case, petitioners contended—as do petitioner appellants in the case under consideration—that the statute is in violation of Article VIII of the North Carolina Constitution, citing for that proposition *Coastal Highway v.*

Turnpike Authority, 237 N.C. 52, 74 S.E. 2d 310 (1953), as do petitioners in the case *sub judice.*

The Supreme Court rejected the argument on the grounds that there is a distinction between " 'delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, *and the conferring of authority or discretion as to its execution.* The first may not be done, whereas the latter, *if adequate guiding standards are laid down, is permissible under certain circumstances.* 11 Am. Jur., Constitutional Law, Sec. 234. See also *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896.' (Emphasis added.)" *In Re Annexation Ordinances, supra,* at 645.

The only discretion given to the municipality under G.S. 160-453.13, et seq., according to the Supreme Court is the "permissive or discretionary right to use this new method of annexation provided such boards conform to the procedure and meet the requirements set out in the Act as a condition precedent to the right to annex." *Id.* at 647.

A careful reading of the annexation statute as a whole leads to the inescapable conclusion that the guidelines established by G.S. 160-453.1 through 160-453.12 are as stringent as those in G.S. 160-453.13, et seq., and the discretion conferred upon the municipalities of population less than 5,000 is no greater than that conferred upon municipalities of population of 5,000 or greater. Therefore, the contention that the annexation statute is unconstitutional is untenable.

[3] In *In Re Annexation Ordinances, supra,* the Supreme Court of North Carolina rejected a contention of an appellant identical to the contention in the present case, viz, that appellant was deprived of his property without due process of law as required by the 14th Amendment of the Constitution of the United States and Article I, Section 17 of the Constitution of North Carolina.

> ". . . [W]here additional territory is annexed in accordance with the law, the fact that the property of the residents in such area will thereby become subject to city taxes levied in the future, does not constitute a violation of the due process clause of the State and Federal Constitutions." *Id.* at 651-652.

In accord is *Matthews v. Blowing Rock,* 207 N.C. 450, 177 S.E. 429 (1934), although this case was decided under a prior

annexation statute. The case holds that an act of annexation is valid when it annexes a territory without the consent of its inhabitants and subjects their property to taxes to pay for a large, unprovided-for indebtedness.

Defendant appellant cites in support of its position *Eakley v. Raleigh,* 252 N.C. 683, 114 S.E. 2d 777 (1960). This case is not directly on point, however, for the precise holding is that the issuance of water bonds is not invalidated by the fact that the City Council at the time of the election contemplated expenditure of the bond monies in territories to be annexed. Neither *Eakley,* nor its companion case—*Upchurch v. Raleigh,* 252 N.C. 676, 114 S.E. 2d 772 (1960) — addresses the issue of annexation as a taking of property without due process of law. The validity of the bond issue—although petitioner appellant purports to appeal on the basis thereof—is not put in issue by the arguments contained in the briefs.

[4] Petitioners further argue that the Town failed to comply with the spirit and intent of G.S. 160-453.1 by arbitrarily selecting Tracts Nos. 1 and 2 for annexation and that the court erred in failing so to find. G.S. 160-453.1 provides:

> "*Declaration of policy.*—It is hereby declared as a matter of State policy:
>
> (1) That sound urban development is essential to the continued economic development of North Carolina;
>
> (2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and government purposes or in areas undergoing such development;
>
> (3) That municipal boundaries should be extended, in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of governmental services needed therein for the public health, safety and welfare; and
>
> (4) That the urban development in and around municipalities having a population of less than 5,000 persons tends to be concentrated close to the municipal boundary rather than being scattered and dispersed as in the

> vicinity of larger municipalities, so that the legislative standards governing annexation by smaller municipalities can be simpler than those for larger municipalities and still attain the objectives set forth in this section;
>
> (5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality as soon as possible following annexation."

Petitioners contend that the spirit of the statute has been violated in that the Town "has attempted to impose upon these petitioners an arbitrary annexation for the purpose of building a tax base against the wishes of the residents of the area . . ."

In *Matthews v. Blowing Rock, supra,* the Court, quoting from *Lutterloth v. Fayetteville,* 149 N.C. 65, 62 S.E. 758 (1908), said:

> "It has therefore been held that an act of annexation is valid which authorized the annexation of territory, without the consent of its inhabitants, to a municipal corporation, having a large unprovided-for indebtedness, for the payment of which the property included within the territory annexed became subject to taxation." *Id.* at 452.

Petitioners cite three avowed objectives stated by the Town's governing board: "(1) Essentially all of the town's desirable building sites are exhausted. (2) The tax base is unable to provide the kind of services people need. (3) Many interested people are unable to participate in town government," as not being sufficient to qualify the annexation under the statute. Petitioners cite *Lithium Corp. v. Bessemer City,* 261 N.C. 532, 135 S.E. 2d 574 (1964). In that case proceedings of Bessemer City, a municipality having a population of less than 5,000, to annex an area of 69.62 acres contiguous to the city's boundary, was before the Court. Justice Moore said that the statute under consideration was the result of a study and recommendation made by the Municipal Government Study Commission which was established in accordance with Joint Resolution 51 of the 1957 General Assembly. That Commission made two reports, one dated 1 November 1958, and the other

26 February 1959. Justice Moore set out in substance, except where quoted verbatim, some of the pertinent comments and recommendations. We quote from his opinion, adopting his numbering and paragraphing:

> "(2). The factors important in deciding what lands should be annexed are: (a) the actual distribution of developed and vacant land in an area, (b) the extent to which the area needs municipal services, (c) the extent to which the owners of developed property in the area desire municipal services, (d) the availability inside the corporate limits of land suitable or desirable for residential, commercial and industrial development, (e) the extent to which municipal services can be provided, and (f) the impact of services and taxation upon lands being annexed. Report 2, pp. 7, 8.
>
> (3). '. . . (T)he General Assembly should not delegate unlimited power to the governing boards. Exercise of discretion to extend corporate boundaries must and should be subject to general standards or limitations . . . . And we think the primary standards should be . . . that the land to be annexed is either developed for urban purposes or is reasonably expected to be so developed in the near future . . .' Report 2, p. 9.
>
> (4). 'We do not believe that a precise municipal boundary can be fixed by reference to specific factual standards. Somewhere in the process there must be the exercise of judgment by some board or agency. Therefore, whether the decision is made by a city council or a state administrative board, the most practical method of reviewing the administrative decision is to provide judicial review. . . . And the scope of review must necessarily be whether the agency making the decision made a reasonable decision in accord with the statutory standards. This, we believe, is the best protection for the individual property owners.' Report 2, p. 10." *Id.* at 537.

We do not perceive that the three avowed objectives of the governing board are violative of the intent and spirit of the statute. Indeed G.S. 160-453.3 entitled "Prerequisites to annexation; ability to serve; report and plans" does not make it incumbent upon the municipality to justify annexation other than to the extent of its ability to serve the areas to be annexed.

Petitioners take the position that the Town has failed to meet the prerequisites of G.S. 160-453.3, and that the court erred in failing to find this as a fact.

The petitioners first object to the court's finding as a fact that the report provided for in G.S. 160-453.5 set out plans which "provided for extending police protection, fire protection, and street maintenance services to the areas to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation; . . ." and its conclusion of law that the Town had fully complied with the provisions of G.S. 160-453.3 (with one exception to which the Town excepted).

[5] The report stated that the present police force consisted of five men operating two radio equipped patrol cars. At the time of the report approximately 12 miles of street were patrolled on a 24-hour basis by the officers on foot and with patrol cars. The annexation would add only 4.6 miles of new streets which are largely residential in character. "The present police force will be able to patrol and provide police protection in the two proposed annexation areas at the same level now provided inside the Town." The additional cost would be minimal, since patrol activity is necessarily most intensely provided in the commercial areas. The increase in operating expense would not be directly proportional to the additional street mileage in the annexation areas. The report estimated the increase at $740 which would be financed from additional ad valorem tax revenue. The record contains evidence supporting the plans set out in the report and no evidence that the service would not be adequate. The evidence was sufficient, in our opinion, to support the conclusion as to the police protection requirement of G.S. 160-453.3.

We shall subsequently discuss fire protection when we discuss extension of water lines.

Petitioners do not seriously protest the adequacy of the plans for garbage collection and street maintenance. They presented no evidence in contradiction, but simply state in their brief that "there was budgeted a very nominal increase of costs of $2,600.00, which obviously cannot serve the area adequately or efficiently."

The petitioners except to the court's finding of fact with respect to financing. In its findings of fact re G.S. 160-453.5, the court's finding No. 9 was as follows:

> "9. The Town of Grifton by election has authorized $575,000 of sanitary sewer bonds and $125,000 in water bonds. The Farmers Home Administration has approved a cost-free grant to the Town of Grifton in the amount of $195,000 for sewer service improvement and installation in the areas to be annexed and a cost-free grant in the amount of $108,000 for water service improvement and installation in the areas to be annexed. Additionally, pursuant to the provisions of Public Law 660, additional funds in the amount of $143,000 will be made available to the Town of Grifton for use in development, contingencies, land rights-of-way purchases, engineering services, legal services, and interest in connection with the water and sewer services hereinabove referred to. The aforesaid sums are adequate to make the proposed improvements."

Petitioners except to that portion with respect to the additional funds in the amount of $143,000. There is competent evidence in the record to support the court's finding. Additionally there was competent evidence from the engineer, without objection, that there were ample funds for the project.

[6] The court concluded that the Town had not complied with the provisions of G.S. 160-453.3 with respect to fire protection for Tract No. 2. This is, however, the subject of one of respondent's assignments of error. As to water and fire protection for Tract No. 1, there was evidence that the plan for water distribution to the area called for an eight-inch line, that the flow would not furnish as much water as is recommended by the Fire Underwriters (750 gallons per minute) but it could be expected to furnish from 750 to 600 gallons per minute, and would furnish as much water in most instances as was then being furnished the population of the Town, that at the present 20% of the population was being served by hydrants furnishing less than 400 gallons. G.S. 160-453.3(3)(a) requires that the plans shall "provide for extending police protection, fire protection, garbage collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to

annexation." We are of the opinion that the evidence is sufficient to support the court's finding of compliance.

[7] Petitioners further urge that the Town failed to meet the test of character of the area to be annexed as required by G.S. 160-453.4 which provides:

> "*Character of area to be annexed.*—(a) A municipal governing board may extend the municipal corporate limits to include any area which meets the general standards of subsection (b), and which meets the requirements of subsection (c).
>
> (b) The total area to be annexed must meet the following standards:
>
> (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.
>
> (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.
>
> (3) No part of the area shall be included within the boundary of another incorporated municipality.
>
> (c) The area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.
>
> (d) In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries, and if a street is used as a boundary, include within the municipality developed land on both sides of the street."

We will here discuss this requirement only as it pertains to Tract No. 1. Compliance as to Tract No. 2 will be addressed in our discussion of respondent's appeal. As to Tract No. 1, the report filed shows that the area to be annexed meets the requirements of G.S. 160-453.4.

The court made the following findings of fact with respect to Tract No. 1:

> "13. Tract or Area No. 1 is adjacent and contiguous as defined by GS 160-453.9(1) as of the 9th day of May, 1972, the date on which this annexation proceeding was begun and as shown on the map included in annexation plan and marked Exhibit A. The aggregate external boundary line of the area to be annexed (Tract No. 1—Country Club Area) is 17,488 feet of which 4,166 feet coincide with the present Town boundary as shown on the map marked Exhibit A. Therefore, at least one-eighth (1/8) of said external boundary coincides with the Town boundary.
>
> No part of the area to be annexed (Tract No. 1—Country Club Area) is included within the boundary of another incorporated municipality.
>
> The area to be annexed (Tract or Area No. 1) is developed for urban purposes in that 65 percent of the total number of lots and tracts in said area are used for residential and commercial purposes, and 80 percent of the total of residential and undeveloped acreage (exclusive of streets) consists of lots and tracts five acres or less in size, all of which is demonstrated as follows:
>
> (a) Total no. of lots and tracts 164
>
> No. of lots and tracts used for
>
> Residential 106
>
> Commercial 1
>
> Total 107
>
> Percent in urban use 65%
>
> (b) Total residential and undeveloped acreage 118.9
>
> Less acreage included within streets 18.0

Net acreage	100.9
Acreage in lots and tracts five (5) acres or less	80.4
Percentage of total residential and undeveloped acreage in lots and tracts five (5) acres or less	80%"

Our own calculations show that more than one-eighth of the external boundary of the area to be annexed coincides with the present Town boundary. It is clear from the exhibits, and there is no contradiction in the evidence that no part of the area to be annexed is included within the boundary of another municipal corporation. Petitioners challenge the court's finding that 65% of the total number of lots and tracts in said area are used for residential purposes; and 80% of the total of residential and undeveloped acreage (exclusive of streets) consists of lots and tracts five acres or less in size. Petitioners argue that the Town should have included all of the subdivision, as maps were recorded in the office of the Register of Deeds. There is no evidence at all in the record with respect to these exhibits. We know not whether any development had been started or whether any streets had even been opened. The only evidence in the record supports the court's findings. We do not consider petitioners' argument in their brief as evidence before the court.

For the reasons set out herein, on petitioners' appeal, the judgment of the court is affirmed.

Respondent's Appeal

Respondent notes six assignments of error with respect to Tract No. 1 and 25 assignments of error with respect to Tract No. 2. Assignments of error Nos. 2 and 3 (Tract No. 1) and 9 and 10 (Tract No. 2) are not brought forward and argued in its brief. These are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[8] Respondent's first assignment of error with respect to both tracts is directed to the failure of the court to sustain its motion for judgment on the pleadings based on its contention that the petitioners did not explicitly set out petitioners' exceptions to the annexation procedure as required by G.S. 160-453.6(b). We agree with respondent that the exceptions stated in the petition are not as explicit as those in the petition before us in

Adams-Millis Corp. v. Kernersville, 6 N.C. App. 78, 169 S.E. 2d 496 (1969). Nevertheless, we do not think the petitions are sufficiently lacking in compliance with the statute to require the granting of a motion for judgment on the pleadings. This assignment of error is, therefore, overruled.

[9] By assignments of error Nos. 5 (Tract No. 1) and 12 (Tract No. 2), respondent takes exception to the court's allowing into evidence the affidavit of F. E. Wallace, Jr., and the affidavit of Mark W. Owens, Jr. At the close of the evidence at trial, it was stipulated and agreed that additional evidence could be tendered to the court by any party at any time prior to the ruling and opinion of Judge Rouse and that the Judge would rule upon any tendered evidence as received by him. On 11 December petitioners tendered to the court an affidavit of F. E. Wallace, Jr., and an affidavit of Mark W. Owens, Jr., both counsel for petitioners. Respondent objects to the receiving of the affidavits of the court, not because they contained evidence given by counsel for the petitioners, but because the affidavits contained hearsay testimony. Unquestionably, the greater portion of both affidavits is purely hearsay evidence. However, the matter was heard by the court sitting without a jury, and we assume that the court considered only competent evidence. At any rate, we find no indication in the court's judgment that he relied on any evidence contained in either affidavit. These assignments of error are overruled.

[10] Since respondent's assignments of error Nos. 2, 3, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16 and 18 (with respect to Tract No. 2) all relate to the Sally Johnson property, we will discuss them together. It appears from the record and from petitioners' Exhibits Nos. 7 and 8 that the Town had, in determining the area to be annexed, considered property of Mrs. Johnson as farm land and not lots. The portion included in the proposed area to be annexed is a 12-acre undeveloped tract. The balance of the land lies outside the boundaries of the area to be annexed. The court allowed in evidence, over respondent's objection, testimony that the land had been subdivided into lots some nine years prior to the hearing, that a map had been made of the subdivision, and two lots (outside the area to be annexed) conveyed with reference to the map. It was stipulated that the map had never been recorded in the office of

the Register of Deeds. It had, however, been filed in the office of the County Tax Collector. In his order, Judge Rouse found that the lots shown on the Johnson map were not considered "in the tally shown in Paragraph 4 of the annexation plan, as the same relate to Tract No. 2 or the Forest Hills Area, as separate lots; they were counted as one tract of land more than five (5) acres in size. Had each lot been considered separately, the summary would have been as follows:

Total number of lots and tracts	112
Number of lots used for residential	59
Percent in urban use	52%

No evidence was offered on specifics here and this finding is based on the Court's examination of the exhibits offered into evidence." The court further found that "less than sixty (60) percent of the total number of lots and tracts in the area of Tract No. 2 at the time of annexation are used for residential, commercial, industrial, institutional, or governmental purposes." The court concluded as to this property as follows:

"5. The word 'lot' is to be taken in its usual, well defined sense when applied to subdivided real estate. It means the fractional part of a block, commonly known as a lot, limited by fixed boundaries on a recorded plat. When a tract is mapped designating fractional parts as lots and the map is filed in the County Tax Office, and lots are conveyed with reference to the map, nothing else appearing, then the fractional parts thereof become 'lots' within the meaning of GS 160-453.4(c).

6. The 'lots' of Mrs. Sally Rouse Johnson as shown on petitioners' Exhibits 7 and 8 and within the area to be annexed as a part of Tract No. 2 should have been included by the Town of Grifton Board of Commissioners in determining whether the requirements of GS 160-453.4(c) were met, in order to provide reasonable accurate results.

7. The requirements of GS 160-453.4 have not been met as the same relate to Tract No. 2 (Forest Hills Area) and the Town of Grifton may not extend its boundaries to include the area of this tract as described in the annexation ordinance."

In this we think the court erred. The map referred to had not been recorded in the office of the Register of Deeds. We are of the opinion that, in order for the map to constitute notice to the Town of a proposed subdivision, recordation in the office of the Register of Deeds is required. Unquestionably, this office is the proper place for such recordation. See G.S. 47-30 and G.S. 47-30.1. There is no evidence in this record that the Town had any notice whatever of this proposed subdivision map. We are inclined to apply the same principle as has been applied for many years to conveyances of real property; tc wit, ordinarily a person may rely on the public records and no notice, regardless of how full and formal, will take the place of registration in the proper public office. See *Dula v. Parsons,* 243 N.C. 32, 89 S.E. 2d 797 (1955), and *McClure v. Crow,* 196 N.C. 657, 146 S.E. 713 (1929), and cases there cited. There is nothing in this record to indicate that the office of the Tax Collector is the acceptable place for "filing" maps or that "filing" maps of subdivisions in the Tax Collector's office is, by custom and practice, considered notice in Pitt County. There was evidence, which we consider incompetent by virtue of our position on this question, that two conveyances had been made with reference to the map. The deeds, which conveyed lots outside the proposed area for annexation, were not introduced in evidence nor was there any evidence that the deeds referred to the location of the map. It could well have been in Mrs. Johnson's desk drawer at her home. We cannot say that the Town had sufficient notice of this proposed subdivision to include it as lots in its tally to determine whether the proposed area qualified under the statute. We, therefore, sustain these assignments of error.

[11] We come now to respondent's assignments of error Nos. 17, 19 and 23 with respect to extension of fire protection to Tract No. 2. The court found as a fact that "The desired pressure is seven hundred and fifty gallons per minute. The National Board of Fire Underwriters recommends a pressure of seven hundred and fifty gallons per minute. Thus, for fire fighting purposes, the proposed plan will not furnish as much water as is recommended by the National Board of Fire Underwriters. If the proposed water lines were looped, then it would provide the pressure recommended by the National Board of Fire Underwriters."

Among the court's conclusions of law were these:

"2. *Except as hereinafter stated with reference to fire protection for Tract No. 2 (Forest Hills Area),* the Town of Grifton has fully complied with the provisions of GS 160-453.3." (Emphasis supplied.)

and

"8. That as to the Forest Hills Area (Tract No. 2), the plan for annexation does not provide fire protection to the Forest Hills Area (Tract No. 2) on substantially the same basis and in the same manner as such services are provided within the rest of the Town of Grifton prior to annexation. Under the proposed plan there will be a deficiency in water pressure and thereby fire protection as compared to most areas of the Town of Grifton prior to annexation in violation of the provisions of GS 160-453.3."

G.S. 160-453.3, in pertinent part, provides that the plan of the municipality for extending services to the area to be annexed must "provide for extending police protection, fire protection, garbage collection and street maintenance services to the area to be annexed on the date of annexation *on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.* If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such times as waterlines are made available in such area under existing municipal policies for the extension of waterlines." (Emphasis supplied.)

There was testimony that an engineer had tested six hydrants in the Town of Grifton. The first hydrant tested put out a flow of 810 gallons per minute; the next, 610 gallons per minute; the next, 790 gallons per minute; the next, 820 gallons per minute. The lowest of the tests was 80 gallons which was the "one on the two inch line". The engineer further testified: "All the others tested were on six inch lines and the lowest of these was 610 gallons per minute. In my opinion 80% of the Town of Grifton would be affected by pressures of over 600 pounds per minute." The evidence from the same engineer was that "it would be around 400 gallons per minute in the Forest Acres area." While we think there was also com-

petent evidence upon which the court could have found otherwise, it is obvious that there was competent evidence, entered without objection, that the plan for annexation does not provide for fire protection "on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." We, therefore, are of the opinion that the court did not err in the challenged findings of fact and conclusions of law with respect to the fire protection to Tract No. 2.

The matter will have to be remanded to the Board of Commissioners for the Town of Grifton for amendment of the plans for providing fire protection service to the end that the provisions of G.S. 160-453.3 are met with respect to Tract No. 2.

Respondent urges that the entire matter need not be remanded since, as to Tract No. 1, there was no error. We do not agree. From the record, it is obvious that all grants committed are for the entire project and not separated as to Tract No. 1 and Tract No. 2. For that reason we remand the matter in its entirety.

The result, then, is this:

Petitioners' appeal — affirmed.

Respondent's appeal — affirmed in part and reversed in part.

Remanded in its entirety.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT LEWIS BROWN

No. 7322SC627

(Filed 26 September 1973)

1. Constitutional Law § 30— 15 months between arrest and trial — no denial of speedy trial

Where defendant was arrested in November 1971, the officer whom he allegedly shot was in hospitals and unavailable to testify until August 1972, defendant petitioned for removal of the cases

against him to another county and the petition was granted in September 1972, but crowded court calendars in the new forum precluded trial until February 1973, although the State and the defense were ready for trial as of October 1972, defendant failed to show that his right to a speedy trial was impermissibly abridged.

2. **Contempt of Court § 2; Criminal Law § 98— misbehavior of defendant — removal from courtroom — no error**

The court has inherent power to take whatever legitimate steps are necessary to maintain proper decorum and appropriate atmosphere in the courtroom during trial, and removing an unruly defendant qualified as such a legitimate step; therefore, the trial court did not err in removing defendant to an adjoining room where he could hear the proceedings over an intercom system and communicate with counsel by telephone where the court had previously warned defendant about interrupting the proceedings in a contemptuous manner, given him the option of behaving or of being removed from the courtroom, and informed him that he could return to the courtroom if and when he promised to behave.

3. **Criminal Law § 171— two offenses arising from one incident — guilty verdicts — judgment entered on one charge only — no prejudice to defendant**

Where defendant was charged with and found guilty of felonious secret assault and felonious assault with intent to kill inflicting serious injury, dismissal of the assault with intent to kill charge was not required, though both offenses arose from the same incident, since no judgment was entered on the charge of felonious assault with intent to kill inflicting serious injury and defendant was not harmed by reason of the verdict on that charge.

APPEAL by defendant from *Copeland, Special Judge*, 12 February 1973 Session of Superior Court held in IREDELL County.

Defendant Robert Lewis Brown was indicted under three separate bills for felonious secret assault (G.S. 14-31), felonious assault with intent to kill inflicting serious injury (G.S. 14-32(a)) and felonious assault on a law enforcement officer (G.S. 14-34.2). The felonious secret assault and felonious assault stemmed from defendant's shooting of Deputy Sheriff Ted Elmore. The charge of felonious assault on a law enforcement officer resulted from the assault on police officer Paul Burgess. The offenses occurred on 11 November 1971 and arrest warrants for defendant were issued and executed at that time. In September 1972, upon petition of defendant, two of the actions were removed from Catawba to Iredell County. The third cause was removed in January 1973. All three cases were consolidated for trial at the 12 February 1973 session.

Prior to trial, defendant filed a motion for speedy trial and later presented a motion to dismiss for lack of a speedy trial which were both denied. In addition the court denied defendant's pretrial motion to dismiss the charge of assault with a deadly weapon with intent to kill on the grounds defendant was already charged with the crime of secret assault for the same act. The State's evidence tended to show the following.

In the early morning hours of 11 November 1971, Deputy Sheriff Ted Elmore stopped a 1961 Chevrolet heading east on U.S. Highway 64-70 in Catawba County. His attention had been directed to the vehicle by reason of the manner in which it was being operated. After stopping his patrol car behind the other car, he started to get out. As he stepped out a shot was fired which struck him in the right elbow. Elmore tried to reach over and draw his pistol with his left hand. He saw defendant fire another shot which struck him in the stomach. Defendant was standing at the back of the door on the driver's side of the Chevrolet. The lights from the patrol car were shining directly on defendant. The second shot turned Elmore around and as he fell he was shot again. The last shot struck him in the back and he fell to the pavement.

Henry Rink, a truck driver, testified that he saw the patrol car and the car in front of the patrol car. As Rink approached, the front car was driven away at a high rate of speed. Rink found Elmore beside his patrol car. Rink used the patrol car radio to call for help and broadcast a description of the suspects and the car in which they had fled.

Paul Burgess, a Newton police officer, heard the radioed call for help, the description of the fleeing vehicle and its occupants and their direction of travel. While proceeding along Highway 321 toward 64-70 in an attempt to intercept the suspects, Burgess met and passed a Chevrolet similar to the one described in the radio message. He turned around and began pursuit. After Burgess had closed to within 25 to 30 feet of the Chevrolet, its passenger side door was opened and a shot fired in his direction. The suspect vehicle then veered to the right and into an embankment, whereupon two occupants abandoned the car and fled into nearby woods. At this time two more shots were fired at Burgess. From 100 to 250 police officers surrounded and searched the woods and nearby area. Defendant was found hiding under a trailer in the vicinity of the

woods. A .38 calibre pistol was also recovered from under the trailer. This pistol and several spent .38 calibre casings found in the woods some distance from the Chevrolet were given to the SBI for testing. Ballistic tests disclosed that 3 of the 4 cartridges had been fired from the weapon taken from defendant. A primer residue examination of defendant's hands revealed that defendant had recently been in direct contact with or close proximity to a pistol which had been fired.

Presentence evidence disclosed that the impounded Chevrolet was registered to a fictitious Georgia resident. Several loaded weapons and a quantity of ammunition were found in the trunk of the car, including: one Ruger .44 Magnum carbine rifle; one hi-standard Flite King Shotgun; one J. C. Higgins Bolt Action Shotgun, 12 gauge; one Mossberg 12 gauge shotgun; one U. S. Carbine rifle; one U. S. Military M-14 rifle; one M-1 30 calibre carbine rifle; one Savage, Model 99, .300 calibre rifle; one Military M-72 rocket launcher; one Taurus .38 revolver; one Classic Crossbow, 80 pound test; and an assortment of knives.

The jury found defendant guilty as charged in all three bills of indictment. The court sentenced defendant to 18-20 years on the count of felonious secret assault on Elmore; it continued prayer for judgment with respect to the count of assault on Elmore with a deadly weapon with intent to kill, inflicting serious injury; and the court sentenced defendant to 4-5 years for assault on a law enforcement officer (Burgess) with a firearm, to run consecutively with the sentence on the first count. Defendant appealed.

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

Alston, Pell, Pell & Weston by E. L. Alston, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that since he was arrested in November 1971 and his case was not heard until February 1973, his right to a speedy trial has been impermissibly abridged. We disagree. Like many other constitutional rights, that of a speedy trial is not absolute with the result that not every delay is improper. "The essential ingredient [of justice] is orderly expedition and not mere speed." *Smith v. United States,* 360 U.S.

1, 10, 3 L.Ed. 2d 1041, 1048, quoted in *United States v. Marion,* 404 U.S. 307, 313, 30 L.Ed. 2d 468, 474. Indeed the very nature of the criminal process makes a certain amount of delay between arrest and trial inevitable. For this reason, the right to speedy trial has been described as "necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the right of public justice." *Beavers v. Haubert,* 198 U.S. 77, 87; 49 L.Ed. 950, 954.

The North Carolina Supreme Court has recently reiterated the view that the appropriateness of a given delay must be evaluated "in light of the circumstances of each case," *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972), and in light of the purpose of the right which is to prevent "purposeful or oppressive delays which the State could have avoided by reasonable effort." *State v. Neas,* 278 N.C. 506, 180 S.E. 2d 12 (1971), quoting *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274. The record discloses that Elmore, the victim of the assault which caused paralysis of his legs, was "in the Baptist Hospital, Winston-Salem, North Carolina, from November 11, 1971, until April 27, 1972, except for a one-day trip to Catawba County for a preliminary hearing, when he testified from a stretcher; and that from April 27, 1972, until the latter part of July, 1972, he was in the Craig Rehabilitation Hospital in Colorado; and that upon his return in July, 1972, he was ordered to remain confined to bed for about a month after that date." The unavailability of this witness constituted an obviously acceptable reason for delaying trial. *See State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659. In September 1972, defendant's removal petition was granted. Crowded court calendars in the new forum precluded trial until February 1973, although the State and the defense were ready for trial as of October 24, 1972. Defendant requested removal and should not be allowed undue benefit from any reasonable delay resulting therefrom. *State v. Johnson, supra.* We do not find that the 4-month delay after removal resulting from a crowded docket was either unreasonable or oppressive or that defendant has shown prejudice by reason of the delay. *State v. Brown, supra; State v. Powell,* 18 N.C. App. 732, 198 S.E. 2d 70.

[2] Defendant asserts that his removal from the courtroom during trial deprived him of his contstitutional right to be informed of the accusations against him and to confront his

accusers. The court had warned defendant about interrupting the proceedings in a contemptuous manner and defendant was finally given the option of behaving or of being removed from the courtroom. Included among the other disruptions by defendant was the following incident. During the testimony of Officer Elmore defendant interrupted the witness by saying, "you're a liar. You're a goddamn liar. I am not going to be framed." To the court's request that he be quiet, defendant responded, "I am not going to be framed. I don't dig no railroading. The man is lying." At this point, the jury was taken from the courtroom. When the court reprimanded defendant for using vile language, he replied, "I didn't use vile language." Shortly thereafter, defendant asserted, "I said I don't want nobody lying on me, period. If somebody lies, I am going to speak." Defendant also told the court, "What you're saying don't intone with my ears." Upon his refusal to respond to the judge's question of whether he wished to remain in court or not, defendant was removed to an adjoining room where he could hear the proceedings over an intercom system and communicate with counsel by telephone. Defendant was informed he could return to the courtroom if and when he promised to behave. When trial resumed the following day, defendant was seated beside counsel at the counsel table.

It is clear that the court has inherent power "to take whatever legitimate steps are necessary to maintain proper decorum and appropriate atmosphere in the courtroom during a trial." *State v. Dickerson,* 9 N.C. App. 387, 176 S.E. 2d 376. It is equally clear that removing an unruly defendant qualifies as such a legitimate step. As the United States Supreme Court has observed in *Illinois v. Allen,* 397 U.S. 337, 343-44, 25 L.Ed. 2d 353, 359:

> "We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."

Despite the patience of the trial judge and his repeated warnings, the defendant contemptuously persisted in disorderly and disruptive conduct. After his removal from the courtroom, reasonable steps were taken to insure that defendant, if so inclined, could follow the trial and communicate with his attorney. Later, defendant's apparent attempt to thwart the progress of the trial having failed, he was allowed to return to the courtroom. There is no merit in defendant's assignment of error based on his removal from the courtroom.

[3] In other assignments of error defendant contends that the court should have dismissed, before trial, the charge of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argues that since duplicate charges are impermissible, dismissal was mandated by the pendency of the charge of secret assault arising out of the same incident. In related challenges, petitioner maintains that the court erred in denying a motion to require the State at the close of the evidence to elect between the charge of felonious secret assault and felonious assault with a deadly weapon with intent to kill, and to instruct the jury so as to allow it to return a verdict of guilty of both charges. For present purposes it is sufficient to say that since no judgment was entered on the charge of felonious assault inflicting serious injury (G.S. 14-32(a)), defendant has not been harmed by reason of the verdict on that charge.

Defendant's remaining assignments of error have been considered and found to be without merit. In the trial from which defendant appealed we find no prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

WACHOVIA BANK & TRUST COMPANY, N.A., EXECUTOR OF THE WILL OF RICHARD R. LAWRENCE, AND NORTH CAROLINA LUTHERAN HOMES v. EUGENE HILL LAWRENCE; ESTELLE PLEASANTS TUTTLE AND HUSBAND, LUCIUS BYRD TUTTLE; CLARA LENORA SHERRILL PAYNE; MARY AMANDA SHERRILL HOUCK AND HUSBAND, JAMES ABRAHAM HOUCK; ANNIE LUELLA SHERRILL THORNBROUG; LAWRENCE WESLEY SHERRILL AND WIFE, GENELLE P. SHERRILL; CORINNE ELIZA SHERRILL COBLE AND HUSBAND, ROBERT COBLE; ROSALIE IRENE SHERRILL GABRIELLE AND HUSBAND, TONY GABRIELLE; VANCE LAWRENCE; CLYDE W. LAWRENCE AND WIFE ESTELLE H. LAWRENCE; MAE LAWRENCE LIGHT AND HUSBAND, WILL LIGHT; PRICE LAWRENCE; LILLIE LAWRENCE EDENFIELD AND HUSBAND, W. R. EDENFIELD; WILLIAM LAMBERT LAWRENCE; ELLEN LAWRENCE FARLOW; CATHERINE LAWRENCE; DARLENE LAWRENCE SCANDALIATO; SARAH LAWRENCE; RUSSELL LAWRENCE; JO BOY LAWRENCE; TERRY ROLAND LAWRENCE AND WIFE, MRS. TERRY ROLAND LAWRENCE; COLENE LAWRENCE; SUZANNE LAWRENCE; ALTHA LAWRENCE BARTON AND HUSBAND, H. C. BARTON; CHARLES LIONEL LAWRENCE AND WIFE, NELLIE L. LAWRENCE; LILLIAN CATHERINE LAWRENCE HOLLAR AND HUSBAND, LARRY D. HOLLAR; WADE G. LAWRENCE AND WIFE, FRANCES O. LAWRENCE; JAMES SAMUEL LAWRENCE AND WIFE, ELAINE C. LAWRENCE; NELLIE JEWEL LAWRENCE LITTLE AND HUSBAND, TERRY LITTLE; IRINE HONNEYCUTT; ANNIE LAYTON AND HUSBAND, WORTH LAYTON; MRS. CLEO WILLIAMS; PAULINE SPIVEY AND HUSBAND, NOAH SPIVEY; AND HARRY E. FAGGART, JR., GUARDIAN AD LITEM FOR THE MINOR HEIRS, MINOR SPOUSES OF HEIRS, UNBORN HEIRS, UNKNOWN HEIRS AND UNKNOWN SPOUSES OF HEIRS OF RICHARD R. LAWRENCE

No. 7326SC115

(Filed 26 September 1973)

1. **Wills § 28— construction of will — intent of testator**

The cardinal principle to be followed in construing every will is to ascertain and give effect to the true intent of the testator, and such intent is to be ascertained, if possible, from the language employed by the testator viewed against the background of his own particular circumstances known to him at the time the will was made, and is to be gathered from examination of the instrument as a whole.

2. **Wills §§ 30, 52— presumption as to excluded relatives — language construed as residuary clause — disposition of real property**

Where the evidence tended to show that testator clearly understood the nature of his assets and that those included his house and lot, that, with the exception of certain named individuals among his friends and kinfolks, he was primarily concerned that his property

should go to benefit certain religious and charitable causes which were for the most part identified with his church, and that testator had a large number of other kin in addition to those named in the will whom it was reasonable to assume he did not intend to become owners by intestacy laws of fractional undivided interests in his house and lot, the trial court properly concluded that the words employed by the testator, "all remaining funds after my estate is settled and all bills paid," were intended by him as a general residuary disposition to the plaintiff N. C. Lutheran Homes of his entire estate, whatever its nature, including all of his real as well as all of his personal property not otherwise disposed of by other clauses of the will and not needed to pay his debts.

APPEAL by defendant, Wade G. Lawrence, and by the defendant guardian ad litem, from *Clarkson, Judge,* 9 October 1972 Civil Session of Superior Court held in MECKLENBURG County.

Action for a declaratory judgment to determine whether title to a house and lot at No. 700 Clement Ave., Charlotte, N. C., passed under provisions of the holographic will of Richard R. Lawrence, deceased, to North Carolina Lutheran Homes, one of the plaintiffs, or whether such property passed under the intestate succession laws to the defendants, who are the heirs at law of the decedent.

Richard R. Lawrence died on 8 January 1970. His holographic will dated 19 July 1968 and a codicil thereto dated 26 December 1968 were duly probated. His estate consisted of personal property, largely in the form of U. S. Bonds and cash on deposit, having a total value of $66,648.66, a cemetery lot, and the house and lot in question, which was valued at $13,750.00. In his will the testator disposed of the cemetery lot and made specific and pecuniary bequests in amounts ranging from $500.00 to $2500.00 to certain of his nieces and nephews, made a bequest of $1000.00 to a Lutheran minister and his wife, and then made several pecuniary bequests in amounts ranging from $1000.00 to $5000.00 to various church and charitable institutions, all but two of which were associated with the Lutheran Church. After making the foregoing provisions, none of which are now in question, the testator provided as follows:

> "To N. C. Lutheran Homes, L. C. A., Hickory, N. C., all remaining funds after my estate is settled and all bills paid."

There then followed provision naming Wachovia Bank & Trust Company as Executor of the estate, after which appeared the testator's signature. Below the signature there appeared a "P.S." in the decedent's handwriting in which reference was made to persons who could verify the testator's signature, and then appeared a listing of "Main assetts" (sic). This listing refers to the U. S. Bonds, stock in mutual savings and loan associations, life insurance policies, household furnishings, an automobile, and also lists the "house and lot at 700 Clement Ave., Charlotte, N. C." By the codicil to his will the testator made a cash bequest of $1000.00 to a cousin and her son.

The case was submitted to the court without a jury upon stipulations of the parties, including a stipulation that "N. C. Lutheran Homes, L. C. A., Hickory, N. C." is the identical non-profit charitable corporation as the plaintiff, the North Carolina Lutheran Homes. The court entered judgment making findings of fact, including findings that the clause above quoted giving "all remaining funds" to the North Carolina Lutheran Homes was intended by the testator to be a residuary clause and that the word "funds" in said clause was intended by the testator as a synonym for "assets" and described all assets of the estate, real or personal, remaining after the specific bequests had been satisfied and all expenses of the estate paid, and that it was not the intent of the testator to die intestate as to the real property of which he was seized at the time of his death. On these findings the court concluded as a matter of law that title to the real estate in question passed to the plaintiff, North Carolina Lutheran Homes, by the will of Richard R. Lawrence, deceased. From judgment in accord with these findings and conclusion, the defendant, Wade G. Lawrence, and the defendant, Harry E. Faggart, Jr., guardian ad litem for any minor heirs and any unknown heirs of the decedent, appealed.

Alexander & Brown by B. S. Brown, Jr., for plaintiff appellee, North Carolina Lutheran Homes.

Helms, Mullis & Johnston by E. Osborne Ayscue, Jr., for plaintiff appellee, Wachovia Bank & Trust Company, N.A.

Weinstein, Sturges, Odom & Bigger, P. A., by T. LaFontine Odom for defendant appellant, Wade G. Lawrence.

Harry E. Faggart, Jr., Guardian Ad Litem, defendant appellant.

PARKER, Judge.

In their brief appellants contend:

> "The testator's overall and specific intent as to what is meant by the phrase 'all remaining funds' cannot be definitely nor reasonably ascertained from the terms of the will and is susceptible of several interpretations. Therefore, this phrase must be construed in its limited and technical sense and be restricted to include only money, deposits, notes, bonds and other such intangible personal property."

We do not agree.

[1] The cardinal principle to be followed in construing every will is to ascertain and give effect to the true intent of the testator, for indeed the intent of the testator is his will. Such intent is to be ascertained, if possible, from the language employed by the testator viewed against the background of his own particular circumstances known to him at the time the will was made, and is to be gathered from examination of the instrument as a whole. Thus, each will presents its own unique problem of construction, and the same word, when employed by one testator to express one intended meaning, may have quite a different meaning when employed by another testator under dissimilar circumstances.

[2] Considering the problem presented by the present case in the light of the foregoing well established principles, we agree with the trial judge's conclusion that the words employed by the testator, "all remaining funds after my estate is settled and all bills paid," were intended by him as a general residuary disposition of his entire estate, whatever its nature, including all of his real as well as all of his personal property not otherwise disposed of by other clauses of the will and not needed to pay his debts. It is apparent that this testator clearly understood the nature of his assets and that these included his house and lot. It is equally apparent that, with the exception of certain named individuals among his friends and kinfolk, he was primarily concerned that his property should go to benefit certain religious and charitable causes which were for the most part identified with his church. As the record before us makes clear, he had a large number of other kin in addition to those whom he expressly remembered in his will, and as to these it is simply

not reasonable to assume that he intended that they should become owners by intestacy laws of fractional undivided interests in his house and lot. Indeed, the law and the particular facts of this case raise quite the opposite presumption. 7 Strong, N. C. Index 2d, Wills, § 30. What was said by Rodman, J., speaking for our Supreme Court in *In re Will of Wilson,* 260 N.C. 482, 133 S.E. 2d 189, has particular pertinence here:

> "Where one undertakes to make a will, the presumption is that the instrument disposes of all of testator's property, not leaving a residue to pass under laws governing intestacy. *Poindexter v. Trust Co., supra* [258 N.C. 371, 128 S.E. 2d 167]; *Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689. 'Having undertaken to make a will at all, it is not consistent with sound reasoning that the testator would have left his estate dangling.' *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420."

The cases cited and relied on by appellants, *Marrow v. Marrow,* 45 N.C. 148, and *Williams v. Best,* 195 N.C. 324, 142 S.E. 2, are distinguishable and are not here controlling. While, as noted above, each case involving interpretation of a will presents its own unique problems of construction and is therefore seldom directly controlled by decisions in other cases, our decision here does find some support in opinions from other courts which on occasion have construed the word "funds" broadly to include real estate or the general residuary estate of the testator, where the contents of the will and the surrounding circumstances indicated that such was his intention. See: Annotation, 67 A.L.R. 2d 1444.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

IN THE MATTER OF: MRS. ROBERT ADAIR, REPRESENTATIVE OF MAGGIE BANGE, DECEASED v. ORRELL'S MUTUAL BURIAL ASSOCIATION, INC.

No. 7319SC527

(Filed 26 September 1973)

1. **Burial Associations— funeral benefits — cash payment to director rendering services**

When funeral services are provided by a funeral director of any mutual burial association in good standing in N. C. for a decedent who was a member of another such association, the benefits of the decedent are not forfeited but are required to be paid in cash to the funeral director who actually renders the services. G.S. 58-226; G.S. 58-224.2.

2. **Burial Associations; Constitutional Law § 25— payment of funeral benefits — provision for amendment of contract by law — statute not impairment of contract**

Where the contract which defendant burial association entered with its members was made with the specific reservation that it could be amended by act of the General Assembly, a change in the statute forbidding payment of funeral benefits in cash which was in effect at the time the contract with plaintiff was made did not violate Article I, Section 10, Clause 1 of the U. S. Constitution which forbids a state to pass any law impairing the obligations of contracts.

3. **Burial Associations— funeral benefits — cash payment to director rendering services**

Where decedent was entitled to a $200 benefit provided under her certificate of membership issued by defendant burial association, but her funeral services were rendered by the funeral director of another association in good standing under N. C. Burial Association laws and regulations, statutes and regulations of the N. C. Mutual Burial Association Commission required that defendant pay the $200 benefit in cash to the funeral director who rendered decedent services. G.S. 58-224.2.

APPEAL by defendant from *Seay, Judge,* 19 February 1973 Session of Superior Court held in RANDOLPH County.

Pursuant to G.S. 58-241.4 this proceeding was instituted before the Burial Association Commissioner of North Carolina to require the defendant, Orrell's Mutual Burial Association, to pay in cash funeral benefits which were due its deceased member, Maggie Bange. The Burial Association Commissioner determined that the representative of the deceased member was entitled to receive the $200.00 funeral benefit in cash and directed the defendant association to make such payment. From

the decision of the Commissioner, defendant appealed to the Superior Court of Randolph County for a trial de novo. Jury trial was waived, and the parties agreed that the matter be heard by the court without a jury.

The facts were not in dispute. Maggie Bange joined Orrell's Mutual Burial Association, Inc., on 7 September 1959 and remained a member in good standing from that date until her death on 2 November 1971. Under her certificate of membership she was entitled to the maximum $200.00 benefit. At the direction of her daughter, Cumby Mortuary, Inc., handled the funeral services for Mrs. Bange and sought reimbursement in cash from Orrell's Mutual Burial Association of the $200.00 benefit to which Maggie Bange had been entitled. Orrell refused to make payment upon the basis that cash payments were prohibited by G.S. 58-226.

From a judgment awarding the $200.00 in cash, defendant has appealed.

Miller, Beck and O'Briant, by Adam W. Beck, for plaintiff appellee.

DeLapp and Hedrick, by Robert C. Hedrick, for defendant appellant.

BALEY, Judge.

Since 1941 mutual burial associations in North Carolina have been regulated by statute and operated under supervision of a burial association commissioner. In 1967 the North Carolina Mutual Burial Association Commission was created to assist the commissioner and make rules and regulations for the proper administration of the associations organized and operating under its authority. G.S. 58-226 provides a set of uniform by-laws and requires every burial association in the state to adopt them in their entirety. These by-laws are usually printed in full on certificates of membership and, in this case, were printed upon the certificate of membership in Orrell's Mutual Burial Association, Inc., which was furnished to Maggie Bange, its deceased member. Article 19 of these by-laws is as follows:

> "These rules and by-laws shall not be modified, cancelled or abridged by any association or other authority except by act of the General Assembly of North Carolina."

The original purpose of the mutual burial associations as set out in the by-laws, among other things, was to provide a funeral benefit for each member in merchandise and services and "in no case shall any cash be paid." G.S. 58-226. Services were always to be provided by the official funeral director of the burial association of which decedent was a member. Transfer of a deceased member's burial benefit in cash could not be compelled. *Burial Assoc. v. Funeral Assoc.*, 11 N.C. App. 723, 182 S.E. 2d 275.

After the decision in *Burial Assoc. v. Funeral Assoc., supra,* the General Assembly in 1971 amended G.S. 58-224.2 to permit surviving representatives of the decedent to choose a funeral director and to transfer members' benefits in cash. The relevant portions of the statute now read as follows:

> "The Burial Association Commissioner, with the consent of the Commission, and after a public hearing, may promulgate reasonable rules and regulations for the enforcement of this Article and in order to carry out the intent thereof. The Commission is authorized and directed to adopt specific rules and regulations to provide for the orderly transfer of a member's benefits in cash or merchandise and services from the official funeral director of the member's association to the official funeral director of any other mutual burial association in good standing under the provisions of this Article."

Pursuant to this statute the Commission adopted the following regulations:

> "On and after November 1, 1971, if a member of a Mutual Burial Association dies, the secretary-treasurer of the Burial Association of the deceased member will pay in cash 100% of the deceased member's benefits to any official funeral director of a Burial Association that furnishes funeral services. Said payments shall be made within 30 days after the request for payment, which request shall be made in writing by the next of kin of the deceased or by any person who contracts for the burial of the deceased or by the official funeral director furnishing such services when requested to do so by the next of kin or the person contracting for burial of the deceased."

[1] The amendment to G.S. 58-224.2 and the adoption of the regulation by the Commission were effective at the time of the death of Maggie Bange on 2 November 1971. Under these changes, by statute and regulation, when funeral services are provided by a funeral director of any mutual burial association in good standing in North Carolina for a decedent who was a member of another such association, the benefits of the decedent are not forfeited but are required to be paid in cash to the funeral director who actually renders the services.

In the present case it was stipulated that Cumby Mutual Burial Association, Inc. was a mutual burial association in good standing under the North Carolina Burial Association laws and regulations and that Cumby Mortuary, Inc. was its official funeral director and performed the funeral services for Maggie Bange.

[2] Defendant contends that G.S. 58-226 which provided "and in no case shall any cash be paid" was in effect at the time the certificate of membership was issued to Maggie Bange and is controlling; that to permit any change would violate Article I, Section 10, Clause 1 of the United States Constitution which forbids a state to pass any law impairing the obligations of contracts.

The contract which the defendant association entered with its members was made with the specific reservation that it could be amended by act of the General Assembly. In *Spearman v. Burial Association,* 225 N.C. 185, 187, 33 S.E. 2d 895, 896, the court in holding that there was no impairment of the obligations of contract stated:

> "Hence the plaintiff's intestate must be held to have accepted the certificate of membership with notice that its provisions could be 'modified, canceled, or abridged' by legislative enactment. Under these circumstances this Act of the General Assembly would not be considered offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. Cons. United States, Art. I, sec. 10; *Faulk v. Mystic Circle,* 171 N.C., 301, 88 S.E., 431; *Helmholz v. Horst,* 294 F. 417. The constitutional prohibition is qualified by the measure of control which the state retains over remedial processes. *Home Building & Loan Asso. v. Blaisdell,* 290 U.S., 398 (434)."

The modification in the statute and regulations which would permit the selection of a funeral director by representatives of decedent is a reasonable change and would seem to be within the general purpose for which the association was formed. Present day society is so mobile that provisions which will facilitate transfer of benefits would appear to be in the public interest.

The portion of G.S. 58-226 prohibiting any cash payment was removed by the General Assembly effective 22 May 1973, but, in any event, the amendment to G.S. 58-224.2 to permit cash payments was passed at a later date and would prevail over prior law which might be in conflict.

Defendant cites *Kenton & Campbell Benevolent Burial Ass'n v. Quinn,* 244 Ky. 260, 50 S.W. 2d 554 (1932), in support of its position. This case is distinguishable because the Kentucky burial association regulations did not contain any reserved-power clause corresponding to Article 19 of the North Carolina by-laws.

[3] The undisputed facts show that at the time of her death Maggie Bange was entitled to the $200.00 benefit provided under her certificate of membership issued by Orrell's Mutual Burial Association. Her funeral services were rendered by Cumby Mortuary, funeral director of an association in good standing under North Carolina Burial Association laws and regulations. The amendment to G.S. 58-224.2 and the regulation adopted by the North Carolina Mutual Burial Association Commission clearly require the defendant to pay the $200.00 benefit in cash to an official funeral director of a properly qualified burial association.

The judgment of the trial court is affirmed.

Affirmed.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. WAYNE EDWARD REAVIS

No. 7322SC638

(Filed 26 September 1973)

1. **Arson § 2— sufficiency of indictment**

Indictment was sufficient to charge defendant with the unlawful burning of a mobile home used as a dwelling, notwithstanding reference was made in the indictment to the wrong statute.

2. **Arson § 4— sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of burning a mobile home used by his wife as a dwelling where it tended to show that a fire broke out in a bedroom of the trailer shortly after defendant was in the bedroom, that the fire did not originate in the electrical wiring system, that the heaviest damage was in the floor of the closet of the bedroom, that the only item present in the closet after the fire was a small amount of charred debris, that defendant and his wife were experiencing marital difficulties and that defendant had threatened to burn up his wife and everything she had.

3. **Arson § 3; Criminal Law § 50— expert opinion testimony — cause of fire**

In a prosecution for the unlawful burning of a dwelling, the trial court erred in the admission of opinion testimony by the State's arson expert as to the cause of the fire where the witness failed to qualify his opinion with sufficient facts based on his personal observations.

4. **Criminal Law § 83— arson case — incompetency of wife to testify against husband**

Defendant's wife was not a competent witness against defendant in a prosecution for burning a mobile home used by the wife as a dwelling, notwithstanding defendant and his wife were experiencing marital difficulties and defendant had assaulted his wife the day preceding the fire. G.S. 8-57.

APPEAL by defendant from *Rousseau, Judge,* 16 April 1973 Session of Superior Court held in DAVIE County.

Defendant was charged in a bill of indictment which contained the following language: ". . . Wayne Edward Reavis unlawfully and wilfully did feloniously and wantonly set fire to and burn a structure, to wit: a mobile home [which was owned by his wife Faye Reavis], used as a dwelling house . . . . "

Defendant pleaded not guilty and was found guilty as charged. From a judgment imposing a prison sentence of not

less than seven years nor more than ten years, defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Alfred N. Salley for the State.

Powell and Powell by Harrell Powell, Jr., and Edward L. Powell for the defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns as error the denial of his motion to quash the bill of indictment. A motion to quash, *inter alia,* challenges the sufficiency of the bill of indictment to charge an offense. *State v. Mayo,* 267 N.C. 415, 148 S.E. 2d 257; *State v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81. The requirements for a sufficient bill of indictment are as follows: (1) The offense is charged in a plain, intelligible, and explicit manner; (2) The offense is charged properly so as to avoid the possibility of double jeopardy; and (3) There is such certainty in the statement of the accusation as to enable the accused to prepare for trial and to enable the court, on conviction or plea of *nolo contendre* or guilty to pronounce sentence according to the rights of the case. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897; *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917. A careful review of the bill of indictment in this case reveals compliance with the aforementioned requisites and even, assuming *arguendo,* that reference to the wrong statute is made in the bill of indictment as defendant contends, this is not a fatal flaw in the sufficiency of the bill of indictment. *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263; *State v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857. See also 4 Strong, N.C. Index 2d, Indictment and Warrant, Sec. 9, pp. 347-48.

[2] Next, defendant asserts that the trial court erred in the denial of his motion for judgment as of nonsuit. The competent evidence offered by the State (defendant offered no evidence) tends to show the following:

Shortly after three o'clock (p.m.) on 9 June 1972, defendant, his mother, and Tammy Reavis, his twelve year old daughter, arrived at the mobile home. Defendant and his mother entered the trailer several times while Tammy remained outside. Tammy testified:

"The last person to go in the trailer was my father, Wayne Reavis. Before the last time he went in the trailer, my grandmother asked him if he wanted her to go in and help; he said NO. He went in the trailer by himself at that time. * * * My father had been drinking that day. He had been drinking Vodka; he come out of the trailer with a glass of it. He kept his clothes that he brought out in the back bedroom of the trailer, which was the bedroom that was burned. He kept them in the closet of the back bedroom. I went in the closet after the fire was put out and there were NO clothes in the back closet."

Defendant, his mother, and Tammy left the mobile home around 3:20 p.m. Within five minutes of their departure a next door neighbor observed smoke pouring from the back bedroom of the trailer and promptly telephoned another neighbor who in turn called the fire department.

After making an inspection of the burned premises, the fire chief contacted an arson specialist to investigate the source of this incident. A special agent of the SBI conducted an investigation two or three hours after the alleged events occurred. The agent testified that a thorough check of the electrical wiring system eliminated this as a possible origin of the fire; that the heaviest damage was in the floor in the closet of the bedroom, and that the only item present in the closet at the time of his inspection was a small amount of charred debris.

Further testimony revealed that defendant and his wife, Faye Reavis, were experiencing marital problems, and were in the process of seeking a separation. In fact, on the day prior to the alleged burning defendant was in the county jail as a result of making an assault on his wife. R. W. Groce, an officer on the Mocksville police force, stated that while defendant was at the jail "he was raising a lot of racket, cursing [and] hollering" and defendant was overheard to say "if they didn't let him out that Goddamn jail he would burn it down when he got out and he was going to burn that Goddamn bitch up and everything she had".

The foregoing evidence was sufficient to require submission of the case to the jury. This assignment of error is overruled.

[3] Next, defendant maintains that the trial court erred in failing to exclude the opinion testimony of Ed Sneed, the SBI agent tendered as an arson expert. While it is true as defendant contends that the general rule seems to be that both expert and nonexpert opinion evidence as to the cause of a fire in an arson case should be excluded, See Annot. 131 A.L.R. 1113, 1136 (1941) we have found no North Carolina decision which adopts this proposition in whole. Defendant relies chiefly upon *State v. Cuthrell,* 233 N.C. 274, 63 S.E. 2d 549; however, we feel this case is distinguishable from the present case in that *Cuthrell* involved only the exclusion of the opinion testimony of a nonexpert witness and not the exclusion of the testimony of an expert witness. In fact, our Supreme Court, in *State v. Moore,* 262 N.C. 431, 137 S.E. 2d 812, indicated that it is proper for an expert witness to express an opinion as to the origin of a fire. The approach in *Moore, supra,* is quite consistent with the one outlined in *Teague v. Power Co.,* 258 N.C. 759, 129 S.E. 2d 507, wherein Justice Sharp wrote:

> "The cases cited by the defendants, in which opinion evidence as to the cause of fires or other damage to property was excluded, involved the opinions of nonexpert or lay witnesses which, the Court said, were worth no more than any one else's. [citation omitted] In such instances, lay witnesses are not permitted to invade the prerogative of the jury. [citation omitted] However, an expert in a particular field may give his opinion, based on personal observation or in answer to a properly framed hypothetical question, that a particular event or situation could or could not have produced the result in question. [citation omitted]"

Even though agent Sneed was found to be an expert, we are of the opinion that his testimony as to the origin of the fire should have been excluded because the agent failed to qualify his opinion with sufficient facts based on his personal observations. An opinion, even of an expert, in order to have probative value, must be grounded on more than a mere assertion without sufficient factual support. See Stansbury's N. C. Evidence, Brandis Revision, Vol. 1, Sec. 132, p. 426, n. 68.

[4] By his next assignment of error defendant contends that the trial court erred in allowing the defendant's wife to testify against him in this criminal proceeding. More specifically, de-

fendant's wife testified that defendant called her on the phone and said: "You son of a bitch — I'm out of jail; I'm going to burn this trailer to the ground." G.S. 8-57 in effect forbids the testimony of one spouse *against* another in criminal proceedings unless the case falls within one of the exceptions enumerated in the statute. The State argues that this testimony should be admitted because of the exceptions which exist to the general rule in the case of assault upon the witness spouse and trespass upon the separate residence of the witness spouse; however, we are unable to agree with the State's interpretation of this case as falling within one of the exceptions to the general rule as provided in G.S. 8-57. Furthermore, the State asserts that *State v. Alford,* 274 N.C. 125, 161 S.E. 2d 575 controls this case and therefore, overriding questions of public policy where serious crimes are involved outweigh any conceivable interest the public might have in precluding the spouse's testimony. It is our opinion that *State v. Alford* is distinguishable from the present case in that *Alford* involved the testimony of a *divorced* spouse and the conclusion of Justice Bobbitt (now Chief Justice) writing for the court that when the marital relationship terminates, the asserted reasons for G.S. 8-57, to wit: the preservation of the sanctity of the home and the fictional oneness of husband and wife, are no longer pertinent. See Stansbury's N. C. Evidence, Brandis Revision, Vol. 1, Sec. 59, p. 188, n. 21. In the instant case there is evidence that defendant and his wife were experiencing less than harmonious marital relations; however, we do not derive from *Alford* any intent to include such circumstances within the scope of that decision. Quite to the contrary, we believe this case is more closely aligned with *State v. Kluttz,* 206 N.C. 726, 175 S.E. 81, a decision in which the court held that the wife of the defendant was not competent to testify against her husband in a prosecution for the burning of their house. Therefore, we conclude that prejudicial error was committed in allowing the wife to testify against her spouse.

We refrain from discussing defendant's other assignments of error as the asserted errors might not recur upon retrial.

For the reasons stated, defendant is entitled to a

New Trial.

Judges BRITT and VAUGHN concur.

GARLING J. McNEELY v. SOUTHERN RAILWAY COMPANY

No. 7319SC567

(Filed 26 September 1973)

1. **Rules of Civil Procedure §§ 41, 50— directed verdict in jury case — involuntary dismissal in nonjury case**

Motion for directed verdict under Rule 50 is proper when the case is tried before a jury, and motion for involuntary dismissal under Rule 41(b) is appropriate where the court sits as trier of fact.

2. **Rules of Civil Procedure § 41— involuntary dismissal — sufficiency of evidence decided by trial judge**

In ruling on a motion to dismiss under Rule 41(b), the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery, and if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover.

3. **Negligence § 35; Railroads § 5— crossing accident — stationary train — negligence of plaintiff automobile driver — involuntary dismissal**

In an action to recover for injuries sustained when plaintiff drove his pickup truck into the side of a railroad boxcar which was stationary on a railroad track blocking a highway crossing, the trial court properly granted defendant's motion to dismiss under Rule 41(b) where plaintiff's evidence disclosed his contributory negligence in that he approached a railroad crossing which he had traversed almost daily for three months, the crossing was marked by a road sign but there were no lights, no whistle, no signals or flagmen, he approached the railroad crossing at 40-45 mph, entered fog approximately 400 feet from the crossing, slowed down immediately and emerged from the fog approximately 100 feet before the crossing, applied his brakes shortly before striking the train, skidded six feet and then collided with the train.

APPEAL by plaintiff from *Collier, Judge,* 19 March 1973 Civil Session of ROWAN County Superior Court.

This is an action to recover for injuries sustained when plaintiff drove his pickup truck into the side of a railroad boxcar which was stationary on a railroad track and blocking a crossing on the Old Concord Road outside the Salisbury city limits.

The cause was tried without a jury, and the evidence was limited to the issue of negligence. The parties stipulated as follows:

". . . that on September 10, 1971, the plaintiff was the owner and operator of a 1962 Ford truck that the plaintiff

was involved in a collision of September 10, 1971 with the portion of a train on the Old Concord Road approximately one mile from the Salisbury City Limits at the point where the railroad tracks cross the Old Concord Road in a generally east and west direction; that the train was a north-south train; that the crew on the train consisted of R. T. Whitmire, Engineer; L. C. Morgan, Conductor; K. L. Moss, Brakeman and D. K. Eaton, Brakeman; that the crew was a Southern Railway crew and were operating the train in the scope of their employment and about their duties as agents and employees of the Southern Railroad; that the train was made up of thirty-one cars and the approximate length of each car was forty feet; that the train was headed towards Salisbury; that the car occupying the crossing was the third from the caboose and the twenty-eighth from the engine; that the train had stopped on this crossing for the purpose of making a switch movement; that the train had been standing on the crossing for approximately six to fifteen minutes; that at the time of the collision the crew members were inside the engine which was parked inside of the gate of the property of Carolina Forrest; that there were no flares, fuses, warning lights, flagman or other warning; that the train was blocking the railroad crossing across the Old Concord Road at the time of the collision; that the time of the collision was approximately 5:30 a.m. on September 10, 1971; that there were no traffic controls present at the aforesaid crossing; that there was a wooden crossarm sign on the western side of the Old Concord Road stating a railroad crossing; that there was a circular sign 246 feet from the track stating 'Railroad' and the white 'X' painted on the roadway with RR beside the 'X'; that at the point of the collision at the Old Concord Road is a smooth asphalt road and is approximately eighteen feet wide; that said road is a two-lane road with one lane for northbound traffic and one lane for southbound traffic; that said road runs generally north and south; that the speed limit at the point of collision was forty-five miles per hour."

Plaintiff's evidence showed that he was driving to work at about 5:30 a.m. on 10 September 1971. He was traveling at about 40-45 miles per hour when he noticed fog approximately

400 feet from the railroad crossing. As soon as he entered the fog, he took his foot off the accelerator and slowed to approximately 20-25 miles per hour. Plaintiff traveled for approximately 300 feet through the fog, but approximately 100 feet before the crossing, he emerged from the fog. Plaintiff applied his brakes shortly before striking the train, and six feet of skid marks were found leading to the back wheels of plaintiff's truck. Plaintiff was familiar with this crossing inasmuch as he had traversed it almost daily for three months prior to the accident. He testified that on the morning of the accident he was looking for the crossing and the warning sign.

The train had been completely stopped at the crossing for a period of several minutes before the collision. There were no lights, flares, or watchmen at the crossing.

At the close of plaintiff's evidence, defendant moved to dismiss under Rule 41(b). From an order allowing defendant's motion, plaintiff appealed.

Robert M. Davis for plaintiff appellant.

Stahle Linn, Jr., and Max Busby for defendant appellee.

MORRIS, Judge.

[1] The sole question for consideration is the propriety of the trial judge's allowing defendant's motion to dismiss under G.S. 1A-1, Rule 41(b). Appellant states in his brief that he presented ample evidence *for his case to go to the jury.* This case was, however, tried without a jury. Since the enactment of the new Rules of Civil Procedure in 1970, this Court has repeatedly distinguished between the motion for directed verdict under Rule 50 and the motion for involuntary dismissal under Rule 41(b). The former is proper when the case is tried before a jury, and the latter is appropriate where the court sits as trier of fact. *Bryant v. Kelly,* 10 N.C. App. 208, 178 S.E. 2d 113 (1970), rev'd on other grounds 279 N.C. 123, 181 S.E. 2d 438 (1971); *Neff v. Coach Co.,* 16 N.C. App. 466, 192 S.E. 2d 587 (1972).

[2] In determining the sufficiency of the evidence when ruling on a motion to dismiss made under Rule 41(b), it is the function of the trial judge " 'to evalute the evidence without

any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case.' *Wells v. Insurance Co.*, 10 N.C. App. 584, 179 S.E. 2d 806 (1971); *Rogers v. City of Asheville*, 14 N.C. App. 514, 188 S.E. 2d 656 (1972)." *Lineberry v. Country Club*, 16 N.C. App. 600, 603, 192 S.E. 2d 853 (1972), quoting Parker, Judge, in *Bryant v. Kelly, supra.*

> "In a ruling on a motion to dismiss under Rule 41(b), applicable only 'in an action tried by a court without a jury,' the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover." *Knitting, Inc. v. Yarn Co.*, 11 N.C. App. 162, 163, 180 S.E. 2d 611 (1971), quoting *Bryant v. Kelly, supra.*

If the trial judge allows the motion, "the court, as the trier of fact, should *determine* the facts and render judgment against the plaintiff." *Wells v. Insurance Co., supra,* at 588. The facts found by the trial court are conclusive if supported by competent evidence, even though there may be evidence to support findings to the contrary. *Bryant v. Kelly, supra.* We hold that the facts found by the court are supported by competent evidence. The only question before us now is whether the findings of fact support the conclusions of law and the judgment. *Id.*

It is our duty then to determine whether Judge Collier's findings of fact support his conclusion that plaintiff's evidence falls short of showing any actionable negligence on defendant's part and that plaintiff as a matter of law is not entitled to recovery. We hold that they do.

[3] We feel that allowing the motion to dismiss was proper under the holding of *Owens v. R.R.*, 258 N.C. 92, 128 S.E. 2d 4 (1962). While *Owens* was decided under the former compulsory nonsuit practice, the facts of that case were very similar to those of the case before us, and under the holding of *Wells v. Insurance Co., supra,* we are permitted to evaluate the sufficiency of the evidence by the same standard.

In *Owens*, the plaintiff's evidence tended to show that he was driving 25 miles per hour on a rainy and foggy night. As he approached the railroad crossing, there were no street

lights, no whistle or signal, and no flagman. When plaintiff first saw the train, he was one to one and one-half car lengths from the train. However, plaintiff was familiar with the crossing, for he was in the habit of crossing it about twice a month. The Court held that plaintiff's evidence taken in the light most favorable to him, disclosed that his driving under the above conditions constituted "active negligence on the part of the driver of the automobile, the male plaintiff, operating subsequent to any negligence on the part of the defendant, and such negligence of the male plaintiff was the real, efficient and sole proximate cause of the injuries to himself and the damage to his automobile and of his wife's injuries." *Id.* at 95. The Court further held that since the plaintiff's evidence disclosed plaintiff's own negligence, it was insufficient under well-established nonsuit practice to make out a case for the jury. Although there was no jury in the case *sub judice*, we feel that the case is controlled by *Owens, supra.* Plaintiff's evidence has disclosed contributory negligence and he has, therefore, failed to establish his right to relief.

We are aware of the holding of the Supreme Court in *Jernigan v. R.R. Co.*, 275 N.C. 277, 167 S.E. 2d 269 (1969), where Justice Higgins stated that the plaintiff in *Owens* was nonsuited not because of contributory negligence but rather because he failed to show the negligence of the defendant. The *Owens* case was not cited as authority in the *Jernigan* case, nor was it necessary to the decision. But aside from both cases, the dismissal should be affirmed. Regardless of whether plaintiff's evidence is evaluated as failing to establish defendant's negligence or as establishing contributory negligence, it fails to establish his right to relief. The judgment allowing the motion to dismiss plaintiff's case under Rule 41(b) is, therefore,

Affirmed.

Judges BRITT and PARKER concur.

J. T. ROSSER & WIFE, DORIS T. ROSSER, HEIRS AT LAW OF THE LATE ATLAS GERALD ROSSER, DECEASED, EMPLOYEE, PLAINTIFFS v. WAGON WHEEL, INC., EMPLOYER; HARTFORD ACCIDENT & INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. 7320IC654

(Filed 26 September 1973)

Master and Servant § 56— workmen's compensation — employee shot while struggling with policeman

In this workmen's compensation proceeding, the evidence was sufficient to support the Industrial Commission's determination that the deceased employee, the manager of a drive-in restaurant, was killed by accident arising out of and in the course of his employment when he was shot during an argument and struggle with a police officer in the restaurant parking lot, and that the employee's death was not occasioned by his intoxication.

APPEAL by defendant from an opinion and award of the Industrial Commission filed 12 April 1973.

The parties stipulated that at the time the deceased employee was fatally shot, the parties were bound by the Workmen's Compensation Act and that the employer-employee relationship existed. The parties also stipulated as to employee's average weekly wage and other matters not relevant to this appeal.

The hearing officer, Forrest H. Shuford, II, made findings of fact which include the following:

"1. Deceased employee and his father, J. T. Rosser, owned a drive-in restaurant in Carthage called the 'Wagon Wheel'. Deceased and his father each owned one-half interest in the business with deceased operating the business and acting as its general manager.

"2. The 'Wagon Wheel' was located about two blocks east of the courthouse in Carthage. The restaurant building was set back about sixty feet from the street and faced west. There was a parking lot in front of the restaurant building with two entrances, one to the north side and one to the south side. A warehouse was located adjacent to the street and at the north side of the parking lot.

"3. A part of the regular duty of deceased as general manager of the 'Wagon Wheel' was to 'police' the parking lot and to keep order in the parking lot. On the evening of

Saturday, 5 September 1970, deceased parked his automobile on the south side of the parking lot facing the restaurant building. He kept order at the 'Wagon Wheel' and on one occasion during the evening broke up a scuffle which occurred in the parking lot. The restaurant stayed open until about 1:00 a.m. At approximately 12:50 a.m. on the morning of 6 September 1970 deceased was sitting in his automobile in the parking lot with his former wife, Brenda Rosser, who worked at the 'Wagon Wheel'. Some other persons were also occupying the automobile and they were discussing a new place of business that deceased proposed to establish.

"4. The 'Wagon Wheel' was still open for business at such time. John Chambers, a police officer with the Carthage Police Force drove his police car into the 'Wagon Wheel' parking lot and circled the lot. The officer was accompanied by another person named Cyrus Belle. After circling the lot the officer stopped the police car at the north entrance of the parking lot and near the warehouse. Some automobiles were parked in front of the warehouse with some boys being on the sidewalk near the warehouse. The officer got out of his police car and told the boys to 'clear the area'. As the cars started to leave the officer heard someone in the 'Wagon Wheel' parking lot whistle. He then walked across the lot toward the automobile occupied by deceased. As he approached such automobile deceased got out of his car and he and the police officer met near the center of the south driveway into the parking lot and at a point about fifteen feet from the street.

"5. Upon meeting at such place in the parking lot the deceased accused the police officer of running off his customers. An argument between the two ensued and the officer raised a night stick which he was carrying. Deceased grabbed the night stick and they stood in such position for a considerable period of time with there being more argument between the two men. Deceased and the police officer then began to struggle with each other and a gun which the police officer had pulled from his holster went off and deceased was killed by such gunshot.

"6. At the time of the fatal accident deceased had some alcohol in his blood but he was not drunk and the accident was not occasioned by intoxication of deceased.

"7. At the time of the fatal accident deceased was on the premises of his business and was acting within the course and scope of his employment. He thought that the police officer was running off customers or potential customers of the business and the fatal accident of the deceased arose out of and in the course of his employment with his business."

The Hearing Commissioner concluded that the deceased employee sustained injury by accident arising out of and in the course of his employment and awarded compensation. The full Commission affirmed the award. Defendant appealed.

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

Teague, Johnson, Patterson, Dilthey & Clay by I. Edward Johnson for defendant appellants.

VAUGHN, Judge.

Defendant contends that the evidence does not support the findings and conclusions of the Commission and that the Commission erred in failing to find that the death of the employee was occasioned by his intoxication.

Plaintiff offered evidence tending to show the following. The deceased employee, Rosser, and his father each owned one-half of the stock in Wagon Wheel, Inc. Rosser was general manager. He was required to spend a considerable part of his time in the parking lot keeping order, regulating parking and generally observing the business. Rosser had been in the parking lot from about 11:30 p.m. until shortly before he was fatally shot. During most of that time he had been seated in his automobile talking with his former wife, Brenda Rosser, who was also an employee of defendant. A fifteen-year-old customer named Billy Ingram and another friend and customer Van Stanley were also in the automobile during a part of the time. Earlier Stanley and another youth had had an argument on the premises which was terminated when Rosser told the other youth to leave. Brenda Rosser left the automobile because business began to pick up. She testified that she observed Officer John Chambers drive onto the premises, circle the restaurant and park; that she then saw him, nightstick in hand, walk over to a group of boys who were eating. She had just waited on these boys. She

could not hear what was said to the boys. Her testimony continued:

". . . When Mr. Chambers turned away, the boys started to leave. After he got rid of the boys he walked back to his car.

I could see from inside the Wagon Wheel and then all of a sudden he got back out and started toward my husband's car and so that is when I started coming outside the Wagon Wheel itself, the grill. I went out the back door. Mr. Chambers was walking from the north side of the walkway of the grill to the south side. As John Chambers was approaching my husband's car, he was getting out. I was watching from inside the Wagon Wheel when John Chambers was walking toward my husband's car and about the time they met I was already outside and they were in the center of the south driveway. They were about fifteen feet from the street. John Chambers was raising a stick at my husband's head. He had the stick in his left hand and Gerald grabbed the stick with his right hand. John Chambers told Gerald Rosser if he didn't turn loose the stick he was going to maul his brains out. Gerald said, 'I don't appreciate you coming here and running my customers off.' Said, 'I think you better get somebody,' and Mr. Chambers said he didn't have to and to turn loose of the stick or he was going to maul his brains out.

As a result of what my husband said, I got somebody to call Mr. Benner, the Chief of Police of Carthage, North Carolina. Steve Childers went to get Chief Benner. I turned around and told Steve to call Mr. Benner and John Chambers told my husband that he was not going. He said he was not going to wake Chief Benner, that he was in uniform and he had authority to run the boys off and he was going to give Gerald one more chance to turn loose of the stick. My husband wasn't doing anything except telling John Chambers to leave. He was not jerking the stick. They were standing still. John Chambers said, 'Now, you turn loose of this stick or I'm going to blow your brains out.' John Chambers raised the gun to Gerald and shot him. He drew the gun from his right side and he just point it at him. He shot Mr. Rosser in the heart."

The testimony of Van Stanley and Billy Ingram, though varying as to some of the details, tended to corroborate that of

Brenda Rosser, including her testimony to the effect that the deceased was not intoxicated.

Defendant offered evidence tending to show: that Chambers was employed through the Community Action Program, had worked for the Carthage Police Department for about five weeks and had no prior police training or experience; that he was being paid by New Careers, Incorporated; that Chambers did not interfere with customers of the drive-in; that the drive-in appeared to be closed and that Chambers spoke to several young boys who were near the premises because he did not want a curfew violation. Defendant offered other evidence tending to show that Rosser was the aggressor in the encounter with Chambers and that Chambers' pistol was accidentally discharged when Rosser slapped him. Defendant offered evidence tending to show that Rosser was intoxicated, including testimony that a sample of Rosser's blood disclosed an alcoholic content of .14 percent.

It is well settled that the Commission's findings of fact are conclusive on appeal if supported by any competent evidence even though there is evidence to support contrary findings. The Commission is the judge of the credibility of the witnesses and the weight to be given the evidence. It is obvious that the Commission saw fit to believe the evidence which was favorable to plaintiff. When this evidence is taken as true it supports the findings of fact and conclusions of the Commission.

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CLARK EUGENE PAYNE

No. 7319SC581

(Filed 26 September 1973)

1. Automobiles § 127— drunken driving — sufficiency of evidence

Trial court in a drunken driving case properly denied defendant's motion to dismiss where the evidence tended to show that defendant weaved back and forth across the highway, that when he stopped his car and got out, he was unsteady on his feet and had the odor of alcohol on his breath, and that in the opinion of two high-

way patrolmen defendant was under the influence of intoxicating liquors.

2. **Automobiles § 129— drunken driving — improper instruction — no prejudice**

Though the court in a drunken driving case inadvertently used the words "appreciable extent" rather than "appreciable impairment" when instructing as to the effect which the intoxicating liquors must have upon an individual to sustain a conviction for driving under the influence, the court was obviously referring to an impairment of defendant's bodily or mental faculties, not to the amount defendant had drunk, and defendant was not prejudiced by the instruction.

3. **Criminal Law § 168— drunken driving — reference to defendant — no prejudice**

Reference in the court's charge to "defendant" rather than "witness," though error, was harmless beyond a reasonable doubt.

APPEAL by defendant from *Armstrong, Judge,* 19 February 1973 Session of Superior Court held in ROWAN County.

Defendant was convicted in the district court for unlawfully and wilfully operating a motor vehicle on a public highway on 8 February 1972 while under the influence of intoxicating liquors. He appealed to the superior court from that conviction and had a trial de novo before a jury on a plea of not guilty. The jury returned a verdict of guilty, and the court imposed a sentence of six months imprisonment. Defendant appeals.

Attorney General Morgan, by Associate Attorney Howard A. Kramer, for the State.

Carlton, Rhodes & Thurston, by Richard F. Thurston and Linda A. Thurston, for defendant appellant.

BALEY, Judge.

[1] Defendant contends that the evidence was not sufficient for submission to the jury and that the court should have granted his motion for dismissal.

The evidence viewed in the most favorable light for the State disclosed that defendant, when observed by a highway patrolman, was driving his car and weaved from the right to the left lane of the highway and back over to the right shoulder. When he stopped and got out of the car, he was unsteady on his feet and had the odor of alcohol on his breath. His eyes were red, bloodshot, and watery; his speech, slurred; and his atti-

tude, belligerent. In the opinion of two highway patrolmen he was under the influence of intoxicating liquors. This is ample evidence from which a jury could conclude that defendant was under the influence of intoxicating liquors to the extent that his physical and mental faculties were appreciably impaired. The motion to dismiss was properly denied.

There are numerous other assignments of error which relate to an alleged unfavorable attitude of the court toward the defendant and his counsel in controlling the examination of witnesses and in the charge to the jury. We have considered all of the exceptions which were properly brought forward and presented for review and, as presented, hold that they fail to show prejudicial error.

As to the charge, the fact that the court spent more time in summarizing the State's evidence than that of the defendant is attributable to the fact that the witnesses for the State testified more extensively than those of the defendant. *State v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668; *State v. Crutchfield,* 5 N.C. App. 586, 169 S.E. 2d 43.

[2] Defendant excepts to the instruction of the court in defining what constitutes driving under the influence. The court inadvertently used the words "appreciable extent" rather than "appreciable impairment" when referring to the effect which the intoxicating liquors must have upon an individual to sustain a conviction for driving under the influence. The court defined the term as "sufficient to be recognized and estimated or is noticeable and you can see it, common sense and reason for that definition of an appreciable extent." This is obviously referring to an impairment of the defendant's bodily or mental faculties, not to the amount defendant had drunk. In *State v. Felts,* 5 N.C. App. 499, 168 S.E. 2d 483, cited by the defendant, a somewhat similar instruction was held erroneous, but there it appeared that the trial judge had given the impression that if defendant had drunk an appreciable amount of an alcoholic beverage, he would be guilty. The approved definition of "under the influence" is set out in *State v. Carroll,* 226 N.C. 237, 240-41, 37 S.E. 2d 688, 691:

> "[A] person is under the influence of intoxicating liquor . . . when he has drunk a sufficient quantity of intoxicating beverage . . . to cause him to lose the normal control of his bodily or mental faculties, or both, to such

an extent that there is an appreciable impairment of either or both of these faculties."

While the instruction in the present case is no model of clarity, it is substantially equivalent to the approved charge in *Carroll* and will not be held as error.

[3] Again, in a *lapsus linguae,* at one point in the charge the court referred to "defendant" rather than "witness," but it is clear from a reading of the charge that such error was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18.

Defendant has failed to bring forward assignments of error which disclose prejudicial error in his trial.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROBERT JAMES MOSHIER

No. 7312SC609

(Filed 26 September 1973)

1. **Criminal Law § 87— allowance of leading question**

The trial court in a prosecution for assault with intent to commit rape did not err in allowing the solicitor to ask the victim a leading question.

2. **Rape § 18— assault with intent to rape — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of assault with intent to commit rape, notwithstanding the evidence showed defendant discontinued his efforts in view of the resistance put up by the victim.

3. **Rape § 18— assault with intent to rape**

The trial court in a prosecution for assault with intent to commit rape did not err in failing to submit the lesser included offense of assault on a female.

APPEAL from *Braswell, Judge,* 7 May 1973 Criminal Session, CUMBERLAND County Superior Court.

Defendant was tried upon a bill of indictment in proper form charging him with a felonious assault with intent to commit rape.

The evidence on behalf of the State was to the effect that on 6 February 1973, the defendant occupied a room in the home of the victim, the victim being a 75-year-old woman. The defendant had rented this room several days prior thereto and was frequently seen by the victim going in and out of the house. On the afternoon in question the victim was in her kitchen cleaning the oven to the stove. She heard a noise behind her and turned and found the defendant standing nude. She screamed, and the defendant grabbed her and ran his hand down her throat cutting off her breath. The victim continued to fight and scratch the defendant. The defendant threw the victim on the floor and pulled her clothes up, and in her words, "He was rubbing his private parts across my stomach. I grabbed hold of his private parts and did my best to hurt him. I think I did."

Thereafter the defendant discontinued his attack and went to his room. The victim then went to a neighbor's house across the street and reported what had happened. The neighbor telephoned police officers and, before they arrived, observed the defendant leave the victim's home.

The defendant was picked up by the officers within a short while and taken to the police station. The defendant had blood on his face and showed the effects of scratch marks about his nose and left ear. The defendant denied being at the home that day.

The jury found the defendant guilty of an assault with intent to commit rape; and from a judgment imposing a prison sentence of fourteen years, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Emerson D. Wall for the State.

Assistant Public Defender Neill Fleishman for defendant appellant.

CAMPBELL, Judge.

[1] The defendant assigns as error a leading question asked the victim. This was a matter within the discretion of the trial judge, and we find no abuse of that discretion. *State v. Pearson*, 258 N.C. 188, 128 S.E. 2d 251 (1962).

[2] The defendant assigns as error the failure to dismiss the case and in letting it go to the jury. We think the evidence more than ample to take the case to the jury. The fact that the defendant discontinued his efforts in view of the resistance put up by the victim does not vary the result. If the defendant at any time during the assault had an intent to gratify his passion upon his victim notwithstanding any resistance on her part, then the defendant would be guilty of the offense charged. *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649 (1963); *State v. Hudson,* 280 N.C. 74, 185 S.E. 2d 189 (1971).

[3] The defendant also assigns as error the failure of the trial judge to submit the case to the jury on the lesser included offense of an assault on a female.

This was not error, for as stated by Lake, Justice, in *State v. Roseman,* 279 N.C. 573, 184 S.E. 2d 289 (1971):

> ". . . Where all of the evidence tends to show that the offense committed, if any, was that charged in the bill of indictment and there is no evidence tending to show the commission of a lesser, included offense, except insofar as it is a necessary element of the offense charged, the court is not required to submit for the jury's consideration the possibility of a verdict of guilty of such lesser, included offense, or to instruct the jury concerning such lesser offense. . . ."

We have considered the other assignments of error and find them to be without merit.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. BARBARA C. JEFFRIES

No. 7310SC543

(Filed 26 September 1973)

Automobiles § 135; Indictment and Warrant § 14— overtime parking — motion to quash warrant — manner of enforcing ordinance

The trial court did not err in the denial of defendant's motion to quash a warrant charging her with parking in a metered zone be-

yond the legal time established for such zone where defendant did not contend that the ordinance under which she was charged was unconstitutional but attempted to establish by evidence *aliunde* the record that the policy, practice and procedure of the police department in enforcing the ordinance constituted invidious discrimination, since extraneous evidence may not be considered on a motion to quash.

APPEAL by defendant from *Hobgood, Judge,* 2 March 1973 Session of Superior Court held in WAKE County.

The defendant, Barbara C. Jeffries, was charged in a warrant proper in form with violating Section 21-49(1) of the Raleigh City Code "by causing, allowing, permitting and suffering a vehicle to be stopped, left standing and parked in a parking meter zone beyond the period of legal parking time established for such zone, the time limit for said zone being 12 minutes and the vehicle having been parked in said zone from 11:15 a.m. to 12:46 p.m. [on 18 October 1972]." Before pleading to the charge, the defendant made a motion to quash "on the ground that the ordinance under which she was charged was unconstitutional *as applied* in that said application violated her rights to due process of law, and equal protection of the laws, as secured to her by North Carolina and United States Constitutions." The court denied the motion after hearing evidence on *voir dire* in the absence of the jury as to the practice of the Raleigh Police Department with respect to the enforcement of the ordinances of the City regulating the parking of motor vehicles.

The defendant pleaded not guilty and was found guilty as charged. The defendant made a motion in arrest of judgment which was denied.

From a judgment that the defendant pay a fine of $1.00 and pay the costs, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney John M. Silverstein for the State.

City Attorney Broxie J. Nelson and Attorney Walter Lee Horton, Jr., for the City of Raleigh, Amicus Curiae.

L. Philip Covington for the defendant appellant.

HEDRICK, Judge.

Defendant's two assignments of error present only the question of whether the trial judge erred in denying her motions

to quash the warrant and to arrest the judgment. A motion to quash challenges the sufficiency of a bill of indictment or warrant. 4 Strong, N. C. Index 2d, Indictment and Warrant, § 14, pp. 359-60. " 'A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record.' *State v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503." *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970).

In her brief defendant states that she does not contend that Section 21-49(1) of the Raleigh City Code (the ordinance under which defendant is charged) is unconstitutional. However, she does contend that "the policy, practice, and procedure carried on in the City of Raleigh for the enforcement of this parking law, as well as all others, constitutes invidious discrimination prohibited by both the North Carolina and United States Constitutions."

"While a motion to quash is an appropriate method of testing the sufficiency of the bill of indictment to charge a criminal offense, it lies only for a defect appearing on the face of the warrant or indictment. *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913 (1969); *State v. Turner,* 170 N.C. 701, 86 S.E. 1019 (1915). 'The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied.' *State v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663 (1949); *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972)." *State v. Springer,* 283 N.C. 627, 197 S.E. 2d 530 (1973).

In *State v. Underwood,* 283 N.C. 154, 162, 195 S.E. 2d 489 (1973), Justice Sharp wrote:

> "If an ordinance or statute upon which a warrant or indictment is based 'is generally constitutional and for some circumstance peculiar to the situation of accused is unconstitutional that is a matter which is properly triable under the general issue or a plea of not guilty.' 16 C.J.S. Constitutional Law § 96(b), at 344 (1956). Upon a motion to quash the judge may not hear evidence tending to show that the ordinance, valid on its face, is being enforced in a manner which deprives the defendant of his constitutional rights, find the facts, and determine the constitutional question upon his findings. In a criminal prosecution in which the

defendant contests his guilt he may not 'waive his constitutional right of trial by jury. . . . [T]he determinative facts cannot be referred to the decision of the court even by consent—they must be found by the jury.' *State v. Muse,* 219 N.C. 226, 227, 13 S.E. 2d 229 (1941) (citations omitted). See also *State v. Hill,* 209 N.C. 53, 182 S.E. 716 (1935)."

Clearly, the defendant attempted to establish by evidence *aliunde* the record that the ordinance was unconstitutionally applied to her by the "policy, practice, and procedure" of the Raleigh Police Department. Judge Hobgood properly disregarded such extraneous evidence in denying the motion to quash. No defect appears on the warrant or in the record proper barring this prosecution or the entry of judgment.

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur in the result.

STATE OF NORTH CAROLINA v. WALTER MAGGIO

No. 7312SC577

(Filed 26 September 1973)

Criminal Law § 149— declaration that statutory presumption is unconstitutional — no right of State to appeal

The State cannot appeal from a declaration of the trial court, in a prosecution for possession of marijuana with intent to distribute, that the State is prohibited from using the presumptive rule of evidence created by G.S. 90-95(f)(3) and that the statute is unconstitutional only in that limited light, since the court's declaration is not a "judgment for the defendant" within the meaning of G.S. 15-179(6) and the State is not prevented from proceeding against defendant on the charge set out in the indictment.

APPEAL by the State from *Braswell, Judge,* 2 April 1973 Session of Superior Court held in CUMBERLAND County.

The defendant, Walter Maggio, was charged in a bill of indictment, proper in form, with the felonious possession of more than five grams of the controlled substance marijuana for the purpose of distribution.

Prior to entering a plea the defendant moved to quash the bill of indictment on the ground that "North Carolina General

Statute 90-95(f) is unconstitutional." After hearing evidence offered by the defendant in support of his motion the trial court made findings of fact, conclusions of law and entered an order denying the motion to quash and declaring G.S. 90-95(f)(3) unconstitutional. The order of Judge Braswell further declared, "The State will have the opportunity to go forward with this bill of indictment, exactly as written, and to offer evidence, if evidence it has, that the defendant possessed any quantity of marihuana with intent to distribute. However, the State will not have the benefit of the so-called presumptive rule of evidence. The State is prohibited from using the presumptive rule of evidence and only in that limited light is the statute declared unconstitutional."

The State appealed.

Attorney General Robert Morgan and Associate Attorney Henry E. Poole for the State.

Ken Glusman, Assistant Public Defender, for defendant appellee.

HEDRICK, Judge.

The court denied the only motion before it challenging the constitutionality of the statute under which the defendant was charged. The State can appeal from a "judgment for the defendant" which declares a statute unconstitutional. G.S. 15-179(6). In this case, however, the trial judge's gratuitous declaration that "[t]he State is prohibited from using the presumptive rule of evidence and only in that limited light is the statute declared unconstitutional" is not a "judgment for the defendant" from which the State can appeal. The order from which the State attempted to appeal does not in any way prevent the State from proceeding against the defendant on the charge set out in the bill of indictment; and if the State should elect to prosecute the defendant, any difficulty the court might have with respect to the constitutionality of G.S. 90-95(f)(3) would be obviated by an adherence to the decision of this court filed 25 October 1972 in *State v. Garcia,* 16 N.C. App. 344, 192 S.E. 2d 2 (1972), cert. denied 282 N.C. 427, 192 S.E. 2d 837. See also *State v. McDougald,* 18 N.C. App. 407, 197 S.E. 2d 11 (1973); *State v. McGee,* 18 N.C. App. 449, 197 S.E. 2d 63 (1973).

Since we do not have before us a "judgment for the defendant" declaring G.S. 90-95(f)(3) unconstitutional from which the State can appeal, the appeal is dismissed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES ROOSEVELT WADDELL

No. 7312SC563

(Filed 26 September 1973)

ON *certiorari* to review the trial of the defendant at the 29 January 1973 Session of CUMBERLAND County Superior Court before *Brewer, Judge.*

The defendant was tried upon a bill of indictment in proper form charging him in two counts with possession of (1) heroin and (2) a hypodermic needle and syringe. After a plea of not guilty, he was tried before a jury which returned a verdict of guilty on both counts. The defendant gave notice of appeal from a prison sentence; and upon failure to perfect the appeal in apt time, this Court granted a petition for certiorari to review the case.

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

Assistant Public Defender Donald W. Grimes for defendant appellant.

CAMPBELL, Judge.

The defendant was arrested on other charges in the City of Fayetteville and taken to the police station. While in the police station, he was searched; and in his coat pocket there was found a bottle cap with a piece of wire attached thereto. The cap appeared to be smoked on the bottom and had a white residue of powder and a wad of cotton in it. There was also found a hypodermic needle. These items were wrapped together. Upon a laboratory test, heroin was found to be present in the residue of powder in the bottle cap.

A review of the record in this case reveals no error in the admission of evidence, charge of the court to the jury, or the judgment imposed.

No error.

Judges MORRIS and HEDRICK concur.

CHARLES FRANKLIN HIGHFILL v. WILLIAM FRED WILLIAMSON

No. 7319SC184

(Filed 10 October 1973)

1. **Appeal and Error § 57; Judgments § 34— motion to set aside judgment — findings — conclusions — appellate review**

While the findings of fact by the trial court upon the hearing of a motion to set aside a judgment are conclusive on appeal when supported by competent evidence, the conclusions of law made by the judge upon the facts found by him are reviewable on appeal.

2. **Rules of Civil Procedure § 55— negotiations between attorney and insurer — appearance — notice of motion for default judgment**

Negotiations between plaintiff's attorney and defendant's insurer prior to the institution of plaintiff's action did not constitute an appearance by defendant in the action which would require that defendant be given written notice of plaintiff's application for default judgment at least three days prior to the hearing on the application. G.S. 1A-1, Rule 55(b)(2).

3. **Judgments § 20; Rules of Civil Procedure § 55— motion for default judgment — court's findings**

Contention that no motion for default judgment was filed by plaintiff is without merit where the default judgment entered by the court recited that the action was heard "upon the motion by plaintiff for judgment against defendant by default."

4. **Judgments § 20; Rules of Civil Procedure § 55— default judgment — absence of entry of default by clerk**

Fact that no default had been entered by the clerk did not deprive a superior court judge of jurisdiction to enter a default judgment. G.S. 1A-1, Rule 55(a).

5. **Judgment § 20; Rules of Civil Procedure § 55— default judgment — finding that defendant is not infant or incompetent**

Trial court's conclusion that there was no basis upon which the court which entered a default judgment could find that the defendant was neither an infant nor an incompetent person was erroneous where plaintiff's complaint alleged that defendant "is of legal age and under no legal disability." G.S. 1A-1, Rule 55(b)(2).

6. **Rules of Civil Procedure § 55— default judgment — trial to determine damages — different judges**

Rule 55(b)(2) does not require the same judge who enters a default judgment to conduct the jury trial on the issue of damages and to enter the default final.

7. **Judgments § 20; Rules of Civil Procedure § 55— default judgment — irrelevancy of prior settlement negotiations**

Judgment entered upon default and inquiry could not be set aside on the ground that the judge who entered the default judgment and

the judge who conducted the trial to determine damages had not been advised of prior settlement negotiations between plaintiff's attorney and defendant's insurer.

8. **Judgments § 29; Rules of Civil Procedure § 55— setting aside default judgment — excessive damages — good defense**

In an action to set aside a $100,000 judgment entered upon default and inquiry, there was no competent evidence to support the trial court's determination that defendant had a good defense to the claim and that the amount of the judgment was excessive.

9. **Judgments § 28; Rules of Civil Procedure § 60— setting aside judgment — injustice — necessity for supporting evidence**

A judge may not set aside a judgment under G.S. 1A-1, Rule 60(b)(6) for "Any other reason justifying relief from the operation of the judgment" without a showing based on competent evidence that justice requires it.

Judge BALEY dissenting.

APPEAL from an order of *McConnell, Judge*, setting aside a default judgment at 31 July 1972 Civil Session, RANDOLPH Superior Court.

On 23 September 1971, a judgment was entered on a jury verdict awarding the plaintiff $100,200 against the defendant. On 29 March 1972, the defendant made a motion to set the judgment aside. The cause came on to be heard before Judge McConnell at the 31 July 1972 Civil Session of Superior Court of Randolph County. Under date of 3 August 1972, Judge McConnell entered an order setting aside the judgment. The plaintiff appealed.

John V. Hunter III for plaintiff appellant.

Henson, Donahue and Elrod by Daniel W. Donahue for defendant appellee.

CAMPBELL, Judge.

This action was instituted 28 August 1970, and the summons and complaint were personally served upon the defendant on 31 August 1970.

The complaint alleges that the defendant is a citizen and resident of Person County, North Carolina, and is of legal age and under no legal disability; that on 24 January 1969, the plaintiff was in his Chevrolet automobile stopped for a red traffic control signal in the City of Asheboro; that the defendant, driving a Pontiac automobile, ran into the rear of the plaintiff's

vehicle; that at the time the defendant was under the influence of intoxicating liquor; that as a result of the collision, plaintiff received permanent injuries to the lumbo-sacral area of his back; that the defendant had been damaged in the amount of $100,000 for personal injuries and in the amount of $200 for property damage and also sought $25,000 in punitive damages.

The defendant filed no answer, demurrer or other pleading and procured no extension of time to do so. On 6 April 1971, Judge Gambill entered a judgment by default and directed that an inquiry as to the amount of damages be determined at a civil term of the superior court before a jury.

At the 21 September 1971 Civil Session of the Superior Court of Randolph County, issues were submitted to a jury and the jury awarded compensatory damages for personal injuries in the amount of $100,000, property damage in the amount of $200 and nothing for punitive damages. Thereupon, Judge Johnston, under date of 23 September 1971, entered a judgment in accordance with the jury verdict.

On 29 March 1972, the defendant filed a motion to set aside the judgment.

The motion sets forth the following reasons for setting the judgment aside:

1. Prior to the institution of the action, plaintiff's attorney had negotiated with James R. Price, an adjuster with the Pennsylvania National Mutual Casualty Insurance Company, regarding a possible settlement.

2. The clerk of court did not enter a default. In the two judgments which were entered, there was not a finding that the defendant was neither an infant nor an incompetent person; nor was there a finding that the court had jurisdiction over the person of the defendant and over the subject matter of the action.

3. At the time of the inquiry as to damages, the plaintiff did not give notice to the defendant.

4. The two judgments were entered by two separate judges of the superior court and neither judge was advised by the attorney for the plaintiff about negotiations for settlement prior to the institution of the action.

5. If the representative of the defendant, namely, the insurance adjuster, had known about the institution of the action, counsel would have been retained to represent the defendant.

6. The amount of the recovery is excessive and shocking to the conscience since the total medical bills amounted to less than $300, and the total cost of repairing the plaintiff's automobile amounted to $99.20.

Attached to the motion was an affidavit from James R. Price, an adjuster for the Pennsylvania National Mutual Casualty Insurance Company. This affidavit set forth that the defendant had a liability insurance policy with that insurance company. The affidavit outlined various negotiations that had taken place between John Randolph Ingram, the attorney who was representing the plaintiff, and Price. The last communication between Mr. Ingram and Mr. Price occurred on or about 18 May 1970. At the time of the hearing, Mr. Price testified as a witness; and it appeared that on 24 April 1970 Mr. Ingram made a demand for settlement of $15,000. Thereafter, the last communication was on or about 18 May 1970, and the record reveals the following:

"Q. And, you told me at that time, when I rejected your offer personally, myself, you said, did you not, 'You have a character on your hands. We have considerable background information. Take it or leave it, $1,000. We won't go any higher.'

A. That's what I said.

Q. You told me that?

A. That's what I said.

Q. I told you, 'As far as I was concerned, we would leave it.'

A. I said, 'Let me know.'

Q. I told you, 'As far as I was concerned, we would leave it.' Isn't that right?

A. I don't remember."

At the conclusion of the hearing, Judge McConnell entered the following order:

"ORDER OF MCCONNELL, J.

THIS CAUSE COMING ON TO BE HEARD before the undersigned Judge Presiding at the July 31, 1972 civil session of Superior Court of Randolph County upon the motion of the defendant William Fred Williamson that the Court enter an order setting aside the two judgments entered in this action; and after considering the evidence offered by the parties, and considering the argument of counsel, the Court makes the following findings of fact:

I. The plaintiff, Charles Franklin Highfill, and the defendant, William Fred Williamson were involved in an automobile collision which occurred on January 24, 1969, in the City of Asheboro, Randolph County, North Carolina. Thereafter, the plaintiff retained John Randolph Ingram to represent him in this action and on or about February 5, 1969, John Randolph Ingram notified the Pennsylvania National Mutual Casualty Insurance Company that he represented the plaintiff. James R. Price, an agent and employee of the Pennsylvania National Mutual Casualty Insurance Company thereafter contacted Mr. Ingram and Mr. Price and Mr. Ingram consulted on a number of occasions thereafter regarding a settlement of the claim of Charles Franklin Highfill.

II. After being first contacted by the plaintiff's attorney on or about February 5, 1969, James R. Price, an adjuster for the Pennsylvania National Mutual Casualty Insurance Company, which company afforded liability coverage to the defendant, William Fred Williamson on the occasion complained of, contacted John Randolph Ingram regarding a settlement of this matter; that on or about March 3, 1969, he received a letter from John Randolph Ingram enclosing medical reports and bills and requesting that an appointment be made to discuss a settlement of the case; that thereafter he conferred with the plaintiff's attorney on March 13, 1969, regarding a possible settlement of the matter; that he was advised on that occasion that the matter could not be settled until the plaintiff, Charles Franklin Highfill, was released by Dr. Frank Edmondson; that on June 20, 1969, he received a letter from the plain-

tiff's attorney, John Randolph Ingram, requesting that an appointment be made so that a settlement of the case could be discussed; that on July 24, 1969, he again discussed this matter with the plaintiff's attorney and was advised that the plaintiff was again seeing Dr. Edmondson and that the matter could not be settled at that time; that the plaintiff's attorney at that time promised that he would furnish to James R. Price, up-to-date medical reports and bills and statements of lost wages; that on August 28, 1969, James R. Price again contacted the plaintiff's attorney regarding a settlement of this case and was advised by the plaintiff's attorney that he would furnish to James R. Price up-to-date medical reports and bills and statements of lost wages; that on or about December 29, 1969, he received a letter from the plaintiff's attorney requesting an appointment to discuss settlement of this case; that on January 8, 1970, James R. Price again contacted plaintiff's attorney and plaintiff's attorney at that time still had no up-to-date medical report or statement of lost wages; that James R. Price advised the plaintiff's attorney that he was willing to settle the case as soon as up-to-date medical reports and bills and statements of lost wages could be submitted; the plaintiff's attorney advised that he would obtain such up-to-date reports; that on April 2, 1970, James R. Price again discussed this matter with the plaintiff's attorney regarding settlement of this matter at which time he was advised by the plaintiff's attorney that he had no recent medical information or statement of lost wages and was advised at that time by the plaintiff's attorney that his settlement demand would be in the area of $10,000.00; that on or about April 3, 1970, he received a letter from the plaintiff's attorney enclosing a medical report from Dr. R. E. Williford; that on April 23, 1970, James R. Price received a letter from the plaintiff's attorney regarding a settlement of this matter; that on April 24, 1970, James R. Price telephoned the plaintiff's attorney and discussed settlement of this matter; that on May 12, 1970, the plaintiff's attorney forwarded to James R. Price a letter regarding settlement of this matter at which time he was advised that the plaintiff's settlement demand was $15,000.00; that on May 18, 1970, James R. Price contacted the plaintiff's attorney and extended an offer of settlement in the amount of $1,000.00; that that settlement offer was never formally rejected by the plaintiff or his attorney; that the plaintiff's attorney has furnished to James R.

Price a list of medical expenses totaling $285.50; that James R. Price has been advised that the plaintiff missed no time from his employment with the Asheboro Police Department; that James R. Price has been furnished with medical information revealing that the plaintiff's injury, if any, sustained in the collision was relatively minor; that the plaintiff obtained an estimate of the cost to repair his automobile resulting from this collision, and that that estimate totaled $99.20.

III. This action was instituted on August 28, 1970. The attorney for the plaintiff, John Randolph Ingram, did not forward copies of the summons and complaint in this action to any representative of the Pennsylvania National Mutual Casualty Insurance Company.

IV. No default has been entered against the defendant in this action, as provided by G.S. 1A-1, Rule 55(a); the plaintiff filed no motion in this action for a judgment by default as required by the provisions of G.S. 1A-1, Rule 55(b)(2); the plaintiff did not give to the defendant three days notice that he intended to apply to the Court for a judgment by default, as required by G.S. 1A-1, Rule 55(B)(2); no affidavit was filed in this action from which the trial court judge could have made a finding that the defendant was neither an infant nor an incompetent and no such finding has been made in this case; there has been no finding by a judge in this action that the Court has jurisdiction over the subject matter of this action, as required by G.S. 1-75.11; the Superior Court Judge who entered the first judgment in this action did not hold the trial by jury to inquire into the amount of damages recoverable by the plaintiff, as provided for in G.S. 1A-1, Rule 55(b)(2); and the trial judges who entered these judgments were not informed of the extensive settlement negotiations carried on between the plaintiff's attorney and the defendant's representative and were, therefore, deprived of the opportunity to exercise their discretion as to whether or not the judgments should have been entered.

Based upon the foregoing findings of fact, the Court makes the following conclusions of law:

I. The defendant William Fred Williamson made an appearance in this action by virtue of the settlement negotiations carried on between the plaintiff's attorney and

the representative of William Fred Williamson and the defendant, William Fred Williamson, was entitled to receive written notice of the application for judgment at least three days prior to the hearing on the plaintiff's application for judgment and no such notice was given to the defendant, as required by G.S. 1A-1, Rule 55(b)(2); and

II. The plaintiff failed to comply with the provisions of G.S. 1A-1, Rule 55(a) in that no default has been entered in this action; and

III. The plaintiff filed no motion for a judgment by default as required by the provisions of G.S. 1A-1, Rule 55(b)(2); and

IV. The plaintiff failed to comply with the provisions of G.S. 1A-1, Rule 55(b)(2) in that there was no basis upon which the Court could have made a finding that the defendant was neither an infant nor an incompetent person; and

V. The plaintiff failed to comply with the provisions of G.S. 1A-1, Rule 55(b)(2) in that the same judge who entered the first judgment in this action did not hold a hearing into the amount of damages to be recoverable; and

VI. The judges who entered these judgments were deprived of the opportunity to exercise their discretion inasmuch as they had not been advised of the prior settlement negotiations carried on between the attorney for the plaintiff and the representative of the defendant; and

VII. (Omitted per JDM)

VIII. The Court concluded as a matter of law that the defendant in this action has a good defense to the plaintiff's claim in that it appears from the foregoing findings of fact that a judgment in the amount of $100,000.00 for personal injuries was unsupported by the evidence and grossly excessive; and

IX. The Court finds, in its discretion, and pursuant to the provisions of G.S. 1A-1, Rule 60(b) that the judgments entered in this action should be set aside on the grounds of mistake, inadvertence, surprise, excusable neglect and, pursuant to the provisions of G.S. 1A-1, Rule

60(b)(6) upon the grounds that the judgments entered in this action are unfair and unjust and that the interests of justice will best be served by having them set aside.

Based upon the foregoing findings of fact and conclusions of law it is ORDERED that the judgments previously entered in this action shall be and the same are hereby set aside; and it is further ORDERED that the defendant shall have 30 days from and after the entry of this order within which to prepare and file answer or otherwise plead to the complaint of the plaintiff.

This the 3rd day of August, 1972.

JOHN D. McCONNELL
Judge Presiding"

[1] The findings of fact by the trial court upon the hearing of a motion to set aside a judgment are conclusive on appeal when supported by competent evidence. The conclusions of law made by the judge upon the facts found by him are reviewable on appeal. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507 (1954).

We now test the order entered by Judge McConnell in accordance with that precept.

In Findings of Fact No. 2, Judge McConnell found, "that James R. Price has been advised that the plaintiff missed no time from his employment with the Asheboro Police Department; that James R. Price has been furnished with medical information revealing that the plaintiff's injury, if any, sustained in the collision was relatively minor." The record reveals no competent evidence sustaining such a finding of fact. This finding of fact is based entirely upon hearsay testimony and supposition on the part of James R. Price.

[2] The first conclusion of law entered by Judge McConnell is that the defendant made an appearance in this action and was therefore entitled to receive written notice of the application for judgment at least three days prior to the hearing. Where a party has made an appearance in an action, three days' notice of an application for judgment must be given. *Miller v. Belk,* 18 N.C. App. 70, 196 S.E. 2d 44 (1973). While negotiations between parties may constitute an appearance in an action, no instance has been called to our attention nor have we been able to find one where an appearance was made prior to the institution of any action. In the instant case all negotiations ceased over three

months before the complaint was filed and the action instituted. Certainly no one would contend that the negotiations prior to the institution of an action would toll the statute of limitations barring such an action. We hold that no appearance in an action can be made prior to the institution of such action.

No appearance having been made in the instant case, the defendant was not entitled to three days' notice prior to the hearing on plaintiff's application for judgment, and the first conclusion of law is erroneous.

[3, 4] In the second and third conclusions of law, Judge McConnell found that the plaintiff failed to comply with the provisions of G.S. 1A-1, Rule 55(a) in that no default had been entered and Rule 55(b)(2), in that no motion for a judgment by default had been filed by the plaintiff. The record shows, however, that in the judgment of 6 April 1971, Judge Gambill stated that the action was heard "upon the motion by plaintiff for judgment against defendant by default." This was done before a judge of the superior court presiding at a session of court. It has long been held that the authority of the clerk of court to enter judgments in certain instances is concurrent with and in addition to that of the judge of the superior court. The judge of the superior court is in no way deprived of jurisdiction simply because the clerk, in certain instances, has concurrent jurisdiction. *Rich v. R.R.*, 244 N.C. 175, 92 S.E. 2d 768 (1956). *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970). We hold that the default entered by Judge Gambill was ample and sufficient. Conclusions of law Nos. 2 and 3 are erroneous.

[5] In the fourth conclusion of law, Judge McConnell found that the plaintiff failed to comply with Rule 55(b)(2) in that there was no basis upon which the court could find that the defendant was neither an infant nor an incompetent person. In the verified complaint it was stated: "DEFENDANT is a citizen and resident of the County of Person, State of North Carolina, and is of a legal age and under no legal disability." This conclusion of law is erroneous.

[6] The fifth conclusion of law was to the effect that plaintiff failed to comply with Rule 55(b)(2) in that the same judge who entered the first judgment in this action did not hold a hearing on the amount of damages to be recoverable. Rule 55(b)(2) does not require the same judge who enters the default

to likewise conduct the jury trial and enter the default final. Judge Gambill, who entered the first default, specifically ordered that the case be referred to a civil term of superior court before a jury to determine the amount of damages. This was done, and the fact that Judge Johnston was holding the court at which this occurred rather than Judge Gambill is in no way erroneous. Under our rotation system of judges, this would be the more natural course for the case to follow. There certainly was no error in pursuing this method.

[7] The sixth conclusion of law was to the effect that Judges Gambill and Johnston, who entered the judgments, were not advised of prior settlement negotiations. Such settlement negotiations would be entirely irrelevant, and there was no need to advise Judge Gambill and Judge Johnston pertaining thereto. *Sanders v. Chavis,* 243 N.C. 380, 90 S.E. 2d 749 (1956); *Swain v. Insurance Co.,* 253 N.C. 120, 116 S.E. 2d 482 (1960).

[8] There was no conclusion of law No. 7, and the next conclusion of law, No. 8, was to the effect that the defendant had a good defense to the claim and that a judgment of $100,000 was grossly excessive. There is no evidence to support this conclusion of law, and as previously pointed out, the findings of fact about the excessive recovery was based upon hearsay and supposition on the part of the insurance company adjuster, Mr. Price. There is no evidence in this record as to what occurred in the trial before the jury conducted by Judge Johnston when the amount of damages was determined.

[9] Conclusion of Law No. 9 is based upon a discretionary finding that the judgment should be set aside on the ground of mistake, inadvertence, surprise, excusable neglect and pursuant to Rule 60(b)(6). There is nothing in this record to show or establish mistake, inadvertence, surprise or excusable neglect on the part of the defendant. Rule 60(b)(6) provides that the judge may set aside a judgment for "(6) Any other reason justifying relief from the operation of the judgment."

This is an addition and it certainly goes beyond the grounds for relief that would have been available under older procedures. This rule is discussed in 11 Wright and Miller, Federal Practice and Procedure, § 2864. While this rule gives the court ample power to vacate a judgment whenever that action is appropriate to accomplish justice, nevertheless, we hold that a judge cannot do so without a showing based on competent evidence that justice requires it. In the instant case there has been no showing

whatsoever of any miscarriage of justice. While the damages in this case may have been excessive, nevertheless, there is no showing to that effect in this record. Hearsay and supposition do not constitute evidence. Hard cases often make bad decisions. The defendant in this case has shown nothing. The insurance company is the unfortunate victim, but that was a business risk taken at the time when the policy was issued. Other companies have sustained similar losses. *Beasley v. Indemnity Co.*, 11 N.C. App. 34, 180 S.E. 2d 381 (1971); affirmed without further discussion in 280 N.C. 177, 184 S.E. 2d 841 (1971).

We hold that on the record in this case the order of Judge McConnell vacating the judgments entered by Judges Gambill and Johnston was in error.

Reversed.

Judge VAUGHN concurs.

Judge BALEY dissents.

Judge BALEY dissenting.

I agree with the court below that this default judgment for $100,200.00 should be vacated and the case heard on its merits.

The entry of a default judgment is a harsh and drastic action. Courts generally favor giving every litigant a fair opportunity to present his side of a disputed controversy. "Where there is a genuine dispute concerning material facts, the philosophy of the . . . rules of procedure favor trial on the merits in contra-distinction to judgments by default." *Newberry v. Cohen*, 374 F. 2d 320, 323 (D.C. Cir. 1967). Therefore, "on a motion for relief from the entry of a default or a default judgment, all doubts should be resolved in favor of the party seeking relief." 10 Wright & Miller, Federal Practice and Procedure, § 2693, at 313; *accord, Whaley v. Rhodes*, 10 N.C. App. 109, 111, 177 S.E. 2d 735, 737. "There is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits." 11 Wright & Miller, *supra*, § 2857, at 160.

Rule 60(b) of the North Carolina Rules of Civil Procedure provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> * * *
>
> (6) Any other reason justifying relief from the operation of the judgment."

Rule 60(b)(6) has been described as "a grand reservior of equitable power to do justice in a particular case." 7 Moore's Federal Practice, ¶ 60.27[2], at 375. The North Carolina Supreme Court has stated that its "broad language . . . 'gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.' " *Brady v. Town of Chapel Hill,* 277 N.C. 720, 723, 178 S.E. 2d 446, 448.

"Under our Rules of Civil Procedure, the determination of whether an adequate basis exists for setting aside the entry of default and the judgment by default rests in the sound discretion of the trial judge. *See Whaley v. Rhodes,* 10 N.C. App. 109, 177 S.E. 2d 735 (1970)." *Acceptance Corp. v. Samuels,* 11 N.C. App. 504, 510, 181 S.E. 2d 794, 798.

In this case the trial court, in the exercise of its discretion, has vacated this judgment as "grossly excessive." The court has found that "the interests of justice will best be served" by setting it aside. In my view there is sufficient evidence when considered in its most favorable light to support this decision.

The affidavit of James R. Price, an insurance adjuster for Pennsylvania National Mutual Casualty Insurance Company, which provided liability insurance for the defendant, recounted in detail extensive negotiations with plaintiff's attorney seeking a settlement prior to the institution of the action. Price's affidavit which was uncontradicted in any material part set out the maximum demand of plaintiff's attorney at $15,000.00, the medical expenses incurred at $285.50, and the car repair at $99.20. At the hearing plaintiff's attorney admitted receipt of a $1,000.00 offer from the insurance company made in a letter dated 18 May 1970 which read as follows:

> "This will supplement our telephone conversation of May 15, 1970, wherein I extended an offer of $1,000 in settlement of the claim of Charles Franklin Highfill.

"We await your reply."

Even though such letter specifically requested a reply, there was no rejection or acceptance of this offer and suit was instituted and default judgment obtained without notice to the representative of defendant with whom negotiations were in progress and who would be responsible for the payment of the judgment. These factors were available for the trial judge as well as the record and argument of counsel. His decision should be upheld unless there is a clear abuse of discretion which does not here appear.

Rule 60(b)(6) was designed to give the trial court authority to prevent injustice where procedural exactitudes would otherwise require violation of the basic rules of fair play. Judge McConnell has used it for that purpose. My vote is to affirm his judgment.

GEORGE W. WILSON, GEORGE WILSON & ASSOCIATES, INC., AND A. E. FINLEY & ASSOCIATES OF VIRGINIA, INC., TRADING AS WILSON-FINLEY COMPANY, A PARTNERSHIP, AND WILSON PARTS & EQUIPMENT COMPANY v. COUNTY OF WAKE

No. 7310SC538

(Filed 10 October 1973)

1. **Taxation § 9.5— import tax — entire shipment as original package**

Where plaintiff, a wholesale distributor of undercarriage parts for crawler-type vehicles, imported some of his parts from Europe, stockpiled them in the condition in which they were imported in warehouses of his own and of the N. C. Ports Authority, and then sold the parts to customers directly from the stockpiles, an entire shipment of parts did not constitute the "original package" for purposes of taxation by the defendant, and the original package was not broken by the sale of any one package or pallet out of a shipment.

2. **Taxation § 9.5— imports sorted and stacked — immunity from taxation unaffected**

The goods in the case at bar which were stored in the original packages or pallets by the plaintiff in the same form and condition in which they were imported were not acted on in any way so as to cause the unsold portion of the unbroken packages to lose their immunity from taxation, even though plaintiff did sort and stockpile the goods in warehouses.

3. **Taxation § 9.5— import tax forbidden — discrimination irrelevant**

With respect to local duties on imports, it is not a discriminating tax that is forbidden, but any impost or duty whatever; therefore,

defendant's claim that its ad valorem tax was an equal tax on all goods and not an impost on imports is without merit.

APPEAL by defendant from *Hobgood, Judge,* Second February 1973 Session of WAKE Superior Court.

The plaintiff, Wilson-Finley Company, was and is engaged in business as a wholesale distributor of undercarriage parts for crawler-type vehicles. Some of these parts are purchased from three European manufacturers and are for resale in the United States. They are imported into the United States through the Port of Wilmington, North Carolina. Import duties are paid to the United States of America on all of such parts except those deemed exempt from such duties as agricultural equipment.

Upon arrival at the Port of Wilmington, the imported parts are unloaded from ships by the North Carolina Ports Authority; some of said parts are immediately loaded for shipment by common carrier to plaintiff's storage facilities; and other parts are stored in Ports Authority warehouses for a period of three or four days awaiting arrival of common carrier for transport to plaintiff's storage facilities. These storage facilities are located at 5313 Hillsborough Street, Raleigh, Wake County, North Carolina. An import shipment usually includes many different parts which, on occasion, are loaded by common carrier for transportation to plaintiff's storage facilities on a random basis; that is, several different types of imported parts may be loaded on one carrier.

The imported parts vary in size and weight and arrive at the plaintiff's storage facilities as prepared for shipment by the foreign manufacturer in methods as follows:

(1) Small items such as Roller Seal Kits and Pin and Bushing Groups are shipped several in a wooden crate or box.

(2) Parts such as Grouser Shoes, Sprocket Segment Groups, and Rollers are shipped several bound together as a unit by steel bands or bolted together, with a wooden pallet sometimes used for ease of handling.

(3) Large items such as Sprocket Rims, Rollers and Idlers, Track Chains, and Shovel Pads are shipped as separate and individual parts.

Upon arrival at plaintiff's storage facilities, the imported parts are sorted by plaintiff's employees and are stockpiled,

along with similar items previously imported, in neat stacks or piles or separate bins or boxes in the original form or condition in which they were imported. The imported parts remain so stockpiled as a part of plaintiff's inventory until such time as sold to a customer.

On occasion it becomes necessary for plaintiff to break a package or pallet to fill an order. When this situation arises, the excess from the broken package is placed in plaintiff's "component" inventory and its taxability is not contested by plaintiff. The inventory of "component" parts and domestic parts are stored together in the front part of the warehouse and are kept separate from the imported parts which are stockpiled in the rear of the same building in the original form or condition in which they were imported.

The plaintiff, Wilson Parts & Equipment Company, participates in the financing of the undercarriage parts imported by the plaintiff, Wilson-Finley Company, and as between the plaintiffs, each owns an undivided interest in the inventory of such parts maintained by plaintiff, Wilson-Finley Company.

On or about December 21, 1971, the plaintiffs paid to the Wake County Tax Supervisor ad valorem taxes assessed solely on the item of inventories in amounts as follows:

Wilson-Finley Company	$13,095.27
Wilson Parts & Equipment Company	$ 2,914.68

On or about January 12, 1972, and within thirty (30) days after such payment of ad valorem taxes, the plaintiffs submitted to the governing body of Wake County a written statement setting forth a defense to payment of part of such tax and claiming refunds of tax paid in amounts as follows:

Wilson-Finley Company	$11,611.54
Wilson Parts & Equipment Company	$ 1,880.00

The defense set forth by plaintiffs in support of the requested refunds was that part of their respective inventories on January 1, 1971, consisted of imported undercarriage parts which were stockpiled in the original form or condition in which imported and that under Article I, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) such part of their inventories was exempt from the ad valorem tax levied by the defendant, Wake County.

Based on the foregoing facts the trial court found that all the imported goods held in inventory by the plaintiffs in their original form or condition were exempt from the ad valorem tax levied by the defendant Wake County. Defendant appealed, contending that the manner in which the imported articles are shipped, and the handling and use to which they are put by the plaintiffs upon their arrival in this country causes the articles to lose their character as imports and thus to be subject to local taxation.

Poyner, Geraghty, Hartsfield and Townsend by N. A. Townsend, Jr. and Paul E. Castelloe for plaintiff appellees.

Wake County Tax Attorney J. Bourke Bilisoly and Wake County Attorney Edwin N. Kearns for defendant appellant.

CAMPBELL, Judge.

Article I, Section 10, Clause 2 of the United States Constitution provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws, and the net Produce of all Duties and Imposts laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

[1] The United States Supreme Court interpreted this constitutional provision in *Brown v. State of Maryland,* 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1827). The court held that the right to import necessarily implies the right to sell. The court went on to say:

> "[T]here must be a point of time when the prohibition ceases, and the power of the State to tax commences. . . . It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too

plainly a duty on imports to escape the prohibition in the constitution."

The defendant, Wake County, contends that an entire shipment, *e.g.*, the hold of the ship, constitutes the original package. Defendant cites *E. J. Stanton & Sons v. Los Angeles County*, 78 Cal. App. 2d 181, 177 P. 2d 804 (1947), *cert. denied*, 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352 (1947); *Volkswagen Pacific, Inc. v. City of Los Angeles*, 7 Cal. 3d 48, 496 P. 2d 1237 (1972); and *Mexican Petroleum Corp. v. City of South Portland*, 121 Me. 128, 115 A. 900, 26 A.L.R. 965 (1922). In each of these cases except the *Volkswagen, supra*, case, the goods were incapable of packaging and fungible, it being impossible to distinguish which pieces of lumber or which gallon of oil was part of the original shipment. Such is not the case here, even with the unpackaged items. In the case of *Florida Greenheart Corp. v. Gautier*, 172 So. 2d 589 (Florida cases) (1965), *cert. denied*, 382 U.S. 825, 86 S.Ct. 56, 15 L.Ed. 2d 70 (1965), the Florida Supreme Court expressly rejected the *Stanton* decision and held that each piece of lumber rather than the entire shipment constituted the original package. In *Garment Corp. v. Tax Comm.*, 32 Mich. App. 715, 189 N.W. 2d 72 (1971), *cert. denied*, 404 U.S. 992, 92 S.Ct. 538, 30 L.Ed. 2d 544 (1971), the Michigan Court of Appeals held that cartons of industrial garments and not the shipping vans were the original package. Several cases have been decided on the grounds that the goods have not been so acted on as to lose their immunity, and in each case it had to have been assumed that the original package was not the entire shipment. *Citroen Cars Corp. v. City of New York, Dept. of Fin.*, 30 N.Y. 2d 300, 283 N.E. 2d 758 (1972); *Standard-Triumph Motor Co. v. City of Houston, Texas*, 220 F. Supp. 732 (S.D. Texas, 1963), vacated on other grounds, 347 F. 2d 194 (1965), *cert. denied*, 382 U.S. 974, 86 S.Ct. 539, 15 L.Ed. 2d 466 (1966); *Emhart Corporation v. Town of West Hartford*, 28 Conn. Supp. 134, 253 A. 2d 670 (1968); *Sterling Liquor Distributors, Inc. v. County of Orange*, 3 Cal. App. 3d 510, 83 Cal. Rptr. 571 (1970), *cert. denied*, 400 U.S. 822, 91 S.Ct. 43, 27 L.Ed. 2d 50 (1970); *Tricon, Inc. v. King County*, 60 Wash. 2d 392, 374 P. 2d 174 (1962), *cert. denied*, 372 U.S. 227, 83 S.Ct. 679, 9 L.Ed. 2d 714 (1963); *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 53 S.Ct. 373, 77 L.Ed. 710 (1933), and *Department of Revenue v. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed. 2d 362 (1963). We hold that on the facts of this case that the entire shipment is not the "original package" and that the original

package has not been broken by selling any one package or pallet out of the shipment.

[2] Defendant contends that even if the original package is unbroken that by separating and stacking the imported goods that they have been so acted on as to lose their immunity because they have been put to the use for which they were imported. *Hooven & Allison Co. v. Evatt,* 324 U.S. 652, 65 S.Ct. 870, 89 L.Ed. 1252 (1945). Defendant cites for authority *Youngstown Sheet and Tube Co. v. Bowers* and *U. S. Plywood Corporation v. City of Algoma,* 358 U.S. 534, 79 S.Ct. 383, 3 L.Ed. 2d 490 (1959), and *In Re Publishing Company,* 281 N.C. 210, 188 S.E. 2d 310 (1972). These cases, however, involved importation for manufacture and the "current operational needs" doctrine and as such do not apply to the case at bar. Defendant also cites *Thyssen Steel Corp. v. Michigan Tax Commission,* 38 Mich. App. 363, 196 N.W. 2d 325 (1972), where goods imported for sale lost their exempt status. *Thyssen, supra,* however, is distinguishable because there the importer of coiled steel decoiled and treated the steel for oxide scale to correct such defect and restore the coils to marketable status. The goods in the case at bar which are stored in the original packages or pallets by the plaintiff in the same form and condition in which they are imported have not been acted on in any way so as to cause the unsold portion of the unbroken packages to lose their immunity. See *Citroen Cars Corp. v. City of New York, Dept. of Fin., supra,* and *Standard-Triumph Motor Co. v. City of Houston, Texas, supra.* The sorting and stockpiling of imported items in preparation for sale does not, by itself, cause the goods to lose their exempt status. *Florida Greenheart Corp. v. Gautier, supra.*

[3] Finally, defendant claims that since the Wake County ad valorem tax is an equal tax on all goods, that it is not an impost on imports. This argument was laid to rest over a century ago in *Low v. Austin,* 80 U.S. (13 Wall) 29, 20 L.Ed. 517 (1872) where the court said: "It is not a discriminating tax that is forbidden, but any impost or duty whatever."

Affirmed.

Judges MORRIS and BALEY concur.

STATE OF NORTH CAROLINA v. CHARLES HOUSTON

No. 7322SC565

(Filed 10 October 1973)

1. **Criminal Law §§ 87, 167— change of counsel on voir dire examination — technical error — no prejudice to defendant**

It is within the discretion of the trial court to permit a change of counsel if a lengthy examination is imminent; however, even if the present case did not fall within the purview of that rule and the trial court erred in allowing the solicitor to conduct a *voir dire* examination in lieu of the assistant solicitor who had begun the examination of the witness, the error was technical and defendant failed to show that he was prejudiced thereby.

2. **Criminal Law § 66— photographic identification of defendant — in-court identification of defendant not tainted**

In a prosecution for attempted armed robbery and felonious breaking or entering with intent to commit a felony, the trial court did not err in concluding that a witness's in-court identification of defendant was based upon her opportunity to observe defendant in daylight for five minutes at the time of the break-in and was not tainted by an out-of-court photographic identification which took place on the same day.

3. **Criminal Law § 89— prior statements — admissibility for corroboration — failure to specify objectionable portions**

Where prior statements made by two witnesses were introduced for the purpose of corroboration, portions of the statements did in fact corroborate the testimony but other portions did not, and defendant objected to both statements in their entirety without specifying the objectionable portions, the trial court properly admitted the entire pretrial statements into evidence.

4. **Burglary and Unlawful Breakings § 5— breaking or entering with intent to commit a felony — necessity of showing a breaking**

Since G.S. 14-54(a) provides that any person who breaks *or* enters any building with intent to commit any felony or larceny is guilty of a felony, it is not necessary that the State show a breaking to support a conviction of breaking or entering; therefore, evidence that defendant entered his victim's trailer, dragged her to the bathroom, bound her and threatened to kill her if she screamed, while his two accomplices searched the premises was sufficient to withstand defendant's motion for nonsuit on the breaking or entering charge.

APPEAL from *Rousseau, Judge,* 5 February 1973 Session of IREDELL County Superior Court.

Defendant Charles Houston was charged in a bill of indictment with attempted armed robbery, felonious breaking and entering with intent to commit a felony and felonious possession

of burglary tools. Defendant, through his court appointed counsel, pled not guilty to all three charges, and was convicted by the jury of felonious breaking or entering with intent to commit a felony, the charge of felonious possession of burglary tools having been dismissed at the close of the State's evidence.

At the trial, Mrs. Creola Johnson testified that on 28 June 1972 she was living alone in a house trailer in the Scotts community in Iredell County. When she opened her door that morning, she was confronted by a young black male who grabbed her, threw her to the floor and entered the trailer. The young man thereupon dragged Mrs. Johnson into the bathroom, bound her with cord and threatened to kill her if she screamed.

Defendant's attorney objected to the assistant solicitor's question whether Mrs. Johnson saw her assailant in the courtroom. He also objected to the solicitor's being permitted to conduct the subsequent voir dire examination in lieu of the assistant solicitor who had begun the examination of the witness. Both objections were overruled.

Following the voir dire to determine admissibility of the in-court identification, the court made the following findings of fact:

"1. That on June 28, 1972, about eleven a.m. Mrs. Johnson was in her trailer in Scotts community of Iredell County.

2. That she went to her door and a man pushed his way into the house; that it was day-time.

3. That this person remained in her house approximately five minutes.

4. That he pulled her from the front door to the bathroom, during which time they were face to face.

5. That on that same date Officer Tate showed her five pictures, all of which portrayed black males — two light colored, two dark colored, and one medium colored.

6. That Mrs. Johnson picked the picture of the defendant Houston in just a few minutes; that Mrs. Johnson had never seen the defendant before June 28, 1972.

7. That on Sept. 14, 1972, at the preliminary hearing in District Court of Iredell County the defendant Houston

was present along with David Campbell who had pleaded guilty to this offense and is not now on trial.

8. That at said time Mrs. Johnson identified him, David Campbell, as the Negro male who came into her house on June 28.

9. That Mrs. Johnson told Officer Tate that a light-skinned Negro male came to her door.

10. That Officer Tate did not recall showing the pictures to the witness, Mrs. Johnson, after June 28, 1972.

11. That David Campbell and the defendant Houston are both of the same build, have similar hair styles, and similar skin tones, as of Sept. 14, 1972."

The court thereupon concluded:

"1. That the witness, Mrs. Johnson, had ample opportunity to observe the intruder in her house on June 28; that it was daylight and she was face to face with him approximately five minutes.

2. That on said date she picked out a picture of the defendant from a group of five, and that her in-court identification of the defendant is not tainted by reason of the photographs or by her misidentification on Sept. 14, 1972."

Mrs. Johnson was allowed to testify that defendant was the man who entered her trailer on the date in question.

David Campbell and Michael Feimster appeared as witnesses for the State and both testified that on 27 June 1972, the two of them met with defendant and discussed "pulling a job" to get some money from Mrs. Johnson's house. Campbell testified that he and Houston drove to some woods near Mrs. Johnson's house. When they approached the house on foot, Houston told Campbell he was going to the front door, but Campbell did not see him enter.

Over objection of counsel for defendant, Deputy Sheriff Tate was allowed to read into evidence statements he had taken from Campbell and Feimster on an unspecified date prior to trial.

Campbell's statement was to the effect that Campbell, Houston and Feimster began discussing the robbery on 27 June. On 28 June the three of them drove to the woods near Mrs.

Johnson's trailer. They approached the house, all three entered, Houston threatened Mrs. Johnson, and Campbell and Feimster searched the premises. All three then ran from the house.

Feimster's statement was to the effect that all three entered the trailer, and Feimster searched for a safe. They found no money and left the house.

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

Pope, McMillan and Bender, by Harold J. Bender, for defendant appellant.

MORRIS, Judge.

[1] Rule 11 of the General Rules of Practice for the Superior and District Courts states that "[w]hen several counsel are employed by the same party the examination or cross-examination of each witness for such party shall be conducted by one counsel, but the counsel may change with each successive witness or, with leave of the court in a prolonged examination." This rule clearly leaves it to the discretion of the trial court to permit a change of counsel if a lengthy examination is imminent. Assuming the circumstances of the present case did not bring it within the purview of the rule, appellant has failed to show that he was prejudiced by the court's overruling his objection. It has been stated by this Court that

> "[m]ere technical error will not entitle defendant to a new trial; it is necessary that error be material and prejudicial and amount to a denial of some substantial right. Whether technical error is prejudicial is to be determined upon the basis of whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Garnett*, 4 N.C. App. 367, 373, 167 S.E. 2d 63 (1969), quoting 3 Strong, N.C. Index 2d, Criminal Law, § 167.

[2] It is further appellant's contention that the trial court erred in its conclusions of law that Mrs. Johnson's in-court identification of defendant was based upon her opportunity to observe defendant at the date of the break-in and was not tainted by an out-of-court photographic identification. We do not agree.

A conviction based upon in-court identification following a pretrial photographic identification will be set aside only if the photographic identification procedure is so suggestive as to give rise to a substantial likelihood of irreparable misidentification. *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968); *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970); *State v. Neal and Davis*, 19 N.C. App. 426, 199 S.E. 2d 143. Appellant's contention that the court failed to find as a fact or conclude as a matter of law that the in-court identification was based on the independent memory of the witness is without merit. The conclusions that the witness had ample opportunity to observe defendant and that the in-court identification was not tainted by the photographic identification is tantamount to a conclusion that the identification was based upon her independent memory.

[3] Appellant also urges that the trial court erred in admitting into evidence the pretrial statement made by the witnesses Campbell and Feimster to Deputy Tate. It is his position that these statements — offered to corroborate the testimony of Campbell and Feimster — are inadmissible in that portions are contradictory to the testimony of the witnesses. This contention cannot be sustained, for portions of the statements do in fact corroborate testimony of Campbell and Feimster, and the objections of appellant did not specify the objectionable portions.

In *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963), appellant sought a new trial on the grounds that a written statement introduced as corroboration of the testimony of a State's witness was not a "prior consistent statement." In affirming the manslaughter conviction the Court said:

> "If a prior statement of a witness, offered in corroboration of his testimony at the trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce this 'new' evidence under a claim of corroboration. . . . (Citations omitted.) However, if the previous statements offered in corroboration are generally consistent with the witness' testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." (Citations omitted.) *Id.* at 189.

The prior statements proffered in *Brooks* were not contradictory to the testimony they were introduced to corroborate, but portions were not identical. Defendant did not specify the

portions of the prior statement objectionable to him. The Court held that:

> "Where portions of a document are competent as corroborating evidence and other parts incompetent, it is the duty of the party objecting to the evidence to point out the objectionable portions. Objections to evidence *en masse* will not ordinarily be sustained if any part is competent." (Citations omitted.) *Id.*

In accord is *State v. Strickland,* 276 N.C. 253, 173 S.E. 2d 129 (1970). See also 7 Strong, N.C. Index 2d, Trial, § 15.

In the case *sub judice,* portions of the testimony of Campbell and Feimster are corroborated by portions of their prior statements. Although other portions of the prior statements offer additional matter and vary the testimony somewhat, defendant's objection was to both statements in their entirety. Thus the prior statements fall within the rule of *State v. Brooks, supra,* and their admission was proper.

[4] Appellant's final assignment of error is to the denial of his motion of nonsuit as to the charges of attempted armed robbery and felonious breaking and entering with intent to commit a felony. There was no prejudice with respect to the attempted armed robbery since defendant was acquitted on that charge. With respect to the breaking and entering charge, there was sufficient evidence to withstand motion for nonsuit. Appellant's contention that there is no evidence that defendant broke *and* entered Mrs. Johnson's house is not well taken, for G.S. 14-54(a) provides that "Any person who breaks *or* enters any building with intent to commit any felony or larceny is guilty of a felony and is punishable under G.S. 14-2." (Emphasis added.) Mrs. Johnson testified that defendant entered her trailer. It is not necessary that the State show a breaking to support a conviction of breaking or entering. *State v. Vines,* 262 N.C. 747, 138 S.E. 2d 630 (1964).

The necessary felonious intent may be found from the actions of defendant once he was within the trailer, i.e., tying up Mrs. Johnson and threatening her. "The intent with which defendant broke and entered, or entered, may be found by the jury from what he did within the building." *State v. Bronson,* 10 N.C. App. 638, 640, 179 S.E. 2d 823 (1971).

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, GREAT AMERICAN INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, UNITED STATES FIDELITY & GUARANTY COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GOVERNMENT EMPLOYEES INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, ST. PAUL FIRE & MARINE INSURANCE COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, HARLEYSVILLE MUTUAL INSURANCE COMPANY, UNIGARD MUTUAL INSURANCE COMPANY, IOWA MUTUAL INSURANCE COMPANY, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, AETNA INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, FIREMAN'S FUND INSURANCE COMPANY, INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, AMERICAN INSURANCE COMPANY, NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INTEGON GENERAL INSURANCE CORPORATION, AND INTEGON INDEMNITY CORPORATION

No. 7310INS629

(Filed 10 October 1973)

1. **Insurance § 79.1— automobile liability rates — classification plan — order unsupported by evidence and findings**

Order of the Commissioner of Insurance adopting a new private passenger automobile liability insurance classification plan and rate structure was unsupported by material and substantial evidence and was not based on appropriate findings of fact. G.S. 58-9.6(b)(5); G.S. 58-9.4.

2. **Insurance § 79.1— automobile liability rate classifications — statutory power**

In exercising the power to establish new automobile liability rate classifications and new rate structures, the Commissioner of Insurance is limited to the authority delegated to him by statute.

3. Insurance § 79.1— automobile liability rates — suspension of rates approved by previous Insurance Commissioner

The Commissioner of Insurance had no authority to suspend or disapprove automobile liability insurance rates which had been duly approved and ordered into effect by his predecessor in office without giving notice, conducting a hearing and making appropriate findings of fact as required by G.S. 58-248.1.

APPEAL by the North Carolina Automobile Rate Administrative Office and member companies of that office from orders of the Commissioner of Insurance filed 17 and 19 April 1973.

Among other things, the orders: abolished all existing classification plans for private passenger automobile liability insurance; abolished the existing Safe Driving Insurance Plan created to establish rate which would distinguish between classes of drivers having safe driving records and those having a record of chargeable accidents and traffic violations; abolished the existing private passenger automobile insurance rates schedule; ordered a new classification plan under which all applicants for minimum limits liability insurance would pay the same base rate, with the provision that convictions for violations of certain of the criminal laws dealing with the use and operation of motor vehicles would result in premium surcharges in the amount set out in the order and specifically directed that those rate changes ordered on 4 December 1972 by his predecessor in office not be placed into effect until the new rates and classification plans are implemented and followed.

Attorney General Robert Morgan by Charles Lloyd, Assistant Attorney General and Isham B. Hudson, Jr., Staff Attorney for the North Carolina Insurance Department, for the Commissioner of Insurance.

Allen, Steed and Pullen by Arch T. Allen and Lucius W. Pullen; Broughton, Broughton, McConnell & Boxley by John D. McConnell, Jr.; Sanford, Cannon, Adams & McCullough by Allen Adams; Young, Moore & Henderson by Charles H. Young, attorneys for defendant appellants.

VAUGHN, Judge.

A comprehensive review of the procedures for insurance rate making in this State is not necessary on this appeal. For analysis of the relevant statutes see *In re Filing by Automobile Rate Office*, 278 N.C. 302, 180 S.E. 2d 155, and *In re Filing by Fire Insurance Rating Bureau*, 275 N.C. 15, 165 S.E. 2d 207.

The North Carolina Automobile Rate Administrative Office is a bureau charged with, among other things, the responsibility of promulgating liability insurance classification plans and promulgating and proposing liability insurance rates based on those classifications. G.S. 58-246. The rates and classifications so promulgated must be submitted to the Commissioner of Insurance for approval before they can be put into effect. The Commissioner is required to approve proposed changes in rates and classifications to the extent necessary to produce rates and classifications which are reasonable, adequate, not unfairly discriminatory and in the public interest. The statute provides that "[p]roposed rates shall not be deemed unreasonable, inadequate, unfairly discriminatory or not in the public interest, if such proposed rates make adequate provision for premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision for a fair and reasonable underwriting profit." G.S. 58-248. If the Commissioner determines, after notice and hearing, that the rates charged or filed on any class of risk "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 is required to direct that such rates, classifications or classification assignments be altered or revised to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory and in the public interest. G.S. 58-248.1.

On 2 March 1973 the Commissioner of Insurance notified the North Carolina Automobile Rate Administrative Office of a hearing to be held on 9 March 1973. A copy of the notice was published in two Raleigh newspapers on 3 March 1973. In pertinent part the notice is as follows: "Notice is hereby given that a Public Hearing will be held . . . for the purpose of reviewing the present rating classification system for private passenger automobile liability insurance and to hear all interested persons concerning changes, if warranted, in order to effect rating classifications for North Carolina which are adequate, reasonable and not unfairly discriminatory and otherwise in accordance with law."

The present Commissioner of Insurance succeeded former Commissioner of Insurance, Edwin S. Lanier, on 5 January 1973. Commissioner Lanier had conducted a series of hearings be-

ginning 20 October 1971 and ending on 23 May 1972. The stated purposes of the Lanier hearings were to consider changes deemed to be required by legislation enacted by the 1971 General Assembly including G.S. 58-248.9 which directed the Commissioner to adopt a rate classification plan called "a 260 Plan rate classification" or an appropriate modification of that plan; amendments to G.S. 58-248.8 which requires establishment of a safe driver reward plan that "distinguishes between classes of drivers having safe-driving records and those having a record of chargeable accidents, a record of convictions of major traffic violations; a record of a series of minor traffic violations; or a combination thereof; and which plan will provide for automobile property damage and bodily injury insurance premium differentials between such classes of drivers." The amendments further directed the Commissioner of Insurance to "maintain a Safe Driver Reward Plan which will balance the additional premium realized from surcharges assessed against drivers having other than safe-driving records with discounts allowed to those drivers having safe driver records." No order was filed as a result of these hearings prior to the time Commissioner Lanier left office. The recorded transcript and exhibits of the Lanier hearings were introduced at the hearing conducted by Commissioner Ingram on 9 March 1973. Witnesses were heard, who, in general, offered evidence as to the merits of rate classification plans more refined than the one presently used, such as the standard "260" plan and the modification of that plan proposed by the North Carolina Automobile Rate Administrative Office in January 1972. The hearing was recessed until 16 March 1973 when one witness was heard in connection with the relationship between territory rate classifications and the availability of insurance in the voluntary market. Other exhibits were introduced and the hearing was adjourned. On 17 and 19 April the Commissioner of Insurance filed the orders which are the subject of this appeal.

[1, 2] In our opinion the orders must be reversed for the reason that they are "unsupported by material and substantial evidence in view of the entire record. . ." as required by G.S. 58-9.6(b)(5) and not based on appropriate findings of fact as required by G.S. 58-9.4. Appellees concede that no evidence was received relative to the merits of the new classification plan and rate structure ordered to be placed into effect. The plan was not placed in the record during any of the proceedings before the Commission. The plan was first seen as an exhibit attached to

the Commission's order filed 17 April 1973, the hearings having been adjourned on 16 March 1973. Thus, no member of the public or the appellants have had notice or opportunity to be heard or offer evidence as to the merits of the plan. Indeed, in his brief, the Commissioner of Insurance takes the view that he was nor required to give notice of the proposed plan and that appellants were not entitled to know what the plan was or how it was to be instituted prior to the time that it was ordered into effect. The Commissioner's argument is that, in establishing a new rate classification plan, he was acting in a legislative capacity and that he was acting for the Legislature. The parties have not raised the serious question of whether there has been a lawful delegation, with proper standards for the guidance of the Commissioner, and such insurance rate-making authority as is assumed to rest in the Legislature. We note only that the stated formula that the Commissioner shall approve rates which are "reasonable, adequate, not unfairly discriminatory and in the public interest" does not appear to amplify the minimum standards that are constitutionally imposed on the Legislature itself. It is sufficient to say that, in exercising such power to establish new rate classifications and new insurance rates as may have been lawfully delegated to him by statute, the Commissioner is limited to the statutory authority so delegated. The applicable statutes require notice and hearing. It is only after notice and hearing that the courts can review an order to determine whether the Commissioner's findings are supported by material and substantial evidence. Administrative declarations, however sound and noble their purpose may be, are not findings of fact upon which the Courts can exercise their duty of judicial review. The merits, therefore, of the classification plan ordered by the Commissioner are not before us and we do not reach the question of his authority to, *sua sponte,* initiate, promulgate and order that plan into effect.

[3] We comment briefly on that part of the supplementary order purporting to suspend the rate changes ordered by Commissioner Lanier on 4 December 1972 as a result of the North Carolina Automobile Rate Administrative Office filing, pursuant to G.S. 58-248, of 1 July 1971. After two appeals to this court the order was affirmed in *Commissioner of Insurance v. Attorney General,* 18 N.C. App. 23, 195 S.E. 2d 572, *cert. den.,* 283 N.C. 585, 196 S.E. 2d 811. Among other things, in that order Commissioner Lanier directed the North Carolina Automobile Rate Administrative Office to place the new rates into effect

at the earliest possible date, subject to such modifications as might be necessary by reason of federal price control regulations. The present Commissioner of Insurance was without authority to suspend or disapprove the rates which had been duly approved and ordered into effect, in the absence of notice, hearings and appropriate findings of fact, all as required by G.S. 58-248.1. If, after proper notice and hearing, the Commissioner determines that existing or previously authorized rates are to be changed, any party to the proceeding may appeal and such appeal operates as a stay of the Commissioner's order until the questions raised by the appeal are determined. G.S. 58-9.5 (10).

For the reasons stated, the orders of the Commissioner of Insurance which are the subject of this appeal must be reversed and set aside.

Reversed and vacated.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. BILLY RAY COLLINS, ALIAS JAMES EARL COLLINS

No. 7312SC664

(Filed 10 October 1973)

Criminal Law § 98— incarceration of defendant — no expression of opinion by court

A trial judge in his discretion may insure the presence of a defendant by ordering him into custody during the course of trial, and there is no prejudicial error so long as that discretion is not exercised in a manner which would convey, either explicitly or implicitly, to the jury the slightest intimation that the court had any opinion regarding defendant's credibility as a witness or the strength of his case; there was nothing in the present case to suggest that the circumstances surrounding the incarceration were such as would probably lead to potentially prejudicial speculation among members of the jury about the court's opinion of the case.

APPEAL by defendant from *Brewer, Judge,* 24 April 1973 Criminal Session of Superior Court held in HOKE County.

Upon indictment for robbery with a firearm, defendant Billy Ray Collins pleaded not guilty. The State's evidence indicated the following. On 14 January 1972, Fred Riley was working

in his gun and antique store when defendant and a companion came in about four o'clock in the afternoon and began looking at guns. After browsing in the store for approximately half an hour, defendant asked Riley for a box of cartridges. Riley was on one side of the counter and defendant on the other. The cartridges were behind Riley on a second counter, and when he turned to get them, defendant pointed a gun at him, announcing, "Old man, this is a hold-up." Having tried without success to convince defendant to reconsider, Riley opened the cash register after defendant had several times threatened to kill him. Defendant removed about $160.00 from the register and also took a .41 Magnum revolver and a carbine rifle from the store. A pistol similar to that taken from Riley's shop was found on defendant's person, and a carbine rifle was recovered from the woods near the place at which defendant was apprehended. Defendant returned to the store in October 1972 and told Riley that "he wished I would reconsider a little bit and make things easier for him. That he has saved up some money and would like to make a deal with me if he could, so I wouldn't prosecute him." Although Riley refused this offer, defendant returned to the store several days later in an unsuccessful effort to convince Riley not to prosecute.

Defendant testified as follows. On the morning of 14 January he went to Fayetteville, N. C. and began drinking beer at a tavern around 10:00 a.m. or 10:30 a.m. He purchased five drug capsules known as "Yellow Jackets" in addition to a ten-dollar bag of marijuana. He took five pills and drank several beers before leaving Fayetteville and smoked a pipe full of marijuana while returning home. After arriving home early in the afternoon, defendant smoked the remaining marijuana, and he and a friend continued to drink beer. Defendant estimated that prior to 2:30 p.m. he had consumed a total of twelve beers in addition to the five "Yellow Jackets," and he maintained that after that time, or thereabouts, he was no longer able to understand what he was doing. He regained his awareness about 6:00 p.m., when he found himself in a swamp-like river, completely under water.

The jury found defendant guilty and from an active sentence of 20 to 30 years imprisonment, he appealed.

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

Donald W. Grimes, Assistant Public Defender for defendant appellant.

VAUGHN, Judge.

Defendant's only assignment of error is that by ordering defendant incarcerated during the course of the trial and permitting the jury to observe defendant in custody, the court violated G.S. 1-180.

The following is the only reference in the record to the incarceration which defendant alleges entitles him to a new trial:

> "COURT: Let the record show that the attorney for the defendant has made an objection as to the defendant being incarcerated for the night. Let the record further show that on previous occasions according to information by the Solicitor, the defendant has failed to appear in Court and on other occasions has failed to appear on time. The Court feels at this time that the presence of the defendant is necessary for the completion of this case and therefore sets a bond in the amount of $20,000.00 for his appearance at 9:30 tomorrow morning. (The Court ordered that the defendant be incarcerated overnight in the Hoke County Jail and that he be brought back to Court on the following morning in time for resumption of Court at 9:30 a.m. The following morning the defendant was returned to the courtroom and placed in the prisoner box which was located to the left of the bench and directly across the courtroom from the jury box. When the defendant was initially brought into the courtroom the jury was sequestered in the jury's chambers, but was thereafter returned to the jury box. When the defendant was ordered to 'come around' from the prisoner box in order to rejoin his counsel for the resumption of the trial, the jury was seated in the jury box. While the defendant was proceeding, in the jury's presence, from the prisoner box to his counsel's table, defense counsel renewed his objection to the defendant's having been incarcerated. At that time the Solicitor objected to the renewal of the defendant's objection in the presence of the jury. Upon the defense and Solicitor's objections, the Court denied the defendant's objection to which the defendant excepted.)"

That a trial judge in his discretion may insure the presence of a defendant by ordering him into custody during the course of trial is clear. *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39. There is no prejudicial error so long as that discretion is not exercised in a manner which would convey, either expressly or

implicitly, to the jury the slightest intimation that the court had any opinion regarding defendant's credibility as a witness or the strength of his case. *State v. Doby,* 18 N.C. App. 123, 196 S.E. 2d 377; *State v. Barnes,* 4 N.C. App. 446, 167 S.E. 2d 76.

Defendant relies on *State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568, and *State v. McBryde,* 270 N.C. 776, 155 S.E. 2d 266. In *Simpson,* defendant and two witnesses testified for the defense. Immediately following the testimony of the second defense witness, the court ordered defendant and his witnesses taken into custody. Although the court had recessed for the noon lunch, several of the jurors were still present in the courtroom when the above incident occurred. After the recess and the seating of the jury, defendant and the two witnesses were escorted into court by the sheriff. Later in the afternoon, the court instructed the solicitor to draw perjury indictments against defendant and his witnesses. In *McBryde,* when one of defendant's primary witnesses completed his testimony, the court instructed him not to leave the room. Shortly thereafter, still in the presence of the jury, the judge and sheriff conferred secretly at the bench. The sheriff then immediately took the witness into custody, returned him to the courtroom and placed him in the prisoner's box directly in front of the jury.

In both *Simpson* and *McBryde* the jury knew or was presumed to know that the court had participated in and ordered the incarceration of the parties under circumstances which could indicate that the court was of the opinion that their testimony was not truthful. *See State v. Barnes, supra.* In the instant case, assuming that since defendant was in the prisoner's box, the jury surmised he was in custody, we are unable to find a similar possibility of prejudice. There is nothing to suggest that the circumstances surrounding the incarceration were such as would probably lead to potentially prejudicial speculation among members of the jury about the court's opinion of the case. "It is not unusual for defendants in criminal cases to be in custody while they are being tried. . . . 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 [defendant]," or his truthfulness as a witness. *State v. Barnes, supra.* The jury was not present when the possibility of defendant's incarceration was discussed; it did not see or hear the court order that incarceration; it did not see the court's order

being executed; and it had no reason to assume that the defendant was placed in custody for committing perjury on the witness stand or because his defense appeared insufficient.

No error.

Chief Judge BROCK and Judge PARKER concur.

FAYETTEVILLE AVIATION, INC. v. INSURANCE COMPANY OF NORTH AMERICA

No. 7312SC622

(Filed 10 October 1973)

1. **Evidence § 31— status of student pilot — best evidence rule — oral testimony inadmissible**

In an action to recover on an aircraft insurance policy, the trial court did not err in refusing to allow a witness to testify as to a student pilot's status since the best evidence rule governed, and the "Student Pilot Certificate," a paper writing with specific language and endorsements thereon indicating the status of the student pilot, was the best evidence of the matter sought to be proved.

2. **Insurance § 6— construction of policy language — no ambiguity**

The trial court did not err in its construction of the endorsement of an aircraft insurance policy in question where there was no ambiguity in the endorsement and the court gave the language its ordinary meaning.

APPEAL by plaintiff from *Brewer, Judge,* 26 March 1973 Session of Superior Court held in CUMBERLAND County.

This is a civil action wherein plaintiff, Fayetteville Aviation, Inc., seeks to recover $12,000 on an aircraft insurance policy issued by defendant, Insurance Company of North America.

Defendant filed answer alleging that plaintiff was precluded from recovery by Endorsement No. 7 on the insurance policy, which provides coverage for the aircraft only when the command pilot may be classified as:

"Any pilot with at least a private license who is properly certificated and rated for the flight and the aircraft, and who has logged a minimum of 100 hours as pilot-in-command of which not less than 20 hours have been logged in like type gear, equal

or greater horsepower and equal or greater seating capacity aircraft

OR

Any pilot who holds a valid student certificate and is under the direct supervision of a properly certificated flight instructor employed by the named insured providing the student pilot has the specified approval of the instructor for solo flight, and providing his student certificate has been properly endorsed for the make and model aircraft involved.

OR

Any pilot with at least a private license who is a Graduate of the Named Insured's flight training school who is properly certificated and rated for the flight and the aircraft and approved by the Name Insured."

All parties having stipulated that this case might be heard without a jury, the defendant, after plaintiff's presentation of his evidence, moved for an involuntary dismissal pursuant to G.S. 1A-1, 41(b) of the Rules of Civil Procedure. This motion having been granted, the court made findings of fact which except where quoted are summarized as follows:

Plaintiff was the owner of a 1968 Cessna 182 airplane which was specifically covered by an aircraft insurance policy (containing Endorsement No. 7) issued and delivered to the plaintiff by the defendant. On 21 February 1970, this airplane, while being piloted by one Martin E. Middleton, crashed; and the plaintiff sustained property damage.

"On February 21, 1970, Pilot Martin E. Middleton had a total of 51.2 hours as pilot in command for any aircraft and 3.8 hours as pilot in command of a Cessna 182 and 9.8 total hours in like type gear, equal or greater horsepower and equal or greater seating capacity aircraft."

"On February 21, 1970, Pilot Martin E. Middleton held a private license."

"On February 21, 1970, Pilot Martin E. Middleton was a student of the named insured attempting to secure a commercial pilot certificate and on February 21, 1970, was under the direct supervision of a properly certificated flight instructor employed by the named insured and had the specific approval of said instructor for the solo flight in question."

Based on the foregoing findings of fact, the court made the following relevant conclusion of law:

> "On February 21, 1970, Pilot Martin E. Middleton did not qualify under any of the provisions of Endorsement No. 7 of the policy herein involved, and, therefore, the Court concludes as a matter of law that coverage under said policy did not apply to the Cessna 182 aircraft and the damage sustained by the Plaintiff as a result of the crash of the Cessna 182 aircraft on February 21, 1970, while being piloted by Martin E. Middleton."

From a judgment of involuntary dismissal, the plaintiff appealed.

McCoy, Weaver, Wiggins, Cleveland & Raper by Richard M. Wiggins and Alfred E. Cleveland for plaintiff appellant.

Anderson, Nimocks & Broadfoot by Henry L. Anderson, Jr., for defendant appellee.

HEDRICK, Judge.

[1] Plaintiff first assigns as error the refusal of the trial court to allow Ronald Lee Peters to testify that he knew that Martin E. Middleton had a Student Pilot's Certificate when he enrolled at Fayetteville Aviation, Inc. Admission or exclusion of this testimony is governed by the best evidence rule. This rule is predicated upon the premise that "a writing itself is the best evidence of its contents, and ordinarily the original writing itself is the only evidence admissible to prove its contents." 3 Strong, N. C. Index 2d, Evidence, Sec. 31, p. 646; *Wendell Tractor & Implement Company, Inc. v. Lee,* 9 N.C. App. 524, 176 S.E. 2d 854 (1970). A "Student Pilot Certificate" is a paper writing with specific language and endorsements thereon indicating the status of the student pilot, and, unless its production is excused, it must remain the best evidence of the matter sought to be proved. Plaintiff contends that the best evidence rule has no application in this instance because the writing is only collaterally involved. We are unable to agree with this position, because "(w)here the writing embodies a contract or other transaction between the parties to the action, and it forms the basis of the cause of action or defense, clearly it is not collateral and the best evidence rule applies." Stansbury, N. C. Evidence, Brandis Revision, Vol. 2, Sec. 191, p. 104. This assignment of error is overruled.

[2] The plaintiff next maintains that the court committed error in its construction of Endorsement No. 7 of the aircraft insurance policy. Plaintiff asserts that any ambiguities and uncertainties in an insurance policy must be construed in favor of the insured and that insurance policies prepared by the insurer will be liberally construed in favor of the insured. While we recognize the soundness of these rules, See Couch on Insurance, 2d Ed., Vol. 1, Sec. 15:73, pp. 776-781; *Fireman's Fund Insurance Co. v. N. C. Farm Bureau Mutual Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513 (1966), it is an equally well-known and accepted tenet that the language of a contract must be given its ordinary meaning in the absence of ambiguity. Appleman, Insurance Law and Practice, Vol. 13, Sec. 7428, p. 137. A careful perusal of Endorsement No. 7 yields the conclusion that there is no ambiguity present. "Ambiguity in the terms of an insurance policy is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning. * * * If (ambiguity) is not (present) the court must enforce the contract as the parties have made it and may not under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay." *Wachovia Bank and Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). Thus, this assignment of error is without merit.

The judgment appealed from is affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. MIRIAM BLAND

No. 7311SC558

(Filed 10 October 1973)

1. Narcotics § 4— sale of drugs without prescription — sufficiency of evidence

In a prosecution for feloniously distributing and dispensing a controlled substance, the State's evidence was sufficient to be submitted to the jury where it tended to show that defendant, who was a pharmacist, offered to an undercover narcotics police agent pills constituting a portion of a prescription belonging to another person, the agent did not have any prescription for the drugs and did not

give defendant any prescription, the agent paid defendant and she gave him change, defendant placed the pills in a plain white envelope and told the agent that she would let him have the remaining portion of other unpurchased prescriptions.

2. **Criminal Law § 121— defense of entrapment raised by defendant — charge proper**

Where the defendant in the course of the trial and, at least in an argument, mentioned the defense of entrapment, it was not error for the court to charge on the defense of entrapment, and the charge contained no prejudicial error.

APPEAL from *Canaday, Judge,* 19 March 1973 Session, LEE County Superior Court.

Defendant was charged in a bill of indictment with feloniously distributing and dispensing a controlled substance on 24 March 1972 to Arthur Manning. The substance consisted of pentobarbital, barbituric acid and methamphetamine. The defendant was accused of distributing this substance without a prescription. She entered a plea of not guilty.

At the close of the State's evidence, the trial judge sustained the defendant's motion to dismiss the charge as to the drug pentobarbital and submitted the case to the jury as to the drug methamphetamine. The jury returned a verdict of guilty and, from a sentence of not less than three nor more than five years suspended and on probation for five years and a fine of $1,000, the defendant appealed.

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

Richard Powell and Samuel S. Mitchell for defendant appellant.

CAMPBELL, Judge.

The State's evidence was to the effect that on 24 March 1972, Arthur Manning was employed by the Sanford Police Department as an undercover narcotics agent. On that date he went into Bland's Drug Store where the defendant was the pharmacist. He went to the rear of the store where the defendant was at the prescription counter. He inquired of her as to whether her brother, who was a doctor in Virginia, would mail to him a drug prescription. She informed him that her brother would not do this and would have to examine him in person before he would issue a prescription for any drug. Man-

ning started to leave the store, and she called him back and informed him that she had a portion of a bottle of drugs; that some woman who had the prescription for these drugs had only taken a portion of the bottle and had left the other half. She told him that it was a drug that would keep him awake and that she would sell it to him for what it would have cost the other woman. She said that she was only interested in getting the money for the drugs. Manning testified that he gave her a five dollar bill and she gave him the change, as the price was $2.40 for 14 pills. She told him that she would put the pills in a white envelope, as the sticker on the bottle would trace the bottle to her if he got caught. She further informed him that if he got caught that he did not know her. She also told him that if anyone else came in and only purchased a half of the prescription, she would let him have the remaining portion. Manning further testified that he did not have any prescription for the drugs and did not give her any prescription.

The pills sold to Manning by the defendant were analyzed by a chemist with the State Bureau of Investigation, and he testified that an analysis "showed the presence of methamphetamine and pentobarbital."

The defendant testified in her own behalf to the effect that she operated the drug store and that her sister also worked there. She testified that she knew Manning but under the name of Pete Watson and had known him for a month or so before the 24th of March 1972; that he came in the drug store practically everyday; that she thought he was a student and that he had told her that he could hardly make it through his classes; that she showed him some nonprescription drugs that would keep him awake, but he was not interested. She said she told him she could not sell him any other drug without a prescription; that actually she was trying to get rid of him; that she did not sell him anything and did not know that he had taken any drugs. Her attention was attracted elsewhere, and when she looked back at Manning, he was leaving the store; and as he left, he pointed to her desk where she saw the bottle on her desk, together with a dollar bill and some change. She tried to catch him but did not succeed. She said if he took any pills from her store, it was without her permission and without her knowledge and that she had only shown him the bottle so that he would know what kind of pills they were but that they required a prescription.

[1] The evidence, when taken in the light most favorable to the State, was ample; and the case was properly submitted to the jury. *State v. Richardson,* 2 N.C. App. 523, 163 S.E. 2d 423 (1968). The evidence was plenary to justify submission to the jury. We find no merit in this assignment of error.

[2] The defendant contends that the trial judge committed error in charging the jury as to a defense of entrapment. The defendant says that the court, by charging on entrapment and charging that the burden of proof on entrapment is upon the defendant, caused the jury to get the misconception that in some way the burden of the entire defense was upon the defendant. A close reading of the charge of the court indicates that the defendant, in the course of the trial and, at least in an argument, mentioned the defense of entrapment. The court thereupon did charge on the defense of entrapment and correctly placed the burden of proof thereon on the defendant, not beyond a reasonable doubt but only to the satisfaction of the jury. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965). The charge on entrapment was proper, and it was not error to give such a charge when the defendant had raised it "by way of argument" and the evidence for the State was susceptible to showing entrapment. The trial judge gave the contentions of the defendant to the effect that Manning was making a nuisance of himself, and she was trying to get him out of the store; that she did not sell any tablets containing methamphetamine to Manning and, in fact, had told him that she would not sell him any such tablets. When it is read contextually and as a whole, the charge contains no prejudicial error.

We have considered the other assignments of error in this case, and we find no merit in them.

The case presented a dispute of facts which was for the determination of the jury, and the jury found the facts against the defendant.

No error.

Judges MORRIS and BALEY concur.

JAMES OLEN RYALS AND WIFE, RUBY RYALS v. R. B. BAREFOOT AND WIFE, ADA MAE BAREFOOT, AND JOSEPH H. LEVINSON, TRUSTEE

No. 7311SC555

(Filed 10 October 1973)

Mortgages and Deeds of Trust § 18— cancellation of deed of trust — summary judgment

The trial court should have entered summary judgment for plaintiffs in their action to cancel a deed of trust executed to defendants where the pleadings and answers to interrogatories established an agreement among plaintiffs, defendants and a third party that the deed of trust would be cancelled when a $36,000 note from the third party to defendants was paid in full, and established that the third party's note to defendants has been paid.

APPEAL by plaintiffs and defendants from *Canaday, Judge,* February 1973 Session of JOHNSTON Superior Court.

In their complaint filed 15 December 1971, plaintiffs allege:

By three deeds executed in 1953, 1954 and 1959, the male plaintiff became the owner of three parcels of land in Johnston County, said land being referred to hereinafter as the Johnston County property. In May of 1964, the male plaintiff purchased from defendants Barefoot a store building lot in Harnett County, said building and lot being referred to hereinafter as the Harnett County property. To secure the balance of the purchase price of the Harnett County property, $36,000, plaintiffs executed to defendants a deed of trust embracing the Harnett County property and the Johnston County property. Defendants Barefoot agreed that the Johnston County property would be released from the deed of trust if and when the indebtedness secured by the deed of trust was reduced to $22,000.

On or about 7 March 1966, at the insistence of defendants Barefoot, plaintiffs conveyed the Harnett County property to W. D. Glover and wife, hereinafter referred to as Glover. At the time of conveyance of said property, Glover executed an agreement, note and deed of trust providing for the payment of $36,000 to defendants Barefoot and the payment of $6,300 to plaintiffs. The agreement provided that when Glover's indebtedness was reduced to $22,000, plaintiffs' Johnston County property would be released from the original deed of trust. On

or about 24 July 1967, while the Harnett County property was under the control of Glover, the building on the property was destroyed by fire and plaintiffs are informed and believe that defendants Barefoot received substantial insurance benefits on account of said fire. Plaintiffs are further informed and believe that the $36,000 indebtedness due defendants Barefoot from Glover has been paid in full and that defendants Barefoot have released Glover from all claims. Defendants have refused plaintiffs' demand for an accounting. Plaintiffs asked for a cancellation of the deed of trust on their Johnston County property and such further relief as the court determined appropriate.

Following the filing of answer to the complaint and the answering of certain interrogatories by defendants, plaintiffs move for summary judgment. After a hearing, the court concluded (1) that there is no genuine issue as to any material fact with respect to the right of plaintiffs to a release of the Johnston County property, and (2) that "plaintiffs have failed to show the absence of a material fact in issue with respect to whether" the 9 September 1968 agreement between defendants and Glover completely released plaintiffs from the provisions of the 24 May 1964 deed of trust. The court entered judgment releasing and cancelling the lien of the original deed of trust as to plaintiffs' Johnston County property. Plaintiffs and defendants appealed.

Wilson, Bowen & Lytch by Wiley F. Bowen for plaintiff appellee-appellant.

T. Yates Dobson, Jr., for defendant appellants.

BRITT, Judge.

DEFENDANTS' APPEAL

Defendants' counsel on appeal, who did not represent defendants in any of the trial proceedings, states in his brief that he has diligently reviewed the record but is unable to submit any authority or reason as to why the judgment entered was not proper. We agree that defendants' appeal has no merit.

PLAINTIFFS' APPEAL

While agreeing with the court's conclusion (1) stated above, plaintiffs contend that the court erred in its conclusion (2) and that the court should have adjudged that plaintiffs are entitled

to the complete cancellation of the 24 May 1964 deed of trust. We agree with the contention.

Summary judgment is proper 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. *Lee v. Shor,* 10 N.C. App. 231, 178 S.E. 2d 101 (1970); G.S. 1A-1, Rule 56(c).

In the instant case admissions in the pleadings and answers to interrogatories established the following: Paragraph 6 of the 7 March 1966 agreement between plaintiffs, defendants Barefoot and Glover provided that defendants Barefoot would cancel the original deed of trust when the new $36,000 note from Glover to defendants Barefoot was paid in full. Plaintiffs' interrogatory 11 asked: "What claim, if any, do the defendants have against William D. Glover and wife, Nancy C. Glover, by virtue of the transaction referred to in the pleading?" Defendants' answer to the interrogatory is "None." The only transaction with Glover referred to in the pleadings relates to the sale and purchase of the Harnett County property and financial arrangements and problems pertaining thereto. In September 1968 the male defendant Barefoot entered into a written agreement with Glover in which he agreed that all matters between him and Glover had been concluded and settled.

We hold that plaintiffs were successful in showing at the hearing on their motion for summary judgment that there is no genuine issue with respect to their contention that they are entitled to the complete cancellation of the 24 May 1964 deed of trust. The court erred in its conclusion to the contrary and in not providing for this cancellation in its judgment. The cause is remanded for entry of judgment providing that relief.

On defendants' appeal — affirmed.

On plaintiffs' appeal — error and remanded.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES BRIDGES

No. 7310SC688

(Filed 10 October 1973)

1. **Criminal Law § 13; Infants § 10— alleged assault by 14-year-old — denial of trial on delinquent child petition — trial on indictment proper**

G.S. 7A-280 expressly provides that if a child who has reached his fourteenth birthday is alleged to have committed an offense which constitutes a felony and probable cause is found, the judge, upon finding that the needs of the child or the best interest of the State will be served, "may transfer the case to the superior court division for trial as in the case of adults"; therefore, the trial judge did not err in overruling defendant's motion that he be tried on a petition alleging him to be a delinquent child by reason of the felonious assault for which he was subsequently tried rather than on the bill of indictment.

2. **Criminal Law § 99— questioning of witness by court — no expression of opinion**

Questions put by the trial judge to defendant while he was testifying before the jury served to clarify the witness's testimony and did not amount to an expression of opinion in violation of G.S. 1-180.

3. **Criminal Law §§ 127, 161— signing of judgment — arrest of judgment — no error on face of record**

Trial court did not err in signing the judgment and denying defendant's motion in arrest of judgment where no fatal defect appeared on the face of the record.

APPEAL by defendant from *Copeland, Judge,* 16 April 1973 Session of Superior Court held in WAKE County.

Defendant, a fourteen-year-old boy, was tried in Superior Court on his plea of not guilty to an indictment charging him with felonious assault with a deadly weapon with intent to kill inflicting serious injuries. In summary, the State's evidence showed: Defendant, a student in the eighth grade at Ligon Junior High School in Raleigh, N. C., while at school on 6 February 1973 took a pistol from his pocket and loaded it. With the gun in his hand he told a classmate, Diana Roberson, that if she did not give him some potato chips, he was going to shoot her. As Diana was walking home after school, defendant followed and asked if he could walk her home. She refused, whereupon defendant took the gun from his pocket and said, "Do you believe I'll shoot you?" While standing beside her, he then put the gun up to her neck and shot her, causing injuries for which she was treated in the hospital for seven days. After the shooting, defendant ran away.

Defendant testified and denied that he had asked for the potato chips or had asked Diana to walk home with him or had said anything to her about whether she believed he would shoot her. He testified that the gun had been given to him about a week before the shooting; that on the day in question he did not know that the gun was loaded; that there had been three or four bullets in the clip when the gun was given to him, but he had taken all of the bullets out of the clip and had put the clip back in while at school that day; that as he was walking home after school with several companions, one of them asked to see the gun; that as he was handing the gun to his companion and while it was still in his hand, it accidentally went off and shot Diana Roberson, who was about fifteen feet away at the time; and that he was scared and ran away because he had a record.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. Judgment was entered sentencing defendant to a maximum term of four years as a committed youthful offender, with direction that he be given credit for time spent in confinement while awaiting trial. Defendant appealed.

Attorney General Robert Morgan by Associate Attorney Henry E. Poole for the State.

William A. Smith, Jr., for defendant appellant.

PARKER, Judge.

[1] On the day of the shooting a petition was signed and verified for presentation to the District Court in which defendant was alleged to be a delinquent child as defined by G.S. 7A-278(2) by reason of the felonious assault upon Diana Roberson for which he was subsequently indicted and tried in the Superior Court in this case. Upon arraignment in the Superior Court on the charge contained in the indictment, defendant's counsel moved that defendant be tried on the petition rather than on the bill of indictment. The overruling of this motion by the trial judge is the subject of appellant's first assignment of error. In this action of the trial judge we find no error. G.S. 7A-280 expressly provides that if a child who has reached his fourteenth birthday is alleged to have committed an offense which constitutes a felony and probable cause is found, the judge, upon finding that the needs of the child or the best interest

of the State will be served, "may transfer the case to the superior court division for trial as in the case of adults." Once such a case is transferred to the superior court, trial upon indictment is the proper procedure.

Appellant's counsel expressly abandoned assignment of error No. 2 in his brief and abandoned assignment of error No. 3 upon oral argument in this Court. Nevertheless, because of the youthfulness of this appellant we have carefully examined these assignments of error and agree with appellant's counsel that they are without merit.

[2] Appellant next assigns as error the action of the trial judge in asking certain questions of the defendant while he was testifying before the jury. While it is proper and may on occasion become necessary for the trial judge to interrogate a witness for the purpose of clarifying and promoting a better understanding of the witness's testimony "[s]uch examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the 'impression of judicial leaning,' they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error." *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376. We have examined the questions by the judge to which exception is taken in the present case and in our opinion no prejudice resulted from them. They served to clarify the witness's testimony and did not amount to expression of opinion by the judge.

[3] Finally, appellant assigns as error the signing of the judgment and the denial of his motion in arrest of judgment. "An exception to the judgment presents the face of the record for review, and a motion in arrest of judgment is one generally made after verdict to prevent entry of judgment based upon insufficiency of the indictment or some other fatal defect appearing on the face of the record." *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405. In the present case no fatal defect appears on the record.

We have carefully reviewed the entire record and in defendant's trial and the judgment imposed we find

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. GARLAND BIGELOW

No. 7315SC680

(Filed 10 October 1973)

1. **Indictment and Warrant § 14— appeal to superior court — motion to quash warrant — discretion of court**

A superior court judge has the discretion to determine whether he will entertain a motion to quash the warrant made for the first time in the superior court on appeal from the district court.

2. **Indictment and Warrant § 6— arrest warrant — probable cause — showing on warrant not necessary**

There is no requirement that an arrest warrant contain a "complaint" setting out information sufficient to show that there is probable cause for issuance of the warrant, it being required only that sufficient facts be presented to the magistrate to establish probable cause for issuance of the warrant.

3. **Automobiles § 3— driving while license suspended — warrant — reference to "highway"**

Warrant charging defendant with operating a motor vehicle while his license was suspended was not fatally defective in alleging that he operated the vehicle on a "highway" rather than alleging that he operated the vehicle on a "highway of the State" or on a "public highway." G.S. 20-28(a).

APPEAL by defendant from *Bailey, Judge,* 30 April 1973 Criminal Session of Superior Court held in ALAMANCE County.

Defendant was convicted in the District Court of operating a motor vehicle upon a highway while his operator's license had been revoked, third offense. Upon appeal to the Superior Court, he made motions to quash the arrest warrant on the grounds that the warrant failed to allege that the violation had occurred on a public highway and that the complaint for arrest was made on information and belief without setting forth the facts upon which the information and belief were based. The motions were denied and defendant entered a plea of not guilty.

The State's evidence indicated the following. On 19 July 1972, while he was patrolling a public highway in Alamance County, Deputy Sheriff Totten met a 1966 Chevelle Chevrolet operated by defendant. Totten had known defendant for five years and was aware that defendant owned a 1966 Chevelle. Totten explained that the car attracted his attention as it approached because he had an outstanding warrant to be served on defendant and was on his way to talk to him about it. Totten

knew defendant's car was damaged on the left side as was the approaching vehicle. He was also familiar with defendant's driving style. After he recognized defendant, Totten turned around and began pursuit. Three or four minutes later, he came upon the scene of a wreck and saw the 1966 Chevelle but did not see defendant or anyone else near the car.

Graham Police Officer Raymond Pardue investigated the accident, and Totten told him that he had seen defendant operating the Chevelle just prior to the accident. During the course of his investigation, Officer Pardue learned that defendant's operator's license had been revoked, and as a result, he secured a warrant for defendant's arrest. In applying for the warrant, Pardue, under oath, "told the Magistrate that Officer Totten as best I can remember had caught him [defendant] driving the car and in my investigation I found that he did not have a driver's license."

Defendant offered no evidence.

The jury returned a verdict of guilty, and from a judgment imposing an active prison sentence of one year, defendant appealed.

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

Vernon, Vernon & Wooten by Wiley P. Wooten for defendant appellant.

VAUGHN, Judge.

[1, 2] Defendant moved to quash the warrant for the first time after appeal to the Superior Court. The trial court may in its discretion decide whether a motion to quash should be entertained under such circumstances. *State v. Matthews,* 270 N.C. 35, 153 S.E. 2d 791; *State v. St. Clair,* 246 N.C. 183, 97 S.E. 2d 840. The exercise of that discretion is not ordinarily reviewable on appeal. *State v. Matthews, supra*; *State v. St. Clair, supra.* In the instant case, the court elected to rule on the motion and denied the same. Defendant's motion was that "the Complaint for Arrest be quashed on the grounds that said Complaint was issued upon information and belief without setting forth any grounds upon which the information or belief was based." The only question raised by the denial of the motion is whether an arrest warrant must contain a "complaint" in which there is set

out information sufficient to show that there is probable cause for the issuance of the warrant. There is no such requirement in this State. Before issuing an arrest warrant, the Magistrate must examine the complainant and any witnesses produced by the complainant under oath. G.S. 15-19. If it appears that a criminal offense has been committed the Magistrate shall issue a warrant "reciting the accusation, and commanding the officer . . . to take the person accused of having committed the offense, and bring him before a masistrate, to be dealt with according to law." G.S. 15-20. There is no requirement that the evidence given the Magistrate be transcribed or set out in a "complaint."

Although defendant's motion, as made, did not raise the question of whether there were sufficient facts before the Magistrate to establish probable cause for the issuance of the warrant for defendant's arrest, the record discloses that such was the case.

[3] Defendant also contends that the arrest warrant was fatally defective in that it contained the term "highway" whereas G.S. 20-28(a) refers to "highways of the State." It is not necessary to charge in the precise words of a statute. Under G.S. 15-153 every criminal proceeding by warrent is sufficient for all intents and purposes if it expresses the charge in a plain, intelligible and explicit manner. Webster's Third New International Dictionary (1968) defines "highway" as a "road or way on land or water that is open to public use as a matter of right." The term "highway" encompasses "highway of the State" or "public highway." We conclude the warrant is definite enough to ". . . (1) identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy. . .; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction . . . to pronounce sentence. . . ." *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897, *cert. den.*, 403 U.S. 940, 29 L.Ed. 2d 719, *quoting State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917.

We find no prejudicial error in the trial from which defendant appealed.

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. ROSCOE MORRISON

No. 7312SC691

(Filed 10 October 1973)

Constitutional Law § 33; Criminal Law § 102— argument that State's evidence was uncontradicted — right to remain silent

Solicitor's argument to the jury that the evidence for the State was uncontradicted, while disapproved, did not place an impermissible burden on defendant's Fifth Amendment right to remain silent.

APPEAL by defendant from *Braswell, Judge,* 14 May 1973 Session of Superior Court held in CUMBERLAND County.

Defendant was tried upon a bill of indictment charging breaking and entering, larceny, and receiving.

State's evidence tended to show that defendant and a companion, Fallow, entered the apartment of one George Webb, residing at 2310-B Murchison Road, Fayetteville, North Carolina, on 30 January 1973, without Webb's consent, and removed therefrom approximately $500.00 worth of stereo equipment and records. State's witness Clodfelter, a taxi driver, testified as to transporting defendant and Fallow to the residence, and driving them away when they had returned to the taxicab with the chattels.

Defendant offered no evidence.

Defendant was found guilty of breaking and entering, and larceny after the Court dismissed the charge as to receiving stolen goods.

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

Kenneth A. Glusman, Assistant Public Defender, Twelfth District, for defendant-appellant.

BROCK, Chief Judge.

Defendant contends that the trial court committed error in overruling defendant's objection to the District Attorney's argument to the jury that the evidence for the State was uncontradicted. Defendant contends that the District Attorney's argument placed an impermissible burden on the exercise by the defendant of his Fifth Amendment right to remain silent.

Defendant bases his contention upon *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229, which held that the Fifth Amendment, in its direct application to the Federal Government, and in its imposition on the States by the Fourteenth Amendment, forbids comment by the prosecution on the accused's silence. This right to silence has been exercised by defendants and protected by the courts of North Carolina for many years.

The problem is to determine whether the remark made by the solicitor was prejudicial so as to constitute reversible error and justify a new trial.

Defendant has cited an annotation in the American Law Reports 3d in support of his contention that it is improper for counsel to refer to accused's failure to testify. However, this same annotation states:

"Many cases support the conclusion that a bare statement to the effect that the prosecution's evidence generally, or that of a particular witness or witnesses, is uncontradicted or undenied, is, in the absence of additional facts or circumstances, not an improper reference to the accused's refusal to testify." Annot. 14 A.L.R. 3d 723, at 763 (1967).

"The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and an impropriety must be sufficiently grave to be prejudicial in order to entitle defendant to a new trial. It is only in extreme cases of abuse of the privilege of counsel, and when the trial court does not intervene or correct an impropriety, that a new trial may be allowed." 2 Strong, N. C. Index 2d, Criminal Law, § 102, p. 642.

In the case presently before us the following transpired:

"During argument for the state, counsel for the defendant objected to the following argument by the District Attorney: I think one thing you should consider when you go to make up your verdict is that this evidence is not contradicted.

"COURT: In the absence of the jury before ruling, I would have counsel for the State to repeat on the record the immediate argument he was making to the jury before the objection.

"DISTRICT ATTORNEY GRANNIS: As best I can recall the statement I made to the jury in this case that in their determination of the guilt or innocence of the defendant, that the evidence in this case was not contradicted by the defendant and I had previously been referring to the evidence immediately prior to that, as to what the evidence for the State had shown and I stated that the evidence was not contradicted.

"COURT: I recognize that this is a touchy area for comment, Gentlemen, but I was listening at the time Mr. Grannis did make his original remarks before the jury and I was listening at the time he repeated it for the record in the absence of the jury. In the particular language as used, I am not aware at this moment that he has transgressed the fine line. While the Court is also aware that the plea of not guilty challenges every phase of the evidence in the case.

"OBJECTION OVERRULED."

The trial judge carefully considered this statement in the light of the entire argument by the District Attorney and overruled defendant's objection. We disapprove of the comment by the District Attorney, but under the circumstances of the case, we feel that it was not prejudicial.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. ADLAI STEVENSON MOORE

No. 7315SC556

(Filed 10 October 1973)

Assault and Battery § 15— intentional pointing of weapon — sufficiency of instructions

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court's instructions with respect to an intentional pointing of the gun by defendant were adequate.

APPEAL by defendent from *Bailey, Judge,* 2 April 1973 Session of Superior Court held in ALAMANCE County.

Defendant was indicted and placed on trial for assault with a deadly weapon with intent to kill, inflicting serious bodily injury.

Defendant and Donna Lynn Tickle, the victim of the alleged assault, were employed at Huey's Barbecue in Glen Raven, North Carolina. Tickle testified that while she was cleaning the dining room tables on the morning of 8 July 1972, she asked defendant if he was afraid to work at night. Defendant pulled a pistol out from under a counter and replied, "Not as long as I have this." Defendant then pointed the loaded pistol at Tickle's face and pulled the trigger. The pistol did not fire. Defendant again pulled the trigger and shot Tickle in the face and neck. She was taken to the hospital and has undergone surgery as a result of her wounds.

On cross-examination defendant stated:

> "I intentionally picked up the pistol. No one forced me to. Lynn asked me to put the pistol up that it was loaded. I knew it was loaded. I didn't point the pistol at Lynn Tickle's head. I cocked the gun the first time. The first time I pointed the gun, I didn't point at any particular part of her body. I just pointed it at her. As to my intentionally pulling the trigger, I knew it wouldn't go off. I intentionally pulled the trigger. Nobody pushed me. She came and told me again to put the pistol up. I don't think I said anything to her. I didn't point the gun at her head again. She then turned facing me. The second time I didn't intentionally point the gun at her. I did it. I wasn't pointing at any part of her body. I was just pointing."

Both the State and the defense offered evidence tending to show that someone had told the owner of the restaurant defendant had been kissing another employee and that defendant at one point believed that Tickle had "told on" him.

When the State rested, defendant moved for a nonsuit. The court granted the motion with respect to the charge of assault with a deadly weapon with intent to kill inflicting serious bodily injuries. The jury was instructed that it might return a verdict of either guilty of assault with a deadly weapon inflicting serious injury or guilty of assault with a deadly weapon or not guilty. The jury found defendant guilty of assault with a deadly weapon inflicting serious bodily injury. From

a judgment imposing an active prison sentence of five years, defendant appealed.

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

Latham, Pickard, Cooper & Ennis by M. Glenn Pickard for defendant appellant.

VAUGHN, Judge.

Defendant's only contention is that the trial court erroneously assumed "that it had been established beyond power of the jury to find to the contrary that the defendant intentionally pointed the weapon at the prosecuting witness on the second occasion?" The trial court's instructions contained the following admonitions:

> "Thus, I charge you that if you find from the evidence and beyond a reasonable doubt that on or about the 8th day of July, 1972, Adlai Stevenson Moore assaulted Glenn (sic) Tickle by *intentionally pointing* a thirty-eight caliber pistol at her, and thereby inflicted serious bodily injury upon the said Glenn (sic) Tickle . . . it would be your duty to return a verdict of an assault with a deadly weapon inflicting serious bodily injuries. . . .
>
> In the case of an assault with a deadly weapon, it would be necessary to find that the defendant acted *intentionally in pointing* the pistol; . . ." (Emphasis added.)

In an earlier portion of the instructions, the court stated that a verdict of guilty would necessitate a finding that "the defendant *assaulted* Glenn (sic) Tickle *intentionally.*" (Emphasis added.)

We hold that the court's instructions were adequate and that defendant's trial was free from prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JESSIE DANIEL SMITH

No. 7314SC547

(Filed 10 October 1973)

Criminal Law §§ 113, 119— evidence of alibi — specific instruction required

Though the court in its charge to the jury called attention to defendant's evidence that he was engaged in the duties of his employment on the date the State's witness testified the offense was committed, the court failed to instruct the jury as to the legal principles applicable in their consideration of the alibi evidence, and defendant was entitled to such an instruction notwithstanding his failure to request it.

APPEAL by defendant from *Webb, Judge,* 5 March 1973 Session of Superior Court held in DURHAM County.

Defendant was indicted for the felonious distribution of heroin. He pled not guilty. The State introduced evidence that at 1:15 p.m. on 11 April 1972 defendant sold and delivered four tinfoil packets containing heroin to an undercover agent, who at the time was seated in his parked car on North Hyde Park about 15 feet from Elmo Street in Durham, N. C. Defendant denied he had ever sold any heroin or had seen the undercover agent at any time in April. He testified that on 11 April 1972 he was at his job as a truck driver for Boyce Supply Company, that on that day he drove a truck to make deliveries to Chapel Hill and to a street near Hope Valley at a point on the other side of town from North Hyde Park and Elmo Streets, and that during such time as he was not driving he was at the yard of his employer. The jury found defendant guilty of felonious distribution of heroin. From judgment imposing a prison sentence, defendant appealed.

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

Paul, Keenan & Rowan by James V. Rowan for defendant appellant.

PARKER, Judge.

The trial judge in charging the jury correctly called attention to the defendant's evidence that on the date the State's witness testified the offense was committed, the defendant had been engaged in the duties of his employment at places some distance away from the place where the State's evidence indi-

cated the unlawful sale of heroin had been made. However, no specific instruction was given the jury as to the legal principles applicable in their consideration of this alibi evidence. Since defendant's trial commenced prior to the date of filing the opinion in *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513, he was entitled to such instruction notwithstanding his failure to request it. On account of the court's failure to so charge, defendant is awarded a

New trial.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD McRAE

No. 7321SC575

(Filed 10 October 1973)

Criminal Law § 158— matter omitted from record on appeal — question not considered on appeal

The Court of Appeals does not reach the question of denial of defendant's right to counsel in District Court where the record on appeal does not disclose anything about the trial in District Court except the warrant, judgment, and notice of appeal.

APPEAL by defendant from *Collier, Judge,* 16 April 1973 Session of Superior Court held in FORSYTH County.

Defendant was charged with an assault upon Mae Frances McRae with a deadly weapon. He was tried in the District Court and found guilty. Upon his appeal he was tried de novo in the Superior Court and found guilty.

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

Jenkins, Lucas and Babb, by Judson D. DeRamus, Jr., for the defendant.

BROCK, Chief Judge.

At defendant's insistence counsel has presented defendant's contention that each of the following constitutes an error which entitles him to relief: (1) the fact that he is not guilty; (2)

there was no corroboration of the State's only witness; (3) jurors summoned to serve in civil cases were sworn and empaneled to sit in his criminal case; (4) one juror works at Western Electric, where the State's only witness works for the food service; (5) defendant was placed in double jeopardy because the solicitor brought up his past record on cross-examination of defendant; and (6) the sentence imposed after conviction in Superior Court was greater than that imposed in District Court. We have considered each of these contentions and find them to be without merit.

Defendant further seeks to argue that he was denied his right to counsel during the trial in District Court. We do not reach this question. The record on appeal does not disclose anything about the trial in District Court except the warrant, judgment, and notice of appeal. We decline to decide an issue submitted upon a theoretical or assumed set of facts. Counsel has been diligent in his efforts, but the record before us does not present the question he seeks to argue.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN FLOYD

No. 7310SC633

(Filed 10 October 1973)

Criminal Law § 161— appeal as exception to judgment

The appeal itself constitutes an exception to the judgment and presents the case for review for error appearing on the face of the record.

APPEAL by defendant from *Copeland, Judge,* 16 April 1973 Session of WAKE Superior Court.

The bill of indictment returned against defendant charges that he did, on or about 29 July 1972, unlawfully, willfully and feloniously distribute a controlled substance, heroin, to Arthur Manning at 709 Jamaica Drive, Raleigh, N. C. Defendant pleaded not guilty, a jury returned a verdict of guilty as charged, and from judgment imposing prison sentence of five years, to

begin at expiration of sentences being served, defendant appealed.

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

Robert P. Gruber for defendant appellant.

BRITT, Judge.

Although defendant's brief contains no assignments of error, the appeal itself constitutes an exception to the judgment and presents the case for review for error appearing on the face of the record. *State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785 (1972); *State v. Harris,* 14 N.C. App. 270, 188 S.E. 2d 2 (1972). "Ordinarily, in criminal cases the record proper consists of (1) the organization of the court, (2) the charge (information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment." *State v. Tinsley,* 279 N.C. 482, 483, 183 S.E. 2d 669, 670 (1971).

In the case at bar, a careful review of the record proper fails to disclose either error of law or of legal inference.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JEFFREY NEWELL HUNNICUTT

No. 7315SC584

(Filed 10 October 1973)

Criminal Law §§ 23, 150— no appeal from guilty plea

There is no right to appeal from a plea of guilty after 30 March 1973. G.S. 15-180.2.

APPEAL by defendant from *Blount, Judge,* 16 April 1973 Session of Superior Court held in ORANGE County.

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

Roy M. Cole for defendant appellant.

HEDRICK, Judge.

The record reveals defendant, Jeffrey N. Hunnicutt, on 17 April 1973, pleaded guilty to the charge of armed robbery. There is no right of appeal from a plea of guilty after 30 March 1973. G.S. 15-180.2. Therefore, we must treat the proceeding as a petition for writ of certiorari to review the proceedings in the superior court. Accordingly, we have reviewed the record which affirmatively discloses that the defendant, represented by court appointed counsel, freely, understandingly, and voluntarily pleaded guilty to a proper bill of indictment and that the prison sentence of not less than 20 years nor more than 25 years imposed in the judgment is within the limits prescribed by statute for the charge in the bill of indictment. Therefore, the petition for a writ of certiorari is denied and the appeal dismissed.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. JENKIE H. BUNN

No. 7314SC515

(Filed 10 October 1973)

APPEAL by defendant from *Copeland, Judge,* at the 11 December 1972 Session of Superior Court held in DURHAM County.

Defendant was charged in a bill of indictment with first degree murder, to which he pleaded not guilty. At the start of the trial, the Solicitor announced that the State would seek a verdict of murder in the second degree or any lesser included offense that the jury might find.

The State presented evidence which tended to show the following: In January 1971, Ruth Hood, 37, was confined to John Umstead Hospital in Butner, N. C. On 19 January 1971, Mrs. Hood went on a bus trip with a group from John Umstead Hospital to visit a museum in Raleigh. At the museum she walked off from the group, took a cab to a cafe in Raleigh, had a couple of beers at the cafe, waited until it turned dark outside, and then took a bus to Durham. In Durham, Mrs. Hood met deceased, James Edward Waddell, at a grocery store. She had not previously known deceased, but at this time

she accompanied him to several places where they drank alcoholic beverages. Mrs. Hood asked deceased if he knew anyone she could stay with until morning when she could wire home for transportation money. Deceased told Mrs. Hood she could stay with his sister.

Deceased then took Mrs. Hood to a house that she believed was deceased's sister's dwelling. There was no lock on the door of the house and deceased only had to push the door to gain entrance. The house was, in fact, an old vacant house without heat or lights. Deceased took Mrs. Hood to a room on the second floor which contained a bed and some other furniture. Mrs. Hood tried to leave this room several times saying she didn't feel right being there, but each time deceased stopped her. Deceased mentioned "something about me going to bed with him." Mrs. Hood took her coat off, although it was freezing that night in the unheated room, so that she wouldn't be cold when she got outside. She did not know whether or not deceased built a fire in the house.

While the two were seated on the bed in that room, the door burst open and defendant came into the room saying "Get up, get up, get out, get out." Defendant had a rifle with a 16-inch army surplus bayonet on its end. He pointed the rifle at deceased and Mrs. Hood. Defendant did not give deceased time to put his coat or shoes on, but marched the two immediately down the stairs. Defendant "prodded" Mrs. Hood with the bayonet as she walked down the stairs. He marched the two outside to a pickup truck. At this time, Mrs. Hood noticed that defendant's face was scratched. Defendant forced deceased and Mrs. Hood into the truck, prodding Mrs. Hood with the bayonet as she tried to climb into the truck and once sticking her in the hip with the bayonet. Defendant placed a chain over the laps of deceased and Mrs. Hood, who were seated in the bed of the truck, but did not fasten it.

Defendant then drove away the truck. When defendant stopped for a red light, deceased jumped over the side of the truck and started running. Defendant got out of the cab of the truck and shot deceased from a distance of about 50 feet. After he shot deceased, defendant got back in the truck and drove to the police station where he turned Mrs. Hood over to the police. Mrs. Hood did not see deceased hit defendant, did not see any scuffle between the two, and heard but did not see the shot when it was fired.

Defendant told investigating officer that he had made a citizen's arrest of deceased and Mrs. Hood for trespassing; that he had found the two in a building belonging to his father on the corner of Elizabeth and Ramseur Streets in Durham; that they had had trouble in the past with drunks and people sleeping in the building; that when deceased jumped out of his truck, defendant had called to him and chased him; that at this time deceased attacked him; that during the struggle, defendant pulled a .25 caliber pistol, shot deceased, and then continued to the police station. Defendant admitted to the police prodding Mrs. Hood with the bayonet. Defendant had been drinking.

Deceased died of a single gun shot wound (.22 to .35 caliber) in the chest shortly after the police got to him. Deceased had a long criminal record mostly including public drunkenness, housebreaking and larceny.

Defendant presented evidence which tended to show the following: that defendant's father owned the building in which deceased and Mrs. Hood were found, and that there had been trouble in the past with people breaking into the building; that on the night of 19 January 1971 defendant drove past this building and observed a "flash of fire" from within it; that defendant stopped his truck, got a .25 caliber automatic pistol and a bayonet from the cab of the truck, and investigated; that he found deceased and Mrs. Hood in a room on the second story of the building; that he made a citizen's arrest for trespassing; that he didn't let the two get their coats because it was dark and he couldn't see them clearly; that when defendant placed the two in the truck, he had to nudge Mrs. Hood with the bayonet to get her in the truck; that when deceased jumped out of the truck and ran, defendant tackled him and a struggle ensued; that during the scuffle, deceased called defendant a "g..d... s.o.b.," and said he was going to kill defendant; that deceased hit defendant hard in the face causing defendant to "see stars" and become "more or less blind"; that as defendant was blinded and staggering back, deceased tried to get defendant's pistol that was tucked in defendant's belt; that defendant pulled the pistol and shot deceased; that he shot deceased to save his own life; that defendant then took Mrs. Hood to the police station, turned her in for trespassing, and reported the shooting; that defendant had not been drinking that night; and that defendant had a good general character and reputation in the community.

A jury found defendant guilty of second degree murder. From the verdict and a judgment imposing an active prison sentence, defendant appealed.

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

Norman E. Williams, Thomas F. Loflin III, and Thomas B. Anderson, Jr., for defendant.

BROCK, Chief Judge.

We have carefully considered each of defendant's assignments of error and conclude that they present no prejudicial error. It seems clear to us from a reading of the evidence and the charge of the trial judge that defendant was granted a full and fair trial. In our opinion the errors complained of by defendant were not prejudicial and did not affect the results of the trial. A new trial will not be ordered for nonprejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. ALTON MORRIS

No. 7316SC607

(Filed 10 October 1973)

APPEAL by defendant from *Clark, Judge,* 26 March 1973 Session, ROBESON County Superior Court.

At the 6 October 1969 Session of Superior Court of Robeson County, the defendant tendered a plea of guilty to a charge of felonious larceny. The defendant had been charged with the crime of felonious larceny in a proper bill of indictment. The record shows that his plea of guilty to the charge was entered understandingly, freely and voluntarily without any undue influence, compulsion or duress and without any promise of leniency; and it was so adjudicated by the Presiding Judge, Edward B. Clark. A sentence of not less than three nor more than five years was imposed, and this sentence was suspended upon certain conditions; and the defendant was placed upon probation for a period of three years.

Thereafter, under date of 16 March 1971, the probation officer served a bill of particulars upon the defendant, together with a report setting out various violations of the conditions of probation and setting the matter for hearing before a judge of the superior court on 19 March 1971. On 19 March 1971, Judge Canaday, presiding over a session of the superior court, found that the defendant had wilfully violated the terms and conditions of the probation judgment, but, nevertheless, in his discretion, continued the probation under the former order of the court.

Under date of 24 April 1972, Judge Cowper entered an order again continuing the probation under former orders of the court.

On 16 September 1972, the probation officer again served a bill of particulars upon the defendant, together with a report setting out various violations of the conditions of probation and notifying the defendant that the matter would be presented to a judge of the superior court at the 18 September 1972 Session. On 21 September 1972, Judge McKinnon found that the defendant had wilfully violated the terms and conditions of the probation judgment and set out the details thereof. Nevertheless, Judge McKinnon, with the consent of the defendant in open court, did not place the probation sentence into effect, but, instead, continued the probation sentence and extended it from 5 October 1972, to 4 October 1974.

Thereafter, on 27 March 1973, the probation officer again served a bill of particulars upon the defendant, together with a report setting out various violations of the terms and conditions of the probation sentence and notifying the defendant that the matter would be presented to the judge of the superior court at the 28 March 1973 Session.

On 29 March 1973, Judge Clark found that the defendant had wilfully violated the terms and conditions of the probation judgment in various particulars and that the defendant was at that time serving an active sentence for a misdemeanor offense. Judge Clark revoked the probation and ordered the previous sentence placed into effect, namely, the sentence of not less than three nor more than five years, and ordered that it run concurrent with the sentence the defendant was serving at that time. From the revocation of the probation and the placing of the sentence into effect, the defendant appealed.

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

George D. Regan for defendant appellant.

CAMPBELL, Judge.

This appeal presents only the face of the record proper for review. We have reviewed the record and no error appears.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. NORMAN HICKS

No. 7310SC620

(Filed 10 October 1973)

APPEAL by defendant from *Hobgood, Judge,* 9 April 1973 Session of Superior Court held in WAKE County.

Defendant was charged in a bill of indictment, proper in form, with assault with a deadly weapon with intent to kill inflicting serious injury upon one David Hamilton. He entered a plea of not guilty and was convicted by a jury.

The State's evidence tended to show that on 10 August 1972 the defendant, an inmate in Central Prison, became involved in an argument with a fellow prisoner, David Hamilton. During the course of the argument defendant produced a dagger-like weapon referred to as a "shank" and stabbed Hamilton several times in the back, lungs, and elsewhere about the body, causing serious injuries.

The defendant presented several witnesses who testified in effect that Hamilton had assaulted him and that he was acting in self-defense.

From judgment imposing a prison sentence of 10 years, defendant appeals.

Attorney General Morgan, by Associate Attorney Emerson D. Wall, for the State.

Carl W. Hibbert for defendant appellant.

BALEY, Judge.

After a careful examination of the record, we find no error in the proceedings in the court below. The trial court properly instructed the jury upon the elements of the offense charged in the bill of indictment and any lessor included offenses and upon the elements of self-defense upon which the defendant relied. The evidence for both the State and the defendant was fully presented. The verdict of guilty was clearly supported by the State's evidence, and the sentence imposed was within statutory limits.

Defendant has been convicted by a jury in a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. ARTHUR GOFF

No. 734SC732

(Filed 10 October 1973)

ON *certiorari* to review judgment of *Cohoon, Judge,* entered at the 12 February 1973 Session of ONSLOW Superior Court.

The indictment against defendant charges that on 3 November 1972 he did unlawfully, willfully and feloniously assault Billy Mobley with a deadly weapon, to-wit: a 12-gauge shotgun, with the felonious intent to kill the said Billy Mobley, inflicting serious injuries not resulting in death. Defendant pleaded not guilty, a jury returned a verdict of guilty as charged, and the court entered judgment imposing prison sentence of not less than five nor more than eight years. Defendant gave notice of appeal but since he was unable to perfect his appeal within the time allowed by the rules, this court granted his petition for writ of certiorari as substitute for appeal.

Attorney General Robert Morgan by Henry E. Poole, Assistant Attorney General, for the State.

James R. Strickland for defendant appellant.

BRITT, Judge.

We have carefully reviewed the record and conclude that the trial court was properly organized, the bill of indictment against defendant is proper in form, the arraignment, plea and verdict meet the requirements of law, the evidence fully justifies the verdict, the verdict supports the judgment, and the sentence imposed by the judgment is well within the limits prescribed by statute. *State v. Tinsley*, 279 N.C. 482, 183 S.E. 2d 669 (1971); G.S. 14-32(a).

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. FOREST McKINLEY SATTERFIELD

No. 7315SC580

(Filed 10 October 1973)

APPEAL by defendant from *Copeland, Judge*, 26 March 1973 Session of Superior Court held in ALAMANCE County.

The defendant was charged in a two count bill of indictment, proper in form, with breaking or entering and larceny. To the charges contained in the bill of indictment, the defendant entered a plea of not guilty. From a verdict finding the defendant guilty of felonious breaking or entering and felonious larceny and the imposition of a prison sentence of not less than seven nor more than ten years, defendant appealed.

Attorney General Robert Morgan and Associate Attorney Emerson D. Wall for the State.

Welker Shue for defendant appellant.

HEDRICK, Judge.

We have carefully reviewed the record and briefs of counsel and find that defendant was afforded a fair trial which was free from any prejudicial error. The bill of indictment, verdict, and judgment were in all respects regular and proper.

No error.

Judges BRITT and MORRIS concur.

ROLAND W. ROBINSON, AND WIFE, KATHERINE H. ROBINSON; C. A. VAN TASSELL, AND WIFE, ARBUTUS B. VAN TASSELL; CLARENCE DAVIS CARPENTER, AND WIFE, MELBA CARPENTER; JAMES E. MOODY, AND WIFE, MARGARET G. MOODY; LELAND J. ROBINSON, AND WIFE, RUTH ROBINSON; LONNIE J. MITCHELL, AND WIFE, LELA R. MITCHELL; HUGH W. LINK, AND WIFE, BERNICE LINK; POLIE Q. CLONINGER, AND WIFE, EUNICE Q. CLONINGER; LESTER E. ROBINSON, AND WIFE, MABEL H. ROBINSON; CARL D. (BILL) WARD, AND WIFE, VIOLET T. WARD; WILLIAM BLAIR (BILL) QUEEN, AND WIFE, HILDA MAUNEY QUEEN; L. H. STARR, AND WIFE, SARA STARR; RAYMOND A. WALLACE, AND WIFE, EVELYN H. WALLACE; MARVIN L. ALDRIDGE, AND WIFE, SARA ALDRIDGE; GEORGE A. MARTIN, AND WIFE, GENEVA P. MARTIN; H. C. FOUTS, AND WIFE, RUTH G. FOUTS; JOHN T. DIEHL, AND WIFE, MINA C. DIEHL; T. E. ROBINSON, AND WIFE, BETTY G. ROBINSON; AND, JAMES MASON STRICKLAND, AND WIFE, GERTRUDE STRICKLAND

— v. —

PACEMAKER INVESTMENT COMPANY; BAUGH DEVELOPMENT COMPANY; HARVEY E. ROBINSON, AND WIFE, CAROLYN E. ROBINSON; GRADY GENE ROBINSON, AND WIFE, CAROLYN ROBINSON; JONAS M. ROBINSON, JR., AND WIFE, KATHLEEN ROBINSON; CLYDE ROBINSON, AND WIFE, GLORIA STROUPE ROBINSON; RAYMOND P. HOWELL, AND WIFE, IOLA G. HOWELL; W. N. PUETT, TRUSTEE FOR FIRST ATLANTIC CORPORATION, SUCCESSOR TO GOODYEAR MORTGAGE CORPORATION AND FIRST ATLANTIC CORPORATION; O. F. STAFFORD, TRUSTEE FOR PILOT LIFE INSURANCE COMPANY AND PILOT LIFE INSURANCE COMPANY; JULIUS T. SANDERS, TRUSTEE FOR FIRST FEDERAL SAVINGS & LOAN ASSOCIATION AND FIRST FEDERAL SAVINGS & LOAN ASSOCIATION; PHILIP V. HARRELL, TRUSTEE FOR FIRST FEDERAL SAVINGS & LOAN ASSOCIATION; PHILIP V. HARRELL, TRUSTEE FOR FIRST CITIZENS BANK & TRUST COMPANY AND FIRST CITIZENS BANK & TRUST COMPANY; T. LAMAR ROBINSON, TRUSTEE FOR CITIZENS NATIONAL BANK IN GASTONIA, NORTH CAROLINA AND CITIZENS NATIONAL BANK IN GASTONIA, NORTH CAROLINA; AND O. F. MASON, JR., TRUSTEE FOR FIRST FEDERAL SAVINGS & LOAN ASSOCIATION

No. 7327SC653

(Filed 24 October 1973)

1. Deeds § 20— resubdivision of subdivision — restrictive covenants in relation to new lot lines — no violation

Where defendant resubdivided lots of a subdivision in which plaintiffs owned property, defendant's construction of homes on those new

lots did not constitute a violation of restrictive covenants thereon, though the homes were actually located upon and extended across what were formerly the interior lot lines of the subdivision, where the homes did conform to the minimum setback requirement of the restrictive covenants in relation to the new front and side lot lines created by defendant's resubdivision of the property.

2. **Deeds § 20— sale of subdivision lots — reference to map — no covenant as to remainder of subdivision**

Transfer of lots by reference to a recorded map of a subdivision does not of itself imply any covenant that the owner of the subdivision will not sell the remainder of the subdivision except in parcels delineated on the map.

3. **Deeds § 20— restrictive covenants on subdivision lots — effect on resubdivision**

Restrictive covenants on subdivision lots which required that buildings be located no closer than given distances from the front and interior lot lines did not prohibit the resubdivision of the property or prevent the relocation of interior side lines of lots.

4. **Injunctions § 2— subdivision property — legal activity of defendant — injunction improper remedy**

Trial court properly refused to enjoin defendant from petitioning for withdrawal of unused streets in the subdivision in question or using its own property to widen streets, since those activities did not concern the building restrictions sought to be enforced by plaintiffs and were in no way illegal.

APPEAL by plaintiffs from *McLean, Judge*, 14 May 1973 Session of Superior Court held in GASTON County.

Plaintiffs as property owners in Robinson Heights Subdivision bring this action to require defendants to comply with the restrictive covenants in effect upon property within the Robinson Heights Subdivision. Plaintiffs seek to enjoin the defendants from completing construction of residences which are less than 15 feet from the interior lot lines of the original subdivision and from any action which might constitute an attempt to violate the restrictive covenants. Their compliant requests mandatory injunction and damages.

An ex parte temporary restraining order was issued, and the cause came on for trial before Judge W. K. McLean, without a jury.

At the trial the evidence submitted showed, in substance, that Jonas M. Robinson and wife, Lottie H. Robinson, created the Robinson Heights Subdivision in 1955. A plat of the subdivision was filed in the Gaston County Registry. All of the lots in the

subdivision were subjected to restrictive covenants, running with the land, which were also recorded. Among the provisions of these restrictive covenants were the following:

"1. No lot shall be used except for residential purposes. . . .

* * *

"3. No building shall be located on any lot nearer to the front lot line than 40 feet. No dwelling shall be located nearer than 15 feet to the interior lot line, except that no side yard shall be required for a garage or other permitted accessory building located more than 80 feet or more from the minimum building setback line.

"4. No dwelling shall be erected or placed on any lot having a width of less than 75 feet at the minimum building setback line, nor shall any dwelling be erected or placed on any lot having an area of less than 11,000 square feet.

* * *

"10. If the parties hereto, or any of them, or their heirs or assigns, shall violate or attempt to violate any of the covenants herein it shall be lawful for any other person or persons owning any real property situated in said development or subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenant. . . ."

In 1971 Baugh Development Company (hereinafter referred to as Baugh) purchased from the Robinson estate all the lots which had not previously been sold by the Robinsons. These lots comprised approximately 82% of the subdivision and consisted of open fields, woods, a lake, and some marshland. Among the lots purchased by Baugh were Lots 3, 4, 5 and half of Lot 6 of Block E which had a total front footage on Hoffman Street of 503 feet. Baugh has resubdivided these 3½ lots, relocating the lot boundaries to form four new lots which have been designated 3A, 4A, 5A and 6A in a plat of resubdivision which has been recorded in the Gaston County Registry. Each of these new lots has an area of more than 11,000 square feet, and each is at least 100 feet wide at the minimum building setback line.

Baugh has constructed foundations for new houses on Lots 4A, 5A, and 6A. These houses are more than 40 feet from the front lines of the lots, and they are more than 15 feet from

the side lines of Lots 4A, 5A and 6A—the new lots; but the houses sit astride the side lines of Lots 3, 4 and 5—the old lots.

By agreement of the parties the court went to Robinson Heights for a view of the premises, and, also by agreement of the parties, admitted into evidence a map designated as Court's Exhibit 1.

The trial court found facts and concluded as a matter of law:

"1. That the resubdivided lots in Robinson Heights Subdivision known as 3A, 4A, 5A and 6A of Block E conform to the restrictive covenants recorded against the subdivision in that all of the lots have a width of at least 75 feet at the minimum building setback line and all of the lots have an area of more than 11,000 square feet.

"2. That the dwellings being constructed on lots 4A, 5A and 6A conform to the restrictive covenants on the subdivision in that no building is located on any lot nearer to the front lot line than 40 feet and no dwelling is located nearer than 15 feet to the interior lot lines.

"3. That the dwellings being constructed on lots 4A, 5A and 6A that cross the old side lot lines of lots 3, 4, and 5 of Block E as contained on Plat Book 11 at page 179 do not constitute a violation of the restrictive covenants as long as the dwellings conform to the minimum setback requirement in relation to the new front and side lot lines created by the resubdivision of Baugh Development Company.

"4. That there is no other evidence that the defendant, Baugh Development Company, is violating or attempting to violate the restrictive covenants recorded in Book 650 at page 206 and as amended in Book 708 at page 595 in the Gaston County Registry."

Judgment was entered for the defendants, and plaintiffs appealed.

Horace M. DuBose III, for plaintiff appellants

Charles D. Gray III, for defendant appellees Baugh Development Company and Pacemaker Investment Corporation.

BALEY, Judge.

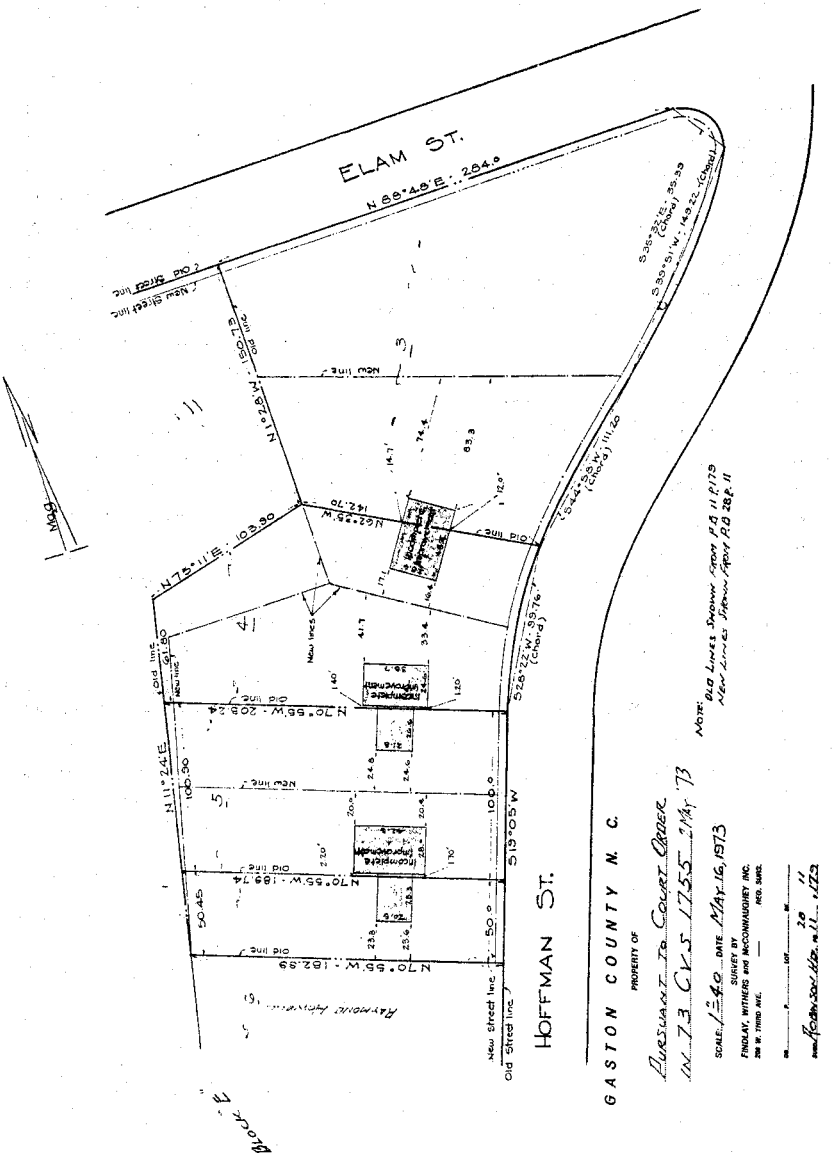
Plaintiffs make two basic contentions: (1) that the restrictive covenants applying to Robinson Heights Subdivision forbid the construction of any dwelling within 15 feet of the interior lot lines of Lots 3, 4 and 5 of Block E as shown on the original plat of the subdivision; and (2) that defendants are "attempting to violate" the restrictive covenants by petitioning authorities to permit withdrawal of unused streets in the subdivision and by proposing to widen other streets.

[1] Defendant Baugh has resubdivided Lots 3, 4 and 5 and one-half of Lot 6 to make new lots designated as 3A, 4A, 5A and 6A and is building houses which admittedly are actually located upon and extend across what were formerly the interior lot lines of Lots 3, 4 and 5; however, they are not within 15 feet of the interior lot lines of the new lots 3A, 4A, 5A and 6A and comply in all respects with the other requirements of the restrictive covenants. See Map, Court's Exhibit 1. The trial court held that constructing houses upon the old side lot lines of Lots 3, 4, and 5 did not "constitute a violation of the restrictive covenants as long as the dwellings conform to the minimum setback requirement in relation to the new front and side lot lines created by the resubdivision of Baugh Development Company," and we agree.

[2] Transfer of lots by reference to a recorded map of a subdivision does not of itself imply any covenant that the owner of the subdivision will not sell the remainder of the subdivision except in parcels delineated on the map. *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197. If plaintiffs are to prevail in this action, they must show that defendants have violated the restrictive covenants imposed on the subdivision by Jonas and Lottie Robinson in 1955.

The key to interpreting restrictive covenants is the intention of the parties. Since they limit the free use of property, restrictive covenants are construed strictly, *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619; *Craven County v. Trust Co.,* 237 N.C. 502, 75 S.E. 2d 620; but not so strictly as to defeat the purpose of the restriction. *Long v. Branham,* 271 N.C. 264, 156 S.E. 2d 235; *Franzle v. Waters,* 18 N.C. App. 371, 197 S.E. 2d 15. "[T]he fundamental rule is that the intention of the parties governs . . . ." *Long v. Branham, supra* at 268, 156 S.E. 2d at 238. In determining the intention of the parties it is impor-

Robinson v. Investment Co.



tant to consider the language of the covenants, the nature of the subdivision, the purpose of the restrictions, and surrounding circumstances at the time such restrictive covenants were created.

[3] In our view the restrictive covenants in this case by their language and purpose do not prohibit the resubdivision of the property or prevent the relocation of interior side lines of lots. In fact, they may well contemplate such resubdivision. The subdivision was created for use for residential purposes limited to only one dwelling per lot with minimum cost and size for such dwellings. The lots were to have an area of not less than 11,000 square feet with a width of not less than 75 feet at the minimum building setback line. No building could be located on any lot nearer to the front line than 40 feet nor to the interior lot line than 15 feet. If the parties did not contemplate resubdivision, the provision requiring a minimum area would be meaningless as the lots would be unchangeable from the beginning. Since the area of the lots would be flexible, the limitations upon setback lines and the location of houses upon the lots give stronger assurance that the residential purpose for which the restrictions were created would be maintained even though the area of the original lots might be enlarged or reduced.

In *Callaham v. Arenson, supra,* plaintiff owned four lots in a subdivision and sought to resubdivide them. The subdivision was subject to restrictive covenants similar to those in the present case. The court permitted such resubdivision since the new lots conformed to the requirements of the original restrictive covenants. An examination of the map in *Callaham* shows that building upon side lot lines of the old lots would be required for any development. We feel that *Callaham* is controlling here.

Plaintiffs rely strongly upon *Ingle v. Stubbins,* 240 N.C. 382, 82 S.E. 2d 388, as limiting or overruling *Callaham.* In *Ingle* the lots concerned were corner lots and the builders sought to treat the front line of the lot as a side line and avoid the setback restriction prohibiting building within 50 feet of the front line. This would defeat the orderly arrangement of the dwellings upon streets in the subdivision which was the purpose of the front line setback restriction and permit an unplanned, irregular, and helter-skelter appearance. Such a damaging change could not have been intended by the parties, and the court construed the covenants to prohibit this type of resubdivision. *Ingle* is not in conflict with *Callaham* as both reflect the intent of the

parties under the factual circumstances of each case and follow logically from the principles used by the North Carolina courts in interpreting restrictive covenants.

[4] With respect to the contention of plaintiffs that Baugh is "attempting to violate" the restrictive covenants by petitioning for withdrawal of unused streets in the subdivision or using their own property to widen streets, these activities are in no way illegal; they do not concern building restrictions. The courts cannot enjoin defendants from engaging in activities which are entirely legal merely because plaintiffs believe that they intend to commit illegal acts in the future. *See, e.g., Membership Corp. v. Light Co.*, 256 N.C. 56, 59-60, 122 S.E. 2d 761, 763.

The trial court found that there was no evidence that Baugh was violating or attempting to violate the restrictive covenants for Robinson Heights Subdivision, and this finding is supported by the record. Its action in refusing to grant the injunction sought by plaintiffs is affirmed.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND CAROLINA COACH COMPANY v. SOUTHERN COACH COMPANY

No. 7310UC721

(Filed 24 October 1973)

1. **Carriers § 2; Utilities Commission § 3— common carrier route — relocation — burden of proof — Utilities Commission rule**

   Utilities Commission rule requiring an applicant seeking to relocate a common carrier franchise route over a new highway to show only "that the proposed route, as it now exists and with future improvements, will provide a much safer, quicker and improved service" is a sound and proper rule.

2. **Carriers § 2; Utilities Commission § 3— relocation of bus route — sufficiency of evidence**

   The evidence supported a finding by the Utilities Commission that an applicant's proposed relocation of a bus route between Raleigh and Durham will provide a fast, comfortable and safer ride for pas-

sengers traveling between the two cities to the benefit of both the traveling public and the carrier, and the finding supported the Commission's decision approving the application for relocation of the bus route.

3. **Carriers § 2; Utilities Commission § 3— common carrier — new routes — burden of proof**

A common carrier seeking franchise authority to establish new routes has the burden of proof to satisfy the Utilities Commission that public convenience and necessity require its proposed service in addition to existing authorized transportation service within the meaning of G.S. 62-262(e)(1).

4. **Carriers § 2; Utilities Commission § 3— common carrier — new route — need for commuter service**

Evidence of a need for local bus service to carry passengers to and from work does not establish the need for a new common carrier franchise route since commuter service is excluded from the coverage of the motor carriers statute and is not regulated by the Utilities Commission. G.S. 62-270(7).

5. **Carriers § 2; Utilities Commission § 3— establishment of new bus routes**

The Utilities Commission is not required to establish new bus routes for the benefit of three persons a day.

6. **Carriers § 2; Utilities Commission § 3— common carrier — new bus route — harm to existing carrier**

In this proceeding upon the application of a common carrier of bus passengers for authority to establish a route between two cities, there was substantial evidence to support a finding by the Utilities Commission that in order to provide the present service between the two cities, an existing carrier must continue to carry its present passengers and that any substantial decrease in its passenger traffic could result in the curtailment of the present service contrary to the public interest, and such finding supported the Commission's determination that the applicant failed to carry its burden of proving that public convenience and necessity require that it be granted its proposed route.

7. **Carriers § 2; Utilities Commission § 3— interchange agreement — order to two carriers — absence of notice and hearing**

The Utilities Commission had no authority to enter an order directing two bus companies to "renegotiate an equitable equipment interchange agreement to provide passengers through service without a change of coaches between Durham and Wilmington" where the Commission issued its directive without any notice or hearing. G.S. 62-262(j).

APPEAL by Southern Coach Company from final order of the North Carolina Utilities Commission dated 29 June 1973.

This appeal involves two applications before the North Carolina Utilities Commission, one filed by Carolina Coach Com-

pany (hereafter referred to as "Carolina") and the other by Southern Coach Company (hereafter referred to as "Southern") for common carrier franchise authority to transport passengers by bus. Both applications relate to franchise routes between Raleigh and Durham and through the Research Triangle area, and each applicant is protesting the application of the other carrier.

Carolina has been providing bus service between the cities of Raleigh and Durham since 1925. As new highways have been built and existing highways relocated or improved, it has obtained additional franchise routes between the two cities and intermediate points including the Research Triangle area. Carolina is now authorized to operate over U. S. Highway 70 between the two cities, and also over a route which begins in Raleigh and proceeds over relocated N. C. Highway 54 to I-40 and thence over I-40 to its junction with N. C. Secondary Road 1959 near the community of Nelson, and then traverses the Research Triangle area along Cornwallis Road (Durham County Road 1121) to Durham, serving all intermediate points.

Southern has no franchise authority to operate directly between Raleigh and Durham. It does operate from Durham to Holly Springs over N. C. Highway 55, and from Raleigh to Holly Springs over Secondary Roads 1009 and 1152. It has an authorized route from Durham to Wilmington, by way of Holly Springs and Fuquay-Varina, using N. C. Highway 55 and U. S. Highway 421, but it does not operate over this route. It does provide bus service from Wilmington to Raleigh, following its authorized route from Wilmington to Fuquay-Varina, and continuing from Fuquay-Varina into Raleigh over a route leased from Carolina.

In early 1973 the Durham North-South Expressway was completed. It is a modern dual-lane highway beginning in downtown Durham and connecting with Interstate 40 near Nelson. The present application of Carolina is for authority to operate its buses on the Durham North-South Expressway.

The application of Southern is for two new routes. One route begins at Lowes Grove on Southern's existing route from Durham to Holly Springs. It runs eastward on N. C. Highway 54 and connects with the Durham Expressway in the Research Triangle Park. The other route sought by Southern runs from Raleigh to Durham. It begins in Raleigh, proceeds along relocated N. C. Highway 54 and I-40 to the Durham Expressway,

and then along the Durham Expressway into the city of Durham. The first half of this route is the same as Carolina's existing route from Raleigh to Nelson, and the second half is the same route that Carolina is requesting in its present application. Thus, if the Carolina and Southern applications were both granted, Carolina and Southern would have identical routes from Raleigh to Durham.

Until 14 April 1972, Carolina, Southern, and Virginia Stage Lines, Inc., were parties to an equipment interchange agreement under which they jointly operated a route from Wilmington to Danville, Virginia. While the agreement was in effect, passengers could travel from Wilmington to Durham or Danville without changing buses. Virginia Stage Lines terminated this agreement on 14 April 1972, and it has never been renegotiated by Carolina and Southern.

The Utilities Commission consolidated the two applications and held public hearings on 20 October 1972 and 4 January 1973. On 29 June 1973 the Commission issued an order granting Carolina's application, denying Southern's application, and directing the two companies to "renegotiate an equitable equipment interchange agreement to provide passengers through service without a change of coaches between Durham and Wilmington." Southern appealed to this Court.

Allen, Steed & Pullen, by Arch T. Allen and Thomas W. Steed, Jr., for plaintiff appellee Carolina Coach Company.

Boyce, Mitchell, Burns & Smith, by F. Kent Burns; and Clarence H. Noah, for defendant appellant.

BALEY, Judge.

Bus companies and other motor carriers in North Carolina are regulated by G.S. 62-259 to -279. G.S. 62-262(a) provides that no company shall provide bus service over any route until the Utilities Commission has granted it a certificate authorizing it to use that route. Under G.S. 62-262(e) (1), before a certificate may be issued, the applicant must satisfy the Commission that "public convenience and necessity require the proposed service in addition to existing authorized transportation service . . . ." *See generally Utilities Comm. v. Coach Co.* and *Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 132 S.E. 2d 249.

Under G.S. 62-90 an aggrieved party may appeal a Utilities Commission decision to this Court. G.S. 62-94 provides that on

such an appeal, the Commission's decision is considered "prima facie just and reasonable," and it should be affirmed if supported by substantial evidence. *Utilities Commission v. Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461. Substantial evidence has been defined as "more than a scintilla or a permissible inference." *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 690, 28 S.E. 2d 201, 203. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). The Commission's decision to grant Carolina's application and reject that of Southern must be judged by this substantial evidence standard.

First, the Carolina application. Carolina did not seek to establish an entirely new route, but only to relocate an existing route. Carolina now operates eighteen round trips daily between Raleigh and Durham. Twelve of these stop at points between the two cities, while six are nonstop. If its application is granted, Carolina intends to reroute its six nonstop trips over Interstate 40 and the Durham North-South Expressway.

[1] The Utilities Commission has developed a special rule for applications that seek only to relocate an existing route over a new highway. In these cases the Commission does not require such an extensive demonstration of public convenience and necessity as in other cases. Instead, the applicant is only required to show "that the proposed route, as it now exists and with future improvements, will provide a much safer, quicker and improved service . . ." Carolina Coach Co., No. B-15, Sub 167, Recommended Order at 4 (Utilities Comm'n Oct. 19, 1971). This is a sound and proper rule. By encouraging bus companies to make use of new and improved highways soon after they are opened, it serves "to promote, in the interest of the public, the inherent advantages of highway transportation" — which is one of the stated purposes of the motor carriers statute. G.S. 62-259.

[2] In this case Aaron Cruise, a vice president of Carolina, testified that U. S. Highway 70, which is the present route for nonstop trips between Raleigh and Durham, traverses an area of increasing development, such as Crabtree Valley Shopping

Center, with reduced speed limits, traffic lights, and congestion, and that the proposed route would be faster, safer, less congested, and more comfortable. He stated further that the change to an improved highway would not result in any reduction in service to the traveling public at the present intermediate points. The Commission found: "[I]t is obvious that the proposed route will provide a fast, comfortable and safer ride for passengers traveling between the cities of Raleigh and Durham to the benefit of both the traveling public and to Carolina Coach Company." Beyond question, the uncontradicted testimony of Cruise is substantial evidence to support the Commission's finding and its decision to approve the Carolina application.

[3] The Southern application is for new routes, not the relocation of existing routes, and is subject to a more stringent standard. Southern has the burden of proof to satisfy the Commission that public convenience and necessity require its proposed service in addition to existing authorized transportation service within the meaning of G.S. 62-262(e) (1).

In *Utilities Commission v. Trucking Co., supra* at 690, 28 S.E. 2d at 203, the court defined public convenience and necessity as follows:

> "It is to be remembered that what constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest."

This definition involves two primary considerations: (1) whether there is a substantial public need for the service which could not be met by existing carriers and (2) whether the proposed service would endanger or impair the operations of existing carriers contrary to the public interest.

Southern contends that there is a public need for its proposed service: (1) to provide local service in the Research Triangle; (2) to establish continuous service between Wilmington and Durham without change of bus in Raleigh; and (3) to reduce its expenses in operating between Raleigh and Durham.

[4] Southern presented several witnesses who testified that there was a need for local bus service in the Research Triangle

area. These witnesses were interested in commuter buses, to carry Triangle employees to work in the morning and home in the afternoon. Commuter service is excluded from the coverage of the motor carriers statute and is not regulated by the Utilities Commission. G.S. 62-260(7). Either Carolina or Southern is free to establish commuter bus service in the Research Triangle at any time. The record indicates that since the 20 October 1972 hearing, Carolina has taken preliminary steps toward providing this service.

[5] While several witnesses testified they would like continuous service reestablished between Wilmington and Durham without change of bus, the witness Aaron Cruise testified that he had studied Carolina and Southern ticket sales records and found that the average number of passengers traveling south from Durham to Wilmington (or to points on the Raleigh-Wilmington route) was 1.6 per day while the average number traveling north was 1.7 per day. The Utilities Commission is not required to establish new bus routes for the benefit of three persons a day. Southern already has a route from Wilmington to Durham which it could use to provide continuous service between the two cities now. However, Southern has found that it cannot operate this route profitably, and it has used the Wilmington-Raleigh route instead.

[6] As to the reduction in operating expenses, the present franchise authority of Southern authorizes service between Durham and Raleigh only by way of Holly Springs. This is not a direct line between the two cities and does not offer any realistic competition in bus service between Raleigh and Durham. The new routes do not constitute an improvement for the purpose of effecting operating economies in present service, but constitute new service in direct competition with Carolina. The testimony of witness Cruise indicates that the volume of traffic has been steadily decreasing in recent years causing a reduction in average passenger load. Over 57% of the available seats on buses operated by Carolina between Raleigh and Durham are presently unoccupied. The Commission found: "In order to continue to provide the present service between Raleigh and Durham, Carolina Coach Company must continue to carry its present Raleigh-Durham passengers and any substantial decrease in passenger traffic could result in the curtailment of the present service contrary to public interest." There is substantial evidence to support this finding.

The Utilities Commission has determined that Southern has failed to carry the burden of proving that public convenience and necessity require that it be granted its proposed routes. The decision of the Commission denying the Southern application is clearly supported by substantial evidence.

In addition to granting Carolina's application and denying Southern's application, the Utilities Commission entered the following order:

> "2. That Southern Coach Company and Carolina Coach Company shall renegotiate an equitable equipment interchange agreement to provide passengers through service without a change of coaches between Durham and Wilmington, North Carolina over the franchised routes of both carriers and submit the proposed agreement to the Commission for its consideration within thirty (30) days from the date of this order."

[7] The Commission has no power to issue an order in this manner. G.S. 62-262(j) provides that the Commission may modify a carrier's certificate "by requiring the holder to furnish more or less transportation service . . . or by imposing other reasonable terms, conditions, restrictions and limitations as public convenience and necessity . . . may require; provided, that the procedure in all such cases as to notice and hearing shall be the same as provided in this section for the issuance of a certificate or permit." Here the Commission issued its directive without any notice or hearing whatever. It simply instructed the parties peremptorily that they must enter into an agreement. Such a procedure is entirely contrary to the statutory requirements, and this portion of the Commission's order is invalid.

The Commission's order is reversed insofar as it requires Carolina and Southern to resume joint operation of the Durham-Wilmington route. In all other respects, it is affirmed.

Affirmed.

Judges CAMPBELL and MORRIS concur.

ELDER NOAH McLAMB, ROY MORRIS AND LEVERNE STEPHENSON, TRUSTEES, ELDER B. H. INGLE, PRESIDENT, MARTHA CURRIN, CLERK, OFFICERS OF FIRST MISSIONARY CONFERENCE OF AMERICA, INC.; AND ELDER NOAH McLAMB, LEVERNE STEPHENSON, AND CHRISTINE McLAMB, TRUSTEES, ELDER NOAH McLAMB AND LEVERNE STEPHENSON, DEACONS, MRS. CALLIE PARKER, TREASURER, AND SHELBY JEAN STEPHENSON, CHURCH CLERK, OFFICERS OF THE LEE'S UNION MISSIONARY CHURCH AND LEVERNE STEPHENSON AND LEVERNE STEPHENSON GROUP AND OTHERS UNITED IN INTEREST CONSTITUTING THE TRUE CONGREGATION OF THE LEE'S UNION MISSIONARY CHURCH

—v.—

ASHLEY RAY McLAMB, W. EDGAR McLAMB AND J. E. WHEELER, PURPORTED TRUSTEES, W. EDGAR McLAMB AND THURMAN LEE, PURPORTED DEACONS, AND JOHN A. WHEELER, PURPORTED CHURCH CLERK, PURPORTED OFFICERS OF THE LEE'S UNION (MISSIONARY) CHURCH, AND JOHN A. WHEELER AND JOHN A. WHEELER FACTION PURPORTING TO BE THE CONGREGATION OF THE LEE'S UNION (MISSIONARY) CHURCH

No. 7311SC679

(Filed 24 October 1973)

Cancellation and Rescission of Instruments § 10; Fraud § 12— setting aside deed — fraud — constructive fraud — fiduciary relationship of church pastor

In this action to set aside a deed conveying land to a church conference and to a local church, the evidence was sufficient for submission to the jury of an issue of direct fraud on the part of the president of the conference, who was also the pastor of the church, in inducing the grantors to sign the deed by falsely representing that he had had the deed drawn so that only the local church would own the property it conveyed; furthermore, there was sufficient evidence for submission of an issue of constructive fraud since the pastor occupied a fiduciary relationship toward the grantors, members of the church, and there is a presumption of fraud or undue influence on the part of the pastor.

APPEAL by plaintiffs from *Canaday, Judge,* at the 30 April 1973 Civil Session of JOHNSTON Superior Court.

The complaint in this action, filed 2 August 1968, alleges in pertinent part the following:

Plaintiff Ingle (Ingle) is the president, plaintiff Currin is the clerk, and plaintiffs McLamb, Morris, and Stephenson are the trustees of plaintiff First Missionary Conference of America, Inc. (conference). Certain named plaintiffs are officers and

with others constitute the true congregation of Lee's Union Missionary Church (church). Certain of the defendants, including defendant Thurman Lee, purport to be trustees, deacons and other officials of the church. The conference consists of two churches, the Lee's Union Church in Johnston County and the First Missionary Church of Raleigh.

On 17 March 1953, defendant Thurman Lee (Mr. Lee) and his wife, Ada Lee (Mrs. Lee), executed a deed to Thurman Lee, Jeff Parker and David Wheeler, as trustees for the conference, and Thurman Lee, Atlas Blackman and Edgar McLamb, as trustees for the church, conveying a one-half acre tract of land in Johnston County, with proviso that said trustees would hold said land in trust for the use of the conference and church. On or about 12 March 1968, defendants notified the conference that the church no longer would be affliated with the conference but would be an independent church. Defendants have notified officers of the conference that the conference could not use the church property and defendants would not allow the property to be used by any group which was not "in unity" with defendants. Plaintiffs asked that certain of them be declared officers and the true congregation of the church, that plaintiffs be awarded full ownership and possession of the church property and that defendants be restrained and enjoined from interfering with plaintiffs in the use and enjoyment of said property.

In their answer defendants denied the material allegations of the complaint. They further alleged that at the time of the execution of the deed for the church property, Ingle was the pastor of the church (in addition to being president of the conference) and enjoyed the respect and confidence of the members of the church, particularly Mr. and Mrs. Lee; that Mr. and Mrs. Lee agreed to give the land in question to the church upon assurance by Ingle that the deed would be prepared so as to vest title in the church; that Ingle had the deed prepared and by fraud and misrepresentation induced Mr. and Mrs. Lee to execute a deed which purports to convey the land to the conference and the church.

Pursuant to pretrial conferences, the parties stipulated: The issue of fraud would be the determinative issue in the trial of the case. If the issue of fraud were answered in favor of plaintiffs, plaintiffs would receive and be entitled to one-half of the real estate and one-half of the money on deposit in a named bank. If the issue of fraud were answered in favor of

defendants, they would be entitled to all interest in the real estate and personal property.

An issue was submitted to and answered by the jury as follows:

"1. Was the deed dated March 17, 1953 from Thurman Lee and wife, Ada Lee, to Jeff Parker, Thurman Lee and David Wheeler, trustees for the Missionary Advent Conference, Inc., and Thurman Lee, Atlas Blackmon and Edgar McLamb, Trustees for the Lee's Union Missionary Advent Church, procured by fraud and misrepresentation as it relates to the trustees of the Missionary Conference of America, Inc.?

"Answer: Yes."

From judgment entered on the verdict in favor of defendants, plaintiffs appealed.

Vaughan S. Winborne for plaintiff appellants.

Corbett & Corbett by Albert A. Corbett, Jr., and Grady & Shaw by C. G. Grady for defendant appellees.

BRITT, Judge.

Plaintiffs assign as error the denial of their motions for directed verdict, contending that the evidence of fraud was not sufficient to be submitted to the jury.

A study of North Carolina cases fails to disclose that our courts have adopted a precise definition of fraud. In *Vail v. Vail,* 233 N.C. 109, 113, 63 S.E. 2d 202, 205 (1951), we find:

"Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated 'that fraud is better left undefined,' lest, as *Lord Hardwicke* put it, 'the craft of men should find a way of committing fraud which might escape a rule or definition.' *Furst v. Merritt,* 190 N.C. 397 (p. 404), 130 S.E. 40. However, in general terms fraud may be said to embrace 'all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, or the

taking of undue or unconscientious advantage of another.' 37 C.J.S., Fraud, Section 1, p. 204.

"These essential facts must appear in order to establish actionable fraud: '(1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does, in fact, deceive; (5) to the hurt of the injured party.' *Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5."

There are numerous statements with respect to the essential elements of actionable fraud but there appears to be no set standard as the case cited above indicates. It appears that in most of the cases the court has decided that there is fraud and has tailored a definition to the particular facts of the case. Probably the best statement, and the one in general use throughout the nation, is found in *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965), where it is said that fraud requires a definite and specific representation which is materially false, the making of the representation with knowledge of its falsity or in culpable ignorance of its truth and with fraudulent intent, and reasonable reliance on the representation by the other party to his deception and damage. 4 Strong, N. C. Index 2d, Fraud, § 1, p. 43 (1968), gives this definition and at footnote 3 cites numerous other cases which provide similar definitions.

A somewhat similar, but at the same time markedly different, statement as to the essential elements of fraud is set forth by Justice Ervin in *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131 (1953), as follows:

"(1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation, and acted upon it; and (6) that plaintiff thereby suffered injury."

Quoted with approval in *Auto Supply Co., Inc. v. Equipment Co., Inc.*, 2 N.C. App. 531, 539, 163 S.E. 2d 510, 515 (1968).

The definition stated in *Cofield* differs from that stated in *Johnson* in that it does not explicitly, though it may implicity, require an intent to deceive.

The evidence applicable to the issue of fraud in this case can be summarized as follows: A faction of the Stone Creek Church decided to form a separate church and needed land upon which to build a sanctuary. Mr. and Mrs. Lee offered to donate a lot upon which the sanctuary could be built. At that time Ingle, who was a minister of a church in Raleigh, was serving as minister of the new congregation and volunteered to have a deed for the land prepared. Since the Lees had the utmost confidence in Ingle's guidance, having known him favorably for some time and he was their minister, the Lees were willing for Ingle to do this but with the understanding that their local church, now named Lee's Union Church, would always own the land. This understanding arose because Lee's Union Church had joined Ingle's church in Raleigh in forming the conference. Ingle told the Lees that he had trouble with conferences in the past and that "they always wanted to own what you had" but that if they would give a lot, he would see to it that the deed was drawn in such a way that their local church would always own the property. Ingle then had the instrument prepared and the Lees met him at the courthouse in Smithfield for purpose of signing the deed and having it recorded. At that time Ingle told the Lees that he had the deed drawn in such a way that "it was safe" and that the local church would hold the property. Mr. Lee was illiterate except for being able to read and write his name and Mrs. Lee did not understand legal terms.

Viewing the evidence in the light most favorable to the nonmovant as the test for denying a directed verdict requires, there is evidence by Mrs. Lee that Ingle made a representation regarding the deed. There is also evidence that the representation was false as it clearly differs from the deed. The representation is obviously material in view of the statement by Mrs. Lee that the only way she would sign the deed would be for it to provide that only the local church would hold the property. The statement made at the courthouse as to the nature of the deed related to an existing fact. Even if the statement was made without knowledge that it was false, then there was recklessness as Ingle can be said to have been under a duty to have the instrument drafted as he said that he would and to determine that it was drafted as promised. The Lees relied upon this statement in signing the deed and the stipulation to turn the case on the issue

of fraud should vitiate the requirement of injury to the complainants.

Perhaps the most difficult element for the defendants here is the element of intent. We conclude from a review of the decided cases that intent usually is not shown by direct evidence but generally is proven by circumstances; therefore, it is for the court to decide if there is sufficient evidence in the case from which the jury can draw the inference of intent to deceive. Oftentimes the intent can be shown by presenting evidence of some motive on the part of the perpetrator. While in this case Ingle did not stand to gain directly by defrauding the Lees, his church organization did stand to so gain. We think there was sufficient evidence to raise, for jury consideration, an inference of intent to deceive.

Assuming, *arguendo,* that there was not enough evidence of direct fraud to go to the jury, the question then arises as to whether there was sufficient evidence to go to the jury on constructive fraud.

In *Rhodes v. Jones,* 232 N.C. 547, 548, 61 S.E. 2d 725, 726 (1950), we find: " 'Constructive fraud often exists where the parties to a transaction have a special confidential or fiduciary relation which affords the power and means to one to take advantage of, or exercise undue influence over the other. A course of dealing between persons so situated is watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party.' 23 A.J. 764; *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615."

In *McNeill, supra* at 181, 25 S.E. 2d at 617 (1943), it is stated, "Wigmore puts it this way: 'Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted, or advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied.' Evidence (3rd Ed.), sec. 2503, and cases cited in note."

No strict definition exists for "fiduciary relation," but *Abbitt v. Gregory,* 201 N.C. 577, 598, 160 S.E. 896, 906 (1931), says, ". . . [I]t exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests

of the one reposing confidence." In this case it can be safely said that Ingle was such a person and it is clear from the evidence that the Lees did so trust him.

In the case of constructive fraud the court is not faced with determining if there is evidence of a fraudulent intent since by the relation of the parties such an intent is presumed. *Miller v. Bank,* 234 N.C. 309, 67 S.E. 2d 362 (1951).

Plaintiffs strenuously argue that the testimony of Mr. Lee that "Mr. Ingle didn't represent to me anything" negatives any fraud on the part of Ingle. Plaintiffs' argument might have validity if the only fraud asserted pertained to Mr. Lee but that is not the case. The question at trial was whether fraud—actual or constructive—had been practiced on the church. Mrs. Lee was a member of the church and although her testimony conflicted with that of Mr. Lee, it was for the jury to resolve the conflicts.

We hold that the evidence was sufficient to go to the jury on the issue submitted.

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

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. WINFRED A. COLE

No. 7312SC663

(Filed 24 October 1973)

Narcotics § 2— possession of heroin — second offense — insufficiency of indictment

Indictment charging that defendant unlawfully possessed heroin on 13 January 1973, this being defendant's "second offense of possession of the narcotic drug, heroin, he having previously been convicted on the 3rd day of November, 1970, in the Superior Court, Cumberland County" *is held* insufficient to charge a second offense of unlawful possession of heroin within the purview of a section of the Controlled Substances Act, G.S. 90-95(c), since that statute provides punishment for persons "convicted of a second violation of G.S. 90-95(a)(3)," and

defendant's 1970 conviction for possession of heroin was for violation of former G.S. 90-88, a section of the Uniform Narcotic Drug Act; although the indictment was sufficient to charge the offense of unlawful possession of heroin and the sentence imposed was within the limits authorized for a first conviction of that offense, the allegations concerning a prior conviction cannot be treated as mere surplusage where the State was permitted to introduce evidence of defendant's prior conviction which would not have been admissible if a prior conviction had not been alleged.

APPEAL by defendant from *Braswell, Judge,* 7 May 1973 Criminal Session of Superior Court held in CUMBERLAND County.

Defendant was indicted for unauthorized possession of heroin, second offense. He pled not guilty but did not testify. The jury returned a verdict of guilty as charged. Judgment was entered sentencing defendant to prison for a term of four years, this sentence to begin at the expiration of a sentence previously imposed upon defendant on 3 November 1970. Defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General R. Bruce White, Jr., and Associate Attorney General Jones P. Byrd for the State.

Assistant Public Defender Neill Fleishman for defendant appellant.

PARKER, Judge.

The defendant contends that he was tried under a defective indictment. In pertinent part the indictment read:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Winfred Allen Cole . . . on or about the 13th day of January, 1973, . . . did unlawfully, wilfully, and feloniously possess a controlled substance, to wit: Heroin which is included in Schedule I of the North Carolina Controlled Substances Act this being the said Winfred Allen Cole's . . . second offense of possession of the narcotic drug, heroin, he having previously been convicted on the 3rd day of November, 1970, in Superior Court, Cumberland County, North Carolina, of possession of heroin on 17th day of July, 1970. . . ."

Defendant's timely motion to quash the indictment on the ground, *inter alia,* that "the charge of second offense possession, as alleged in the indictment, fails to allege facts sufficient to

constitute an offense against the laws of North Carolina," was denied, and the defendant duly excepted. We find defendant's exception to be well taken.

Unauthorized possession of heroin is made a crime by G.S. 90-95(a)(3), which in pertinent part is as follows:

> "(a) Except as authorized by this Article [Article 5 of G.S. Chap. 90], it shall be unlawful for any person:
>
> * * * * *
>
> "(3) To possess a controlled substance included in any schedule of this Article."

By G.S. 90-89(b)(10) heroin is listed in Schedule I of Article 5. G.S. 90-95(c) provides for punishment of second offenders of the offense specified in G.S. 90-95(a)(3) as follows:

> G.S. 90-95(c). "Any person convicted *of a second violation of G.S. 90-95(a)(3)* with respect to controlled substances included in Schedules I or II of this Article shall be guilty of a felony and shall be sentenced to a term of not less than five years nor more than 10 years or fined not more than ten thousand dollars ($10,000), or both, in the discretion of the court." (Emphasis added.)

Defendant in the present case had not been convicted previously of a violation of G.S. 90-95(a)(3). His 1970 conviction for possession of heroin was for violation of former G.S. 90-88, a section of the Uniform Narcotic Drug Act (Uniform Act) adopted by North Carolina in 1935. On 19 July 1971 the North Carolina General Assembly ratified a major revision of our drug laws, replacing the Uniform Act with the North Carolina Controlled Substances Act (Controlled Substances Act), effective 1 January 1972. It is this latter Act that governed defendant's more recent trial and governs his present appeal therefrom.

The State urges this Court not to confine itself to a literal reading of G.S. 90-95(c), arguing that the Legislature, despite the wording of the provision, intended to punish as second offenders those defendants previously convicted for unauthorized possession of heroin under statutes other than or preceding the Controlled Substances Act. The State would have us read G.S. 90-95(c) as though it read as follows:

> "(c) . . . Any person convicted of a second violation of *unauthorized possession* with respect to controlled substances included in Schedule I. . . ."

For reasons hereinafter set forth we are unable to read "a second violation of G.S. 90-95(a)(3)" as being the same as "a second violation of unauthorized possession."

It is a well established rule of statutory construction that criminal statutes must be strictly construed against the State and liberally in favor of the private citizen, with conflicts and ambiguities resolved in his favor. *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596; *State v. Martin,* 7 N.C. App. 532, 173 S.E. 2d 47; 82 C.J.S., Statutes, Section 389(b)(1), p. 924. While courts will not adopt an interpretation which will lead to a strained construction of a statute or to a ridiculous result, and will be guided by legislative intent when construing criminal as well as civil statutes, upon careful consideration we find our adherence to the literal import of G.S. 90-95(c) neither strained nor contrary to legislative intent.

The original recidivist provision of the Uniform Act contained the following language:

> "G.S. 90-111: Any person violating any provision of this Article shall, upon conviction, be punished for the first offense by a fine not exceeding one thousand ($1000) dollars, or by imprisonment for not exceeding 3 years, or both; and for any subsequent offense by a fine not exceeding three thousand dollars ($3000) or by imprisonment for not exceeding five years, or both."

In 1953, the scope of G.S. 90-111 was broadened to include the following provision:

> "(a) . . . For a second violation of this article, *or where in case of a first conviction of violation of this article, the defendant shall previously have been convicted of a violation of any law of the United States, or of this or any other state, territory or district, relating to the . . . possession of narcotic drugs . . . and such violation would have been punishable in this State if the offending act had been committed in this State, the defendant shall be fined.* . . ." (Emphasis added.)

G.S. 90-111(a) remained unchanged thereafter until superseded 1 January 1972 by the Controlled Substances Act.

The initial legislative version of the Controlled Substances Act contained recidivist provisions similar to G.S. 90-111(a) of

the Uniform Act in its post-1953 form, the bill as originally introduced containing the following:

> G.S. 90-89(b)(6). "Any person convicted of a second or subsequent offense under this Article shall be subject to penalties as provided in G.S. 90-110." [House Bill 294 "H-1" page 14.]
>
> G.S. 90-110(d). "For purposes of this section, an offense shall be considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted of an offense or offenses under this Article *or under any statute of the United States or of any state relating to narcotic . . . drugs.*" (Emphasis added.) [House Bill 294 "H-1" page 47.]

The Act, then House Bill 294, was referred to the House Judiciary Committee I on 24 February 1971. On 3 June 1971 the House approved the Committee's revision of Bill 294. The Committee had reorganized the proposed revision of Article 5, relocating the recidivist provisions and changing the language therein to read:

> G.S. 90-95(c). "Any person convicted of a second violation of G.S. 90-95(a)(3) shall be fined. . . ." [House Bill 294 "H-2" page 25.]

Before final ratification, this part of G.S. 90-95(c) was further amended to make it clear that only second violations with respect to substances listed in Schedules I and II were covered thereunder:

> G.S. 90-95(c). "Any person convicted of a second violation of G.S. 90-95(a)(3) with respect to controlled substances included in Schedules I and II of this Article shall be guilty of a felony and shall be sentenced. . . ." [House Bill 294 "H-3" page 26.]

G.S. 90-95(c) in this form was ratified by the General Assembly on 19 July 1971, and became effective 1 January 1972.

The General Assembly, in short, replaced the comprehensive language of the Uniform Act's provision for second offenders with the narrow provision of present G.S. 90-95(c), rejecting in the process similarly comprehensive language in the original House version of the Controlled Substances Act. If the Legislature intended by this action to limit the types of convictions for possession of heroin that qualify as prior convictions to

actual violations of the Controlled Substances Act, it could hardly have used more specific language. Certainly there were numerous statutory models available to the drafters and legislators that contained various formulations of the interpretation now urged by the State; in addition to the superseded Uniform Act and the initial version of the Controlled Substances Act, the Uniform Controlled Dangerous Substances Act, from which the Controlled Substances Act was largely derived, and the codes of the 17 states that had adopted the Uniform Controlled Dangerous Substances Act contained similarly comprehensive language. Being most favorable to the State, the best we can say is that the legislative intent lying behind G.S. 90-95(c) is unclear, and given such ambiguity, the defendant must be given the benefit of the doubt.

We note in passing that the General Assembly, by Ch. 654 of the 1973 Session Laws, amended G.S. 90-95, effective 1 January 1974. This amendment, *inter alia*, rewrote the recidivist provisions of the Controlled Substances Act. This change, however, does not affect the present appeal.

The indictment in the present case did correctly charge all elements of the offense of unlawful possession of heroin, and the sentence imposed was within the statutory limits authorized for a first conviction of that offense. We might, therefore, treat the allegations in the indictment concerning the prior conviction as mere surplusage except for the fact that the inclusion of these allegations resulted in substantial prejudice to the defendant. Defendant did not take the stand or otherwise put his character in issue. Therefore, had the charge against defendant been one of simple possession of heroin, the State would have been barred from introducing before the jury evidence of his prior conviction. 1 Stansbury's N. C. Evidence (Brandis Revision) § 91. In the present case the State did introduce such evidence, and in this the defendant suffered error which, in our opinion, was sufficiently prejudicial to warrant granting him a new trial.

We do not discuss appellant's remaining assignments of error since the questions presented may not recur upon a new trial. For the reasons stated above, defendant is awarded a

New trial.

Chief Judge BROCK and Judge VAUGHN concur.

JAMES O. COLLIER AND JULIET W. COLLIER v. CLAY L. WELKER, SHARON H. WELKER, J. RALPH HOBBS, ALICE W. HOBBS, CHARLES PARKER, ETHEL PARKER AND JOHN F. COMER

No. 7318SC248

(Filed 24 October 1973)

1. **Adverse Possession § 7— tenant in common against cotenant — ouster**

One tenant in common cannot adversely possess without an ouster, either actual or constructive, of his co-owners.

2. **Adverse Possession § 7— tenant in common against cotenant — appropriation of rents and profits — ouster**

Even where a co-owner appropriates rents and profits for his sole benefit, silent occupation and exclusive use of the entire property does not qualify as actual ouster absent a demand for accounting by the excluded tenants in common.

3. **Adverse Possession § 7— tenant in common against cotenant — notice of intent to dispossess**

One cotenant cannot be deprived of his rights by another cotenant unless he has actual or constructive notice of the cotenant's intent to dispossess.

4. **Adverse Possession § 7— tenant in common against cotenant — presumption of ouster — no demand for accounting**

Ouster is presumed if one tenant in common and those under whom he claims have been in sole and undisturbed possession and use of land for 20 years when there has been no demand for rents, profits or possession.

5. **Adverse Possession § 7— tenant in common against cotenant — no demand for accounting**

The evidence was sufficient to go to the jury on the issue of whether plaintiff tenants in common obtained the interest of a cotenant by adverse possession where it tended to show that plaintiffs and those under whom they claim have been in exclusive and peaceable possession of the property for more than twenty years without an account to or claim by the cotenant.

APPEAL by defendants from *Seay, Judge,* 21 August 1972 Session of Superior Court held in GUILFORD County.

In this action, instituted on 27 October 1971, plaintiffs seek to have themselves declared the sole owners of a tract of land in Guilford County. Defendants, Clay L. Welker and Sharon H. Welker, are the record owners of a one-fourth undivided interest in the tract and plaintiffs, James O. Collier and Juliet W. Collier, claim that one-fourth interest by virtue of adverse possession for more than twenty years.

Plaintiffs' evidence tended to show the following. Benjamin Parker, Ethel Parker, Charles Parker and Mary Novia Parker were the owners of a farm which included a forty-acre tract. In 1949, Charles and Ethel Parker conveyed their respective one-fourth interests in the forty-acre tract to Benjamin Parker. The owner of the remaining one-fourth interest, Mary Novia Parker, was incompetent, and, by deed dated 13 December 1950, her guardian conveyed her one-fourth interest to defendant Clay Welker. Later in December of 1950, Benjamin Parker conveyed his three-fourths interest in a portion of the forty-acre tract to Welker, and that part of the tract is not the subject of this law suit.

In 1963, Benjamin Parker purported to convey the entire interest in the remainder of the forty-acre tract (amounting to some 32 acres and being the subject of this suit) to J. Ralph Hobbs, although he only owned a three-fourths interest in the tract, the defendant Welker owning the remaining one-fourth. Benjamin Parker died in 1964. In 1966, Hobbs purportedly conveyed the whole interest in the tract to plaintiffs.

The property in dispute fronts to the South on Alamance Church Road. The property shares its western border with another tract owned by the Parker family, known as Ethel Parker's Place. The property had belonged to the Parker family for many years. From 1950 to 1955, Benjamin Parker had used part of the disputed property to produce tobacco, vegetables, including corn, and grain, and he had also harvested and sold timber from the land. From 1955 to 1959, Charles Parker farmed part of the property and had continued to produce crops similar to those Benjamin Parker had cultivated. From 1950 to 1963, David Hodgin sharecropped on part of the Parker property not cultivated by Benjamin Parker or Charles Parker. He continued to rent the property and farm it after it was transferred to Hobbs in 1963 and finally to Collier in 1966. During the 1950's and early 1960's, several families had intermittently rented an old house located on the disputed property from Benjamin Parker, and after 1966, the windows and doors were repaired and the house used for storage through 1970.

Collier testified that in June 1970, he began building a home on the property. The house was completed in September 1971. On 10 August 1970, plaintiff received a letter from Welker's attorney advising that Welker claimed a one-fourth undivided interest in the property. At this time, the exterior of the house

had been completed, and plaintiffs had already invested $20,000.00 in the construction. The total cost of the house, excluding that of the land, was $40,000.00. Plaintiff denied any knowledge of Welker's alleged interest in the property and stated Welker had never made any demands or claims consistent with that interest. Welker lived about one-fourth of a mile from the property.

Testifying in his own behalf, defendant acknowledged that he was aware that Benjamin Parker farmed the property but claimed that the usage of the land did not change over the years. Regarding his intentions with respect to the property, defendant stated:

> "When we bought the property, we have (sic) no intention of ever farming it. We bought it more to do a favor when they sold the part that was conveyed to settle up the estate. We bought the property, not intending, and I still don't intend, to ever do anything with it adverse to Uncle Ben Parker or Miss Ethel."

The case was tried on the question of whether plaintiffs have obtained the outstanding one-fourth interest in the thirty-two acre tract by adverse possession against the record owners, the Welkers. The jury answered the issue in favor of plaintiffs, and defendants, Clay L. Welker and Sharon H. Welker, appealed.

Smith, Patterson, Follin & Curtis by Marion G. Follin III for plaintiff appellees.

Douglas, Ravenel, Hardy & Crihfield by Robert D. Douglas III for defendant appellants.

VAUGHN, Judge.

Defendants' motions for a directed verdict at the close of plaintiffs' evidence and at the close of all the evidence and their motion for judgment notwithstanding the verdict were denied. The question presented by defendants' motions for directed verdict is whether the evidence, when considered in the light most favorable to plaintiff, is sufficient for submission to the jury. This is substantially the same question formerly presented by a motion for nonsuit. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396. Although defendants failed to specifically designate the insufficiency of plaintiffs' evidence as the ground for the motion for directed verdict, that is obviously the question they

sought to raise. In this instance we have, in our discretion, considered the question thus presented on its merits.

[1] Plaintiffs Collier possessed the property as tenants in common with the defendants, as had J. Ralph Hobbs and Benjamin Parker through whom plaintiffs claim. Because the nature of the relationship between tenants in common precipitates an assumption in law that cotenants will be "true to each other, the possession of one is the possession of all" with the result that any one of them "is supposed to protect the right of his fellows." *Cox v. Wright,* 218 N.C. 342, 349, 11 S.E. 2d 158, 162, *quoting Day v. Howard,* 73 N.C. 1. Accordingly, our courts have long maintained that one tenant in common cannot adversely possess without an ouster, either actual or constructive, of his co-owners. *E.g., Brewer v. Brewer,* 238 N.C. 607, 78 S.E. 2d 719; *Cox v. Wright, supra.*

[2, 3] Even where a co-owner appropriates rents and profits for his sole benefit, silent occupation and exclusive use of the entire property does not qualify as actual ouster, absent a demand for accounting by the excluded tenants in common. *Cox v. Wright, supra; Clary v. Hatton,* 152 N.C. 107, 67 S.E. 258; *Dobbins v. Dobbins,* 141 N.C. 210, 53 S.E. 870; *Bullin v. Hancock,* 138 N.C. 198, 50 S.E. 621. This position is consistent with the general precept that, regardless of a conflicting rule with respect to persons who are not joint owners, "the entry and possession of one tenant in common are presumed not to be adverse to his cotenants." 4 Thompson, Real Property (1961 Replacement), § 1810, p. 204. The lack of a presumption of adversity as between tenants in common is particularly significant in view of the fact that possession is not adverse unless it is, among other things, notorious. *Newkirk v. Porter,* 237 N.C. 115, 74 S.E. 2d 235; *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347. One cotenant may not be deprived of his rights by another cotenant unless the allegedly disseized has actual knowledge or constructive notice of a co-owner's intent to dispossess. As the court noted in *Clary v. Hatton, supra,* the adverse nature of a cotenant's possession must be "manifested by some clear, positive and unequivocal act equivalent to an open denial of the co-tenants' rights, and putting them out of seizin." Ordinarily, a particular action or activity falls outside the purview of this test unless it exposes the actor to an action by the cotenants for a breach of fealty. *Cox v. Wright, supra; Clary v. Hatton, supra; Dobbins v. Dobbins, supra; Page v. Branch,* 97 N.C. 97, 1 S.E.

625. *See* Webster, Real Estate Law in North Carolina §§ 260 (a) and (b).

[4] Although ouster is required to support a cotenant's claim of adverse possession, our courts have favorably acknowledged the concept of constructive ouster. Ouster is presumed if one tenant in common and those under whom he claims have been in sole and undisturbed possession and use of the land for twenty years when there has been no demand for rents, profits or possession. *Morehead v. Harris,* 262 N.C. 330, 137 S.E. 2d 174; *Brewer v. Brewer, supra; Battle v. Battle,* 235 N.C. 499, 70 S.E. 2d 492; *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *Crews v. Crews,* 192 N.C. 679, 135 S.E. 784; *Lester v. Harward,* 173 N.C. 83, 91 S.E. 698; *Lumber Co. v. Cedar Works,* 165 N.C. 83, 89 S.E. 982; *Shannon v. Lamb,* 126 N.C. 38, 35 S.E. 232. Upon completion of the requisite 20-year period, ouster relates back to the initial taking of possession. *Cox v. Wright, supra; Lumber Co. v. Cedar Works, supra; Dobbins v. Dobbins, supra;* 1 Mordecai Law Lectures, Chapter XVII, p. 624. Not only does 20 years of exclusive possession raise a presumption of ouster, but it also supplies all the elements necessary to support a finding that the possession was adverse and included elements of notice and hostility. The rule is clearly set forth in *Dobbins v. Dobbins, supra:*

> "We have thus reviewed this subject to show the nature of an ouster, and in order that we may understand clearly what it is the law means when it is said to presume an ouster. It is a disseizin by one tenant of his cotenant, the taking by one of the possession and holding against him by an act or series of acts which indicate a decisive intent and purpose to occupy the premises to the exclusion and in denial of the right of the other. *This is what the law presumes, whether it be in exact accordance with the real facts or not.* It is a presumption the law raises to protect titles, and answers in the place of proof of an actual ouster and a supervening adverse possession. *The presumption includes everything necessary to be proved when the title can be ripened only by actual adverse possession as defined by this Court.* . . ." (Emphasis added.)

The rule of a presumption of rightful possession after 20 years is designed "to prevent stale demands" from those who have slept on their rights for so long a period and "to protect pos-

sessors from the loss of evidence from lapse of time." *Black v. Lindsay,* 44 N.C. 467, *quoted in Dobbins v. Dobbins, supra.*

[5] The evidence was sufficient to permit a finding that plaintiffs and those under whom they claim had been in exclusive and peaceable possession, without an account to or claim by defendant, for more than twenty years prior to institution of the action. Under the presumption so often repeated in the cases cited, that evidence was sufficient to permit the case to go to the jury and sustain the verdict.

We have considered defendants' assignments of error directed at the charge to the jury and find nothing so prejudicial as to require a new trial.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM H. STANFIELD

No. 7315SC571

(Filed 24 October 1973)

1. **Searches and Seizures § 1— authority of officer to make limited search — concealed weapon found**

An officer had the right to make a limited search of defendant's person at the time and in the manner which he did where the officer knew that on at least one previous occasion defendant had fought with a fellow officer, the officer had been informed by phone that defendant was armed and in a public place known to police as a trouble spot, the place was within the officer's patrol responsibility, the officer investigated and found defendant at the trouble spot, defendant kept his right side turned away from the officer but the officer noticed a bulge in defendant's coat pocket anyway, the officer "patted down" the bulge and, upon discovering it to be a heavy object, extracted a loaded pistol.

2. **Constitutional Law § 31— identity of confidential informer — disclosure not required**

In a prosecution for carrying a concealed weapon in violation of G.S. 14-269 where defendant did not attempt to obtain disclosure of the identity of the confidential informant whose tip led to his arrest until a *voir dire* examination at trial and at that time he completely failed to demonstrate or even to suggest in any manner how disclosure would benefit his defense, the trial court properly sustained the State's privilege against disclosure.

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

Questions of the trial judge eliciting testimony which tended to prove an element of G.S. 14-269, that defendant was not on his own premises when discovered carrying a concealed weapon, did not constitute an expression of opinion by the judge on the strength of the evidence or on the credibility of a witness.

APPEAL by defendant from *Bailey, Judge,* 26 February 1973 Session of Superior Court held in ALAMANCE County.

Defendant was charged by warrant with carrying a concealed weapon while off his own premises in violation of G.S. 14-269. After trial and conviction in the District Court he appealed to the Superior Court where he again pled not guilty. The State presented as its only witness Officer Tommy Bray of the Burlington Police Department, who testified in substance to the following:

On Saturday night, 6 January 1973, Officer Bray was on duty at the Police Department. About midnight he received a phone call in which he was given information that defendant was at the Brown Derby located in the Holly Hill Mall in Burlington and that defendant had a pistol in his coat. The Brown Derby was a place in Officer Bray's "patrol boundary" and the police had frequently experienced trouble there. Bray had known the defendant about ten or twelve years, had once observed a fight between defendant and another police officer, and knew that a warrant had recently been issued charging defendant with an assault. After receiving the phone call, Bray proceeded directly to the Brown Derby. Upon entering, he saw defendant in the crowd, sitting in a booth and wearing a three-quarter length coat. As Officer Bray approached the booth, defendant stood up, keeping the right side of his body away from the officer. Bray walked up and told defendant that he wanted to speak to him about something, but did not then tell him what was to be discussed. Bray intended to talk with defendant about the assault charge. Defendant refused to talk with the officer and instead took several steps towards his girl friend. As he did this, Officer Bray noticed a bulge in defendant's right coat pocket. Officer Bray patted the outside of defendant's clothing, felt a heavy object in the right coat pocket, reached in, and pulled out a loaded .32 caliber automatic pistol. Bray thereupon placed defendant under arrest on the charge for which the warrant was subsequently issued and on which defendant was tried.

Defendant testified to the effect that he did not know that any weapon was in his coat at the time of the arrest and that the pistol must have been placed there without his knowledge by someone else at some time earlier in the evening.

The jury found defendant guilty as charged. From judgment sentencing defendant to prison for the term of 90 days, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General William F. O'Connell for the State.

R. Chase Raiford for defendant appellant.

PARKER, Judge.

[1] Defendant contends that the search of his person violated his Fourth Amendment rights and that the fruits of the search should have been excluded from evidence. We do not agree. While the search was made without a search warrant and the officer may have lacked probable cause to make an arrest, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio,* 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams,* 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921. Our own Supreme Court has recently recognized a limited right in police officers in appropriate circumstances to "stop and frisk." *State v. Streeter,* 283 N.C. 203, 195 S.E. 2d 502.

In the present case the officer knew that on at least one previous occasion defendant had fought with a fellow officer. He had been informed by telephone that defendant was armed and was in a public place known to the police as a local trouble spot. This place was within the officer's patrol responsibility. On investigating he found defendant at the place his informant told him defendant would be, thus corroborating at least a portion of the information which the informant had given. When the officer attempted to talk with defendant, defendant kept his right side turned away from the officer. Despite this maneuver the officer noted a bulge in defendant's right coat

pocket. In our opinion these circumstances justified the officer's limited action in "patting down" the outside of defendant's coat pocket. This action produced the additional information that a "heavy object" was contained therein, and this additional information justified the further search into the pocket itself which resulted in the discovery of the loaded pistol. In our opinion the officer had the right to make the limited search of defendant's person at the time and in the manner which he did. Indeed, he would have been derelict in his duty had he failed to do so.

Holding, as we do, that the search was lawful, defendant suffered no prejudicial error in the fact that some evidence concerning the search was admitted before the jury over defendant's general objections prior to the time the trial judge conducted a voir dire and determined that the search was valid. As soon as it became apparent that defendant was objecting to the lawfulness of the search, the trial judge promptly conducted a voir dire examination and made findings as to the circumstances under which the search had been conducted.

[2] Defendant contends error in the trial court's refusal to order disclosure of the identity of the informant who telephoned Officer Bray at the police station. The courts recognize a limited privilege in the State to withhold disclosure of the identity of persons who furnish information of violations of law to officers charged with its enforcement. "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623. Where the disclosure of an informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. *Roviaro v. United States, supra.* Whether this is so depends on the circumstances of each case. *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481. In the present case, the only time defendant sought to obtain disclosure of the identity of the informant was during the voir dire examination. At that time he completely failed to demonstrate or even to suggest in any manner how disclosure would benefit his defense. The trial judge's ruling sustaining the State's privilege against

disclosure was clearly correct at the time it was made. If we assume *arguendo* that a somewhat tenuous connection between the informer's identity and defendant's defense (that, unknown to him, someone else had slipped the loaded pistol into his coat pocket) might possibly have been perceived after defendant testified before the jury, defendant failed at that time to point this out to the trial judge or to repeat his request for disclosure. We hold that under the circumstances of this case defendant has failed to demonstrate prejudicial error in the trial court's ruling sustaining the State's privilege.

[3] Defendant's final assignment of error concerns the following colloquy between the trial judge and Officer Bray at the close of the State's evidence:

"[Solicitor]: No further questions.

"THE COURT: Who owns the Brown Derby?

"[Bray]: A corporation, the gentleman over there in the brown coat can probably tell you (referring to the State ABC Officer in the Courtroom), it is a corporation from Greensboro, I understand.

"THE COURT: As far as you know does Mr. Stanfield own it?

"[Bray]: No, sir.

"THE COURT: Thank you, you may cross examine him."

This testimony tended to prove an element of G.S. 14-269, that defendant Stanfield was not on his own premises when discovered carrying a concealed weapon. We do not agree with defendant's suggestion that the trial court's questioning was improper. By asking the questions the judge commented neither on the strength of the evidence nor on the credibility of a witness. Rather, the judge asked a neutral question which, depending upon the answer, would benefit either the State or the defendant. The questioning was within the sound discretion of the trial judge to conduct the trial in the interests of justice.

In the trial and judgment appealed from we find

No error.

Judges HEDRICK and BALEY concur.

EUGENE S. ANDERSON II, BY HIS GUARDIAN AD LITEM, NANCY S. ANDERSON, AND EUGENE S. ANDERSON v. CORNELIUS BUTLER, JR., AND WIFE, PHYLLIS H. BUTLER

No. 7318SC469

(Filed 24 October 1973)

Negligence § 29— injuries from operation of forklift — insufficient evidence of negligence

In an action to recover for injuries sustained by minor plaintiff when he was run over by a forklift allegedly operated by defendants' minor son, the trial court erred in failing to allow defendants' motion for directed verdict where the evidence favorable to plaintiffs tended to show only that minor plaintiff visited with defendants, that defendants owned a forklift which they allowed their minor son to operate, and that at the time of the accident causing plaintiff's injuries, defendants' son was operating the forklift while male defendant was in the vicinity.

Judge BALEY dissenting.

APPEAL by defendants from *Crissman, Judge,* 4 December 1972 Session of Superior Court held in GUILFORD County.

This is an action to recover for injuries to the minor plaintiff, Eugene S. Anderson II (Sonny) by his mother and guardian ad litem, Nancy S. Anderson and an action by Eugene S. Anderson, father of the minor plaintiff, to recover for medical expenses incurred on behalf of the minor.

Except for allegation as to jurisdiction and damages the complaint is as follows:

"III. That on or about 11 April 1970, the plaintiff minor was invited to and went upon the residential property of the defendants for a visit to play with the defendants' son; that the property of the defendants is located in a rural area of Randolph County at Route 31, Randleman, North Carolina.

"IV. That while the plaintiff minor was visiting with the defendants, the defendants were both present at the residence and were aware of all of the occurrences alleged herein; that the male defendant owned a fork lift machine and was using said machine to clean up or move certain materials from place to place in the yard of his home; that the defendants allowed their son, then about ten (10) years old, to operate the fork lift machine about the yard on uneven terrain and at dangerous and excessive speed, and

the defendants allowed the plaintiff minor to ride upon the front of the fork lift without either warning him of the danger or controlling the dangerous operation of it by their son.

"V. That the defendants allowed their son to drive the fork lift machine so that it tipped, and threw the plaintiff minor off in front of it, and allowed him to drive the fork lift onto and over the plaintiff's body as he lay upon the ground, doing severe damage and injury to the plaintiff minor's body. That the defendants' acts as alleged, and their omission to act as alleged, were negligence, and this negligence was the proximate cause of severe bodily injury to the plaintiff minor."

The evidence tended to show the following.

On 11 April 1970, Sonny's father brought him to defendants' home and left him to play with defendants' youngest son, Russell. Sonny and Russell were then nine years old. Defendants had just built their house and the yard was being graded. On the same premises and several hundred feet from the house, defendants had a shop building used for the manufacture of trailers. A forklift was used in that business. Sonny's father had been to defendants' home before and was familiar with the machinery there and had seen the forklift in operation on those premises. When he arrived, a bulldozer was being used in front of the home to grade the yard. He did not talk with the male defendant but took Sonny inside and left him with Mrs. Butler. He admonished Sonny to behave himself and to stay away from the equipment. After about five minutes, he left and did not see Sonny again until after the accident.

Mrs. Butler was called as a witness for plaintiff. In substance she testified that after Sonny's father left him there about ten or eleven o'clock a.m., Sonny and Russell played inside for awhile and then went outside. Later the children came inside, and Sonny asked if he could ride the forklift. She replied, "Absolutely not." The children then played outside until they came in for lunch. Sometime after lunch, the children went out to play and remained outside until after the accident. During all of this time she was engaged in her usual household chores. She knew that both the forklift and the bulldozer were being used in the yard but did not go outside except possibly

briefly to shake rugs or work of that nature. At no time did she see Sonny about the forklift or bulldozer. On the day of the accident another son, Don, age eleven, was helping his father in the yard. Her husband was operating the forklift part of the time on the day of the accident. Although Mrs. Butler did not testify that she saw Don operate the forklift on the day of the accident, she had frequently seen him operate the machine over the preceding two years. During that two-year period Don used the machine about once each week to move stacks of lumber and generally help his father.

Sonny testified that it was at school that he first spoke to Russell, the youngest of the Butler boys, about coming to visit with Russell. On the morning of 11 April 1970, his father took him to Russell's home (11 April 1970 was a Saturday). He could not remember his father saying anything about the building or machinery. He did not remember talking to Mrs. Butler on the morning of the accident. He did not ask her about riding the forklift, and at no time did she forbid him from doing so. He and Russell rode the forklift once in the morning when Don was operating it in back of the house. At that time Mr. Butler was in the front yard with the bulldozer. That ride lasted about five minutes. He and Russell went down to a nearby river and played for about 30-45 minutes. They then went back inside and played for awhile. They learned that the bulldozer had crushed the septic tank and went outside to look at that. Later he and Russell got on the forklift again. The forklift was loaded with an old roll of carpet. Don asked them to get on to keep the carpet from falling off the machine. As they were headed toward the shop building the machine hit a bump, Sonny fell off and was struck by one of the forks. Russell jumped off the machine. Don stopped the machine and called for help. During this ride Mr. Butler was in the back scraping dirt away from the septic tank. Although Sonny did not say that Mr. Butler did see him on the machine, he did say that he saw Mr. Butler and that Mr. Butler "could see me." Don had operated the machine for an hour or more before the accident, and Mr. Butler was in and around the yard for all of that time. Sonny did not know how fast the machine was being operated when it hit the bump, but he would say "maybe five to ten miles an hour."

The male defendant, called as a witness by plaintiff, testified substantially as follows. He was not aware that Sonny

planned to visit. He did see Sonny's father leave the premises in a truck. He went in the house to get a sandwich for lunch and saw the child. This was his first knowledge that the child was there. He did not remember saying anything to the child. He operates a family business in a shop behind the home in the course of which he builds trailers. He was not engaged in the business that day but was leveling the yard around his new home. They were also moving trash and scraps of building materials. His son Don was helping with the yard cleaning and for some of the work had to use the forklift. He had told Don to remove an old roll of rotten carpet that was located behind the house. Don had used the machine regularly for two years and could operate it as well as an adult. He saw Don operate the machine on the day of the accident and never saw Russell or Sonny on the machine. He learned of the accident when his wife told him. He then took Sonny first to plaintiffs' home and then to the hospital.

There was no evidence that, prior to the day of the accident, Don had ever allowed another child to ride with him on the forklift.

Plaintiffs' evidence tended to show that Sonny's injuries were painful and serious and required extensive medical care.

Defendants' motions for directed verdict, made at the close of plaintiffs' evidence and at the close of all the evidence, were denied.

The following issue was submitted to the jury on the question of defendants' negligence:

> "1. Was the plaintiff-minor injured as a result of the negligence of the defendants, as alleged in the complaint."

That issue was answered in the affirmative and the jury, by its answer to other issues, awarded damages in the amount of $19,849.45.

The court denied defendants' motion that the verdict be set aside and that judgment be entered in accordance with their motions for directed verdict. Defendants appealed from the judgment entered.

Dees, Johnson, Tart, Giles & Tedder by J. Sam Johnson, Jr., for plaintiff appellees.

Harry Rockwell, John R. Hughes and Worth Coltrane for defendant appellants.

VAUGHN, Judge.

The record does not disclose that defendants stated the specific grounds for their motions for a directed verdict. It is clear, however, that the motions were made on the grounds that the evidence, in the light most favorable to the plaintiff, as a matter of law was insufficient to justify a verdict for plaintiffs. The motion thus raised substantially the same question as that formerly raised by a motion for involuntary nonsuit, *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396, and we will, in our discretion, review the denial thereof.

In consideration of defendants' motions for a directed verdict we do not consider the testimony given by defendants, called as witnesses by plaintiffs, which tends to exculpate defendants, even when that evidence favorable to defendants is not otherwise contradicted by plaintiffs. The credibility and weight to be given such evidence are matters for jury consideration. *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789.

We have set out the evidence in considerable detail. A majority of the panel is of the opinion that the evidence, when considered in the light of the familiar standards, is insufficient for submission to the jury. The dissent, of course, entitles plaintiffs to further review as a matter of right.

Our decision that it was error to deny defendants' motions for a directed verdict makes it unnecessary to consider defendants other assignments of error. Suffice it to say that if the case had been one for the jury, the majority would hold that the defendants are entitled to a new trial for, among other reasons, the failure of the judge to tell the jury what acts or omissions, under the evidence, they might find to constitute negligence. A jury cannot be left free to find defendants generally negligent "for any reason which the evidence might suggest to them." *Griffin v. Watkins*, 269 N.C. 650, 153 S.E. 2d 356.

It was error not to allow defendants' motions for a directed verdict. The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judge CAMPBELL concurs.

Judge BALEY dissents.

Judge Baley dissenting:

I am of the opinion that the evidence in its most favorable light for plaintiff presents a question for the jury.

STATE OF NORTH CAROLINA v. GEORGE LYLES, JR.

No. 7312SC570

(Filed 24 October 1973)

1. **Criminal Law §§ 9, 10— aider and abettor — accessory before fact — driver of getaway car**

The driver of a getaway car who drove robbers to within a block and a half of the premises robbed and who was apprehended while parked 100 feet behind those premises was present at the scene of the robbery and was thus a principal rather than an accessory before the fact.

2. **Criminal Law § 115; Robbery § 5— armed robbery — failure to submit accessory before the fact**

In a prosecution of defendant for armed robbery as an aider and abettor, the trial court did not err in failing to submit the lesser included offense of accessory before the fact where the evidence showed that defendant was the driver of the getaway car.

3. **Criminal Law § 118— instructions — contentions of State**

It is not error for the trial court to instruct the jury in terms of the State's contentions where the record discloses evidence from which inferences drawn by the court could legitimately, fairly and logically be drawn by the jury.

APPEAL from *Brewer, Judge*, 5 March 1973 Session of CUMBERLAND County Superior Court.

Defendant Lyles was charged, with two codefendants not involved in this appeal, with the armed robbery of Mack's Shell Self Serve in Fayetteville.

Evidence for the State is briefly summarized as follows:

Larry Absher, the night attendant at Mack's, observed Houston and Webster (codefendants who entered a guilty plea) get out of a late model orange car one and a half to two blocks from the station. They proceeded on foot up the street toward

the station, and upon entering the attendant's cubicle, Houston pulled a sawed off shotgun from beneath his coat. The two took money from the cash register, and they took an automatic pistol and some money from Absher's person.

Melvin Webster testified that Lyles and Houston came to his trailer together on the night of the robbery in an orange Dodge "Super Bee." Lyles asked Webster if he would like to "go out and make some money." As the three men cruised around Fayetteville in the orange Super Bee — with Lyles at the wheel — they discussed robbing two places other than Mack's, but decided otherwise because of the risk involved. When they decided to rob Mack's, Lyles let Houston and Webster out of the car about a block and a half from the station. Houston took the shotgun from the car and put it under his coat.

Webster's testimony from this point was substantially the same as that of Absher concerning the taking of the money at gun point. He further testified that they ran from the station with a car in close pursuit. They approached Lyles parked in a trailer park 100 feet to the rear of the store and attempted to get in the car. However, the car in pursuit blocked Lyles, so Houston and Webster continued to run.

Deputy Sheriff Hollingsworth testified that:

He was on patrol the morning of the robbery, and he noticed suspicious activities in the station, i.e., three men in the attendant's cubicle. As he made a U-turn and came back to investigate, two of the men ran from the cubicle toward the trailer park behind the station. The deputy followed them in his car and blocked the orange Super Bee which was parked with its headlights off and its motor running. Deputy Hollingsworth's partner pursued the two men as they fled. Hollingsworth picked up a shotgun one of the fleeing men had dropped and arrested the man behind the wheel of the car whom he identified in court as defendant Lyles.

Deputy Sheriff Capps was then allowed over defendant's objection to read into evidence a sworn statement by Webster which was substantially identical to Webster's testimony. The court gave the jury a proper instruction for corroborative evidence.

At the close of State's evidence, defendant's motion for judgment as of nonsuit was denied. Motion to reduce the charge to accessory before the fact was also denied.

Defendant presented no evidence, and he was convicted by the jury of aiding and abetting in robbery with a firearm.

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

Assistant Public Defender Neill Fleishman for defendant appellant.

MORRIS, Judge.

Appellant's assignments of error can be separated into two groups. Assignments of error Nos. 1, 3 and 4 depend upon appellant's contention that he was not present at the scene of the crime. In assignment of error No. 2 appellant contends that the trial judge commented on the evidence in contravention of G.S. 1-180.

The first group of assignments of error may be summarized as depending entirely upon the theory that defendant's conduct in driving the "getaway car" does not amount to his being present at the scene of the robbery. If defendant were not present, he contends, he would be entitled to a judgment as of nonsuit and a directed verdict, for the evidence produced would be insufficient to go to the jury on the offense as charged. Likewise, were he not present, the court's instruction to the jury concerning aiding and abetting would be prejudicial, for an aider or abettor must be present. Appellant further urges that he was entitled to an instruction on the lesser included offense of accessory before the fact inasmuch as the distinction between a principal — including an aider and abettor — and an accessory before the fact is that the former is present at the time of the offense whereas the latter is not.

[1] As we have stated, these assignments of error depend entirely upon the contention of defendant that he was not present at the time of the armed robbery. Thus, a favorable determination of these assignments would require a holding on our part that the driver of a getaway car who had driven the robbers to within a block and a half of the premises robbed — and was apprehended while parked 100 feet behind the premises with his headlights off and his motor running — is not present at the scene of the robbery. We do not so hold.

As this Court stated in *State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680 (1972), the distinction between a principal and an accessory before the fact — abolished in some jurisdictions — remains in force in North Carolina with regard to general felonies, including armed robbery. The distinction has been set forth in *State v. Benton,* 276 N.C. 641, 653, 174 S.E. 2d 793 (1970).

> " 'A principal in the first degree is the person who actually perpetrates the deed either by his own hand *or through an innocent agent.'* (Emphasis added.) Any other who is actually or constructively present at the place of the crime either aiding, abetting, assisting or advising in its commission, or is present for that purpose, is a principal in the second degree. (Citations omitted.) In our law, however, 'the distinction between principals in the first and second degrees is a distinction without a difference.' Both are principals and equally guilty. *State v. Allison,* 200 N.C. 190, 194, 156 S.E. 547, 549; *accord, State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485; *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398. An accessory before the fact is one who was absent from the scene when the crime was committed but who procured, counseled, commanded on encouraged the principal to commit it. *State v. Benton,* 275 N.C. 378, 167 S.E. 2d 775; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580; Miller, *supra,* § 76; 22 C.J.S. *Criminal Law* § 90 (1961).
>
> Thus, ordinarily, the only distinction between a principal and an accessory before the fact is that the latter was not present when the crime was actually committed."

In order to determine whether a defendant is present, the court must determine whether "he is near enough to render assistance if need be and to encourage the actual perpetration of the felony." *State v. Wiggins, supra,* at 531.

The general principle has been stated that

> " 'One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if

needed, *or to provide a means by which the actual perpetrator may get away from the scene upon completion of the offense,* is a principal in the second degree and equally liable with the actual perpetrator. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Sellers,* 266 N.C. 734, 147 S.E. 2d 225.' *State v. Price,* 280 N.C. 154, 158, 184 S.E. 2d 866, 869." *Id.,* at 530-531. (Emphasis added.)

The facts of the case before us are clearly sufficient to bring it within the general rule established by *Benton* and *Wiggins, supra.* The driver of a getaway car is present at the scene of the crime, and he is a principal rather than an accessory before the fact.

Therefore, there is no error in the denial of the motions for judgment as of nonsuit and for directed verdict, nor is there error in the court's instructing the jury on aiding and abetting.

[2] Likewise, there was no error in the failure of the trial court to instruct the jury on the lessor included offense of accessory before the fact. It is a well-established principle that the court is not required to submit the question of guilt on a lesser included offense where all the evidence tends to establish the greater charge, and there is no evidence of the lesser charge. *State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Wilson,* 14 N.C. App. 256, 188 S.E. 2d 45 (1972).

[3] As his final assignment of error, appellant urges that the trial court erred in its charge to the jury in that it failed to state the evidence necessary to explain the applicable law except in the contentions of the State. It is appellant's position that this amounts to a comment on the evidence in contravention of G.S. 1-180. We do not agree. It is not error for the trial judge to instruct the jury in terms of the State's contentions where the record discloses evidence from which inferences drawn by the court could legitimately, fairly and logically be drawn by the jury. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970).

No error.

Judges CAMPBELL and HEDRICK concur.

ROGER DALE CLARY v. ALEXANDER COUNTY BOARD OF EDUCATION

PHYLLIS CLARY, ADMINISTRATRIX OF THE ESTATE OF FRED H. CLARY v. ALEXANDER COUNTY BOARD OF EDUCATION

No. 7322SC637

(Filed 24 October 1973)

1. **Schools § 11— high school basketball player — invitee**

A student participating in pre-season practice for a high school basketball team was an invitee while in the school's gymnasium.

2. **Schools § 11— duty of landlord to invitee — applicability to school board**

The rule that a landlord owes a duty to an invitee to use reasonable care to keep the premises safe and to warn of hidden dangers applies to a public school or board of education if the board of education has waived the defense of sovereign immunity by purchasing liability insurance as permitted by G.S. 115-53.

3. **Schools § 11— high school basketball player — collision with glass panel — contributory negligence**

A high school basketball player was contributorily negligent in colliding with a glass panel in the gymnasium wall some three feet from the end line of the basketball court while running wind sprints from one end of the court to the other, notwithstanding he was running the wind sprints at the direction of his basketball coach, where the player was thoroughly familiar with the gymnasium and the proximity of the glass panels to the basketball court.

APPEAL by plaintiffs from *Winner, Judge,* 9 April 1973 Session of Superior Court held in ALEXANDER County.

Plaintiffs instituted these actions against the Alexander County Board of Education to recover for personal injuries sustained and medical expense incurred when Roger Dale Clary, a student at Stony Point High School, collided with one of the glass panels in the wall adjacent to the doorway at the front end of the school gymnasium.

Plaintiffs alleged in their complaints that the Board of Education was negligent in permitting breakable glass panels to be used in a wall near the basketball court and in permitting the basketball coaches to direct the players to run wind sprints in the direction of the panels.

The evidence for the plaintiffs was substantially as follows:

On the afternoon of 8 October 1968 Roger Dale Clary, age 17, a senior in high school, participated in pre-season basketball

practice in the school gymnasium. He had been a member of the high school team for the three previous years and was familiar with the gymnasium where the basketball games were played. During the course of this practice session, the players were directed to run wind sprints from one end of the basketball court to the other. Clary had run similar sprints in this gymnasium during the three previous years.

One end line of the basketball court in the Stony Point High School gymnasium was located three feet from the gymnasium wall. The wall at this end of the court contained several glass panels or windows which were in plain view. In his testimony Clary stated: "I didn't have any trouble seeing the window, and I knew it was there. I hit the window with my left arm. I covered my face. I did fall down. When I hit the glass and was cut, I fell back onto the floor. . . . I knew that I had to stop or run into something." In running one of his wind sprints upon this particular occasion, Clary did not stop but crashed into one of the glass panels. The glass shattered and he was severely injured.

At the close of plaintiffs' evidence the court granted defendant's motion for a directed verdict because of the contributory negligence of Roger Dale Clary. Plaintiffs appealed to this court.

Collier, Harris, Homesley & Jones, by Jack R. Harris and Edmund L. Gaines, for plaintiff appellants.

Hedrick, McKnight, Parham, Helms, Warley & Kellam, by Philip R. Hedrick, and Frank & Lassiter, by Jay Frank and Michael T. Lassiter, for defendant appellee.

BALEY, Judge.

The sole question for decision in this case is whether plaintiffs' evidence when considered in its most favorable light for the plaintiffs discloses contributory negligence as a matter of law. The trial court answered this question in the affirmative, and we agree.

[1] As a student participating in pre-season practice for the Stony Point High School basketball team, Roger Dale Clary was an invitee on the property of defendant. *See Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154; *Pafford v. Construction Co.*,

217 N.C. 730, 9 S.E. 2d 408. A landlord owes a duty to an invitee to use reasonable care to keep the premises safe and to warn of hidden dangers, but he is not an insurer of the invitee's safety. *Wrenn v. Convalescent Home,* 270 N.C. 447, 154 S.E. 2d 483; *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283; *Hull v. Winn-Dixie Greenville, Inc.,* 9 N.C. App. 234, 175 S.E. 2d 607. Specifically, he cannot be held liable for injuries to an invitee when the injuries are caused by the invitee's contributory negligence. *Berger v. Cornwell,* 260 N.C. 198, 132 S.E. 2d 317; *Waldrup v. Carver,* 240 N.C. 649, 83 S.E. 2d 663; *Blake v. Tea Co.,* 237 N.C. 730, 75 S.E. 2d 921; *Gordon v. Sprott,* 231 N.C. 472, 57 S.E. 2d 785.

[2] These rules apply to a public school or board of education just as they apply to any other landlord, if the board of education has waived the defense of sovereign immunity (as defendant has done in the present case) by purchasing a liability insurance policy, as permitted by G.S. 115-53. *Stevens v. Central School Dist. No. 1,* 25 App. Div. 2d 871, 270 N.Y.S. 2d 23 (1966), *aff'd mem.,* 21 N.Y. 2d 780, 235 N.E. 2d 448, 288 N.Y.S. 2d 475 (1968) (school owes duty of reasonable care to invitee); *Juntila v. Everett School Dist. No. 24,* 183 Wash. 357, 48 P. 2d 613 (1935) (school is not an insurer of invitee's safety); *Seel v. City of New York,* 179 App. Div. 659, 167 N.Y.S. 61 (1917) (school is not liable to invitee who is contributorily negligent).

"Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care concurring and cooperating with some negligent act or omission on the part of the defendant as makes the act or omission of the plaintiff a proximate cause or occasion of the injury complained of." *Adams v. Board of Education,* 248 N.C. 506, 511, 103 S.E. 2d 854, 857; *accord,* 6 Strong, N.C. Index 2d, Negligence, § 13, pp. 33-34.

[3] In the present case Roger Dale Clary was a senior student at Stony Point High School who had been a member of the school basketball team for three years. He was thoroughly familiar with the gymnasium and the proximity of the glass panels to the basketball court. He knew, or should have known, that glass will or can break when a heavy body comes violently into contact with it, and that broken glass is dangerous and can cut a person severely. He had run wind sprints upon many other occasions in this gymnasium and knew, or should have known,

that he could not stop immediately at the end line of the basketball court when running at top speed. He knew that the glass panel was within three feet of the end line of the basketball court and in plain view. Yet he chose to run directly at the panel at full speed without slowing down until he was within three feet of the glass. Anyone who runs toward a glass wall at full speed and does not slow down until he is only three feet from the wall would be compelled by his momentum to crash into the wall and suffer injury. We hold that Roger Dale Clary failed to exercise ordinary and reasonable care for his own safety under the known circumstances then existing and was clearly negligent. There is no other reasonable inference to be drawn from the evidence. Since plaintiffs' own evidence established his contributory negligence, the directed verdict for the defendant was entirely proper. *Lowe v. Futrell,* 271 N.C. 550, 157 S.E. 2d 92; *Turpin v. Gallimore,* 8 N. C. App. 553, 174 S.E. 2d 697, *cert. denied,* 277 N.C. 117.

Plaintiffs contend that Clary was excused from contributory negligence, if any, because he was acting under the instructions of his basketball coach. The rule with respect to acting in obedience to the orders of a person in authority requires that such orders be disregarded when a reasonable man under similar circumstances would know that his compliance with such orders would result in his injury. *Swaney v. Steel Co.,* 259 N.C. 531, 131 S.E. 2d 601; *see Drumwright v. Theatres, Inc.,* 228 N.C. 325, 45 S.E. 2d 379; *Johnson v. R.R.,* 130 N.C. 488, 41 S.E. 794; *Lambeth v. R.R.,* 66 N.C. 494.

Since we have reached the conclusion that contributory negligence would bar recovery of the plaintiffs, we do not consider the question of negligence of the defendant Board of Education in the construction and operation of the school gymnasium in the manner herein described.

The injuries suffered by Roger Dale Clary are most unfortunate but the evidence clearly supports the directed verdict for the defendant entered by the trial court.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. WALTER LEE SADLER

No. 739SC485

(Filed 24 October 1973)

1. **Indictment and Warrant § 12— amendment of warrant — same crime charged — amendment proper**

Where the original warrant read in pertinent part, "N. C. Department of Correction, Vance County Subsidiary #4080," but the warrant was read and amended in open court to charge defendant with escape from "North Carolina Dept. of Correction in Granville County, Number 4080," the statutory offense charged, escape from a N. C. correctional unit in violation of G.S. 148-45, was never altered so that an entirely different offense was charged; therefore, the amendment to the warrant was not invalid.

2. **Criminal Law § 15— objection to venue — plea in abatement required**

Defendant waived any objection he might have had as to venue when he failed to plead in abatement. G.S. 15-134.

3. **Criminal Law § 99; Escape § 1— prison records not introduced — testimony proper — questions by trial court — no expression of opinion**

Defendant failed to show that he was prejudiced in any way by testimony of a prison official from unintroduced records all of which concerned defendant's past record of disciplinary charges; furthermore, questions by the trial court with respect to the records were proper where the judge elicited the fact that defendant was found not guilty of the disciplinary charges, and the court could therefore instruct the jury to disregard testimony relative to the charges.

4. **Escape § 1— county of escape — failure to instruct — no error**

Where defendant was assigned to a N. C. correctional unit in Vance County, was at all times under the supervision of guards from the Vance County Unit, but escaped from the unit while a group of inmates was working in Granville County, the trial court did not err in failing to instruct the jury that the escape actually occurred in Granville County and that defendant could not be convicted under a warrant charging an escape in Vance County, since that fact did not affect defendant's guilt or innocence.

ON *Certiorari* to review judgment of *Hobgood, Judge,* 20 November 1972 Criminal Session, VANCE Superior Court.

Walter Lee Sadler was charged with felonious escape in violation of G.S. 148-45 by a warrant dated 7 September 1972. At the time of his escape he was serving a one day to six-year sentence on a charge of uttering a forged check. Sadler was located at the North Carolina Department of Corrections, Vance County Subsidiary No. 4080. The defendant was one of a group of inmates chosen to work during the day at the State's Enter-

prise Meat Processing Plant at Butner in Granville County. The inmates are bussed daily to Butner and back under the supervision of a guard from the Vance County unit. The same guard also has the prisoners under his surveillance while they are working under the supervision of the permanent staff of the meat processing plant. On 31 August 1972 Sadler walked away from the Enterprise Meat Processing Plant and was reported an escapee. Some six hours later the defendant, from a service station near Stovall, N. C., in Granville County, called the Vance County unit to turn himself in. The warrant, laid in Vance County, charging the defendant read:

> "The undersigned, James F. Jernigan, Correctional Sgt., being duly sworn, complains and says that at and in the county named above and on or about the 31 day of August, 1972, the defendant named above did unlawfully, wilfully and feloniously escaped (sic) from the N. C. Department of Correction, Vance County Subsidiary #4080, while serving a 1 day to 6 year sentence for Uttering Forged Check. This sentence was imposed by the Hon. W. K. McLean in the Superior Court for Mecklenburg County, on the 13th day of August 1971.
>
> The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 148-45."

The defendant executed an affidavit of indigency and was appointed counsel relative to the hearing in the District Court of Vance County. The defendant, through his court-appointed attorney, tendered a plea of guilty to misdemeanor escape which was accepted and judgment entered thereon.

Subsequently, Sadler gave notice of appeal to the Superior Court of Vance County indicating he desired to retain his own attorney. On September 25, 1972, Sadler executed a waiver of right to counsel. On November 21, 1972, Walter Lee Sadler was tried in the Superior Court *"de novo"* on the charge of misdemeanor escape. Acting as his own attorney, defendant entered a plea of not guilty. From a verdict of guilty and a sentence pronounced thereon, the defendant gave notice of appeal to the North Carolina Court of Appeals. On December 11, 1972, an order was entered appointing counsel for said indigent relative to his appeal. Certiorari was granted May 2, 1973.

Attorney General Robert Morgan by Associate Attorney William Woodward Webb for the State.

Zollicoffer & Zollicoffer by John H. Zollicoffer, Jr., for the defendant appellant.

CAMPBELL, Judge.

[1] The defendant moved for arrest of judgment on the grounds that he was tried in the Superior Court of Vance County under an unauthorized amendment to the original warrant. The original warrant in pertinent part read, "N. C. Department of Correction, Vance County Subsidiary #4080." The warrant was read and amended in open court to charge the defendant with escape from "North Carolina Dept. of Correction in Granville County, Number 4080." The defendant alleges that the Vance County Superior Court lacked jurisdiction to try the defendant on the amended warrant because it charged a different offense from that for which he was convicted in the lower court.

It is true that the court has "no power to permit the original warrant to be amended so as to charge an entirely different crime from the one on which the defendant was convicted in the lower court." *State v. Davis,* 261 N.C. 655, 135 S.E. 2d 663 (1964). *State v. Cooke,* 246 N.C. 518, 98 S.E. 2d 885 (1957). The warrant in the case at bar could have more clearly stated that "Number 4080" was a Vance County Subsidiary of the North Carolina Department of Correction and that the defendant, while a member of said unit, was working in Granville County when the alleged escape took place. However, the statutory offense charged, escape from a North Carolina correctional unit in violation of G.S. 148-45, was never altered. The amendment did not charge an entirely different offense and hence is not invalid. *State v. Brown,* 225 N.C. 22, 33 S.E. 2d 121 (1945); *State v. Mills,* 181 N.C. 530, 106 S.E. 677 (1921).

[2] The defendant asserts that Vance County was not the proper venue for this trial. However, any objection the defendant may have had as to venue has been waived. G.S. 15-134 provides:

> "[I]n the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place,

> unless the defendant shall deny the same by plea in abatement, . . ."

It has long been established that a defendant waives any objection to improper venue by not pleading in abatement. *State v. Ray,* 209 N.C. 772, 184 S.E. 836 (1936).

Defendant also assigned as error the same grounds on which he made his motion for arrest of judgment, *i.e.,* that the warrant was amended to charge a different offense. We find this contention without merit. We also find that there was no fatal variance between the warrant and the evidence elicited at trial.

[3] The defendant contends that the trial court erred in the admission of testimony concerning unidentified records which had not been introduced into the record, and in asking questions relative thereto. Defendant cites *State v. Vaillancourt,* 268 N.C. 705, 151 S.E. 2d 610 (1966). In *Vaillancourt, supra,* the court, in dealing with the issue of lawful custody, held that while it was error in a prosecution for escape to permit a prison official to testify over objection as to the contents of the commitment instead of introducing the commitment itself, that where the defendant himself testified that at the time of his escape, he was serving a life sentence, defendant's testimony cures the error. In the case at bar appellant has not shown that he has been prejudiced in any way by the testimony from unintroduced records all of which concerned Sadler's past record of disciplinary charges.

> "Mere technical error will not entitle defendant to a new trial; it is necessary that error be material and prejudicial and amount to a denial of some substantial right. Whether technical error is prejudicial is to be determined upon the basis of whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Garnett,* 4 N.C. App. 367, 167 S.E. 2d 63 (1969).

The questions put forward by the trial judge did not compound the error. Rather, he was able to elicit the fact that defendant had been found not guilty of the disciplinary charges referred to and therefore to instruct the jury to disregard testimony relative to such charges.

". . . It is entirely proper, and sometimes necessary, that they [trial judges] ask questions of a witness so that the 'truth, the whole truth, and nothing but the truth' be laid before the jury. . . ." *Eekhout v. Cole,* 135 N.C. 583, 47 S.E. 655 (1904).

[4] Defendant also contends that the trial judge committed error in failing to charge that the escape actually occurred in Granville County and that the defendant would therefore not be guilty of the offense charged in the warrant. In *State v. Outerbridge,* 82 N.C. 619 (1880), the court stated:

"No witness having testified that the place where the deceased was killed was in the county of Bertie, the prisoner's counsel prayed for the following instructions, to-wit: 'It is the duty of the State to satisfy the jury beyond a reasonable doubt that the offense was committed in manner and form as charged in the bill of indictment, and as there is no evidence before the jury that Peter Freeman was shot, assaulted or died in Bertie County, it is their duty to acquit.' The Court declined to give the instruction, holding that under section 70, chapter 33, of Battle's Revisal, the objection could only be raised for the benefit of the prisoner by plea in abatement.

Since the act of 1844 it has not been necessary on the trial of an indictment, either for felony or misdemeanor, for the State to prove the offense to have been committed in the county where the defendant is indicted. The act is very broad in its terms, and the language used is 'that in the prosecution of *all* offenses it shall be deemed and taken as true that the offense was committed in the county in which, by the indictment, it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement.' . . . There was no error in the refusal to give this instruction."

Defendant's contention has no merit. He was at all relevant times assigned to Vance County Unit No. 4080 and was at all times under the supervision of guards from the Vance County Unit. It was from the custody of the Vance County Unit while at the Enterprise Meat Processing Plant that defendant escaped and defendant's guilt or innocence is not changed by the fact that the Enterprise Meat Processing Plant is actually in Granville County. There was no error in the judge's charge.

We have examined the other assignments of error brought forward by the defendant and find them without merit.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM R. HALTOM

No. 7320SC596

(Filed 24 October 1973)

1. **Criminal Law § 15— possession of marijuana — motion for change of venue — public outrage caused by rock festival**

The trial court in a prosecution for possession of more than five grams of marijuana did not err in the denial of defendant's motion for a change of venue on the ground that a recent rock festival in the county had stirred up public outrage against the use of marijuana to the extent that it would be impossible for defendant to receive a fair trial in the county where defendant did not set forth the facts upon which the motion was based in any detail. G.S. 1-85.

2. **Criminal Law § 91— motion for continuance — jury hearing of voir dire arguments in previous case**

The trial court in a prosecution for possession of marijuana did not abuse its discretion in the denial of defendant's motion for continuance made on the ground that the jury panel was in the audience in the preceding case and heard arguments made by defendant's counsel on *voir dire* on issues identical to those heard in the present case in the absence of the jury.

3. **Criminal Law § 158; Searches and Seizures § 3— validity of warrant — omission of warrant from record**

The appellate court cannot review the trial court's conclusion that a search warrant was valid where the warrant and supporting affidavit are not in the record on appeal.

4. **Searches and Seizures § 3— validity of warrant — information from informants**

Trial court's conclusion that a warrant to search for marijuana was valid was supported by the *voir dire* testimony of the SBI agent who obtained the warrant that he received information that defendant had marijuana in his possession from an informant who had proven reliable in the past and from a second informant who had not previously furnished information, since the information furnished by the second informant was corroborated by the previously reliable informant.

5. **Constitutional Law § 31— identity of confidential informant**

The trial court did not err in refusing to require the State to reveal the identity of a confidential informant.

6. **Narcotics § 3— unanalyzed packages — comparison with analyzed substances**

In this prosecution for possession of more than five grams of marijuana, the trial court did not err in permitting the jury visually to compare substances in packages seized from defendant which had not been analyzed with other seized packages analyzed as containing 52.2 grams of marijuana.

7. **Criminal Law § 101— permitting jury to take evidence into jury room**

The trial court in a prosecution for possession of marijuana did not commit prejudicial error in permitting the jury to take the State's evidence into the jury room.

APPEAL from *Webb, Special Judge,* 29 January 1973 Session of RICHMOND County Superior Court.

Defendant was convicted by a jury of wilful possession of a controlled substance, i.e., more than five grams of marijuana in contravention of the North Carolina Controlled Substances Act and was sentenced to the statutory maximum of five years' imprisonment.

Prior to the trial of the case, defendant moved for a change of venue on the grounds that a recent rock festival in Richmond County had caused a great deal of public outrage concerning the use of marijuana, and that it would be impossible for him to receive a fair trial. In addition, he moved for a continuance on the grounds that the jury panel had been in the audience in the immediately preceding case, where defendant's counsel had represented another defendant on a marijuana charge. Thus, they were able to hear arguments made by counsel on voir dire concerning search warrants, suppression of evidence, etc., in the preceding case. Both motions were denied.

SBI Special Agent Van Parker testified that he was informed by two informants that Bill Haltom had in his possession a quantity of marijuana and that one of the informants had purchased marijuana from Haltom. With this information, Agent Parker obtained a search warrant and went to the pool-room owned by Haltom where he and two other SBI agents discovered approximately 20 plastic bags containing a green

vegetable substance, a quantity of copper tubing, and a quantity of "rolling paper."

Of the total number of packages, only two were analyzed by the SBI laboratory as marijuana. They totalled 52.2 grams. The packages not so analyzed were admitted into evidence over the objection of defendant and the jury was permitted to compare them visually with the packages analyzed as marijuana.

At the close of State's evidence, defendant's motions for mistrial and dismissal of the charges were overruled.

Defendant thereupon took the stand in his own behalf. He testified that the area from which Agent Parker seized the plastic bags and other material was not restricted or inaccessible to anyone who was in the poolroom. The only item he had seen prior to the seizure was State's Exhibit 7A which he had placed inside the candy counter. He testified that he had taken it from his son, and he had placed it in the candy counter in an attempt to find the individual who had sold it to his son. He had also seen the copper tubing when someone brought it in from the street and left it on the counter.

At the close of defendant's evidence and again following State's rebuttal evidence, defendant's motion for dismissal was overruled. Following the jury's verdict of guilty, defendant's motion to set aside the verdict was denied.

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

Leath, Bynum and Kitchin, by Henry L. Kitchin, for defendant appellant.

MORRIS, Judge.

[1] Appellant assigns as error the trial court's denial of his motion for a change of venue on the ground that a recent rock festival in Richmond County had stirred up public outrage against the use of marijuana to the extent that it would be impossible for him to get a fair trial from any jury panel in the county. A motion to remove pursuant to G.S. 1-84 is within the sound discretion of the trial court. *Patrick v. Hurdle,* 6 N.C. App. 51, 169 S.E. 2d 239 (1969). When such a motion is made, the facts upon which the motion is based must be stated with particularity and detail in the affidavit pursuant to G.S.

1-85. *Patrick v. Hurdle, supra.* Nowhere in the record does it appear that defendant has set forth the facts on which his motion was based in any detail; therefore, the trial court did not abuse its discretion in denying the motion.

[2] Appellant also contends that the trial court erred in its denial of his motion for continuance prior to the trial. The basis of this motion is the fact that the panel from which the jury was selected was in the audience at the trial of the case immediately preceding the present one, and they heard arguments made by counsel on voir dire on issues identical to those of the present case that were heard outside the presence of the jury. Like the motion for removal, this motion is the subject of the trial judge's discretion, and is not subject to review absent an abuse of discretion. *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811 (1973); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Cameron,* 17 N.C. App. 229, 193 S.E. 2d 485 (1972).

[3] The crux of appellant's case is his contention that the various items of evidence seized pursuant to the search warrant should have been suppressed because of the invalidity of the search warrant. However, the search warrant and supporting affidavit do not appear in the record, and there is no indication of their contents other than the testimony of Agent Parker on voir dire. We are, therefore, precluded from reviewing the trial court's conclusion that the search warrant was properly granted, the search properly conducted and the evidence seized pursuant thereto admissible.

[4] We are of the opinion, nevertheless, that the trial court's conclusions were correct inasmuch as they are supported by the testimony of Agent Parker on voir dire. According to Agent Parker, he had two informants — one of whom had been reliable in the past, and one who had not previously furnished information. The information furnished by the informant who had not proven reliable in the past was corroborated by the previously reliable informant. Thus, we feel that the standard for probable cause as established in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964), has been satisfied.

[5] We cannot sustain appellant's contention that the trial court erred in refusing to allow him to ascertain the identity of one of the informants. The right of the State to confidentiality

of its informants is well established. *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476 (1957); *McCray v. Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed. 2d 62 (1968); *Aguilar v. Texas, supra.*

[6] There has been no prejudice to defendant in allowing the jury to compare the unanalyzed substances to the packages previously analyzed as containing marijuana. As we have noted, the substance identified as marijuana was 52.2 grams—well above the statutory requirement of 5 grams. Inasmuch as there was 52.2 grams of marijuana introduced into evidence, State's case was sufficient to go to the jury, and appellant's assignment of error to the denial of the motion for nonsuit cannot be sustained.

The trial court's charge to the jury appears to be free from prejudicial error. Even if defendant had been prejudiced thereby, his broadside exception cannot be sustained. An assignment of error to the charge as a whole that specifies no additional charges deemed to be required is ineffective to bring up any portion of the charge for review. *Investment Properties v. Allen,* 281 N.C. 174, 188 S.E. 2d 441 (1972).

[7] Appellant contends the trial court erred in allowing the jury to take the State's evidence into the jury room. Assuming, arguendo, that this was error, appellant has nevertheless failed to sustain his burden upon appeal. It is not sufficient that he show error; he must make it appear that the error was prejudicial to him and that a different result would likely have ensued absent the error. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Crump,* 280 N.C. 491, 186 S.E. 2d 369 (1972).

The final assignment of error is to the denial of appellant's motion to set aside the verdict of the jury. Such a motion is addressed to the discretion of the trial court and is not reviewable on appeal. *State v. Mason,* 279 N.C. 435, 183 S.E. 2d 661 (1971).

No error.

Judges CAMPBELL and PARKER concur.

WILLIAM B. ROSSMAN AND AMELIA ROSSMAN v. NEW YORK LIFE INSURANCE COMPANY

No. 7315SC534

(Filed 24 October 1973)

1. **Courts § 21— what law governs — life insurance contracts completed in another state**

The substantive law of this State applies to an action to recover double indemnity benefits under life insurance contracts completed in New York where the insured was a resident of this State at the time of his death. G.S. 58-28.

2. **Insurance § 46— death from accidental bodily injury — intentional injection of drugs**

Insured's death did not result from "accidental bodily injury" within the meaning of double indemnity provisions of two life insurance policies where insured's death was caused by his intentional intravenous injection of himself with a non-prescription methyl amphetamine.

APPEAL by plaintiff from *Bailey, Judge,* 1 January 1973 Session of Superior Court held in ORANGE County.

This civil action was instituted by the plaintiffs for the recovery of twenty thousand dollars ($20,000) which sum represents the accidental death benefits under two (2) policies of life insurance issued by the defendant, New York Life Insurance Company, on the life of James L. Rossman, son of the plaintiffs. The defendant admits that both policies were in full force and effect on the date of the death of the insured and in fact the defendant has paid the face amount of each of said policies to the beneficiaries; although it has refused to pay the accidental death benefits under either policy.

Both parties moved for summary judgment pursuant to G.S. 1A-1, Rule 56, of the Rules of Civil Procedure. The record discloses the uncontroverted facts to be as follows:

Each of the two (2) insurance policies on the life of James Rossman contains a clause which requires double indemnity benefits to be paid if "the Insured's death resulted directly, and independently of all other causes, from accidental bodily injury." On the evening of 30 October 1969 Rossman knowingly and voluntarily injected himself with a non-prescription methyl amphetamine. Within a short period after such injection the insured complained of a headache, became dizzy, and lapsed into a coma. He was rushed to North Carolina Memorial Hospital

in Chapel Hill by friends and after a period of approximately eight hours died at the hospital on 31 October 1969. The cause of death as shown in the Certificate of Death and as diagnosed by both Dr. Dalldorf, the County Medical Examiner, and Dr. Page Hudson, the pathologist who performed an autopsy on the insured's body, was an intra-cerebral hemorrhage resulting from the intravenous injection of methyl amphetamine. At the time of his death, Rossman, who was a Phi Beta Kappa graduate of the University of North Carolina at Chapel Hill, was a resident of North Carolina and was employed as the manager of Harry's Restaurant in Chapel Hill.

From summary judgment for the defendant, plaintiffs appealed.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant, Jr., for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter by Larry B. Sitton for defendant appellee.

HEDRICK, Judge.

[1] There being no genuine issue as to any material fact, the question to be resolved on this appeal is whether defendant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c), Rules of Civil Procedure. Plaintiff first contends that the substantive law of the State of New York governs this action since both contracts of insurance were completed in the State of New York; however, N. C. G.S. 58-28 declares that "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein. . . ." Therefore, since at the time of his death James Rossman was a resident of North Carolina, under the provisions of G.S. 58-28, the life insurance policies in question are deemed to have been made in North Carolina and are subject to the laws of this State.

[2] The only question remaining is whether Rossman's death resulted from "accidental bodily injury." Both policies contain identical clauses which declare that in order to qualify for double indemnity benefits it must be proved that "insured's death resulted directly, and independently of all other causes, from accidental bodily injury." The parties are in agreement that the intravenous injection of the methyl amphetamine was intentional; thus, our inquiry must be directed to the impact on the terms of the policy of such a voluntary, intentional act.

The key word appearing in that portion of the insurance contracts dealing with double indemnity benefits is "accidental." Justice Bobbitt (now Chief Justice) writing for the court in *Mills v. Insurance Co.*, 261 N.C. 546, 135 S.E. 2d 586 (1964) was confronted with the same phrase "accidental bodily injury" and in ascertaining the meaning of the salient word "accidental" he stated: "The word 'accidental' in the absence of a policy definition, must be interpreted in its usual, ordinary, and popular sense." The *Mills* decision, in seeking to determine the usual, ordinary, and popular meaning of "accidental bodily injury" cited cases which afforded coverage for death or injury by "accidental means," and quoted with approval the following statement of Justice Higgins in *Fallins v. Insurance Co.*, 247 N.C. 72, 100 S.E. 2d 214:

> "An injury is 'effected by accidental means' if in the line of proximate causation the act, event or condition from the standpoint of the insured is unintended, unexpected, unusual, or unknown."

There being in the instant case no policy definition of "accidental" we conclude that the usual, ordinary, and popular definition of "accidental" would not include "intentional bodily injury," and that James Rossman's intentional self-injection of methyl amphetamine was not an "accidental bodily injury" but rather an "intentional bodily injury." Therefore, on this record, the plaintiff is not entitled to double indemnity benefits. See also, *Whiteside v. New York Life Insurance Company*, 7 Wash. App. 790, 503 P. 2d 1107 (1972).

The defendant was entitled to judgment as a matter of law which is

Affirmed.

Judges PARKER and BALEY concur.

SZABO FOOD SERVICE, INC. OF NORTH CAROLINA v. BALENTINE'S, INC., DEFENDANT, AND WAKE COUNTY, ADDITIONAL DEFENDANT

No. 7310SC708

(Filed 24 October 1973)

1. **Uniform Commercial Code § 71— conditional sale of restaurant equipment**

Where plaintiff and defendant entered into an agreement whereby defendant was to have the use of certain restaurant equipment, furniture and fixtures for a given term, at which time plaintiff agreed to transfer the equipment without further charge to defendant, the agreement between the parties provided plaintiff with a security interest in the equipment and was in reality a conditional sale of the items, not a leasing or bailment arrangement. G.S. 25-1-201(37).

2. **Taxation § 25— ad valorem taxes — owner of conditional sales contract property — definition**

The vendee of personal property under a conditional sale in which the vendor retains the title as security is considered the owner of the property provided the vendee has possession of or the right to use the property; therefore, defendant who was in possession of restaurant equipment which was the subject of a conditional sales agreement was the owner of the property and was the proper party to list the property for ad valorem taxes. G.S. 105-306(c)(2).

APPEAL by plaintiff from *Hobgood, Judge,* 19 March 1973 Session of Superior Court held in WAKE County.

This is an action brought under the provisions of the Uniform Declaratory Judgment Act, Chapter 1, Article 26, of the General Statutes of North Carolina by Szabo Food Services, Inc., of North Carolina (Szabo) against Balentine's, Inc. (Balentine's) and Wake County. The action seeks an adjudication of the liability and responsibility of Szabo and Balentine's for the listing of certain personal property for *ad valorem* taxes with the Tax Supervisor of Wake County and for the payment of such taxes applicable to this property for the tax years 1970 through 1973.

The personal property which comprises the focal point of this action is certain restaurant equipment, furniture, and fixtures at Balentine's Cafeteria in Raleigh, North Carolina, which Szabo purchased from Balentine's in 1966.

On 14 August 1969 Szabo and Balentine's completed an agreement, the terms of which required Balentine's to resume the operation of Balentine's Cafeteria and Szabo to agree "that Balentine's shall have use of all existing equipment located in the demised premises, an inventory of the same to be prepared and signed by Szabo and Balentine's. Provided there is no termination of this agreement prior to the end of the term under the sublease with J. W. York, Szabo agrees to transfer said equipment without further charge to Balentine's at the termination of the sublease with J. W. York. Prior to that time Szabo agrees that Balentine's may use said equipment as long as Balentine's occupies the demised premises at any place and in any manner it determines."

For the tax year 1970, the Tax Supervisor of Wake County listed the personal property involved in this case to Szabo and Szabo paid the taxes as assessed. Szabo subsequently informed the Tax Supervisor that this property had been improperly listed, the taxes improperly paid, and sought a refund which was denied. Thereafter in the tax years of 1971 and 1972 Szabo refused to list said personal property and informed the Tax Supervisor that Balentine's was the proper party to list the property and pay the taxes. Balentine's has neither listed nor paid the taxes, and in fact, contends in its answer that Szabo is responsible for the taxes.

After hearing this matter, the court determined that Szabo was responsible for listing and paying the taxes on this restaurant property. From this decision the plaintiff appealed.

Bailey, Dixon, Wooten & McDonald by Wright T. Dixon, Jr., and Kenneth Wooten, Jr., for plaintiff appellant.

Purrington, Hatch & Purrington by A. L. Purrington, Sr., for defendant appellee, Balentines, Inc.

J. Bourke Bilisoly for third party defendant appellee, Wake County.

HEDRICK, Judge.

The key inquiry in the instant case is the determination of the nature of the 14 August 1969 agreement which exists between Szabo and Balentine's. Upon resolution of this matter, reference must then be made to N. C. G.S. 105-304(a) and G.S. 105-306(c)(2), the 1972 amended version of G.S. 105-304(a),

which controls the effect that this legal arrangement has on who must list the personal property for *ad valorem* tax purposes.

[1] Initially, it is imperative that we recognize that just because the parties clothe their agreement in lease terminology or label the arrangement a bailment, does not preclude the possibility that we are dealing with a different type of transaction. *Puffer v. Lucas,* 112 N.C. 378, 17 S.E. 174. Although the present agreement between Szabo and Balentine's, particularly in reference to the equipment in question, in form purports to be a bailment or lease, we are compelled to pierce this subterfuge and find that in substance the parties have actually entered into a conditional sales agreement. See, White and Summers, Uniform Commercial Code, § 22-3, pp. 762-763; Henson, Secured Transactions, § 3-12, pp. 28-29.

The critical fact present in the agreement between plaintiff and defendant is that Balentine's will become owner of the restaurant equipment, furniture, and fixtures at the end of the term of the agreement without being required to pay any additional consideration. G.S. 25-1-201(37) of the Uniform Commercial Code in pertinent part states: ". . . an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security." Therefore, the agreement entered into between Balentine's and Szabo constituted not a leasing or bailment arrangement, but rather provided Szabo with a security interest in the cafeteria equipment and is in reality a conditional sale of these items. See, *In Re Brothers Coach Corp.,* 9 U.C.C. Rep. Serv. 502 (E.D. N. Y. 1971); *Nickell v. Lambrecht,* 29 Mich. App. 191, 185 N.W. 2d 155 (1970); *In Re Dennis Mitchell Industries, Inc.,* 280 F. Supp. 433 (E.D. Pa. 1968).

[2] Both G.S. 105-304(a) and its 1972 amended version, G.S. 105-306(c)(2), declare that the vendee of personal property under a conditional sale in which the vendor retains the title as security shall be considered the owner of the property provided ("if" in the 1972 version) the vendee has possession of such property or the right to use the property. Thus, as a result of Balentine's being presently in possession of the cafeteria equipment and our finding that the transaction between Szabo and Balentine's qualifies as a conditional sale, it follows that the trial court erred in concluding as a matter of law that Szabo

was the proper party to list the personal property; and the judgment is

Reversed.

Chief Judge BROCK and Judge BALEY concur.

IN THE MATTER OF: THE CUSTODY OF MELVIN LEE COX, JR., SUSAN DIANNE COX AND JAMES EARL COX

No. 7319DC615

(Filed 24 October 1973)

1. **Appeal and Error § 6— absence of order from which to appeal**

There was no order from which respondent could appeal where the judge stated that he would like to find that respondent knew the whereabouts of her child and indicated that he would do so at a proper contempt proceeding, but the judge actually entered no order.

2. **Divorce and Alimony § 21— failure to make support payments — motion to be purged of contempt — necessity for hearing**

Where petitioner was jailed for contempt in failing to make court-ordered child support payments, the petitioner filed a motion supported by affidavit that he be purged of contempt on the ground that he had no means to comply with the court's order requiring him to pay $6,460, the amount of arrearage of his support payments, the trial court erred in entering an order finding that petitioner had no means to comply, that his relatives had raised $2,000 on his behalf and that he should be purged of contempt upon payment of the $2,000 where the court conducted no evidentiary hearing and respondent was given no opportunity to present evidence of petitioner's ability to pay.

APPEAL by respondent-mother from *Sapp, Judge,* 14 May 1973 Session of District Court, RANDOLPH County.

The matter of custody and child support with respect to Melvin Lee Cox, Jr., Susan Dianne Cox, and James Earl Cox has been the subject of litigation in the courts of Randolph County since 1961. The children's ages are now 17, 16 and 15 respectively. Prior to 2 May 1972, custody of the children was in the mother, respondent, Virginia Minton Cox. The father, petitioner, Melvin Lee Cox, was ordered on 17 October 1964 to pay $17.50 for their support. He has paid nothing since 20 June 1966, and was adjudged in contempt on 31 August 1972. Also on 31 August 1972, the court placed Susan and James Earl

in the custody of the Department of Social Services of Randolph County and after hearing on 28 September 1972, the court refused to change its order of custody. Respondent appealed to this Court. We affirmed the trial tribunal's order [17 N.C. App. 687, 195 S.E. 2d 132 (1973)], and certiorari to the Supreme Court was denied [283 N.C. 585, 196 S.E. 2d 809 (1973)]. Respondent now appeals from what she says is an order holding her in contempt after a hearing held on 10 May 1973, pursuant to notice to determine whether Virginia Minton Cox and Ottway Burton, her attorney, had any knowledge as to the whereabouts of James Earl Cox, who had left the Children's Home in Lexington.

After the affirmance of the court's order was certified back to Randolph County, the petitioner Melvin Cox was, on 19 April 1973, jailed on the contempt order. On 30 April 1973, his counsel moved for the court to make further inquiry to the end that petitioner be examined under oath as to his financial means. Attached to the motion was an affidavit of petitioner that he had no means to comply with the order requiring him to pay $6,460, the amount of arrearage in his support payments. On 14 May 1972, the court entered an order finding that petitioner had no means with which to comply, but that his relatives had raised $2,000 in his behalf. The court found as a fact that the confinement of Melvin Lee Cox and the payment of the $2,000 into the office of the clerk would be sufficient to purge him completely of any wilful contempt of the orders entered in the cause. The court, thereupon, ordered his release, providing that any sum remaining due should constitute a judgment on the property or estate of Melvin Lee Cox. From that order, respondent appealed.

Ottway Burton for respondent appellant.

No counsel contra.

MORRIS, Judge.

At the end of the hearing with respect to the whereabouts of James Earl Cox, the following transpired:

> "COURT: As to Virginia Minton Moon, I firmly believe that she knew—I don't know that she knows now, but I think she knew when she had James Earl Cox in her presence and carried him to Mr. Burton's office and let him leave with-

out saying anything about it, that she knew that it was against the order of the court. She was in court when the order was made, and I think she has interfered with the operation of the court orders, and I would like to sign a judgment to that effect holding that the court finds as a fact that she did know at the time she carried the child into Mr. Burton's office that he was away from the Children's Home without permission; that she had knowledge of that fact; that she had knowledge that she should inform the authorities of his whereabouts, and she intentionally and wilfully failed to do so.

MR. IVEY: Would the court on its own motion be inclined to hold her in contempt?

COURT: I think you better go through the regular procedure.

MR. BURTON: If your Honor please, we would like to object and except to the court's finding of that fact.

COURT: Let the record show that counsel for the defendant, Virginia Minton Cox Moon, excepts.

This is Respondent, Virginia Minton Cox Moon's EXCEPTION NO. 2.

MR. BURTON: And we would like to give notice to the North Carolina Court of Appeals—notice of appeal to the North Carolina Court of Appeals.

COURT: All right. You are given 45 days them 30."

[1] It is completely obvious that no order was entered from which respondent could appeal. We find no order of any kind in the record. The court simply stated that he would like to find as a fact that respondent knew the whereabouts of the child and further indicated that at proper contempt proceedings, he would do so. This exception is the subject of assignment of error No. 2 which we find to be without merit.

Respondent's argument that the court had no jurisdiction over the matter we find to be specious. This assignment of error is overruled.

[2] The record contains the motion of petitioner for his release, his affidavit, and the order releasing him from custody for contempt. There is nothing in the record indicating that evidence was taken or that any type of hearing was had. There

is in the record an affidavit of Ottway Burton, counsel for respondent. No exception was taken to its inclusion. We, therefore, assume that it speaks the truth. According to the affidavit, no hearing was held on 10 May 1973 as stated in the order, although counsel for petitioner was in the courtroom. Respondent was ready to give evidence as to petitioner's ability to pay. Petitioner's counsel made no effort to have the motion heard. On 15 May 1973, respondent's counsel found the order releasing petitioner in a box in the clerk's office. Upon telephone inquiry to the judge, he learned the order had been signed in Chapel Hill at an alumni meeting on 11 May 1973, without a hearing. There had been no agreement that an order could be signed out of the district.

Petitioner sought to have himself purged of contempt. The burden was his to show facts sufficient to warrant his release. Respondent is entitled to rebut the evidence if she can. Although the order recites that petitioner's relatives have raised $2,000 which they are willing to use for his benefit, there is no evidence to support that finding. We note that respondent's counsel in his brief set forth evidence in behalf of his client to rebut petitioner's motion. This, of course, we did not consider. The place for the giving of testimony is in open court and not in a brief filed in an appellate court. This is highly improper. Nevertheless, we are of the opinion that the trial court acted hastily in signing and entering the order purging petitioner of contempt and ordering his discharge from custody. The order is, therefore, vacated and the matter remanded for further proceedings consistent with this opinion.

Remanded.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. DONALD RAY ALLEN

No. 7315SC739

(Filed 24 October 1973)

Criminal Law § 97— possible misidentification of defendant — refusal to reopen case for additional evidence — new trial

Where the possibility of a mistaken identification of defendant was obviously present in this armed robbery case, the trial court

should have allowed defendant's motion to reopen the case after it had been submitted to the jury in order that the jury should be given the benefit of hearing the testimony of an additional witness under whose supervision defendant allegedly worked on the day the crime was committed.

APPEAL by defendant from *Bailey, Judge,* 18 June 1973 Criminal Session of Superior Court held in ORANGE County.

Defendant was indicted for armed robbery and pled not guilty. At the trial, which was held in June 1973, two witnesses for the State, one of whom was the victim of the robbery, gave positive in-court identification of defendant as the person who appeared at the used car lot of Merritt Motors located on Franklin Street in Chapel Hill on the afternoon of 19 May 1972 and there robbed the proprietor of $780.00 after beating him on the head with a pistol and threatening to shoot. The State's evidence indicated the robbery occurred at 3:00 or 4:00 p.m.

Defendant testified that on 19 May 1972 he was employed by a sheet metal company in Raleigh, N. C., and on that day worked a full eight-hour shift putting up screen around a cooling tower on top of the State Highway Building in Raleigh. He testified that he did not get off from work until 4:00 p.m., when he was paid for the week. Defendant's brother testified he saw defendant in a Raleigh bank at 4:15 p.m. on 19 May 1972. The custodian of the time card records of the company for which defendant worked testified that its employees worked from 7:30 a.m. to 4:00 p.m. and that defendant's time card for 19 May 1972 showed he had worked eight hours that day on the State Highway Building. On cross-examination this witness testified that he had not himself seen defendant on 19 May 1972 and that his records indicated that the supervisor who signed defendant's time card had himself been on the job for only four and one-half hours that day.

The jury found defendant guilty as charged. Judgment was entered sentencing defendant to prison for a term of thirty years. Defendant appealed.

Attorney General Robert Morgan by Associate Attorney General W. A. Raney, Jr., for the State.

Manning, Allen & Hudson by Frank B. Jackson for defendant appellant.

PARKER, Judge.

After both sides rested and the case was submitted to the jury, defendant's counsel moved to reopen the case in order that he might present the testimony of an additional witness. The trial court denied the motion but permitted defendant's counsel to place in the record what the testimony of the witness would be. The witness then testified for the record that on 19 May 1972 he was employed by the same company as defendant and on that day defendant was working under his general supervision, but he was not the same person who had signed defendant's time card for that day; that two or three weeks prior to the trial he told defendant's counsel he did not remember whether defendant was on the job on 19 May 1972 and for that reason no subpoena was issued for him; that since having that conversation and after defendant's brother had called him on the preceding night and told him it was urgent if he could remember anything, he had reviewed his own time cards for 19 May 1972 and now remembered exactly where he was on that date; that he knew that at about 3:00 p.m. on 19 May 1972 defendant was on the State Highway Building putting up screen around the cooling tower; that on 19 May 1972 he had himself worked on another job for two hours in the morning but had worked with defendant on the State Highway Building job from 9:30 a.m. until 4:00 p.m.; and that he felt he had shirked his responsibilities to the court.

"It is well settled that it is within the discretion of the trial judge to reopen a case and to admit additional evidence after both parties have rested and even after the jury has retired for its deliberations." *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206. Ordinarily, the trial judge's ruling, whether to reopen or to refuse to reopen, being a matter within his sound discretion, will not be reviewed on appeal. However, because of the special circumstances of the present case, we have elected to review the ruling in this case and are of the opinion that defendant should be granted a new trial.

The State's evidence revealed the commission of a brutal and vicious crime by someone. The sole issue was defendant's identity as the person who committed it. The record reveals that the State's witnesses, who saw the robber only briefly at the time the crime was committed, did not identify the defendant as the perpetrator until on or about 23 February 1973, some nine months after the crime was committed. At that time they

selected defendant's picture from a group of photographs shown them by the police. Defendant was then in jail in Raleigh, apparently charged with some other offense, and one of the State's witnesses, the victim of the robbery, after identifying defendant's picture, was permitted to view the defendant through a one-way glass while defendant was being interrogated by two police officers at the Raleigh jail. While the trial court, after a voir dire hearing, found that the identification of defendant by the State's witnesses "was proper and was not tainted by any suggestion of improper procedure," nevertheless the possibility of a mistaken identification is obviously present under the procedure followed in the present case. Under these circumstances, it is our opinion that the trial judge should have allowed defendant's motion to reopen the case in order that the jury should be given the benefit of hearing the testimony of the additional witness in arriving at their verdict. Accordingly, defendant is awarded a

New trial.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. DOUGLAS R. (DICKEY) MIZE

No. 7315SC550

(Filed 24 October 1973)

1. **Criminal Law § 169— failure of record to show excluded testimony**

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

2. **Assault and Battery § 8— felonious assault — self-defense — incidents of violence by victim**

In this felonious assault prosecution, the trial court did not err in the exclusion of testimony by defendant that the victim had beaten defendant's estranged wife several times and had broken her brother's arm where there was no showing that any altercation between the victim and defendant's wife or her brother occurred in defendant's presence or that defendant had personal knowledge of any such altercation.

APPEAL by defendant from *Bailey, Judge,* 15 January 1973 Session of ALAMANCE Superior Court.

The indictment against defendant charged that on or about 15 September 1972, defendant unlawfully, willfully and feloniously assaulted Harold Covert (Covert) with a deadly weapon, to wit: "a military survival fixed blade knife" with the felonious intent to kill and murder the said Harold Covert, inflicting serious injuries not resulting in death. Defendant pleaded not guilty.

The State's evidence in pertinent part showed: On 15 September 1972 defendant and his wife were living separate and apart, and Covert and his wife were living separate and apart. For some four months prior to 20 August 1972, Covert and defendant's wife had been living together, but on that date she "moved out" and obtained her own apartment. Around midnight on 15 September 1972, defendant went to Covert's apartment, knocked on the door and when Covert opened the door, defendant proceeded to cut him about his head and body with a knife. Covert had no weapon about his person when he was cut. Defendant's wife was in Covert's apartment at the time.

Defendant testified in pertinent part as follows: On the night in question, his wife owed him $150 and, seeing her car in front of Covert's apartment, defendant went there looking for her. Defendant had been fishing the day before, and because of threats previously made by Covert, he carried with him a knife that was part of his fishing equipment. When defendant knocked on Covert's door, defendant's stepchild, who was in the apartment, inquired as to who was at the door. Defendant identified himself, and soon thereafter Covert opened the door and "swung" at defendant. A tussle ensued with defendant and Covert fighting in the hallway adjacent to the apartment and in the yard in front of the apartment. Defendant cut Covert in self-defense.

The jury found defendant guilty of assault with a deadly weapon inflicting serious bodily injury, and from judgment imposing prison sentence of not less than three nor more than five years, defendant appealed.

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

John D. Xanthos for defendant appellant.

BRITT, Judge.

Defendant combines his assignments of error 2 and 9 and states the question presented by the assignments thusly: "Did the court err in not allowing the defendant to establish prosecuting witness' reputation as a combatant and instructing jury to disregard answer?"

[1] The assignments of error relate to exceptions 4, 5 and 15. Exceptions 4 and 5 relate to defendant's cross-examination of Covert when the court sustained the State's objections to questions attempting to elicit evidence to the effect that Covert had beaten defendant's wife several times and had whipped his brother. The record does not show what the answers to the questions would have been had the witness been allowed to answer. Therefore, we cannot know whether the rulings were prejudicial. The burden is on appellant not only to show error but *prejudicial* error. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972).

[2] Exception 15 relates to defendant's testimony on direct examination. Defendant was asked if he knew the reputation of Covert "with regard to fighting, and so forth." Defendant answered: "He previously beat my wife up and her two brothers come to his apartment and he broke one of them's arms and the police came up there and settled the whole thing." The court thereupon instructed the jury to disregard the answer as it was not responsive to the question and advised defendant that the question was whether he knew Covert's reputation and that specific instances were not responsive to that question. Defendant then answered "his reputation is pretty rough."

Our Supreme Court has held that where defendant in a homicide prosecution pleads self-defense, he is entitled to show, for the purpose of explaining and establishing defendant's reasonable apprehension when deceased advanced toward him, the character of the deceased as a violent and dangerous man, and may testify as to incidents of violence in altercations between the deceased and himself, and may also testify as to specific acts of violence which occurred in defendant's presence or of which he had knowledge in altercations between the deceased and third parties. *State v. Johnson,* 270 N.C. 215, 154 S.E. 2d 48 (1967). The same rules apply in cases of assault and battery, both criminal and civil. 1 Stansbury's N. C. Evidence (Brandis Revision), § 106, p. 330. In the instant case there

was no showing that any altercation between Covert and defendant's wife or her brothers occurred in defendant's presence or that he had personal knowledge of any such altercation. The court allowed defendant to testify as to Covert's reputation "for fighting." We find no prejudicial error in the court's action.

By other assignments of error, defendant contends the court erred in expressing opinions to the jury in violation of G.S. 1-180. We have carefully considered each of these assignments but conclude that any error committed was not prejudicial.

By his remaining assignments of error, defendant contends the court erred in its instructions to the jury. We have carefully reviewed the instructions and conclude that they are free from prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. MARVIN HEWITT

No. 7315SC681

(Filed 24 October 1973)

Criminal Law § 99— questioning witnesses — belittling counsel — expression of opinion by court

In a prosecution for receiving stolen property knowing said goods to be stolen, the trial court committed prejudicial error in questioning the State's witnesses and in belittling counsel upon his request for instructions.

APPEAL by defendant from *Bailey, Judge,* 19 March 1973 Session of ORANGE County Superior Court.

The defendant was indicted by the Orange County Grand Jury for feloniously receiving stolen property knowing said goods to be stolen. From a verdict of guilty and a judgment sentencing the defendant to ten years imprisonment, the defendant appeals.

Attorney General Robert Morgan by Assistant Attorney General George W. Boylan for the State.

Norman E. Williams; Thomas F. Loflin III; and Thomas B. Anderson, Jr., for defendant appellant.

CAMPBELL, Judge.

G.S. 1-180 provides: "No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, . . ." Although the statute refers to the charge, it has always been construed to include the expression of any opinion, or even an intimation by the judge, at any time during the trial which prejudices either party. *State v. Oakley,* 210 N.C. 206, 186 S.E. 244 (1936).

In *State v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378 (1946), the court said:

> ". . . It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial. The statute forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. 'Every suitor is entitled by the law to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury.' *Withers v. Lane,* 144 N.C., p. 192, 56 S.E., 855."

In the course of the State's case, the trial judge interrupted to ask a witness, "Do you know what he did with the stuff?" It is error for the judge to make any statement which goes beyond the stage of eliciting or clarifying the witness's testimony and which is subject to the interpretation by the jury that the judge believes the defendant to be guilty. *State v. McEachern,* 283 N.C. 57, 194 S.E. 2d 787 (1973). ("You were in the car when you were raped?"); *State v. Ealy,* 7 N.C. App. 42, 171 S.E. 2d 24 (1969). (Instruction to jury to answer the question, "At the time of the stabbing that killed the deceased, Jesse Osborne, was the defendant at a place where she had the right to be?")

It is also error for the judge to make any remarks which tend to belittle or humiliate defendant's cause or his counsel

before the jury. *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971); *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971). See, Annotation, Remarks or Acts of Trial Judge Criticizing, Rebuking, or Punishing Defense Counsel in Criminal Case, as Requiring New Trial or Reversal, 62 A.L.R. 2d 166 (1958). See, Annotation, Prejudicial Effect of Trial Judge's Remarks, During Criminal Trial, Disparaging Accused, 34 A.L.R. 3d 1313 (1970). During the cross examination of one of the State's witnesses, Mr. Brad Wilson, the following took place:

"Q. And at that time did you take the witness stand and testify?

A. No sir.

THE COURT: Why would he on a plea of guilty?

Why would he take the witness stand on a plea of guilty?"

Later in the same cross examination the following occurred:

"Q. You thought if you could involve someone else in this matter you thought that would help you?

A. No sir.

Q. You don't think it would help you?

A. No sir.

THE COURT: What difference does that make?"

Finally, at the conclusion of the evidence the following exchange took place:

"THE COURT: Well it's time to get the cigarette smoked I reckon.

MR. NOELL: Your Honor, may I make one motion pertaining to the Charge of the Court before the Court charges?

THE COURT: Is that a motion or request for instructions?

MR. NOELL: It is a request for instructions.

THE COURT: Why don't you write them out so I can rule on them and put it in the file so if you don't like my ruling you will have something to appeal from?

MR. NOELL: I thought I'd put it in the record.

THE COURT: If you think I am going to listen to instructions while you argue to the jury, you are crazy."

When all these incidents, particularly the last one, are viewed in light of their cumulative effect upon the jury, we are constrained to hold that the cold neutrality of the law was breached to the prejudice of the defendant. We feel certain the learned trial judge did not intend to prejudice the defense or in any manner belittle counsel; but, nevertheless, when these inadvertences occur, they must be corrected, as they could have conveyed to the jury the impression of judicial leaning. This, of course, violates G.S. 1-180 and requires a new trial. Having ordered a new trial, we need not consider defendant's other assignments of error as they may not recur.

New trial.

Judges PARKER and VAUGHN concur.

JACK R. KINLAW v. EDITH ANN TYNDALL AND BILLY RAY TYNDALL

No. 7316SC669

(Filed 24 October 1973)

Automobiles § 63— striking child — insufficient evidence of negligence

Trial court properly directed verdict for defendants in an action to recover for personal injuries sustained by plaintiff's minor child when she was struck by defendants' automobile where the evidence tended to show that the child was walking along a street upon which defendant was driving, defendant's view of the street was unobstructed, defendant decreased her speed upon observing children walking on the street, plaintiff's child ran into the side of the vehicle sustaining injuries, and there were tire marks measuring twelve feet in length at the scene of the accident.

APPEAL by plaintiff from *McLelland, Judge,* March 1973 Session of Superior Court held in ROBESON County.

This is a civil action wherein the plaintiff, Jack R. Kinlaw, seeks to recover damages in the sum of ten thousand dollars for medical and hospital expenses for which he became responsible as a result of injuries sustained by his minor daughter, Linda

Rose Kinlaw, who was struck by an automobile owned and operated by the defendants.

The material evidence offered by the plaintiff tended to show the following:

At approximately 3:30 p.m. on 23 September 1969 the automobile operated by defendant Edith Ann Tyndall struck and injured Linda Rose Kinlaw, minor daughter of the plaintiff. The accident occurred on Vance Drive in a residential area of Lumberton, North Carolina. Vance Drive runs north and south and is intersected by 13th Street which runs east and west. On the day of the accident defendant, whose view was unobstructed, made a left turn from 13th Street and headed north on Vance Drive. The weather was clear and the streets were dry, paved and straight.

Mrs. Judy Beatty, who lived at 1005 East 13th Street and was in her front yard on the day of the accident, testified that she observed defendant's automobile pass her house and turn left onto Vance. "After the car turned left on Vance, what I heard that was remarkable was like squaling and a child screaming." Mrs. Beatty then testified that she ran to the scene of the accident and upon arrival found "Linda sitting in what would be the driver's side in the right-hand lane, going between 13th and 14th on Vance."

A. E. Carroll, the investigating officer, in response to a message, commenced an investigation of the accident shortly after 5:00 p.m. At the hospital to which Linda had been taken, Officer Carroll had a conversation with the defendant Edith Ann Tyndall during which she stated:

> "(S)he was traveling on 13th Street, turned left, and she noticed some kids walking on the street, on the left side facing on the opposite, coming traffic, and she had slowed down. She saw the kids and took her foot off the gas and slowed down to approximately 15 miles an hour. As she got alongside of the kids, Linda darted out to the side of her vehicle and she hit her brakes and slid, attempting to stop, but she never did run in front of her vehicle, but into the left front side of the vehicle. . . ."

With respect to the damage to defendant's vehicle and conditions at the site of the accident Officer Carroll testified:

> "I observed the vehicle Mrs. Tyndall was driving and there was not any damage to it. * * * When I went to the

scene of the incident I observed some tire marks there. I measured them and they were twelve feet in length.

At that time there was not a center line in Vance Drive. With reference to the center of the paved portion of Vance Drive, these marks were on the right portion, right half. . . ."

At the close of plaintiff's evidence, pursuant to G.S. 1A-1, Rule 50, Rules of Civil Procedure, defendant moved for directed verdict on the ground that plaintiff's evidence failed to show actionable negligence on the part of defendant. The trial judge allowed the motion and from a judgment directing a verdict in favor of defendants, plaintiff appealed.

Johnson, Hedgpeth, Biggs & Campbell by John Wishart Campbell for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey for defendant appellees.

HEDRICK, Judge.

The sole question before this court is whether the trial court erred in allowing defendants' motion for directed verdict at the conclusion of the plaintiff's evidence.

On defendants' motion for a directed verdict the evidence must be considered in a light most favorable to plaintiff. It is our opinion that when the evidence is so considered it is insufficient to raise an inference that the injuries to the minor child of plaintiff were proximately caused by the actionable negligence of the defendant Edith Ann Tyndall in the operation of the automobile. *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610 (1961).

The judgment is

Affirmed.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. HOUSTON LEE WILSON

No. 7326SC295

(Filed 24 October 1973)

Arrest and Bail § 3— arrest without warrant — lawfulness

Officers lawfully arrested defendant in a motel room and lawfully seized articles in the room where the officers entered a motel room with the consent of the occupant, upon entering the room the officers, through an open door, observed defendant, a convicted felon, sitting in an adjoining room in close proximity to a pistol, and the officers entered the adjoining room and placed defendant under arrest when they saw him reaching toward the pistol.

APPEAL by defendant from *Grist, Judge,* and a jury, 25 September 1972, Criminal Session, MECKLENBURG Superior Court.

The defendant was charged in two bills of indictment, each proper in form with the felonies of armed robbery.

From a conviction in each case and a prison sentence of not less than twenty nor more than thirty years in each case to run concurrently, the defendant appealed.

George Bergos operated a restaurant in the City of Charlotte on 1 July 1972, and lived in the Yorktown Apartments. After closing the restaurant, Bergos and Townsend, who worked for Bergos, went to the apartment where Bergos lived. On entering the apartment, they were accosted by two masked men who were in the apartment. They were pistol-whipped by one of the men, and then both Bergos and Townsend were tied up. Numerous articles of personal property were removed from the apartment and from the persons of both Bergos and Townsend, including a watch, a pistol and a sum of money.

Later, on Sunday morning, 2 July 1972, police officers of the City of Charlotte were investigating a report they had received from police officers in South Carolina. In the course of the investigation, the Charlotte police officers visited a motel. The officers received permission to enter Room 144 at the motel. This permission came from one George Glass who was occupying that room and who is now dead. On entering the room the officers observed an open door to an adjoining room, Room 145, and in that room the defendant was sitting on a bed in close proximity to a pistol which the officers could see in a vanity case located between the beds. The officers recognized the de-

fendant from previous association with him; and when they saw the defendant reaching towards the exposed pistol, they immediately entered the room where the defendant was and placed him under arrest. Further investigation revealed in the room several items which had been taken from the Bergos apartment. In the vanity case towards which the defendant was reaching when the officers entered the room, they found not only one, but two pistols, one of the pistols being the pistol taken from Townsend at the Bergos apartment; and in the defendant's pocket they found a watch which had been taken from Bergos.

Attorney General Robert Morgan by Assistant Attorneys General Edward L. Eatman, Jr., and Richard B. Conely for the State.

T. O. Stennett for defendant appellant.

CAMPBELL, Judge.

Before admitting in evidence the various items of property which were taken from Bergos, Townsend, and the apartment, the trial judge conducted a voir dire examination and thereafter found that the officers entered Room 144 at the motel with the permission of George Glass, the occupant of that room. After having entered Room 144, the officers, through an open door, saw the defendant, a convicted felon, in close proximity to a firearm. The trial judge then concluded that the arrest of the defendant and subsequent search was legal and the fruit of the search was competent in evidence.

We have reviewed each exception brought forward by the defendant and find no merit in them. The findings and conclusion of the trial judge with regard to the arrest and search and the admissibility of the results of the search were proper.

The evidence was plenary to go to the jury and supports the jury verdict.

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

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. DENNIS HAWKINS, JR.

No. 7310SC593

(Filed 24 October 1973)

Indictment and Warrant § 9— omission of year in which crime occurred

Warrant charging defendant with driving while under the influence of intoxicants "on or about the 19 day of June, 19....." is not fatally defective by reason of the omission of the year in which the offense occurred. G.S. 15-155.

APPEAL by defendant from *Hobgood, Judge,* 26 March 1973 Session, Superior Court, WAKE County.

Defendant, on appeal from District Court, was convicted of driving an automobile upon the highways of this State while under the influence of intoxicating liquor. On appeal defendant raises only one question and decision does not require a recitation of the facts.

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

Tharrington, Smith and Hargrove, by Roger W. Smith, for defendant appellant.

MORRIS, Judge.

The warrant upon which defendant was tried placed the time of the offense as "on or about the 19 day of June, 19___." The failure to insert the year is defendant's only assignment of error. Defendant cites *State v. Roberts,* 270 N.C. 449, 154 S.E. 2d 536 (1967), where the Court said: "The *indictment* here alleges that the offense was committed 'on the 26th day of April, A.D. 196___.' We do not approve of such careless pleading." *Id.* at 450. (Emphasis added.) Nor do we. We note, however, that the defendant in that case was not granted a new trial on that basis. Additionally, in the case before us, the officer who signed the complaint for the warrant before the magistrate swore to the information in the complaint on 19 June 1971. Also the warrant for arrest was executed by the magistrate on 19 June 1971. The sheriff certified that he received the "summons" on 19 June 1971 and that it was executed on 19 June 1971. We think there can be no doubt but that the offense occurred "on or about the 19 day of June, 1971." Defendant's position that the statute of limitations could have run is not well taken.

The warrant charged all the elements of the offense: driving a vehicle, upon a highway within the State, while under the influence of intoxicating liquor. G.S. 20-138.

> "All that is required in a warrant or bill of indictment since the adoption of G.S. 15-153 is that it be sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense." *State v. Anderson,* 259 N.C. 499, 501, 130 S.E. 2d 857 (1963).

Nor can we agree with defendant that time is of the essence in this situation. He entered his plea of not guilty; heard the evidence for the State, which included evidence that the offense occurred on 19 June 1971; took the stand in his own behalf; and not until the jury verdict of guilty was in did he move in arrest of judgment. We think the provisions of G.S. 15-155 are applicable:

> "No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words 'as appears by the record,' or of the words 'with force and arms,' nor for the insertion of the words 'against the form of the statutes' instead of the words 'against the form of the statute,' or vice versa; nor for omission of the words 'against the form of the statute' or 'against the form of the statutes,' *nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened;* nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense." (Emphasis added.)

Defendant was completely aware of the charge against him and the date on which it occurred. He had a fair and impartial trial, free from prejudicial error.

No error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. LONNIE BRYANT

No. 7311SC696

(Filed 24 October 1973)

Assault and Battery §§ 11, 16— assault with firearm with intent to kill — indictment — submission of other types of felonious assault

An indictment for assault with a firearm with intent to kill under G.S. 14-32(c) will not support a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury under G.S. 14-32(a) or a verdict of guilty of assault with a deadly weapon inflicting serious injury under G.S. 14-32(b).

APPEAL by defendant from *Canaday, Judge,* 7 May 1973 Session of Superior Court held in JOHNSTON County.

Defendant was arraigned on separate bills of indictment charging that he did:

1. Murder Molton Ray Rawlings (73CR3034).
2. Assault James Rawlings with a deadly weapon with intent to kill inflicting serious injuries (73CR3033).
3. Assault Sam Currie with a firearm with intent to kill (73CR3039).

The offenses occurred around 5:00 a.m. on the morning of 17 March 1973 at a place called Bradley's Amusement Center in Princeton after an argument about a poker game.

The cases were consolidated for trial without objection from defendant. In the murder case the solicitor announced that he would seek a verdict of guilty of murder in the second degree or manslaughter. The State and defendant offered evidence. Defendant did not deny the shootings but contended that he acted in self-defense.

The verdicts and judgments were as follows:

1. (73CR3034) Guilty of voluntary manslaughter of Molton Ray Rawlings: Imprisonment for 15-20 years.
2. (73CR3033) Guilty of assault with a deadly weapon inflicting serious injury on James Rawlings: Imprisonment for 3-5 years to follow the term imposed in 73CR3034.
3. (73CR3039) Guilty of assault with a deadly weapon inflicting serious injury on Sam Currie: Imprisonment for 3-5 years to follow the term imposed in 73CR3033.

Defendant gave notice of appeal in each case. His trial counsel was appointed to represent him on appeal.

Attorney General Robert Morgan by Miss Ann Reed, Associate Attorney for the State.

Wallace Ashley, Jr., for defendant appellant.

VAUGHN, Judge.

No assignments of error are brought forward in connection with cases 73CR3034 and 73CR3033. We have examined the record in these cases and find no prejudicial error.

All of the assignments of error as to 73CR3039, the case involving the assault on Currie, relate to the fact that, under instructions of the Court, the jury was allowed to consider verdicts of assault with a deadly weapon with intent to kill resulting in serious injury, the felony punishable under G.S. 14-32(a), and assault with a deadly weapon inflicting serious injury, the felony punishable under G.S. 14-32(b), when, in fact, he was indicted for assault with a firearm with intent to kill, the felony punishable under G.S. 14-32(c).

Defendant's exception is well-taken. The indictment for assault with a firearm with intent to kill (G.S. 14-32(c)) would not support a verdict of guilty of assault with a deadly weapon with intent to kill *inflicting serious injury* (G.S. 14-32(a)) and does not support the verdict of guilty of assault with a deadly weapon *inflicting serious injury* (G.S. 14-32(b)).

It is apparent from reading the charge that the judge was under the mistaken impression that defendant was charged with identical offenses under G.S. 14-32(a) on Rawlings and Currie. As to Currie, however, defendant was only charged with assault with a firearm with intent to kill. (G.S. 14-32(c)).

In 73CR3034—No error.

In 73CR3033—No error.

In 73CR3039—New trial.

Judges BRITT and PARKER concur.

FRANCES HOSIERY MILLS, INC. v. BURLINGTON INDUSTRIES, INC.

No. 7315SC727

(Filed 14 November 1973)

1. **Constitutional Law § 26; Judgments § 39; Uniform Commercial Code § 13— proposal for addition to contract — arbitration clause — foreign judgment — full faith and credit**

Where plaintiff ordered yarn from defendant by telephone and defendant sent to plaintiff for each yarn shipment "yarn contracts" containing a provision for arbitration of disputes in New York, but plaintiff did not read or sign any of the "yarn contracts," the arbitration clause was a proposal for addition to the contracts entered by telephone within the meaning of G.S. 25-2-207(2)(b); therefore, where the jury in plaintiff's action in this State to recover damages from use of defective yarn found that the arbitration clause materially altered the terms of the telephone contracts and thus did not become a part of them, a New York judgment affirming an arbitration award entered in that state in favor of defendant is not entitled to full faith and credit in plaintiff's action in this State since the New York court had no jurisdiction of the subject matter.

2. **Uniform Commercial Code § 13— statute of frauds — confirmation of contract**

Where plaintiff ordered yarn from defendant by telephone, "yarn contracts" sent by defendant to plaintiff for each shipment of yarn did not meet the criterion of "confirmation of the contract" set forth in the statute of frauds provision of the Uniform Commercial Code, G.S. 25-2-201(2), where they served not only to confirm the oral telephone contracts but also attempted to attach additional terms to the agreements.

APPEAL by defendant from *Martin (Robert), Judge,* 21 May 1973 Session of Superior Court held in ALAMANCE County.

This is a civil action commenced by Frances Hosiery Mills, Inc. (Frances Hosiery), against Burlington Industries, Inc. (Burlington), based upon allegations that plaintiff was damaged by using defective yarn which was purchased by it from the Burlington Throwing Company Division of Burlington Industries, Inc.

The following facts are uncontroverted: On or about the first of June, 1967, plaintiff, through its Secretary-Treasurer, Frances Kimrey, commenced purchasing yarn by telephone from Burlington Throwing Company Division of Burlington Industries, Inc., through an office of the defendant in High Point, North Carolina. Eleven shipments were delivered by defendant

to plaintiff as agreed and were used and paid for by the plaintiff.

Specifically, on 3, 15, and 17 January and 1 March 1968, the plaintiff ordered certain yarn by telephone from the Burlington Throwing Company Division of Burlington Industries, Inc. On or about 25 January 1968, or within a week thereafter, plaintiff alleged it discovered certain defects in panty hose produced with defendant's yarn, the subject of the orders of 3, 15 and 17 January 1968. Plaintiff notified defendant of the alleged defects and stopped payment for the yarn received. Defendant had its technical people confer with the plaintiff with respect to those complaints but the parties could not agree on the cause of the difficulties.

As the yarn was shipped to the plaintiff by defendant, written invoices were issued for each shipment by defendant's New York office and duly received by the plaintiff. Yarn for which payment was not made was specifically ordered on 3, 15, and 17 of January 1968 and 1 March 1968, and is evidenced by invoices, defendant's Exhibits H-1 through H-8, which the plaintiff duly received. The specifications of yarn ordered by telephone were met, and no objection to any of the invoices was made by the plaintiff at the time of delivery.

Upon receipt of each order, defendant also issued from its New York office a "yarn contract" which contained much of the same information set forth on the invoice. Each yarn contract contained statements on its face that "the yarns as described below are ordered at the price and upon conditions of sale below and on the back of this contract" and "the buyer must sign and return a copy of this contract." On the back of each yarn contract was set forth provisions for arbitration of differences between the seller and the buyer, arbitration to be had in the State of New York. The yarn contract also contained a provision at the bottom "a copy to be signed and returned to seller within five days" followed by a line for the buyer's name and a line for the signature of the buyer's representative. Plaintiff at no time signed either of the yarn contracts.

The parties were unable to adjust their differences and in July, 1968, Burlington gave notice of and requested arbitration as provided in the alleged agreement between the parties as set forth in the yarn contracts, defendant's Exhibits A, B, C, and D.

Notice of the arbitration hearing was duly served upon plaintiff and its counsel by registered mail on 16 July 1968. On 30 September 1968 plaintiff filed a "Notice and Objection" to the arbitration proceedings. On 24 February 1969 plaintiff, through its counsel, filed a motion in the arbitration proceeding stating that at no time and under no circumstances had plaintiff agreed to arbitrate any dispute in the State of New York. On 25 February 1969, plaintiff instituted the present action.

On 2 April 1969 an unanimous arbitration award was made in favor of defendant, and plaintiff was directed to pay to defendant the sum of $6,365.75. Thereafter, on 11 April 1969, defendant filed a notice of application to confirm the arbitrator's award with the Supreme Court in the State of New York. Service was made on plaintiff and its counsel on 14 April 1969. Thereafter, the matter came on for hearing before the court in New York on 28 April 1969 and the award of the arbitrators was affirmed.

Defendant, answering the complaint filed in this action pleaded as a third defense the judgment of the Supreme Court of New York in bar of the plaintiff's right to maintain this action and as a counterclaim alleged and set forth the New York judgment and prayed that it have and recover $6,979.23 upon the same, together with interest and costs until paid.

Pursuant to defendant's motion under 1A-1, Rule 42(b), Rules of Civil Procedure, the trial court ordered that defendant's third defense (plea in bar) be tried as a separate issue prior to any further proceedings in this matter.

At trial the defendant, in support of its plea in bar, offered into evidence the judgment of the Supreme Court of New York (Exhibit K-1) and the "yarn contracts" (Exhibits A, B, C, and D).

Plaintiff offered evidence tending to show the following: Plaintiff had placed seventeen orders with defendant over the period covering 7 December 1967 to 21 March 1968. Several orders had been received and paid for; however, upon discovering certain defects in the panty hose produced with the 3, 15, and 17 January 1968 shipments of defendant's yarn, the plaintiff refused to make further payments.

Each of plaintiff's telephone orders placed with the Burlington Throwing Company Division of defendant encompassed

an agreement by both parties as to the weight, date of delivery, and price per pound of the yarn ordered. Furthermore, plaintiff's evidence revealed that invoices and "yarn contracts" (defendant's Exhibits A, B, C, and D) were received for each of the shipments of yarn; however, plaintiff, through its Secretary-Treasurer, Frances Kimrey, stated that at no time during telephone conversations was there any mention of the possibility that the parties would arbitrate any differences in the State of New York, nor did plaintiff read the print on any of the "yarn contracts" or sign any of the "yarn contracts."

Upon completion of the presentation of evidence by both parties, the following issues were submitted to and answered by the jury as indicated:

"1. Did the defendant's acceptance or confirmation of the plaintiff's offer contain additional or different terms than orally agreed upon?

ANSWER: Yes.

2. If so, did such additional or different terms materially alter the contracts?

ANSWER: Yes."

From a judgment entered on the verdict, defendant appealed.

Latham, Pickard, Cooper and Ennis by Thomas D. Cooper, Jr., for plaintiff appellee.

Sanders, Holt & Spencer by W. Clary Holt, James C. Spencer, Jr., and Frank A. Longest, Jr., for defendant appellant.

HEDRICK, Judge.

[1] The crux of this appeal is the effect to be given the judgment of the Supreme Court of New York affirming the arbitration award entered in favor of defendant. Defendant has offered this judgment as a plea in bar to the proceedings instituted by plaintiff and asserts that defendant's New York judgment is entitled to full faith and credit as provided in Article IV, Section 1, of the Constitution of the United States. In order for this contention to prevail, it is a necessary prerequisite that the defendant establish proper jurisdiction of the New York court over the controversy.

"Jurisdiction is the power of the court to decide a case on its merits and presupposes the existence of a duly constituted court with control over the subject matter and the parties." 2 Strong, N. C. Index 2d, Courts, § 2, p. 429. Assuming *arguendo* that the State of New York could successfully claim jurisdiction over the person of plaintiff, subject matter jurisdiction must still exist before the judgment of the Supreme Court of New York will be afforded *res judicata* effect. Defendant's claim of New York's jurisdiction over this subject matter is dependent upon the arbitration clause which appears in the written matter designated "yarn contract" (defendant's Exhibits A, B, C, and D). Dissecting the transactions between plaintiff and defendant, the determination is made that the arbitration clause was not a part of the original contract between plaintiff and defendant but rather was an additional term "proposed" by defendant. The impact of such an additional term is governed by G.S. 25-2-207(2)(b) of the Uniform Commercial Code which provides:

> "The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless they materially alter it."

The course taken by the trial court in submitting to the jury the matter of whether the arbitration clause (contained in the "yarn contract") was a material alteration of the terms of the contract was proper, and we are bound by the jury's determination that the clause did materially alter the terms of the contract and thus did not become a part of the agreement between the parties. Therefore, since jurisdiction of the State of New York is bottomed upon the applicability of the arbitration clause, the judgment of the Supreme Court of New York is not a bar to plaintiff's cause of action.

[2] Next, defendant contends by assignments of error 8, 9, 10, 11, 13, and 15, based upon exceptions duly noted to the charge, that the trial court committed error in its instructions to the jury. This argument is in part repetitive of defendant's first assertion which we have already discussed, nevertheless, we deem it necessary to commit on defendant's reliance upon G.S. 25-2-201(2) (the Statute of Frauds provision) of the Uniform Commercial Code. G.S. 25-2-201(2) reads as follows:

> "Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the

sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received."

Even though defendant satisfies most of the requirements of G.S. 25-2-201(2), it fails to meet the criterion of "confirmation of the contract." Defendant's "yarn contracts" serve not only to confirm the oral telephone contracts between the parties but also attempt to attach additional terms to the agreement. To allow these additional terms under the guise of "confirmation of the contract" would render G.S. 25-2-207(2) of the Uniform Commercial Code meaningless. See, White and Summers, Uniform Commercial Code, Section 2-3, pp. 46-48; Davenport, How To Handle Sale Of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law, 19 Bus. Law 75, 82 (1963-64). Thus, this contention is overruled.

Defendant also assigns as error both the trial court's definition of "material" and the failure of the court to define "merchant." Whatever inaccuracy might have been present in the particular definition of "material" which defendant assigns as error was certainly corrected by the court's extensive discussion of the meaning of the word "material." Furthermore, a definition of "merchant" was unnecessary as the parties had stipulated that they were both merchants, and the trial court instructed the jury in its charge that the plaintiff and defendant were merchants. Explanation of the term "merchant" would have been mere surplusage.

We have carefully reviewed defendant's other assignments of error including those relating to the admission and exclusion of testimony and find them to be without merit. In the trial of the issues in the Superior Court we find no prejudicial error.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. CHARLES STANLEY

No. 7329SC702

(Filed 14 November 1973)

1. **Bribery § 1— elements of the offense**

The elements of the offense of bribing a public officer are (1) offering a sum of money (2) to a public officer (3) with corrupt intent to influence the recipient's action as a public officer in the discharge of a legal duty.

2. **Bribery §§ 2, 3— bribery of police officer — sufficiency of alleged acts to constitute offense — sufficiency of indictment, evidence**

In a prosecution for bribery of a public officer where the evidence tended to show that defendant offered a police officer money in return for a breathalyzer test report pertaining to a third person and additional money upon entry of a *nolle prosequi* in the case against the third person, the conduct attributable to defendant was calculated with corrupt intent to influence the officer's action as a public official in the performance of official duty required of him in that it was an attempt to induce the officer to abandon his duty to aid in the prosecution of the third person's case and to persuade the officer to violate his duty to aid in preserving evidence; therefore, the alleged offers of defendant were bribery, acts alleged in the indictment were sufficient, and evidence was sufficient to withstand motion for nonsuit.

APPEAL by defendant from *Winner, Judge,* 3 May 1973 Session HENDERSON Superior Court.

Defendant was charged in a bill of indictment with the felony of offering a bribe to a public officer. He entered a plea of not guilty, was found guilty as charged, and from judgment imposing a prison term of not less than two nor more than five years, he appealed.

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

Redden, Redden & Redden by Monroe M. Redden, Jr., for defendant appellant.

BRITT, Judge.

Defendant assigns as error the denial of his motion to quash the bill of indictment, the denial of his motions for judgment as of nonsuit interposed at the close of the State's evidence and at the close of all the evidence, the portions of the charge to the jury. All of defendant's assignments are based upon the conten-

tion that the indictment does not charge, and the evidence does not show, that he offered a bribe to influence a public official in the performance of his *official duty.*

The indictment upon which the defendant was tried, in pertinent part, reads:

> " * * * The legal duty of the officer was to serve criminal warrant on Raymond Patrick Weaver, and to arrest said Weaver and bring him before the District Court of Henderson County on the 18th day of May, 1971 to be dealt with according to law as ordered by Magistrate J. H. Bruton, said Weaver being charged on the 29th day of April, 1971 with unlawfully, wilfully operating a vehicle on the public highways of the State of N. C. in Henderson County while under the influence of intoxicating liquor. Circumstances surrounding the corrupt intent of Charles Stanley to influence Officer McCraw was [sic] that Charles Stanley offered Officer McCraw the sum of $250.00 in return for McCraw's obtaining the above mentioned warrant and breathalyzer report and delivering same to Charles Stanley prior to the trial of said Weaver, the Warrant being the only process upon which Weaver could be tried for driving under the influence, and further, that Charles Stanley offered the further sum of another $250.00 to Officer McCraw upon the dismissal of charges against the said Weaver. The said offers were made after Magistrate Bruton had ordered Officer McCraw to bring said Weaver before the Henderson County District Court to be dealt with according to law on the above mentioned charge. The defendant at the time of the offense here-in-above mentioned knew McCraw was a police officer, against the form of statute in such made and provided and against the peace and dignity of the State."

The evidence viewed in the light most favorable to the State, as required on the motion for judgment as of nonsuit, tends to show: On 29 April 1971 Officer Alvin R. McCraw of the Hendersonville police force stopped Raymond Patrick Weaver and cited him to court for driving under the influence of intoxicating liquor. McCraw placed Weaver in the county jail and immediately went before a magistrate, swore to and obtained a warrant charging Weaver with the offense. On the same day he served the warrant upon Weaver and made his return. The warrant and the report of a breathalyzer test made at

the time of Weaver's arrest were filed with the Clerk. On 5 May 1971, while Officer McCraw was in defendant's restaurant, defendant approached McCraw and offered him $500 if he would drop the charges against Weaver for driving under the influence. Later in the same day, defendant telephoned McCraw and told him to get the warrant and breathalyzer reading and bring them to his restaurant, at which time he would give him the money. McCraw told the defendant that he could not get the warrant and breathalyzer reading. Defendant replied that he would give McCraw $250 then and $250 when the case was nol prossed. On two other occasions the defendant telephoned McCraw and told him to come and get the money.

The judge in his charge to the jury stated, "The Court will charge you that if you find from the evidence, beyond a reasonable doubt, that the defendant offered McCraw $500.00 to dispose of the case against Mr. Weaver or to bring him the warrant and breathalyzer report of Mr. Weaver's case, then the defendant would be guilty of this charge."

Defendant argues that custody and possession of the warrant and breathalyzer report being beyond the control of Officer McCraw, the alleged conduct of defendant did not tend to influence McCraw in the performance of an act or duty within the scope of his authority. Defendant relies upon the case of *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917 (1953), where Justice (later Chief Justice) Parker in speaking for the court said: "For the indictment to be good it must appear from the indictment that the offering of a bribe to D. C. Safriet, Jr., a State Highway Patrolman, was to influence Safriet in the performance of some act, which lay within the scope of his official authority, and was connected with the discharge of his legal and official duties, and allegations to that effect must be definite and particular in statement, and not mere conclusions."

We do not think *Greer* controls the case at bar. We interpret *Greer* to hold that where an indictment in a bribery case charges a defendant with attempting to influence a police officer in the performance of his official duties, the indictment, to be valid, must allege the official duty or duties which the defendant attempted to prevent the officer from performing and "allegations to that effect must be definite and particular." The bill of indictment in the case at hand alleges in detail the acts that defendant was attempting to influence Officer McCraw to perform.

In *Greer,* page 328, on the question of defining bribery, we find:

> "Our statute as to offering bribes is G.S. 14-218 'if any person shall offer a bribe, whether it be accepted or not, he shall be guilty of a felony.' This statute neither defines bribery, nor sets forth its essential elements.
>
> * * * *
>
> "The essence of bribery 'is the prostitution of a public trust, the betrayal of public interests, the debauchment of the public conscience.' Ex parte Winters, 10 Okla., Crim. Rep. 592, 140 P. 164, 51 L.R.A. (N.S.) 1087.
>
> "Bribery may be defined generally as the voluntary offering, giving, receiving or soliciting of any sum of money, present or thing of value with the corrupt intent to influence the recipient's action as a public officer or official, or a person whose ordinary profession or business relates to the administration of public affairs, whether in the legislative, executive or judicial departments of government in the performance of any official duty required of him. The bribe must be intended, however, to influence the recipient in the discharge of a legal duty, and not a mere moral duty." (Citations.)

[1] In *State v. Brinson,* 5 N.C. App. 290, 168 S.E. 2d 228 (1969), this court held that the elements of the offense of bribing a public officer are (1) offering a sum of money (2) to a public officer (3) with corrupt intent to influence the recipient's action as a public officer in the discharge of a legal duty.

[2] Admittedly, in the case at hand, Officer McCraw was not the legal custodian of the warrant and breathalyzer report pertaining to Weaver and had no authority to "drop" or *nol pros* the charge against Weaver. Nevertheless, we think the conduct attributable to defendant was calculated with corrupt intent to influence McCraw's action as a public official in the performance of "official duty required of him."

The limited number of bribery cases that have reached the appellate division of our State provide little guidance on the question confronting us. However, our holding finds support in other jurisdictions. In *State v. Ellis,* 33 N.J.L. 102, 105, 97 Am. Dec. 707, 710 (1868), the New Jersey Court said:

"* * * If the common council of Jersey City had not authority to grant the application referred to, the act of the defendant in endeavoring to procure the grant asked for was only the more criminal, because he sought, by the corrupt use of money, to purchase from council an easement which they had no authority to grant. He thereby endeavored to induce them to step beyond the line of their duty, and usurp authority not committed to them. The gist of the offence is said to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial."

More recently the New Jersey Court in *State v. Begyn*, 34 N.J. 35, 47, 167 A. 2d 161, 167 (1961), said: "* * * It is not necessary that the act requested be one which the official has authority to do. Sufficient it is if he has official power, ability or apparent ability to bring about or contribute to the desired end * * * ."

The legal duty of an arresting officer does not end when he arrests and obtains a warrant for a defendant. In *State v. Austin*, 65 Wash. 2d 916, 924, 400 P. 2d 603, 608 (1965), we find:

"Police officers have many official duties, among which is the investigating of crime and presenting of evidence in its prosecution. That the investigation has been completed and the avails thereof turned over to the prosecuting attorney for prosecution, does not, we think, sever the investigating officer's official connection with the case. Nor does the fact that the prosecuting attorney assumes the primary responsibility for and control of the prosecution once a criminal charge has been filed end the investigating officer's official connection with the case. The policeman's function as a public officer, duty bound in law and oath to uphold and enforce the law, persists throughout all stages of a criminal proceeding until final adjudication thereof in the courts. The payment of money to a police officer for the purpose of inducing a breach of duty in connection with a criminal charge of which a police officer possesses information and may give competent evidence, or to dissuade him from seeking or obtaining evidence in the performance of his official duties, constitutes bribery under RCW 9.18.010."

Williams v. State, 178 Wis. 78, 189 N.W. 268 (1922), decided along the same lines, said that the court could take judicial notice that after the service of the warrant, the duties of the officer would continue and among these duties would be the gathering of evidence and serving of subpoenas.

Certainly it is a duty of an arresting officer to give testimony in the trial of the case and aid the prosecution in other ways. While an arresting officer does not have the authority to "drop" charges or enter a *nolle prosequi,* his recommendations can be very persuasive in influencing the prosecuting attorney to take that action. The evidence in the case at hand tended to show that defendant attempted to induce McCraw to abandon his duty to aid in the prosecution of Weaver's case.

It is also the duty of a police officer to aid in the preservation of evidence against a defendant that he has arrested. The offer of money in return for the breathalyzer report in this case was a clear attempt to deprive the court of essential evidence, hence an offer to persuade McCraw to violate his duty to aid in preserving evidence.

We therefore conclude that in each instance the alleged offer of the defendant would be bribery and that the acts alleged in the indictment are sufficient, that the evidence was sufficient to withstand the motions for judgment as of nonsuit, and that there was no error in the charge.

No error.

Judges PARKER and HEDRICK concur.

SAMUEL TANNER v. STATE DEPARTMENT OF CORRECTION; TRAVELERS INSURANCE COMPANY

No. 7310IC714

(Filed 14 November 1973)

1. State § 10— tort claim — appellate review

In reviewing a decision of the Industrial Commission in a tort claim action, the appellate court has two questions to consider: whether the Commission's findings of fact are supported by competent evidence and whether its conclusions of law are supported by its findings of fact.

2. State § 8— tort claim — prisoner — riding on truck side rail — contributory negligence

In this tort claim action by a prisoner to recover for injuries sustained when he fell from a pickup truck, the evidence was sufficient to support findings by the Industrial Commission that plaintiff was sitting on the side rail of a truck traveling on a dirt road and lost his balance and fell from the truck when the driver crossed from the left to the right side of the road, and such findings are sufficient to support the Commission's conclusions that plaintiff was negligent and that his negligence was a proximate cause of his injuries.

3. State § 7— motion to reopen tort claim action

The Industrial Commission did not err in the denial of plaintiff's motion in a tort claim action to reopen the case for additional testimony where the Commission did not act under any misapprehension of law and plaintiff has shown no abuse of discretion.

Judge HEDRICK dissenting.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 7 June 1973.

Samuel Tanner, a prisoner at the Caledonia Correctional Farm in Halifax County, was injured when he fell from a moving truck on 4 November 1971. He brought suit against the Department of Correction under the Tort Claims Act, G.S. 143-291 to -300.1, alleging that his injuries were caused by the negligence of Leonard E. Newsome, a Department employee, who was driving the truck at the time of the accident. The case was heard originally before Deputy Commissioner C. A. Dandelake who denied plaintiff any recovery. Upon appeal to the Full Commission the findings of fact and conclusions of law of Deputy Commissioner Dandelake were adopted and his decision was affirmed.

According to the Commission's findings of fact, plaintiff was working in the fields with several other prisoners on the day he was injured. Shortly before noon that day, Leonard Newsome, the farm superintendent, came in a pickup truck to bring them back to the prison camp for the noonday meal. While riding in the back of the truck, plaintiff sat on the side rail. The prisoners had previously been instructed to sit in the bed of the truck rather than on the side rail, but on this particular day Newsome did not tell plaintiff to get off the rail. The road from the field where the prisoners had been working to the prison camp was a dirt road. Newsome "drove on the left-hand side of the road as it was smoother than the right-hand side, and after he had traveled several hundred feet he crossed over

to the right-hand side of the road; . . . the plaintiff, Samuel Tanner, was riding in the back of the truck, sitting over the side edge of the truck, over the wheel, and at this time he lost his balance and fell backward out of the truck and was badly injured."

From these facts the Commission concluded that both Newsome and the plaintiff had been negligent and denied plaintiff's claim.

Plaintiff has appealed to this Court.

Vaughan S. Winborne for plaintiff appellant.

Attorney General Morgan, by Associate Attorney E. Thomas Maddox, Jr., for State Department of Correction.

BALEY, Judge.

[1] In reviewing a decision of the Industrial Commission in a case arising under the Tort Claims Act, an appellate court has two questions to consider: whether the Commission's findings of fact are supported by competent evidence, and whether its conclusions of law are supported by its findings of fact. *Mason v. Highway Commission,* 273 N.C. 36, 159 S.E. 2d 574; *Bailey v. Dept. of Mental Health,* 272 N.C. 680, 159 S.E. 2d 28.

[2] The Commission's findings of fact are conclusive if there is any competent evidence supporting them, even though there may also be evidence that would justify a contrary finding. G.S. 143-293; *Jordan v. Highway Commission,* 256 N.C. 456, 124 S.E. 2d 140; *Harris v. Construction Co.,* 10 N.C. App. 413, 179 S.E. 2d 148. Here the testimony of the plaintiff, of the driver, Leonard Newsome, and of the two other prisoners who were riding in the back of the truck with plaintiff supports the finding by the Commission that plaintiff was sitting on the side rail of the bed of a moving truck traveling on a dirt road and lost his balance and fell backward out of the truck when the driver crossed from the left to the right side of the road. This finding is sufficient to support the Commission's conclusion that plaintiff was negligent and that his negligence was one of the proximate causes of his injury.

By sitting on the side rail of a moving truck traveling on a dirt road, plaintiff failed to exercise reasonable care for his own safety. He was an adult, had received prior warnings, and knew, or should have known of the danger involved. A person who sits on the side rail of a truck may easily fall onto the road

whenever the truck hits a bump in the road, rounds a curve too rapidly, swerves to one side, or makes a sudden stop. Several cases have held that a plaintiff may commit contributory negligence by "placing himself in a position of obvious peril" on a motor vehicle. *Burgess v. Mattox,* 260 N.C. 305, 307, 132 S.E. 2d 577, 578 (sitting on hood of moving truck); *Huffman v. Huffman,* 271 N.C. 465, 156 S.E. 2d 684 (sitting on fender of moving car); *Peeler v. Cruse,* 14 N.C. App. 79, 187 S.E. 2d 396 (standing on blade of motor grader). *Skinner v. Jernigan,* 250 N.C. 657, 110 S.E. 2d 301, cited by plaintiff, is factually distinguishable. In *Skinner* the plaintiff was standing in the bed of the truck holding to the cab. The boards and rails on the bed of the truck were about as high as the cab. The plaintiff did not fall out of the truck when it swerved; he was thrown out when the truck overturned. His standing in the bed was not a proximate cause of his injury.

The findings of fact by the Commission concerning the possible negligence of Newsome in his operation of the truck are sketchy and so limited as to leave in doubt the issue of Newsome's negligence; however, in view of the Commission's determination that plaintiff was negligent, which is supported by the evidence and findings and is decisive of the case, we do not reach the question of Newsome's negligence.

[3] At the time of his appeal from Deputy Commissioner Dandelake to the Full Commission, plaintiff moved to reopen the case for additional testimony. He contends that the Commission erred in refusing to grant his motion. This contention is without merit, because the decision whether to reopen a case is within the discretion of the Industrial Commission. *Mason v. Highway Commission, supra.* The decision on such a motion will be reversed only if the Commission has abused its discretion or has acted "under a misapprehension of applicable principles of law." *Owens v. Mineral Co.,* 10 N.C. App. 84, 87, 177 S.E. 2d 775, 777. Here the Commission did not act under any misapprehension of law, and plaintiff has shown no abuse of discretion.

The decision of the Industrial Commission denying the claim of the plaintiff is affirmed.

Affirmed.

Chief Judge BROCK concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting:

It is my opinion that the facts found by the Commission fail to support its conclusion that both the plaintiff and defendant were negligent and that such negligence upon the part of each was a proximate cause of plaintiff's injuries. The findings of fact are not sufficiently definitive to be determinative of the issues between the parties. While the Commission found and concluded that the plaintiff "lost his balance" and fell from the moving truck, the findings are silent as to why the plaintiff lost his balance. The record is replete with evidence as to the speed and manner in which Newsome operated the truck, and as to the conduct of the plaintiff immediately before and at the time he fell. It is the duty of the Commission to make findings and conclusions determinative of the issues between the parties. This, in my opinion, it has failed to do.

I vote to vacate the order and remand the proceeding to the Commission for further findings and conclusions.

STATE OF NORTH CAROLINA v. JERRY F. THOMPSON

No. 7315SC628

(Filed 14 November 1973)

1. **Criminal Law § 75— admission by defendant — necessity for voir dire and finding of voluntariness**

In a prosecution for driving under the influence of intoxicating liquor where there was evidence tending to show that one other than defendant was driving the vehicle in question, the trial court erred in allowing into evidence defendant's admission made to police officers while he was in custody that he was the driver of the vehicle where there was no *voir dire* hearing to determine whether defendant was given Miranda warnings and there was no determination that defendant's admission was voluntary.

2. **Criminal Law § 97— reopening of case for additional evidence — rebuttal not allowed — error**

The trial court in a drunk driving case erred in allowing the State to reopen its case and present additional testimony after completion of the charge to the jury while denying to the defendant the opportunity to offer testimony in rebuttal.

APPEAL by defendant from *Bailey, Judge,* 12 February 1973 Session of Superior Court held in CHATHAM County.

Defendant was charged in a valid warrant with driving under the influence of intoxicating liquor. He was tried and convicted in the District Court of Chatham County and appealed to the Superior Court for a trial de novo.

At the trial in Superior Court G. F. Wheeler, a highway patrolman, was the only witness for the State. Wheeler testified that on 29 July 1972 he saw a panel truck weaving from one lane to the other on a secondary road in Chatham County. He stopped the truck and found defendant behind the wheel. Defendant walked unsteadily, his speech was slurred, and he had an odor of alcohol on his breath. He failed several of the performance tests commonly administered to persons suspected of driving under the influence, and he refused to take the breathalyzer test. Wheeler stated that in his opinion defendant was under the influence of intoxicating liquor when he was stopped on 29 July 1972.

Defendant's only witness was Steve Stancil. Stancil testified that he had been riding in the panel truck with defendant and James Arthur Scott on 29 July 1972. He stated that Scott, rather than defendant, was driving the truck, and defendant was riding in the right front seat. When the patrolman stopped the truck, defendant and Scott exchanged seats, because Scott had no driver's license. Stancil testified that he was the owner of the panel truck.

The State recalled G. F. Wheeler as a rebuttal witness, and during the course of his testimony the following proceedings ensued:

> Q. [by the Solicitor] Trooper Wheeler, when you placed the Defendant Jerry Thompson under arrest and brought him down to the Pittsboro jail, was Mr. Steve Stancil, the gentleman who just testified, in your presence at that time?
>
> A. Yes, sir.
>
> MR. BARBER: Objection.
>
> THE COURT: Overruled
>
> Q. Did you have a conversation with the defendant Jerry Thompson in Mr. Stancil's presence?
>
> A. Yes, sir, Mr. Stancil and the third person in the vehicle came in.

Q. All four of you were together?

A. Yes, sir.

Q. Did you ask the defendant whether or not he was operating the motor vehicle?

MR. BARBER: Objection

THE COURT: Overruled

A. Yes, sir.

Q. What did Jerry Thompson tell you?

MR. BARBER: Objection

THE COURT: Overruled

A. His answer was Yes.

After Wheeler finished his testimony, the attorneys argued the case and the court instructed the jury. At the conclusion of the charge, one of the jurors asked: "This Dodge truck was it one that had a seat on this side of the motor in the center and the other, the driver's seat on the other side?" In response to this question, the court recalled Patrolman Wheeler and asked him to describe the interior of the truck. After wheeler had testified, defendant requested permission to recall Steve Stancil, so that he too could answer the juror's question, but this request was denied. The jury then retired for its deliberations. It returned a verdict of guilty, and defendant was sentenced to sixty days in jail. He appealed to this Court.

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

J. Russell Kirby and John E. Clark, for defendant appellant.

BALEY, Judge.

[1] The key point in the trial below was the identity of the driver of the truck. The court permitted the arresting officer, over objection, to testify that defendant admitted that he was the driver of the truck. At the time of the purported admission the defendant was in custody and being questioned by the officer.

An admission made by a criminal defendant while in custody, in response to questioning by law enforcement officers, may not be used in evidence by the State unless the State shows, in

a voir dire hearing, that the defendant received the warnings required by *Miranda v. Arizona,* 384 U.S. 436 (1966), and that the admission was made voluntarily. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481; *State v. Mitchell,* 270 N.C. 753, 155 S.E. 2d 96; *State v. Ross,* 269 N.C. 739, 153 S.E. 2d 469. Here there was no voir dire hearing, and no finding that defendant's admission was voluntary. The contention of the State that the testimony of the officer was for the purpose of impeachment is not persuasive. The defendant did not testify. His alleged admission, not otherwise competent, is not made so simply because it would tend to impeach the testimony of another witness. It was error to admit a confession of defendant through the back door without complying with the proper legal safeguards required under *Miranda* and without making a finding after voir dire hearing that such confession was voluntary. *See* 2 Stansbury, N. C. Evidence (Brandis rev.), § 186, at 82-83.

[2] The defendant also assigns as error the action of the trial court in allowing the State to reopen its case and present additional testimony after completion of the charge to the jury while denying to the defendant the opportunity to offer testimony in rebuttal.

The court has discretion to reopen a case for additional evidence even after the jury has retired and begun its deliberations. *State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206, *cert. denied,* 406 U.S. 928; *State v. Noblett,* 47 N.C. 418; *Parish v. Fite,* 6 N.C. 258. Certainly it is proper to reopen the case at the conclusion of the court's charge before the jury has retired. But if the State is permitted to reopen its case, fairness requires that the defendant be afforded an opportunity for rebuttal. *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336; *State v. Harding,* 263 N.C. 799, 140 S.E. 2d 244; *see State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774. The defendant can, as in this case, be severely handicapped if the jury is allowed to hear only the State's evidence on an important aspect of the case.

Here the court's refusal to allow defendant a chance for rebuttal cannot be considered harmless error. At least one juror felt that the construction of the interior of the front seat of the truck was a matter of critical importance. The ease with which defendant could change seats and assume the position of driver may have been crucial to this juror who was concerned enough to inquire openly. It is impossible to tell what Stancil might have said if he had been allowed to testify, but it might well have

been significant enough to affect the outcome of the trial. *See State v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39.

For errors in the court below in the admission and exclusion of material evidence, defendant is entitled to a new trial.

New trial.

Judges PARKER and HEDRICK concur.

CAROLINA PAPER COMPANY, INC., PLAINTIFF v. EVERETT B. BOUCHELLE, T/A BOUCHELLE ENTERPRISES, DEFENDANT

— AND —

W. P. CHERRY & SON, INC., GARNISHEE

No. 7326DC687

(Filed 14 November 1973)

1. **Process § 1— service upon one authorized by appointment or law**

Service of process upon one not authorized by appointment or by law to be served or to accept service of process results in a lack of jurisdiction over the party attempted to be served.

2. **Garnishment § 1; Process § 12— service on purchasing agent of garnishee — sufficiency**

Though the garnishee's purchasing agent did not, by nomenclature, fit into any of the categories of G.S. 1-440.25 or G.S. 1-440.26(a) dictating to whom garnishment process may be delivered, he could be termed a "managing agent" and thus be amenable to service of process when certain facts were taken into consideration, among them his age, his business experience, his full-time employment status, his past experience with garnishment papers and proceedings, the confidence which was expressed in his abilities by designating him purchasing agent, and the responsibility lodged with him by leaving him in charge of the office on the day of delivery of the suit papers.

APPEAL by defendant from *Abernathy, Judge,* 2 April 1973 Session of District Court held in MECKLENBURG County.

This is an action on open account against the defendant Everett Bouchelle for merchandise sold and delivered to a construction project in Statesville, North Carolina. The action was instituted in October 1970 and supplemental attachment and garnishment proceedings against W. P. Cherry and Son, Inc. (garnishee) followed shortly thereafter.

Copies of the order of attachment, summons and notice of levy were personally delivered by Deputy Sheriff Morris to the offices of the garnishee and they were received by W. F. Lyon, full-time employee, who received these papers in his capacity as a purchasing agent for the garnishee. Lyon acknowledged receipt of these papers by his signature and designation upon the Sheriff's return filed of record in this action.

Trial was held upon the merits of the plaintiff's action against the defendant Bouchelle and judgment was entered against Bouchelle in April of 1972 in the sum of $10,404.87 with interest thereon.

During the period between October 1970 (date of service) and April 1972 (date of judgment against defendant Bouchelle), the garnishee did not respond to the summons served upon it by filing a verified answer. Upon application of the plaintiff, a Conditional Judgment was entered against the garnishee by the Clerk of the Superior Court for Mecklenburg County. This Conditional Judgment contained a provision granting the plaintiff a Conditional Judgment against the garnishee in the sum of $10,404.87 with interest thereon, and contained a notice requiring the garnishee to appear before the Clerk of the Superior Court to show cause, if any there be, as to why the Conditional Judgment should not be made final. A copy of the Conditional Judgment and Notice was duly served upon the garnishee; and at no time did the garnishee file an answer either to the summons served upon it in October 1970 or to the Conditional Judgment and Notice served upon it in April of 1972.

A final judgment was entered by the Clerk of Superior Court for Mecklenburg County against the garnishee in May 1972. In December 1972 defendant-garnishee made a motion to strike the conditional and final judgments entered in this matter under the provisions of G.S. 1A-1, Rule 60(b)(4), Rules of Civil Procedure. Upon denial of this motion, with prejudice, the garnishee appealed.

Harkey, Faggart, Coira & Fletcher by Francis M. Fletcher, Jr., and Philip D. Lambeth for plaintiff appellee.

John E. McDonald, Jr., and Thomas C. Ruff for movant-garnishee, W. P. Cherry & Son, Inc.

HEDRICK, Judge.

[1] The prime inquiry to be made is whether W. F. Lyon, purchasing agent of W. P. Cherry, Inc., was a proper person to receive service of process. Service of process upon one not authorized by appointment or by law to be served or to accept service of process results in a lack of jurisdiction over the party attempted to be served. *Board of Health v. Brown,* 271 N.C. 401, 156 S.E. 2d 708 (1967). Applying this last-mentioned principle to the facts of the case now before us, we determine that unless service of process upon W. F. Lyon was proper in the first instance, the further proceedings against the garnishee, to wit: the conditional and final judgments, would be of no legal consequence.

[2] G.S. 1-440.25 and 1-440.26(a) dictate to whom garnishment process may be delivered. Proper process agents under these statutes include: (1) those specifically authorized by the garnishee or those expressly or impliedly authorized by law; (2) "When the garnishee is a domestic corporation . . . the president or other head, secretary, cashier, treasurer, director, managing agent, or local agent of the corporation." The appellant is correct in asserting that the title of purchasing agent is not specifically enumerated in G.S. 1-440.25 and 26(a); however, this does not preclude the classification of Mr. Lyon within one of the listed categories. A similar circumstance existed in *Whitehurst v. Kerr,* 153 N.C. 76, 68 S.E. 913 (1910) when process papers were left with the defendant's bookkeeper and acting agent. In Whitehurst, although the defendant's employee was not embraced by the statute controlling who could receive process, the court determined the employee, because of the attendant facts, could be classified as a "local agent" and thus be amenable to service of process. The court poignantly stated:

> "[T]he cases will be found in general agreement on the position that in defining the term agent it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him." (citations omitted) *Whitehurst v. Kerr, supra,* pages 79-80.

In a similar vein, W. F. Lyon (the purchasing agent) does not conveniently fit, at least by nomenclature, into the listed categories of G.S. 1-440.26(a); but a careful analysis of his background and responsibilities manifests sufficient reason why he should, under the facts of this case, be termed a "managing agent." These facts include: his age (38); his business experience (15 years); his full-time employment status; his past experience with garnishment papers and proceedings; the confidence which was expressed in his abilities by designating him the purchasing agent of W. P. Cherry and Son, Inc.; the fact that on the day of delivery of the suit papers W. P. Cherry, Jr., the President of the company, and Clifford Ambrose, the company's accountant, were out of the office and that Lyon was "next in command" and "of sufficient character and rank as to afford reasonable assurance that he [would] communicate to his company the fact that service of process had been served upon him." *Whitehurst v. Kerr, supra.*

Furthermore, it is of no import that Lyon was not expressly designated to be an agent for service of process and thus must be termed an implied agent. While there have been to our knowledge no cases under G.S. 1-440.25 dealing with service of process upon an implied agent, an analogy can be made to G.S. 1A-1, Rule 4(J)(6)(a), Rules of Civil Procedure, and a recent case which considered the question of whether there was implied authority to receive process. In *Simms v. Stores, Inc.*, 18 N.C. App. 188, 196 S.E. 2d 545 (1973), the following passage from 2 Moore's Federal Practice, ¶ 4.22 [1], p. 1116, was quoted with approval:

> " . . . The agency for receipt of process may be implied from the surrounding circumstances. But the mere appointment of an agent 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."

We determine that the surrounding circumstances presented in the instant case are sufficient to imply that Lyon was an agent for the service of process.

The motion to strike the conditional and final judgments was properly denied and the decision below is

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JOHNNY CALVIN PATE

No. 7326SC754

(Filed 14 November 1973)

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

The State's evidence was sufficient for the jury in an armed robbery case where witnesses identified defendant as (1) the man who held the gun during the robbery by three persons and (2) the man who handed a check stolen in the robbery to a State's witness for the purpose of cashing it.

2. **Criminal Law § 66— failure to identify defendant from photographs or at lineup — identification in hallway — identification at trial**

Although a robbery victim failed to identify defendant from photographs or at a police lineup, but identified defendant in a hallway prior to the preliminary hearing and at the hearing, the victim was properly allowed to identify defendant at the trial where the court found upon supporting *voir dire* evidence that the identification prior to and at the preliminary hearing was based upon observation at the time of the robbery and that the identification at trial was of independent origin and not tainted by any pretrial procedure.

3. **Criminal Law § 131— new trial for newly discovered evidence — appeal pending — authority of trial court**

The trial court was without authority to entertain defendant's motion for a new trial for newly discovered evidence filed after expiration of the trial term and while an appeal in the case was pending.

4. **Criminal Law § 131— new trial for newly discovered evidence — motion in appellate court — motion after judgment affirmed**

A new trial for newly discovered evidence will not be awarded in a criminal case in the appellate division, but a motion for a new trial for such reason may be made in the lower court at the next succeeding term following affirmance of the judgment on appeal.

APPEAL by defendant from *Grist, Judge,* 2 April 1973 Session of Superior Court held in MECKLENBURG County.

Defendant Johnny Calvin Pate, along with one Robert Lee Morrow, was tried upon a bill of indictment charging armed robbery; the cases were consolidated for trial.

The State's evidence tended to show that on 24 November 1972, Mrs. Rebecca Roberts was employed by Long's Dry Cleaners in Charlotte, North Carolina. Between 3:20 and 3:30 p.m. on that date, defendant Pate and two or more men entered the establishment. Defendant Pate advanced toward the witness Roberts, pointed a gun at her, and demanded that she fill

up a pink plastic bag which he handed her. While holding the gun four or five inches from the side of the witness while the witness was extracting money from the cash register, defendant Pate became anxious and dumped everything from the register including a payroll check for the witness Roberts, endorsed by her, into the bag. Another man instructed the witness to lie down on the floor and close her eyes until the men escaped. The witness failed to identify defendant Pate at a subsequently held police lineup or from photographs. The witness did identify defendant Pate in a hallway prior to entering the district court where a preliminary hearing regarding the robbery was to be held; she also identified the defendant Pate at the hearing and at the trial. She was unable to identify defendant Morrow as one of the individuals who entered the establishment on the date in question.

The State also presented the testimony of Mary Elaine Morrison who knew both defendants. On 24 November 1972, the witness Morrison attempted to cash the endorsed check of Mrs. Rebecca Roberts, having been requested by the defendant to do so after being told the check belonged to the sister of Morrow. The witness was arrested and charged with receiving stolen goods.

Defendant Pate's evidence tended to show that at different times on the day in question, the defendant had been seen by three different witnesses.

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

Peter H. Gerns for the defendant.

BROCK, Chief Judge.

The defendant assigns as error the failure of the trial court to allow his motion for judgment of nonsuit.

"On motion to nonsuit, the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the state's evidence, are for the jury to resolve, and do not warrant nonsuit. Only the evidence favorable to the state will be considered, and defendant's evidence relating to matters of

defense, or defendant's evidence in conflict with that of the state, will not be considered." 2 Strong, N. C. Index 2d, Criminal Law § 104, pp. 648-651.

[1] The testimony of the witnesses identifying defendant Pate as (1) the man who held the gun during the robbery, and (2) the man who handed the stolen check to the witness Morrison for the purpose of cashing it, is sufficient to take the question to the jury. This assignment of error is overruled.

[2] The defendant next assigns as error that the trial court found as a fact and concluded as a matter of law that the in-court identification of State's witness, Mrs. Rebecca Roberts, was of independent origin and not tainted by any pretrial identification procedure. Prior to the presentation of evidence at trial, the defendant moved to suppress all evidence pertaining to identification and the court conducted a voir dire in the absence of the jury. Following the voir dire, the court made findings of fact and concluded that the in-court identification of the defendant was not based upon photographic or lineup procedures, constitutionally impermissible in nature or in scope; that such photographic or lineup procedures did not produce identification of the defendant; that identification by the witness in a hallway prior to the preliminary hearing and at the preliminary hearing, was based upon observation at the time of the robbery.

"It is well established in North Carolina that findings of fact made by the trial judge and conclusions drawn therefrom on the voir dire examination are binding on the appellate courts if supported by evidence." *State v. Accor* and *State v. Moore,* 281 N. C. 287, 188 S.E. 2d 332. This assignment of error is overruled.

[3] Defendant also seeks a new trial upon the basis of newly discovered evidence submitted to the trial judge after expiration of the trial term and while the appeal was pending before this Court. The trial court properly determined that it was without authority to entertain a motion for a new trial while the case is on appeal. However, the judge entered an order directing that defendant's motion for a new trial be made a part of the record on appeal so that it could be considered by this Court.

[4] "The procedure for moving for a new trial in a criminal action on the grounds of newly discovered evidence is well estab-

lished in this jurisdiction. In *State v. Edwards,* 205 N.C. 661, 172 S.E. 399, in an opinion by Stacy, C. J., it is said:

' * * * [W]hen a case is tried in the Superior Court, and no appeal is taken from the judgment rendered therein, motion for new trial on the ground of newly discovered evidence may be entertained only at the trial term. (Citing authorities.) But, if the case is kept alive by appeal, such motion may be made, as a *dernier ressort,* in the Superior Court at the next succeeding term following affirmance of the judgment on appeal. (Citing authorities.)' " *State v. Thomas,* 3 N.C. App. 223, 164 S.E. 2d 391. A new trial will not be awarded in a criminal case in the appellate division for newly discovered evidence. *State v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245.

For the reasons stated, the motion for a new trial is dismissed without prejudice to the right of defendant to present such motion at the next session of Superior Court held in Mecklenburg County after this opinion is certified to said Court.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. R. L. ARMISTEAD, WILLIAM R. ARMISTEAD, HENRY BAKER, R. A. HENDRICKS III, ABNER C. JONES III, PAUL IRVIE TREGEMBO AND ROBERT DEE TREGEMBO

No. 732SC544

(Filed 14 November 1973)

Admiralty; State § 2; Waters and Watercourses § 6— Civil War cannons — underwater archaeological artifacts — ownership in State

In an action to determine ownership of certain items of ordnance rolled into the Roanoke River and abandoned by the Confederate States of America in 1865, the trial court properly granted summary judgment for the State based on findings of fact that the cannons in question were archaeological artifacts, that they had lain on the bottom of the Roanoke River since 1865, and that the river was a navigable body of water and based on the conclusion of law that the cannons were underwater archaeological artifacts within the meaning of G.S. 121-22.

APPEAL from *Cowper, Judge,* 2 April 1973 Session of MARTIN County Superior Court.

Defendant appellants in this case are a group of Civil War enthusiasts and collectors, three of whom are residents of North Carolina and the remainder of whom are residents of Alabama. After extensive research into Civil War records, they determined that the Confederate States of America had in 1865 abandoned certain items of ordnance at Fort Branch, North Carolina, by rolling them off a bluff and into the Roanoke River. Defendants began in June, 1972, a diving expedition into that part of the Roanoke River adjacent to the site of Fort Branch at a spot known as Rainbow Bluff in Martin County, North Carolina. On 8 July 1972, the expedition discovered and brought to the surface three cannons, remnants of artillery carriages, and sundry hardware. On the advice of W. R. Armistead—who was the head of the Restoration Laboratory at the University of Southern Alabama and had experience in the preservation of such historical objects—the cannons and other pieces of ordnance were transported to and immersed in a fresh water pond on a nearby farm. The Department of Archives and History executed on 20 January 1973, a contract of loan of the cannons to the Fort Branch Battlefield Commission for the purpose of a public display at Hamilton, N. C.

On 26 January 1973, plaintiff, through its agent, the Department of Archives and History removed the cannons from the pond and transported them by flatbed truck to Hamilton, where they were put on display.

The present action by the State was instituted on 28 August 1972, when the cannons were still immersed in the pond. In its complaint, the State sought injunctive relief and prayed for judgment that the State of North Carolina is the owner of the cannons and for costs in the action.

Defendants Baker, R. L. Armistead, W. R. Armistead and R. A. Hendricks III, deny that the cannons are the property of the State and that they wrongfully removed them from the river. The defendants claim that the State knew of their activities, and that they allowed them to expend their time and money in the recovery of the cannons with the purpose of confiscating them as soon as they were removed. Furthermore, they claim that the cannons were abandoned property, and they are entitled to them at common law. By way of counterclaim, defendants seek $10,000 as reimbursement for their services in recovery of the cannons, $20,000 for deprivation of possession

of the cannons, and $10,000 for damage to the cannons incident to the removal to Hamilton.

The record from the complaint to the final order of Judge Cowper is replete with an exhaustive series of affidavits, motions, temporary restraining orders and preliminary injunctions, all of which are addressed to the proposition that various parties, persons and agencies should refrain from various courses of conduct relative to the possession, location and physical condition of the cannons. It does not behoove us to explicate further this portion of the record inasmuch as no material facts therein are in dispute.

On 19 February 1972, plaintiff moved for summary judgment against R. L. Armistead, William R. Armistead, Henry Baker and R. A. Hendricks III, on the ground that there was no material issue of fact and that plaintiff was entitled to judgment as a matter of law. They moved also for default judgment against Abner C. Jones III, Paul Irvie Tregembo and Robert Dee Tregembo since they were served and failed to answer. In addition, they moved to dismiss all counterclaims for lack of jurisdiction, since the State had not consented to be sued.

Judge Cowper made the following findings of fact and conclusions of law:

"FINDINGS OF FACT

1. That on July 8, 1972, the defendants Robert L. Armistead, William R. Armistead, Henry Baker, R. A. Hendricks, III, and others did remove from the bottom of the Roanoke River the three cannons and portions of carriages described in the complaint filed herein.

2. That the three cannons are the type used during the American Civil War by the troops of the Confederate States of America and are archaeological artifacts.

3. That the defendants removed said artifacts from the river without the permission of the plaintiff and without first obtaining a permit or license from the Office of Archives and History, Department of Art, Culture and History.

4. That the Roanoke River is a navigable body of water and is capable of being navigated by large commercial vessels

from its mouth to Weldon, North Carolina, a distance of about 130 miles; that the river at the point where said artifacts were removed by defendants lies within that portion of the river referred to herein and is navigable in fact.

5. That said artifacts have been lying on the bottom of the Roanoke River since 1865.

6. That all defendants except Abner C. Jones, III, have been duly served with process.

7. That the defendants Paul Irvie Tregembo and Robert Dee Tregembo have not filed answer or otherwise pleaded herein, and that the time for answering or otherwise pleading has expired.

CONCLUSIONS OF LAW

1. That pursuant to G.S. 121-22 the plaintiff, State of North Carolina, is the owner of and is entitled to possession of all underwater archaeological artifacts which have remained unclaimed for more than ten years on the bottom of any navigable waters in the State and such artifacts are subject to the exclusive dominion and control of the State.

2. That the artifacts described in the complaint are underwater archaeological artifacts within the meaning of G.S. 121-22, and the plaintiff, State of North Carolina, is the owner thereof and entitled to possession of the same.

3. That the counterclaims asserted by defendants in their respective answers fail to state a claim against plaintiff upon which relief may be granted."

Judge Cowper thereupon ruled that the State is the owner of the cannons. The motions for summary judgment and default judgment were granted. The motion to dismiss all counterclaims was granted on the grounds of lack of jurisdiction and failure to state a claim upon which relief may be granted. In addition plaintiff's voluntary dismissal as to Abner C. Jones III, was approved.

From the above judgment, defendants appeal.

Attorney General Morgan, by Assistant Attorneys General Costen and Giles, for the State.

Ezzell and Henson, by Thomas W. Henson, for defendant appellants.

MORRIS, Judge.

There is no dispute as to material issues of fact. Both assignments of error present to this Court the question of whether the three cannons found by defendants in the Roanoke River are archaeological artifacts within the purview of G.S. 121-22 and consequently, whether the State is the owner thereof. Defendants' first assignment of error is to the granting of summary judgment in favor of plaintiff based on the finding of fact that the cannons were archaeological artifacts and the conclusion of law that they were underwater archaeological artifacts within the meaning of G.S. 121-22.

G.S. 121-22 provides:

> "Subject to chapter 82 of the General Statutes, entitled 'Wrecks' and to the provisions of chapter 210, Session Laws of 1963 [§§ 121-7, 121-8.1 to 121-8.3 and 143-31.2], and to any statute of the United States, the title to all bottoms of navigable waters within one marine league seaward from the Atlantic seashore measured from the extreme low watermark; and the title to all shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts which have remained unclaimed for more than 10 years lying on the said bottoms, or on the bottoms of other navigable waters of the State, is hereby declared to be in the State of North Carolina, and such bottoms, shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts shall be subject to the exclusive dominion and control of the State."

It is conceded by the defendants that the cannons have remained in the river for more than 10 years and that the Roanoke River is a navigable water. Thus, it remains only for us to determine whether a cannon rolled off a bluff into the river by the Confederate Army in 1865 is an archaeological artifact.

If the cannons are not archaeological artifacts and G.S. 121-22 does not apply, the defendants contend that they are entitled to the cannons under the common law regarding abandoned property. Specifically, it is their contention that G.S. 121-22 modified the applicable common law rule as established in *Bruton, Attorney General v. Enterprises, Inc.*, 273 N.C. 399, 160 S.E. 2d 482 (1968). Since the statute modifies the common law, they contend, it must be strictly construed. Without regard

to the holding of *Bruton, supra,* we hold that under established rules of statutory interpretation, the cannons are archaeological artifacts and title is in the State.

It has been consistently held by the appellate courts of this State that a statute must be construed insofar as possible to effectuate the intent of the legislature. *Person v. Garrett, Comr. of Motor Vehicles,* 280 N.C. 163, 184 S.E. 2d 873 (1971); *State v. Johnson,* 278 N.C. 126, 179 S.E. 2d 371 (1971); *Galligan v. Town of Chapel Hill,* 276 N.C. 172, 171 S.E. 2d 427 (1970). In order to ascertain the purpose of the legislature relative to a particular piece of legislation, the courts are to consider the language of the statute, the spirit of the Act, and what it sought to accomplish. *Galligan v. Town of Chapel Hill, supra.*

An examination of the face of the statute and its legislative history (Chapter 533, Session Laws of 1967) reveal the manifest intent of the legislature to vest title in the State of *all* archaeological artifacts recovered from navigable waters. Nowhere does it appear that the legislature intended to limit the coverage of G.S. 121-22 to artifacts associated with shipwrecks.

Nor are appellants aided—as they contend—by the rule of *ejusdem generis.* It is their position that the general language "and archaeological artifacts" in G.S. 121-22, is restricted in its meaning by the preceding specific language "shipwrecks, vessels, cargoes, tackle." *Ejusdem generis* is to be relied upon only in determining legislative intent where there is uncertainty; it will not be used to defeat legislative intent. *State v. Fenner,* 263 N.C. 694, 140 S.E. 2d 349 (1965). See also *State v. Ross,* 272 N.C. 67, 157 S.E. 2d 712 (1967).

Appellants would have us restrict the meaning of the term "archaeological" to items of antiquity, i.e., *circa* the fall of the Roman Empire. Such a construction would be entirely unreasonable in light of our previous holdings regarding interpretation of specific words. A word within a statute will not be interpreted out of context, but must be construed as a part of the composite whole and given only the meaning that other provisions and the clear intent of the Act will permit. *Myrtle Desk Co. v. Clayton,* 8 N.C. App. 452, 174 S.E. 2d 619 (1970). In light of the clear legislative intent to vest title of Civil and Revolutionary War vessels in the State, it is inconceivable that the use of the term "archaeological artifacts" in the same Act was intended to limit artifacts not associated with shipwrecks to a period prior to the Fifth Century, A.D.

Since there was no dispute as to any issue of material fact, and since the cannons are archaeological artifacts belonging to the State, the trial judge did not err in his granting of summary judgment in favor of the State. Likewise, the failure to grant summary judgment in favor of defendant was proper.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

EUGENIA GLOVER BOWEN v. EDGAR GERALD BOWEN

No. 7315DC658

(Filed 14 November 1973)

1. **Divorce and Alimony § 16— alimony without divorce — evidence of adultery — no error**

Trial court in an action for alimony without divorce did not err in allowing into evidence testimony of the plaintiff which implied adultery of defendant where comments of the trial judge clearly showed that he was aware of the prohibition contained in G.S. 50-10 against such evidence and in hearing the case took care not to draw the forbidden inference of adultery from any statement made by plaintiff.

2. **Divorce and Alimony § 16— alimony without divorce — abandonment — sufficiency of evidence**

Evidence in an action for alimony without divorce supported the trial court's determination that defendant abandoned plaintiff where it tended to show that defendant left plaintiff intending never to return, that he attended one marriage counseling session with her but he did not resume living with her after the counseling session, and that defendant never has returned to plaintiff, though he has provided her with financial support during the period of separation.

3. **Divorce and Alimony § 18— amount of alimony award — discretionary order**

The amount to be awarded for alimony and child support is within the discretion of the trial court and will not be disturbed in the absence of a manifest abuse of such discretion.

APPEAL by defendant from *Horton, Judge,* 27 April 1973 Session of District Court held in ORANGE County.

This is an action brought by plaintiff-wife against defendant-husband for alimony without divorce and child custody

and support. It was heard by the court upon motion of the plaintiff for alimony pendente lite, counsel fees, and custody and support for the eight-year-old son. Both plaintiff and defendant testified at the hearing.

Plaintiff testified that in 1971 defendant left her, contrary to her desires and without any provocation on her part, simply because he no longer wanted to be married. Several months after the parties separated, they went to a marriage counselor together, at plaintiff's request, but the counseling was unsuccessful. Plaintiff stated that she is financially dependent on her husband. Her monthly expenses amount to approximately $490.00. In the year 1972 she earned a total of $500.00, from substitute teaching and baby-sitting. She has a teacher's certificate, and she has applied for teaching positions in public and private schools in the Chapel Hill area, but she has been unable to get a job. She is now working full time as a real estate agent, but she is just starting in this type of work and has not yet earned any commissions.

During the direct examination of plaintiff, the following proceedings took place:

Q. Mrs. Bowen, in your attempts to have some sort of counselling help, did you find that there was some stumbling block to or condition to your getting back together that you weren't able to overcome?

A. Yes, I did.

Q. And what was that?

A. That he was going with another—

MR. WINSTON [counsel for defendant]: Objection. Motion to strike.

JUDGE HORTON: Overruled.

MR. WINSTON: May I be heard, your Honor?

JUDGE HORTON: Yes sir. You cannot get into anything dealing with adultery.

MR. WINSTON: Yes sir. And that's—

JUDGE HORTON: It hasn't gotten to that point; but when it gets to that, it will be stopped.

MR. WINSTON: All right, sir.

JUDGE HORTON: That would not be — any objections to that type question would be sustained.

PLAINTIFF: My husband was doing something which amounted to a condition that prevented our getting back together. He agreed to go with me to get counselling on the condition that he would stop seeing this woman. I felt like I could not — I knew it would be hard enough after so much time had passed and so many things had happened to bring the marriage back together, and I knew I could not do it with a third person standing between us.

Defendant testified about his financial condition, stating that his net monthly income was $857.00 after taxes, insurance payments and other deductions. He did not dispute plaintiff's account of their separation and unsuccessful attempt at reconciliation.

In his findings of fact and conclusions of law Judge Horton held that plaintiff was a dependent spouse, that defendant was a supporting spouse, and that defendant had abandoned plaintiff. He issued an order awarding plaintiff custody of the child and requiring defendant to pay $483.25 per month, $187.25 for child support and $296.00 for alimony pendente lite. Defendant was also ordered to pay $400.00 in counsel fees for plaintiff's attorney. He appealed to this Court.

No brief filed by plaintiff appellee.

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

BALEY, Judge.

Defendant makes three assignments of error which he contends would justify reversal of the order of the trial court: (1) admission of testimony of the plaintiff which implied adultery of defendant; (2) insufficient evidence of abandonment of the plaintiff by defendant; and (3) abuse of discretion in awarding excessive alimony and support. We do not consider any of these assignments of error to have merit.

[1] G.S. 50-10 provides that in divorce cases "neither the husband nor wife shall be a competent witness to prove the adultery of the other." This statute applies to actions for alimony without

divorce. *Hicks v. Hicks,* 275 N.C. 370, 167 S.E. 2d 761. It is clear from the comments of Judge Horton that he was fully aware of the prohibition contained in G.S. 50-10 and in hearing the case took care not to draw the forbidden inference of adultery from any statement made by plaintiff. He specifically instructed plaintiff's attorney not to ask any question dealing with adultery. In a nonjury case it is presumed that the judge in reaching his decision would not draw inferences from testimony otherwise competent which would render such testimony incompetent. *See Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.,* 279 N.C. 313, 182 S.E. 2d 373; *General Metals v. Manufacturing Co.,* 259 N.C. 709, 131 S.E. 2d 360.

[2] Abandonment is listed in G.S. 50-16.2 as one of the grounds justifying an award of alimony without divorce, and it has been defined as follows: "One spouse abandons the other, within the meaning of this statute, where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intention of renewing it." *Panhorst v. Panhorst,* 277 N.C. 664, 670-71, 178 S.E. 2d 387, 392. In this case the evidence clearly supports Judge Horton's determination that defendant abandoned plaintiff. Defendant left plaintiff intending never to return, and he never has returned. He attended one marriage counseling session with her, but he did not resume living with her after the counseling session. He has provided plaintiff with financial support during the period of separation, but this alone is not sufficient to avoid a finding of abandonment. *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5; *Richardson v. Richardson,* 268 N.C. 538, 151 S.E. 2d 12; *Pruett v. Pruett,* 247 N.C. 13, 100 S.E. 2d 296.

[3] The amount to be awarded for alimony and child support is within the discretion of the trial court and will not be disturbed in the absence of a manifest abuse of such discretion. *Schloss v. Schloss, supra; Austin v. Austin,* 12 N.C. App. 390, 183 S.E. 2d 428; *Peeler v. Peeler,* 7 N.C. App. 456, 172 S.E. 2d 915; *Dixon v. Dixon,* 6 N.C. App. 623, 170 S.E. 2d 561. The record indicates that since their separation the defendant has been making payments voluntarily to the plaintiff for her support and that of their child in the amount of $430.00 per month. This was increased to $483.25 by the court pending a final determination of the litigation. Under the factual circumstances here appearing, we do not find any abuse of discretion. If there is any significant change in the condition of the parties before

trial, defendant is free to move for a reduction in alimony payments. G.S. 50-16.9; *see Fonvielle v. Fonvielle*, 8 N.C. App. 337, 174 S.E. 2d 67.

The judgment of the trial court is affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. LESLIE EARL HADDOCK

No. 732SC65

(Filed 14 November 1973)

Narcotics § 4— possession of marijuana with intent to distribute — sufficiency of evidence

Evidence was sufficient to withstand defendant's motion for nonsuit in a prosecution for possession of marijuana with intent to distribute where it tended to show that defendant had in his possession and control an automobile when marijuana was found therein, that, though the automobile was owned by defendant's brother, it had been in defendant's possession for several hours prior to discovery of the marijuana, that defendant was in possession of the automobile at the time, a few minutes prior to his arrest, when a quantity of marijuana was brought into it, and this was made possible only by defendant's actions in stopping and parking his car at a place where this might conveniently be accomplished.

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

Defendant was charged in a bill of indictment, proper in form, with felonious possession of marijuana with intent to distribute. He pled not guilty, was found guilty as charged, and from judgment sentencing him to prison for the term of 18 months, appealed.

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

James V. Rowan for defendant appellant.

PARKER, Judge.

The charge against defendant was consolidated for trial with similar charges against one Clark and others. Clark was also convicted and appealed to this Court, which found no error in opinion reported in *State v. Clark,* 18 N.C. App. 473, 197 S.E. 2d 81.

Defendant in the present appeal first assigns error to the court's refusal to grant his motion for nonsuit, contending that the evidence was insufficient to warrant a jury finding that he possessed any marijuana. In substance the State's evidence showed the following: Officer Boyd, an ABC officer, discovered three plastic bags containing green vegetable matter hidden in the bushes near the Honey Pod Farm Road in Beaufort County. After notifying the sheriff's department of this find, he remained hidden some distance away. After about an hour and at about 1:05 p.m., he observed a car, driven by defendant Haddock and containing five other young men, pull off and park on the shoulder of the road. Officer Boyd observed Clark get out from the center front seat, cross the road, and go to the spot where Boyd had seen the plastic bags. When Clark came back across the road, the officer observed that he had the plastic bags sticking out of his shirt. Clark got back in the right front seat of the car, which drove away. The car, still being driven by defendant Haddock, was stopped a short distance away on Honey Pod Farm Road by members of the sheriff's department who had been alerted by radio communication from Officer Boyd. The officers asked Clark to get out of the car. As he did so, the officers saw him throw away three plastic bags, which were recovered. Later, Clark voluntarily turned over a fourth bag to the officers. The officers arrested all six occupants of the car. At the officers' direction, defendant Haddock, accompanied by an officer, then drove his car to the police station in Washington, where it was searched, without objection. This search resulted in the discovery of two additional small plastic bags under the rear of the front seat at a point toward the middle of the car. Upon analysis, the contents of all six bags were found to be marijuana. The contents of the four bags found in Clark's possession weighed 30.3 grams and the contents of the two bags found under the front seat weighed 18.1 grams.

Defendant testified that he had borrowed the car that day from his brother who owned it, that he had left it unlocked in a public park from 10:30 a.m. until 12:30 p.m., and that upon

his return to the car Clark had requested a ride home, to which he agreed. At that time one of the other defendants asked if the other young men could also have a ride, to which defendant also agreed. As they rode down Honey Pod Farm Road, Clark requested defendant to stop the car, which he did. Defendant testified that he paid no particular attention to where Clark went, did not observe the marijuana on Clark when the latter returned to the car, and that when he was stopped by the officers, he did not know there was any marijuana in the car. Defendant testified further that he did not object to the search of his car at the police station and that he did not own, possess or control the marijuana found under the seat or that found in Clark's possession. The other defendants, with the exception of Clark, also testified that Clark had requested defendant to stop on Honey Pod Farm Road and that they did not see the marijuana in Clark's possession when he came back to the car.

When the evidence is viewed in the light most favorable to the State and when the State is given the benefit of every reasonable inference to be drawn, therefrom, we find it sufficient to withstand defendant's motion for nonsuit. "An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706. Here, the automobile, though owned by defendant's brother, was in defendant's possession and subject to his control when the marijuana was found therein. It had been in his possession and under his control for several hours prior thereto. Defendant was sitting in and in control of the automobile at the time, a few minutes prior to his arrest, when a quantity of marijuana was brought into it, and this was made possible only by defendant's actions in stopping and parking his car at a place where this might be conveniently accomplished. Two bags of marijuana were found underneath the seat on which defendant was sitting. Under these circumstances it was a reasonable inference for the jury to draw that defendant knew of the presence of the marijuana in the automobile and that he had both the power and intent to control its disposition. His motion for nonsuit was properly denied.

Appellant assigns error to the portion of the charge in which the court instructed the jury as to the effect of the presumption arising under G.S. 90-95(f) (3) from the fact of unlawful possession of more than five grams of marijuana. Appellant does not attack the form of the trial judge's instructions in this connection, but questions the validity of the statutory presumption itself, contending that no sufficient connection exists between the fact proved, i.e., unlawful possession of more than five grams of marijuana, and the fact to be inferred, i.e., intent to distribute. This question has already been decided adversely to appellant's contention, *State v. Garcia,* 16 N.C. App. 344, 192 S.E. 2d 2, *cert. den.,* 282 N.C. 427, 192 S.E. 2d 837; *State v. Clark, supra,* and we adhere to these decisions.

We have carefully examined appellant's remaining assignments of error, all of which relate to portions of the court's charge to the jury, and find them without merit. Considered contextually and as a whole the charge was free from prejudicial error. In defendant's trial and in the judgment appealed from, we find

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. A. B. MORRISON

No. 7326SC751

(Filed 14 November 1973)

1. Criminal Law §§ 91, 175— motion for continuance — question of law — review on appeal

Where the dual grounds stated as the basis for defendant's motion for continuance involved the right to the assistance of counsel and the right to face his accusers with other testimony, constitutional rights were involved, and the question presented was one of law and not of discretion; therefore, the trial court's ruling was reviewable on appeal.

2. Criminal Law § 91— motion for continuance — denial proper

The trial court properly denied defendant's motion to continue in order to obtain the presence of his Tennessee attorney and two Tennessee witnesses at his trial where the court found that defendant was represented by N. C. counsel, that the Tennessee attorney had been employed as additional counsel by defendant after his first trial

ended in a mistrial, that the court had issued a certificate to require attendance of the Tennessee witnesses, and that no affidavit had been filed to show the materiality of the testimony of the witnesses.

3. **Criminal Law § 43— photographs of murder victim — admissibility**

The trial court in a murder prosecution did not err in permitting introduction into evidence of three color photographs of deceased's body where those photographs were used to illustrate the testimony of the State's witnesses and served to make that testimony more intelligible to the jury.

4. **Homicide § 30— second degree murder — failure to submit manslaughter issue — no error**

Where the State's evidence, if believed, tended to show that defendant shot deceased four times at close range a few hours after the two had quarreled over a poker game, but defendant's evidence, if believed, tended to show that defendant did not shoot deceased and that they had parted company on amicable terms at some distance away from the place the State's evidence indicated the shooting occurred, the trial court did not err in submitting the issue of defendant's guilt of second degree murder to the jury and in failing to submit the issue of defendant's guilt of manslaughter.

APPEAL by defendant from *Snepp, Judge,* 16 April 1973 Schedule "C" Criminal Session of Superior Court held in MECKLENBURG County.

This is an appeal from judgment imposing a prison sentence after jury verdict finding defendant guilty of second-degree murder.

Attorney General Robert Morgan by Associate Attorney Archie W. Anders for the State.

Robert F. Rush for defendant appellant.

PARKER, Judge.

[1, 2] Appellant first assigns error to denial of his motion for a continuance made on the ground that his Tennessee attorney was committed to appear in the Tennessee Court of Appeals on the date upon which trial of this case was scheduled to begin and on the further ground that two defense witnesses from Tennessee had declined to appear voluntarily and defendant's Tennessee attorney had been unable to process subpoenas to require their attendance by the time of the trial. "A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion. *State v. Stinson,* 267 N.C. 661, 148

S.E. 2d 593 (1966). However, when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable." *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296. The dual grounds stated as the basis for defendant's motion for continuance in the present case involve the right to assistance of counsel and the right to face one's accusers with other testimony, rights guaranteed by the Sixth Amendment. Thus, the trial court's ruling in this case is reviewable. In denying the motion the court made findings of fact from the record, including findings that defendant was still being represented by the same North Carolina attorney who represented him at a first trial of this case which had resulted in a mistrial when the jury could not agree, that the Tennessee attorney had been employed by defendant as additional counsel after the first trial, that eleven days prior to the date on which this trial was scheduled to commence the court on motion of defendant had issued a certificate to require attendance of the two Tennessee witnesses, and that no affidavit had been filed to show the materiality of the testimony of these witnesses. Based on these findings the trial court properly concluded that defendant was not entitled to a continuance as a matter of law. The court also considered the motion in its discretion and denied the continuance; in so doing no abuse of discretion has been shown. We note that throughout the trial of this case defendant continued to be represented by the same able and experienced North Carolina lawyer who had represented him at the prior trial, that one of the two Tennessee witnesses did in fact appear and testify for the defense but the testimony of this witness proved to be irrelevant, and that nothing in the record indicates what the testimony of the absent witness would be or suggests that his testimony might have proved helpful to the defense. We find that defendant suffered no deprivation of any constitutional or legal right in denial of his motion for continuance, and his first assignment of error is overruled.

[3] The defendant next contends error in the trial court's action permitting introduction into evidence of three color photographs of the deceased's body. One of these showed the body lying at the place and in the condition it was found on the morning after the killing and was admitted to illustrate the testimony of the State's witness who discovered it and the testimony of the County Medical Examiner who examined it at the

scene. The other two were photographs admitted to illustrate the Medical Examiner's testimony as to bullet wounds in various portions of the deceased's body. Defendant does not contend that the photographs are inaccurate or were not properly taken or authenticated. His contention is that, there being no dispute as to the cause of death, permitting their introduction in evidence served no useful purpose and could only inflame the jury. We do not agree. "Ordinarily, a witness may use photographs to explain or illustrate anything which it is competent for him to describe in words [citations omitted], and if a photograph is relevant and material, the fact that it is gory or gruesome will not alone render it inadmissible." *State v. Chance,* 279 N.C. 643, 654, 185 S.E. 2d 227, 234. In the present case the photographs were used to illustrate the testimony of the State's witnesses and served to make that testimony more intelligible to the jury. The trial judge instructed the jury that the photographs were for the purpose of illustration and were not substantive evidence. We find that they were relevant and served a proper purpose. No error was committed in permitting the jury to see them.

[4] Finally, defendant contends that the trial court erred in submitting this case to the jury on the single issue of defendant's guilt or innocence of the crime of second-degree murder and in failing to instruct the jury that they should also consider the additional issue of defendant's guilt or innocence of the crime of manslaughter. The uncontradicted evidence showed that the victim of the crime was shot four times at close range and that his death resulted from one or more of the wounds thus inflicted. The State's evidence, if believed by the jury, would establish that defendant was the person who shot him and that this occurred a few hours after the two men had quarreled over a poker game. Defendant's evidence, if believed by the jury, would establish that defendant did not shoot the deceased and that on the contrary they had parted company on amicable terms while the victim was still alive and well and at some distance away from the place the State's evidence indicated the shooting occurred. Under neither view was the crime of manslaughter involved. "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. There

being no such evidence in the present case, the trial court did not err in refusing to instruct the jury as to manslaughter.

In the trial and judgment appealed from we find

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES GRANN McMILLAN

No. 7315SC551

(Filed 14 November 1973)

1. **Arrest and Bail § 3— warrantless arrest — reasonable grounds — arrest lawful**

Defendant's warrantless arrest for possession of narcotic drugs was lawful where the arresting officer was told by an informer whose information on 25 previous occasions had been reliable that defendant was selling marijuana and heroin at a car wash, that defendant was a colored male operating a Ford Falcon, and that defendant was getting ready to leave the car wash, and where the officer immediately proceeded to the car wash, observed defendant there, watched him leave the scene in his automobile, and arrested him after he had proceeded one block. G.S. 15-41(2).

2. **Criminal Law § 84; Searches and Seizures § 1— warrantless arrest — search of defendant — admissibility of drugs**

Where defendant's warrantless arrest was lawful, the search of his person incident thereto was also lawful, and drugs seized were admissible in his trial for possession of heroin and marijuana.

3. **Criminal Law § 99— expression of opinion by trial judge**

In a prosecution for possession of marijuana and heroin, the trial court did not express an opinion in violation of G.S. 1-180 in questioning a witness or in interrupting counsel for defense in his argument to the jury.

APPEAL from *Bailey, Judge,* 5 March 1973 Session of ALAMANCE County Superior Court.

Defendant was charged with possession of heroin and marijuana. The cases were consolidated for trial and defendant pled not guilty. He was found guilty of possession of heroin and not guilty of possession of marijuana.

Officer Hoggard of the Burlington Police Department testified that he arrested defendant for possession of narcotic

drugs. Counsel for defendant moved to suppress the evidence of heroin seized from the person of defendant. Upon the subsequent voir dire examination of Officer Hoggard, the following evidence was received:

At about five o'clock p.m. on the day of the arrest, a reliable confidential informant telephoned Officer Hoggard at his residence and informed him that a man named McMillan was in the parking lot of a car wash on Rawhut Street selling marijuana and heroin. He informed him that McMillan was a colored male and that he was operating a Ford Falcon parked in the car wash parking lot. He said that earlier the same day McMillan had offered to sell drugs to the informant. In addition, the informant told Officer Hoggard that McMillan would only be in the car wash for a few minutes, for he was getting ready to leave.

Officer Hoggard testified that he had known the informant —who was a civilian—for approximately one year. The informant had in the past provided him with information on at least 25 occasions, and in every case the information had proven reliable.

Officer Hoggard thereupon telephoned the police station and notified Officer Garner to meet him at the station. After Officer Hoggard drove to the police station, he and Officer Garner got into a squad car and without first getting a warrant drove to the car wash where they observed McMillan and another man walking to McMillan's car, which was the only Falcon among the four or five cars parked in the lot. The two officers observed McMillan and the other man walking toward McMillan's car. As the two men got in the car and pulled out of the parking lot, the officers followed them and stopped them approximately one block from the car wash. After seeing McMillan's name on his driver's license, Officer Hoggard placed him under arrest for possession of narcotic drugs. He seized an aluminum foil packet containing heroin from McMillan's shirt pocket, and he found a paper bag containing marijuana on the floorboard in the back seat of the car.

At the conclusion of the voir dire examination, the court made the following findings of fact and conclusions of law:

"THE COURT: Having heard the VOIR DIRE of Officer Hoggard, the direct examination by the Solicitor and cross examination by the defense, the Court finds as a fact that

at 5 o'clock p.m. on the 10th of December, 1972, Officer Frank Hoggard was at his home. That he was not dressed for duty at that time. That shortly after five p.m. he received a telephone call from an informant who had on at least twenty-five prior occasions furnished him with accurate information. That on no prior occasion had this informant furnished him with inaccurate information. That the informant advised him that the defendant in this case Charles G. McMillan was located at a car wash selling narcotic drugs and was a colored male, driving a Ford Falcon automobile. Officer Hoggard called another officer at the police department, dressed and proceeded at once to the police department where he picked up his Senior Officer and proceeded to the site of the car wash. That upon approaching the car wash he observed a colored male walking toward a Ford Falcon automobile. That as he came into the car wash driveway, the defendant McMillan, driving a Ford Falcon, departed from the other driveway.

That Officer Hoggard, together with Officer Garner pursued the defendant in the Falcon automobile and stopped him and placed the defendant under arrest for the possession of narcotic drugs.

That he conducted a search of the person of the defendant and found in his shirt pocket wrapped in foil, enclosed in an envelope one bindle (standard dose) of heroin, and in the rear of the car on the right floorboard a bag of green vegetable substance, later determined to be marijuana.

The Court further finds, orders, adjudges, and decrees that the arrest of the defendant McMillan was a justifiable arrest by an officer having reasonable grounds to believe that a felony had been committed and that the arrested person had committed the same. That the opportunity for pursuing a search warrant did not exist because of the time factors involved, the officer having been informed that the defendant was fixing to leave the scene in his original information. Further, that the defendant was in a moving automobile which is by its nature a highly mobile situation. The evidence procured on the search will be admitted into evidence."

Officer Hoggard further testified that he warned McMillan of his constitutional rights, and McMillan confessed that he

had gotten the heroin from a boy at Elon College. During defense counsel's argument to the jury, the trial court corrected counsel by informing the jury that the court—not the jury—was "sitting in judgment."

From a judgment of conviction, defendant appeals, assigning as error the failure of the court to suppress the evidence of the heroin and the court's comment on the evidence.

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

Lee, High, Taylor, Dansby, and Stanback, by Herman L. Taylor and Leroy W. Upperman, Jr., for defendant appellant.

MORRIS, Judge.

[1] In order to hold that the heroin seized from the person of defendant was properly admitted into evidence, we must first determine whether the warrantless arrest was proper under G.S. 15-41 (2). We hold that it was proper.

G.S. 15-41 (2) provides that a peace officer may arrest without a warrant

> "When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

The testimony of Officer Hoggard on voir dire is ample to justify this warrantless arrest. The information provided by the reliable confidential informer was that a black man named McMillan was selling narcotics in the parking lot of a car wash on Rawhut Street and that he was operating from a Ford Falcon automobile. Reasonable ground for belief—which is an element of the officer's right to arrest under G.S. 15-41 (2)—may be based on information given the officer by another if the source is reasonably reliable. *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1970). The information furnished Officer Hoggard as well as his observation of the defendant's leaving the car wash is sufficient to provide reasonable ground to believe the defendant would evade arrest if not immediately taken into custody.

[2] Since the warrantless arrest is lawful, the search of defendant's person incident thereto is also lawful, and the drugs seized are admissible into evidence. *State v. Woody,* 277 N.C. 646, 178 S.E. 2d 407 (1971); *State v. Dobbins,* 277 N.C. 484, 178 S.E. 2d 449 (1971); *State v. Roberts, supra.*

[3] Defendant also contends that the trial court violated G.S. 1-180 by taking over the examination of Officer Hoggard and in interrupting counsel for defendant in his argument to the jury. While G.S. 1-180 prohibits a trial judge from expressing an opinion on what has been shown by a witness' testimony, it is not improper for the court to ask questions for the purpose of clarifying testimony. *State v. Williams,* 17 N.C. App. 31, 193 S.E. 2d 478 (1972); *State v. Huffman,* 7 N.C. App. 92, 171 S.E. 2d 339 (1969). There has been no prejudice to defendant by the court's questioning of the witness; likewise, there is no prejudice in the court's interrupting counsel for defense in his argument to the jury.

Affirmed.

Judges BRITT and HEDRICK concur.

OFFICE ENTERPRISES, INC. v. TOM P. PAPPAS AND NICKY'S, INC.

No. 7326DC726

(Filed 14 November 1973)

Landlord and Tenant § 18— forfeiture of lease for nonpayment of rent— waiver

Plaintiff landlord waived its right to demand forfeiture of a lease for failure of the tenant to make the monthly rental payments by the first of each month as provided in the lease when it accepted the tenant's late payments for previous months and received and retained the tenant's belated check for the last month's rent prior to the time it instituted an action in ejectment to evict the tenant.

APPEAL by plaintiff from *Abernathy, Judge,* at 28 May 1973 Session of MECKLENBURG County, General Court of Justice, District Court Division.

Summary proceeding in ejectment to evict the defendants as tenants from the premises of the plaintiff.

From a judgment in favor of the defendants, the plaintiff appealed.

Edward T. Cook for plaintiff appellant.

Plumides, Plumides and Shulimson by Michael G. Plumides for defendant appellees.

CAMPBELL, Judge.

This action was instituted 14 August, 1972 and was assigned for trial before a magistrate of the district court for trial on 22 August 1972. The magistrate entered a judgment 29 August 1972 dismissing the action. On 31 August 1972, the magistrate entered another judgment finding inter alia that Nicky's, Inc. is not a lessee; that Tom P. Pappas was the lessee of the premises; and that all rents and amounts that plaintiff claimed had been paid prior to judgment and thereupon dismissed the action against both defendants.

The record further shows that the plaintiff took a voluntary dismissal without prejudice as to the defendant, Nicky's, Inc.

The case was appealed by the plaintiff to the district court where it was heard *de novo* by Judge Abernathy without a jury.

The plaintiff introduced evidence to the effect that the plaintiff bought the premises in question on 31 January 1972. At the time of purchase the premises were subject to an outstanding lease which provided for a rental payment of $665.00 per month payable on the 1st day of each month, and further provided:

> "In the event that the annual fire insurance premium exceeds the sum of $670.00 for any year during the term of this lease, or any renewal thereof, such excess shall be borne by the Lessee.
>
> In the event of default in the payment of rents, the Lessor may immediately terminate this Lease and thereupon shall be entitled to immediate possession of the premises."

Mr. Linder testified on behalf of the plaintiff to the effect that he was the Vice President of the plaintiff and owned 100% of the outstanding stock and that he managed all of the properties belonging to the plaintiff. Linder testified that the first month's rent, namely for the month of February 1972, was paid to the previous owner, Mr. Medlin, who in turn paid it over to Mr. Linder. The monthly rental payments for the months of March, April and May were not received on the first of the month as provided in the lease but were received from three to fifteen days late.

Linder further testified:

"I have collected every dollar from Mr. Pappas with reference to rent and insurance premiums due up to this date other than what I have not billed him for."

Judge Abernathy found facts to the effect that Pappas was in possession of the premises at all times and that March, April and May rents were paid from two to fifteen days late and that with regard to the May payment Linder received a cashier's check for that payment and turned it over to the company's attorney, Mr. Cook, who had it in his possession when the letter of May 26, 1972 was written to Pappas. The letter of 26 May 1972 was the letter which purported to terminate the lease. It recited the following:

"It has been made to appear that you have violated the lease agreement and defaulted therein in the following respects:

(a) our rent has never been received by the 1st;

(b) you have sub-leased the demised premises to Nicky's, Inc. without our consent or agreement; and,

(c) we have not been reimbursed for the insurance coverage in the amount of $173 which was billed to you March 12, 1972.

Please accept this letter as notice to vacate the demised premises on or before July 31, 1972.

Yours very truly,
OFFICE ENTERPRISES, INC.
By: _____
Vice President"

Judge Abernathy concluded as a matter of law:

"A. That the plaintiff received the May rent prior to its sending the May 26, 1972 letter (Exhibit 3), which constituted waiver by the plaintiff of any forfeiture of said lease by the defendant.

B. That the defendants are entitled to remain in possession of the premises described in Exhibit 2 of the Stipulations and described as 1408 and 1412 E. Morehead Street, Charlotte, North Carolina, and the defendant is entitled to possession as if there were no forfeiture on his part."

and thereupon dismissed the action; and it is from that judgment that the plaintiff appealed.

The facts found by Judge Abernathy are fully supported by the evidence in the case, and those factual findings support the judgment which was entered. The plaintiff contends that this action is controlled by *Tucker v. Arrowood,* 211 N.C. 118, 189 S.E. 180 (1937). We do not agree. In the *Tucker* case it is stated:

> ". . . Under the terms of said lease the rent was due on 4 April, 1936, and 4 May, 1936, and said rent was not paid when this action was instituted on 6 May, 1936."

On the other hand, in *Winder v. Martin,* 183 N.C. 410, 111 S.E. 708 (1922), it is stated:

> ". . . It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent. Or to state the rule differently, it is generally held that the acceptance of rent by the landlord, with full knowledge of a breach in the conditions of the lease, will ordinarily be treated as an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof. . . ."

This was the situation in the instant case, for the plaintiff had received the May payment and retained it even though the check itself was not cashed and was placed in the hands of plaintiff's attorney. This still constituted a receipt by the plaintiff, and the rent was still in the plaintiff's possession when the letter of May 26 was written. In fact the payment was never returned to the defendant, and the plaintiff at all times had it in its control. The plaintiff was thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof. The conclusion of law entered by Judge Abernathy was in all respects correct and supported by the findings of fact.

Affirmed.

Chief Judge BROCK and Judge BALEY concur.

GERALD R. HAMRICK v. WRAY BEAM

No. 7327SC798

(Filed 14 November 1973)

Compromise and Settlement § 1; Judgments § 44— restitution ordered in criminal case — no bar to civil action

Civil action to recover compensatory and punitive damages for personal injuries resulting from an assault made upon plaintiff by defendant was not barred by defendant's payment to plaintiff of restitution for loss of earnings and medical expenses pursuant to an order of the district court in a criminal trial of defendant for the assault where the district court's order was not the result of a settlement agreement between the parties, defendant being entitled only to credit for the payment previously made by him.

ON *certiorari* to review an order of *McLean, Judge,* entered at the 21 May 1973 Session of Superior Court held in CLEVELAND County.

Civil action to recover compensatory and punitive damages for personal injuries resulting from an assault made upon plaintiff by defendant. Plaintiff alleged and defendant denied that the assault was willful and malicious and caused permanent injuries. As a further defense, defendant alleged that he struck plaintiff with his fist after plaintiff used profane language toward's defendant's son and that plaintiff had been fully paid for damage received by him.

At the trial plaintiff testified as to the assault, which occurred while he was engaged in the duties of his employment, and as to the severity and permanent nature of his injuries. During cross-examination of the plaintiff, the following facts were made to appear: Prior to the commencement of this civil action, defendant had been charged in a criminal proceeding with the offense of assault inflicting serious injury, the assault being the same assault which is the subject of this civil action. He pled not guilty, was found guilty by the District Judge, and prayer for judgment was continued for five years. In the order orginally entered continuing prayer for judgment, the District

Judge ordered defendant to make restitution to plaintiff for loss of earnings and for medical expenses "not covered by Workmen's Compensation or other insurance." Subsequently, the District Judge amended the order to find "the amount of restitution to be paid to the prosecuting witness is $231.54," and ordered defendant to pay that sum to the clerk of court to be disbursed to plaintiff. Defendant complied with this order, and plaintiff received payment of $231.54 from the clerk on 22 May 1972. During these proceedings in the District Court, plaintiff was not represented by counsel. He thereafter employed counsel who represented him in bringing the present civil action.

Upon learning of the foregoing facts, the trial court expressed the view that "when the criminal court orders you to pay damages, that ends your lawsuit," and on its own motion entered an order concluding as a matter of law that "the plaintiff's action was barred by the defendant paying damages as ordered by the General Court of Justice, Criminal District Court Division for the County of Cleveland," and ordered this action dismissed. From this order, plaintiff appealed. To permit perfection of the appeal, this Court subsequently granted plaintiff's petition for writ of certiorari.

Michael S. Kennedy for plaintiff appellant.

C. A. Horn for defendant appellee.

PARKER, Judge.

The order appealed from is in error. The civil liability for a tort which also constitutes a crime may, of course, be compromised and settled just as any other unliquidated claim. A binding settlement of such a claim may result from negotiations or actions taken during the course of criminal proceedings, and the terms of such a binding settlement may be embodied in the judgment entered in the criminal case. *Jenkins v. Fields,* 240 N.C. 776, 83 S.E. 2d 908, an appeal from rulings on the pleadings, exemplifies such a case. Such is not the present case.

Nothing in the record before us suggests that when the defendant paid the $231.54 into court, as he had been ordered by the District Judge, or when the plaintiff received said sum from the clerk, either party thought plaintiff's claim was being settled. Even months later, after the present civil action had been brought, defendant did not plead an accord and satisfac-

tion, but pled only that plaintiff "has been fully paid for damage received by him." This would indicate that defendant considered the prior payment as relieving him of liability, not because it was made pursuant to a binding compromise settlement, but because it represented compensation commensurate with plaintiff's injuries. The District Court in the criminal proceeding had no power, absent plaintiff's consent, to adjudicate finally his civil claim, and nothing in the present record suggests that the District Judge even thought that he was doing so. Defendant did not plead *res judicata,* estoppel, or, as above noted, accord and satisfaction, all of which are affirmative defenses. G.S. 1A-1, Rule 8. Indeed, a reading of the record in this case leaves the strong impression that defendant's counsel, no less than plaintiff's, was caught by surprise by the trial court's ruling dismissing plaintiff's action.

So far as the record in this case discloses, the matters sought to be litigated in the present action were simply not negotiated, adjudicated, or in any other way finally determined by anything which occurred in or as a result of the criminal prosecution. Defendant is, of course, entitled to credit for the payment previously made by him, *Hester v. Motor Lines,* 219 N.C. 743, 14 S.E. 2d 794, but on the present record that payment did not finally dispose of his potential civil liability to the plaintiff.

The order appealed from is reversed and this case is remanded to the Superior Court for trial.

Reversed and remanded.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. GENE ALSTON EVANS

No. 7310SC728

(Filed 14 November 1973)

1. **Assault and Battery § 8— self-defense — apparent danger**

The right of self-defense does not necessarily depend upon real or actual danger but may arise from apparent danger.

2. **Assault and Battery § 15— refusal to instruct on self-defense — error**

In this prosecution for discharging a firearm into an occupied vehicle, the trial court erred in refusing to instruct the jury on self-defense where defendant presented evidence tending to show that the defendant was told that the victim was looking for him and had a pistol, that defendant saw the victim parked across the street from defendant's house with a pistol on the seat beside him, that the victim left and defendant saw him return to the scene with a shotgun or rifle, and that defendant was afraid and fired a rifle at the victim's vehicle to make him leave.

APPEAL by defendant from *Godwin, Judge,* 18 June 1973 Session of Superior Court held in WAKE County.

Defendant was charged in a bill of indictment, proper in form, with the felony of discharging a firearm into an occupied vehicle in violation of G.S. 14-34.1. He pleaded not guilty.

The State's evidence tended to show the following: On 3 June 1972 one Eddie Watson was driving down Davie Street, in the city of Raleigh, in his 1950 Chevrolet pickup truck at which time he saw defendant sitting on the porch of a house on Davie Street. Defendant owed Watson some money so Watson decided to ask defendant about the money. Watson stopped his truck across the street from defendant. Defendant called out and asked if Watson was looking for him. Watson answered that he wanted to see him whereupon defendant started shooting. Watson immediately drove away but decided that defendant was not angry with him and did not shoot at him; therefore, he was going back and talk to him. As Watson approached the area in which he had seen defendant, defendant raised up from behind a bush and fired a rifle at Watson. Watson stopped his truck and defendant fired the rifle again, striking the truck. Watson backed away from the area and returned home.

The defendant's evidence tended to show the following: Watson gave defendant $45.00 to get Watson an eight-track tape player and some tape cartridges. Defendant spent the money on drugs and did not secure the items requested by Watson. On the day of the alleged offense in this case, Watson went to defendant's home where he talked with defendant's cousins. Watson stated to them that he was looking for defendant because they had a little "run-in." Watson said he had something for defendant and showed them a pistol. Later, defendant arrived home and someone told him Watson had a pistol and was looking for him to hurt him. Defendant saw Watson sitting

in his car across the street from defendant's house. Defendant went on his porch and called to Watson. "I hollered loud enough for him to hear and I asked him was he looking for me. He said yes, told me to come over there . . . I was just about to start over there and I seen this nickel-plated pistol on the seat and he was sliding it to him." Defendant pulled his own pistol and started firing it into the air because he was afraid. Watson drove away. In about five minutes Watson drove back towards defendant's house, and stopped. Defendant saw a rifle or shotgun standing in Watson's truck. Defendant ran next door, secured a .22 caliber rifle from his uncle and ran back to the front of his house. He stopped behind a bush and fired at Watson's truck to keep him from getting out. Defendant told Watson to get away because he was scared of him. Watson did not move or say anything so defendant fired at Watson's radiator again. Watson backed the truck away from the scene and did not return.

Defendant was found guilty as charged.

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

Robert E. Smith for the defendant.

BROCK, Chief Judge.

Defendant relied upon his contention and argument that he acted in self defense. Defendant specifically requested an instruction upon the principle of self-defense. The trial judge denied the requested instruction and instructed the jury as follows: "I instruct you, that the principle of self-defense, the plea of self defense, under the circumstances in this case, is not available to the defendant; and that you will not consider whether the defendant acted in his own self defense, or in the defense of the house in which he lived." Defendant assigns this as error.

[1] The right of self-defense does not necessarily depend upon real or actual danger. The right to act in self-defense may arise from apparent danger. 1 Strong, N. C. Index 2d, Assault and Battery, § 8, p. 300.

[2] In this case, according to defendant's evidence, Watson had given defendant $45.00 for which defendant was going to secure an eight-track tape player and some tape cartridges. Defendant

had spent the $45.00 on drugs and had not delivered the tape player. Defendant was told that Watson was looking for him and had a pistol. Defendant saw Watson parked across the street from defendant's house with a pistol on the seat beside him. Defendant saw Watson return to the scene with either a shotgun or rifle. Defendant was afraid of Watson and fired a rifle at Watson's vehicle to make him leave.

The defendant's appraisal of the situation is not controlling upon the question of his right to act in self-defense. The reasonableness of his apprehension is to be determined by the jury in accordance with the facts and circumstances as they appeared to the defendant at the time. 1 Strong, N. C. Index 2d, Assault and Battery, § 8, p. 300.

In our view the defendant's evidence presents the question of self-defense for jury determination. Possibly His Honor was overly impressed with doubts of the credibility of defendant's evidence. The credibility of the testimony is to be evaluated by the jury, not the court.

New trial.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. CHARLES ARTHUR McCLINTON

No. 7326SC600

(Filed 14 November 1973)

1. **Criminal Law § 75— written confession — voluntariness — admissibility**

The trial court's findings of fact that defendant possessed above average intelligence, was able to read and understood what he read, was fully advised of his constitutional rights including the right to an attorney before answering any question, understood his constitutional rights and executed a written waiver of his rights supported the court's conclusions that defendant's written confession was made voluntarily and understandingly.

2. **Criminal Law § 138; Robbery § 6— armed robbery — severity of sentences of codefendants**

The trial court in an armed robbery case did not abuse its discretion in imposing a more severe sentence upon defendant than upon his codefendant, though defendant pleaded not guilty and stood trial while his codefendant pleaded guilty to the same offense as well as another offense.

State v. McClinton

APPEAL by defendant from *Grist, Judge,* 5 March 1973 Session of MECKLENBURG Superior Court.

By bill of indictment, proper in form, defendant was charged with armed robbery. He pleaded not guilty, a jury returned a verdict of guilty as charged, and the court entered a judgment imposing a prison term of not less than fifteen nor more than twenty years. Defendant appealed.

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

Edmund A. Liles for the defendant appellant.

BRITT, Judge.

[1] Defendant's first six assignments of error are founded upon the contention that the trial court erred in admitting into evidence a written confession signed by him. We find no merit in these assignments.

It is well settled in this jurisdiction that whether the alleged confession of a defendant was voluntarily and understandingly made is a question of fact to be determined by the trial judge upon a *voir dire* and the findings of fact by the trial judge as to the voluntariness of a confession are conclusive if they are supported by competent evidence in the record. *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966); *State v. Young,* 16 N.C. App. 101, 191 S.E. 2d 369 (1972); and *State v. Caldwell,* 15 N.C. App. 342, 190 S.E. 2d 371 (1972).

In the case at bar, following a *voir dire* hearing on defendant's motion to suppress the evidence provided by the confession, the court found as facts and concluded that defendant possessed above average intelligence, completed the eleventh grade in high school, had better than average understanding of the English language and was able to read and "comprehend the contents of the printed and written word"; that he had been fully advised of his constitutional rights including the right to an attorney before answering any question; that defendant understood his constitutional rights; that he executed a written waiver of his rights to remain silent and to the presence of an attorney during his interrogation; and that the confession was knowingly, willingly, understandingly, and voluntarily made without any inducement, threat, violence or mental coercion of any kind and was therefore admissible into evidence.

A review of the evidence heard on *voir dire* discloses: The interrogating officer submitted to defendant, before questioning began, a form containing the standard *Miranda* warning. The officer asked defendant to read the form, which he did, and then asked him if there were any questions and whether he understood it. Defendant did not ask any questions and answered that he understood the import of the form. Defendant completed eleven grades in school and had no problem understanding English. Defendant testified that Officer Thompson read the waiver of rights form to him and then asked defendant to read the form; that thereafter he signed the form. There was other evidence which was conflicting but that evidence raised a question of the credibility of the witnesses, which was for the determination of the trial court. *State v. Logner,* 266 N.C. 238, 145 S.E. 2d 867 (1966); *State v. Clyburn,* 273 N.C. 284, 159 S.E. 2d 868 (1968); and *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971).

We conclude that there was competent evidence to support the findings of fact and the findings of fact support the conclusions of law.

[2] By his seventh assignment of error, defendant contends the court erred in imposing a more severe sentence upon him, who had pleaded not guilty and stood trial, than was imposed upon his codefendant who pleaded guilty to the same offense as well as another offense, the record being silent as to the reason for the harsher sentence. We find no merit in this assignment.

The record discloses that on 5 June 1972 (defendant's trial being in March 1973) the codefendant pleaded guilty to two counts of armed robbery and that as to him Judge J. W. Jackson entered judgment imposing a maximum sentence of eight years as a "committed youthful offender" for treatment and supervision pursuant to G.S. 148-Art. 3A. The record further indicates that at the time of the offense alleged in the instant case, defendant was either twenty or twenty-two years of age and his codefendant was seventeen years of age. Be that as it may, there is no requirement that defendants charged with the same offense be given the same punishment. If the punishment is within the statutory limits, as is the case here, the punishment imposed in a particular case is within the sound discretion of the judge. *State v. Gibson,* 265 N.C. 487, 144 S.E. 2d 402 (1965); *State v. Garris,* 265 N.C. 711, 144 S.E. 2d 901 (1965).

There is no showing on this appeal that there was an abuse of discretion on the part of the trial judge.

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

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. KENNETH BLAKE WEATHERS

No. 7327SC634

(Filed 14 November 1973)

Criminal Law § 161— assignment of error to entry of judgment — review

Defendant's assignment of error to the entry of judgments presented only the question of whether or not an error of law appeared on the face of the record.

APPEAL by defendant from *McLean, Judge,* 5 February 1973 Session of Superior Court held in GASTON County.

On 11 May 1972 defendant entered a plea of guilty in Lincoln County Superior Court to two charges of operating an automobile without first obtaining a license (71CR5024 and 71CR5520); driving while under the influence of intoxicating liquor (71CR5520); and wilfully and wantonly damaging real property (72CR1290). Defendant was sentenced as a youthful offender to not more than two (2) years confinement. It was further ordered that defendant be given credit for the four (4) months he spent in jail prior to trial. Judge Martin suspended the sentence and placed defendant on probation for four (4) years provided, among other things, that defendant "[w]ork faithfully at suitable, gainful employment as far as possible and save his earnings above his reasonably necessary expenses; . . ." This order was modified on 6 September 1972 to prohibit defendant from changing "his place of employment without the written consent of the Probation Officer." The original order also required that defendant "not operate a motor vehicle on the public highway of North Carolina until he has been duly licensed to do so."

On 6 September 1972 defendant pleaded guilty in Lincoln County Superior Court to the crime of larceny of an automobile (71CR5225). Prayer for judgment was continued until the 1 January 1973 Session of Superior Court at which time Judge McLean ordered defendant imprisoned for four (4) years in the common jail of Lincoln County and assigned to work under the State Department of Correction. Sentence was suspended and defendant placed on probation for three (3) years subject to certain conditions, including the requirement that he "[w]ork faithfully at suitable, gainful employment as far as possible and save his earnings above his reasonably necessary expenses; . . ."

On 5 February 1973, Judge McLean revoked defendant's probation in consolidated cases 71CR5024, 71CR5520 and 72CR1290. The order included the following findings of fact:

"2. That the defendant has wilfully and without lawful excuse violated the terms and conditions of the probation judgment as hereinafter set out:

(a) That on October 25, 1972 the defendant was employed by Hardees of Lincolnton and was discharged on November 3, 1972 for failing to work regular; that he was scheduled to go to work at Excel in Lincolnton on November 7, 1972 and failed to report for work; that he went to work for Clark Tire Company in Lincolnton on November 9, 1972 and was fired for excessive absence on January 2, 1973; that he was scheduled to begin work at Mohican Mill in Lincolnton on January 12, 1973 and failed to report for work; that he went to work at Burris in Lincolnton on January 17, 1973 and was fired on January 23, 1973 for excessive absence; that he went to work for Doug Caldwell on January 24, 1973 and was fired for taking his truck to South Carolina without permission and that after constant insistence by the probation officer he has failed and refuses to work regular even though he was able and capable of doing the jobs he had and the aforesaid failure of the defendant to work regular constitutes a violation of the condition of probation that he shall 'Work faithfully at suitable gainful employment as far as possible.' and the special condition of probation 'That he shall not change his place of employment without the written consent of the probation officer.'

(b) That on January 24, 1973 he drove a truck belonging to Doug Caldwell of Lincolnton to York, S. C. and did not have a driver's license and that the aforesaid act is in violation of the condition of probation 'That he not operate a motor vehicle on the public highways of North Carolina until he has been duly licensed to do so.' "

On the same date, Judge McLean also entered an order revoking probation in case 71CR5225. The order contained the following findings of fact:

"2. That the defendant has wilfully and without lawful excuse violated the terms and conditions of the probation judgment as hereinafter set out:

That the defendant was to begin work at Mohican Mills in Lincolnton on January 12, 1973 and failed to report to work, that he went to work at Burris in Lincolnton on January 17, 1973 and was fired on January 23, 1973 for excessive absence, that he went to work for Doug Caldwell on January 24, 1973 and was fired for taking his truck to South Carolina without permission and that the only employment his probation officer approved was at Mohican Mill in Lincolnton and that the aforesaid action on the part of the defendant constitutes a violation of the special condition of probation 'That the defendant shall keep himself gainfully employed at all times and upon obtaining employment shall remain with that employment unless relieved from doing so by the probation officer.' "

Judge McLean entered judgment and commitment revoking probation and ordering that the sentences, previously suspended, be placed into effect. In each judgment the court concluded:

"From evidence presented, the Court finds as fact that within the specified period of suspension, the defendant has wilfully and without lawful excuse violated the terms and conditions of the probation judgment."

As a result of his violation of the 11 May 1972 probation order, defendant was ordered imprisoned under the terms of the suspended sentence for not more than two (2) years. He was also imprisoned, pursuant to the 5 February 1972 suspended sentence, for a term of four (4) years. The sentences are to be served concurrently.

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

Thomas J. Wilson, P. A. for defendant appellant.

VAUGHN, Judge.

Defendant's only assignment of error is to the entry of the judgments. Defendant concedes that the only question presented by his broadside exception is whether or not an error of law appears on the face of the record. We have examined the warrants and indictment under which defendant was charged and have found them adequate in form and sufficient to support the judgments. The record discloses that both Judge Martin and Judge McLean adequately and thoroughly examined defendant before accepting his pleas of guilty and determined that they were freely and understandingly entered. The order revoking probation contains findings of fact based on competent evidence which support the court's conclusion that defendant wilfully and without lawful excuse violated the terms and conditions of the probation judgment. No error appears on the face of the record. The judgment from which defendant appealed is affirmed.

Affirmed.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. HENRY DAVID DOZIER, JR.

No. 7326SC671

(Filed 14 November 1973)

Burglary and Unlawful Breakings § 7— breaking and entering — circumstantial evidence on intent — submission of misdemeanor

Where there was evidence in a prosecution for felonious breaking and entering that defendant unlawfully broke into and entered a building, but the only evidence of any felonious intent in doing so was entirely circumstantial, the trial court properly submitted the question of defendant's guilt of the lesser included offense of breaking and entering without felonious intent. G.S. 14-54.

APPEAL by defendant from *Hasty, Judge,* 8 May 1973 Session of Superior Court held in MECKLENBURG County.

Defendant and one Woodrow Simmons were separately indicted for breaking and entering into the premises of Carolina Rim and Wheel Company, a corporation, with intent to steal. The cases were consolidated for trial.

Testifying for the State, Charlotte Police Officer J. D. Bruce stated that on the night of 15 August 1972, he and two other police officers entered the building occupied by Carolina Rim and Wheel Company to investigate an apparent break-in. They climbed in through a broken window, the same window which had initially led them to believe a break-in had occurred. While in the building Bruce heard a noise in the vicinity of some shelving in an inventory storage area. Simmons responded to his command to "come out." Simmons told Officer Bruce that someone else was still in the building. Bruce further testified that as he was escorting Simmons from the building, he saw defendant crawl from under some shelves in the presence of other police officers and that shortly thereafter defendant was brought out of the warehouse. Officer J. R. Dunn corroborated Bruce's testimony and stated that Officer Boothe had taken defendant into custody inside the premises. Officer Boothe, in turn, testified that he first saw defendant under a cardboard box and that he arrested defendant inside the building. There was no evidence that any personal property within the building had been stolen or disturbed.

Testifying in his own behalf, defendant maintained that while he and Simmons were walking in the vicinity of Carolina Rim and Wheel Company, Officer Boothe stopped them to ask if they knew anything about the broken window at Carolina Rim and Wheel Company. Defendant stated that when he and Simmons denied knowing anything about the window, Officer Boothe forced them to enter Carolina Rim and Wheel Company through the broken window and insisted that they "call out" unnamed companions whom the officer apparently believed were participating in the break-in. Defendant testified that while in the building he and Simmons were handcuffed and that it was not long before other policemen arrived on the scene. Simmons' testimony was similar to that related by defendant.

The court instructed the jury that they were to consider three possible verdicts: guilty of felonious breaking or entering, guilty of nonfelonious breaking or entering and not guilty. Upon a verdict of guilty of nonfelonious breaking or entering, the

court sentenced defendant to a prison term of two years. Counsel was appointed to perfect defendant's appeal.

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

T. O. Stennett for defendant appellant.

VAUGHN, Judge.

Defendant's sole contention on appeal, that the trial court erred "in its charge to the jury, when the Court charged on a lesser included offense, where there was no competent evidence to substantiate the charge," is without merit. Any person who breaks or enters any building described in G.S. 14-54, with intent to commit any felony or larceny therein, is guilty of a felony. A wrongful breaking or entering into such building, without the intent to commit any felony therein, is a misdemeanor, a lesser included offense within the meaning of G.S. 15-170.

Here, as in *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27, evidence as to defendant's alleged felonious intent was circumstantial. It was not only proper to instruct as to the lesser included offense, it would have been prejudicial error to fail to so instruct. *State v. Jones, supra.*

No error.

Judges MORRIS and BALEY concur.

STATE OF NORTH CAROLINA v. JOHN HICKS MOORE

No. 7329SC736

(Filed 14 November 1973)

Automobiles §§ 127, 131— driving under the influence — hit and run driving — sufficiency of evidence

In a prosecution charging defendant with driving under the influence and hit and run driving, evidence was sufficient to be submitted to the jury where it tended to show that in the opinion of the arresting officer defendant was very intoxicated, the breathalyzer test given defendant indicated that the alcohol content of his blood was .27%, an approaching car ran the prosecuting witness off the road and struck the driver's side of the prosecuting witness's car, the witness turned around and chased the hit and run vehicle, observed

that it was a black Pontiac, took the license number of the vehicle, and called the State Patrol, within a short while the patrol officer saw defendant seated behind the wheel in a black Pontiac with the reported license number and observed that the vehicle was partially on the highway and partially in a private driveway, and defendant stated to the officer that he had been in an accident.

ON *Certiorari* to review the trial before *Winner, Judge,* 12 March 1973 Criminal Session, RUTHERFORD County Superior Court.

The defendant was charged with operating a motor vehicle upon the public highways while under the influence of intoxicating liquor in violation of G.S. 20-138 and with the offense commonly known as "hit and run" having done property damage in violation of G.S. 20-166(b). He was tried in the Rutherford County District Court, found guilty and given active consecutive sentences. The defendant appealed to the superior court and was found guilty by a jury and given an active four-month prison sentence. Certiorari was allowed on 22 August 1973.

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

Hamrick and Hamrick by J. Nat Hamrick for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error the denial of his motions to dismiss and asserts that there was insufficient evidence to go to the jury.

The State's evidence tended to show that the prosecuting witness's car was traveling on a public highway, the Henrietta-Ellenboro-Caroleen Highway, when an approaching car, in the middle of the road, and going from side to side, ran the prosecuting witness off on the right shoulder. The approaching car, with the driver's side of his car, struck the driver's side of the prosecuting witness's car. The prosecuting witness turned around and chased the hit and run vehicle, an old model black Pontiac, following him almost to the "Old Tater House" Road at Ellenboro; he saw only one person in the car and obtained his license number. After getting the license number, the prosecuting witness and his wife went to the nearest service station and called the State Patrol.

Officer Church arrived in 10 or 15 minutes, and he was given the license number. In about 10 or 15 minutes Officer Church returned to the service station with the defendant. Officer Church saw the defendant at 1:50 a.m. just below the "Old Potato House" in Ellenboro in a black 1963 Pontiac, bearing the identical license number as reported, partially on the highway and partially in a private driveway. The defendant was seated behind the steering wheel and was the only one in the vehicle. The defendant stated to the officer that he had been involved in an accident and was there to use a telephone. The officer was of the opinion that the defendant was very intoxicated. Officer Church found a nearly empty bottle of whiskey in defendant's car. There was black paint on the left side of the prosecuting witness's car. Without objection the breathalyzer operator stated the breathalyzer test was .27%.

This case is controlled by *State v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411 (1961), in which the motion for nonsuit was denied where the evidence tended to show the defendant was in an intoxicated condition sitting under the steering wheel with his hands on the steering wheel of an automobile parked on the shoulder of a highway with the headlights burning and motor running, no automobile having been at the scene some fifteen minutes earlier, and no other person being present at the scene. In *State v. Haddock, supra,* the court stated:

> "This is a case of circumstantial evidence. The rule in respect to the sufficiency of the evidence to carry a case of circumstantial evidence to the jury is stated by *Higgins, J.,* in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431: 'We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: "If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." '
>
> "WINBORNE, C. J., said for the Court in *S. v. Rogers and S. v. Foster,* 252 N.C. 499, 114 S.E. 2d 355: 'In this

connection, it is settled law in this State that in passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be considered in the light most favorable to the State, and it is entitled to every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, and if there be any competent evidence to support the charge in the warrant, the case is one for the jury.' "

We hold that the trial court properly denied the defendant's motions to dismiss.

We have examined defendant's other assignment of error and find it without merit.

No error.

Chief Judge BROCK and Judge BALEY concur.

IOWA NATIONAL MUTUAL INSURANCE COMPANY v. BARBARA RICE SURRATT

No. 7326DC716

(Filed 14 November 1973)

Torts § 3— contribution — no negligence by one defendant — contributory negligence in defendant's cross-action

Plaintiff insurer is not entitled to contribution from defendant where the jury in a third party's action against plaintiff's insureds and against defendant found no negligence on the part of defendant, notwithstanding the jury also found contributory negligence on the part of defendant in her cross-action against plaintiff's insureds.

APPEAL by plaintiff from *Stukes, Judge,* 18 June 1973 Session of District Court held in MECKLENBURG County.

This is a civil action in which the plaintiff, Iowa National Mutual Insurance Company, seeks to recover the sum of One Thousand Nine Hundred Dollars ($1,900.00) from the defendant, which sum represents one half of the amount of the judgment recovered against the plaintiff's insured in a property damage and personal injury automobile accident case previously tried and reduced to judgment in Gaston County. This former suit involved Paul Springs as plaintiff against co-defendants

Fredrickson Motor Lines, Inc. (Motor Lines), Bill Summitt, employee of Motor Lines and operator of a truck involved in the incident (both of whom constitute the plaintiff's insureds), and Barbara Rice Surratt. There was no appeal from a judgment against the plaintiff's insureds which was satisfied by the Iowa National Mutual Insurance Company. The jury in the Springs' action answered the issue as to the negligence of the co-defendant Barbara Rice Surratt in the negative; however, with respect to Barbara Rice Surratt's cross-action against her co-defendants, the jury found both negligence and contributory negligence.

Within one year from the entry of judgment in this former action, Iowa National Mutual Insurance Company brought this suit to enforce its alleged right of contribution against Barbara Rice Surratt.

After both parties had moved for summary judgment, the trial court denied the plaintiff's motion for summary judgment and for judgment on the pleadings and allowed the motion of the defendant for summary judgment. From this judgment the plaintiff appealed.

Carpenter, Golding, Crews & Meekins by James P. Crews for plaintiff appellant.

Hollowell, Stott & Hollowell by James C. Windham, Jr., for defendant appellee.

HEDRICK, Judge.

There being no genuine issue as to any material fact, the only question which we must resolve on this appeal is whether plaintiff, as a matter of law, is entitled to contribution from the defendant. A basic prerequisite to plaintiff's right of contribution is that there be joint tort liability. G.S. 1B-1(a); *Pearsall v. Power Co.*, 258 N.C. 639, 129 S.E. 2d 217 (1962); *Wise v. Vincent and Stronach v. Vincent*, 265 N.C. 647, 144 S.E. 2d 877 (1965); *Clemmons v. King*, 265 N.C. 199, 143 S.E. 2d 83 (1965). In the former action instituted by Springs, plaintiff's insureds and Barbara Rice Surratt were sued as joint tortfeasors. If the jury had returned a verdict finding all defendants negligent, then the present plaintiff's contention would be meritorious; however, in the original action, the jury found that the injuries and damages sustained by the plaintiff, Paul Springs, did not result from any negligence of the co-defendant Surratt. Plaintiff, in the present case, appears to be acting

under the misconception that a jury finding of contributory negligence on Barbara Rice Surratt's part in her crossclaim against the present plaintiff's insureds in the original Springs' action was tantamount to a determination of joint tort liability. Clearly, this is an incorrect interpretation of the judgment and verdict in the original case.

The judgment in the Springs' action is *res judicata* as to the matter of contribution between plaintiff and defendant Barbara Rice Surratt.

The judgment below is

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT EUGENE LIPSCOMB, AND REGINALD T. HARRIS

No. 7329SC701

(Filed 14 November 1973)

1. **Criminal Law § 91— guilty plea by co-defendant — denial of continuance**

The trial court did not abuse its discretion in denying defendants' motion for a continuance when a co-defendant withdrew his plea of not guilty and entered a plea of guilty.

2. **Criminal Law § 89— *corroborating testimony* —slight inconsistency**

A slight inconsistency between testimony of a prior witness and testimony by a corroborating witness did not render the corroborating testimony incompetent.

3. **Robbery § 4— conspiracy to rob — common law robbery**

The State's evidence was sufficient to be submitted to the jury on issues of defendants' guilt of conspiracy to commit common law robbery and common law robbery where it tended to show that defendants were riding around together, that one defendant stated that some easy money could be gotten at a certain store, that such defendant entered the store in which the 83-year-old proprietor was present while the other defendants waited in the car, that the proprietor "had a scared feeling" when defendant entered the store, that defendant seized a money box and fled to the waiting car, and that all the defendants divided the stolen money.

APPEAL by defendants from *Thornburg, Judge,* May 1973 Session of Superior Court held in RUTHERFORD County.

The defendants Robert Eugene Lipscomb and Reginald T. Harris were charged, along with two others, in separate bills of indictment, proper in form, with conspiracy to commit common law robbery and with the common law robbery of Mrs. B. M. Melton in the amount of $682.00.

All defendants pleaded not guilty; but after seven jurors had been selected, one of the co-defendants, Robert Lee Clark, entered a plea of guilty to common law robbery.

The defendants were found guilty as charged; and from a judgment imposing a prison sentence of not less than three nor more than five years, they appealed.

Attorney General Robert Morgan and Assistant Attorney General Eugene Hafer for the State.

Robert L. Harris for defendant appellants.

HEDRICK, Judge.

[1] Defendants contend the trial court erred in denying their motion to continue when the co-defendant withdrew his plea of not guilty and entered a plea of guilty. A motion for a continuance is addressed to the sound discretion of the trial court whose ruling thereon is not reviewable except in the case of manifest abuse. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1971); *State v. Penley,* 6 N.C. App. 455, 170 S.E. 2d 632 (1969). There being no showing of abuse of discretion in the trial court's refusal to grant the continuance, this assignment of error must be overruled.

[2] Defendants next assign as error the admission into evidence of the testimony of Deputy Sheriff Dennis Burgess for the purpose of corroboration when, according to defendants, such testimony did not corroborate the testimony given by the principal witness (Mrs. B. M. Melton). There is no question that Officer Burgess did mention one fact — Mrs. Melton pushing defendant Dewberry — which Mrs. Melton failed to disclose during her testimony; however, slight inconsistencies between the prior witness' statements and the corroborating witness' testimony do not "render the corroborating evidence incompetent, but [go] merely to its weight, it being for the jury to

determine whether or not the testimony does in fact corroborate the witness." 2 Strong, N. C. Index 2d, Criminal Law, § 89, p. 615.

[3] Defendants assign as error the denial of their motion for judgment as of nonsuit. The evidence presented by the State tended to show the following:

On 27 March 1973 the defendants were riding around in Robert Lipscomb's car when Terry Dewberry said "he knowed where he could get some easy money. He said at Melton's Store. . . ." The defendants proceeded to the Melton store and upon arriving there, Dewberry entered the store, unarmed, while the other defendants remained in the car. Mrs. B. M. Melton, 83-year-old operator of the general merchandise store, stated that "this boy came in the store and I had a scared feeling. . . ." Dewberry seized a box containing nearly $700.00 which belonged to Mrs. Melton and fled from the store to the waiting automobile. The defendants later split the money.

This evidence when viewed in the light most favorable to the State, as we are bound to do on a motion for judgment as of nonsuit, is sufficient to overcome such motion and to uphold the verdicts of guilty of common law robbery and conspiracy to commit common law robbery. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971).

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ELLIOTT JUNIOR JACKSON

No. 7326SC624

(Filed 14 November 1973)

Forgery § 2— uttering forged check — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for uttering a forged check where it tended to show that two checks were stolen from a business, that defendant cashed a check for $350 made payable to him and purportedly signed by the owner of the business, and that the signature on the check was not actually that of the owner.

State v. Jackson

APPEAL by defendant from *Hasty, Judge,* 7 May 1973 Session of Superior Court held in MECKLENBURG County.

This is a criminal action where the defendant, Elliott J. Jackson, was tried on a bill of indictment, proper in form, charging him with uttering a forged check in violation of G.S. 14-120.

From a verdict of guilty and imposition of a prison sentence of not less than six years nor more than eight years, the defendant appealed.

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

Oliver, Howard, Downer, Williams & Price by Paul J. Williams for defendant appellant.

HEDRICK, Judge.

The one question presented on this appeal is whether the court erred in denying the defendant's timely motions for judgment as of nonsuit. Upon a motion for judgment as of nonsuit the trial court is required to consider the evidence in the light most favorable to the State, take it as true, and consider every reasonable inference arising from the evidence. *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971).

The material evidence offered by the State tends to show the following:

During the late evening or early morning of December 20-21, 1972, the offices of the J. King Harrison, Jr., Company, located in Charlotte, were forcibly entered, a filing cabinet forced open, and two checks from the checkbook of the Supreme Felt Corporation (a felt business owned by J. King Harrison, Jr.) were found missing the next day. J. King Harrison, Jr., and Mrs. Walters, his secretary, were the only two people authorized to draw checks on the account of the Supreme Felt Corporation at the North Carolina National Bank.

On 22 December 1972 Lester McCoy, manager of the Men's Smart Shop, cashed a check presented by defendant, payable to defendant, in the sum of Three Hundred and Fifty Dollars ($350.00), One Hundred Dollars ($100.00) of which was in payment for the purchase of clothes by defendant. This check contained the purported signature of J. King Harrison, Jr.;

however, the State offered evidence that the signature was not that of Harrison. Further evidence established that defendant had been employed formerly by J. K. Harrison, Jr.; but this employment had terminated six or seven years prior to 20 December 1972. Defendant offered no evidence.

To prevent the granting of a judgment as of nonsuit the State must prove the elements of the crime of uttering a forged instrument as contained in G.S. 14-120. "Uttering a forged instrument consists in offering to another a forged instrument with knowledge of the falsity of the writing and with intent to defraud. 2 Wharton's Criminal Law and Practice, Anderson Ed., Forgery and Counterfeiting, § 648." *State v. Greenlee,* 272 N.C. 651, 657, 159 S.E. 2d 22 (1967).

Considering the evidence in the light most favorable to the State, we hold that it is sufficient to establish all of the necessary elements of the crime of uttering a forged instrument and to support a verdict of guilty of that charge. *State v. Greenlee, supra.*

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. LARRY RAY SANDERS

No. 7325SC589

(Filed 14 November 1973)

Criminal Law § 143— revocation of suspended sentence — necessity for specific findings

Where, in a proceeding to revoke suspension of sentence, the trial court failed to make specific findings as to what condition of suspension defendant had violated, the order revoking the suspension of sentence must be vacated and the cause remanded for a specific finding relating thereto.

APPEAL by defendant from *Falls, Judge,* 7 May 1973 Session CALDWELL Superior Court.

The judgment from which defendant appeals provides in pertinent part as follows:

"The defendant appeared before the Court this day after due notice upon an inquiry into an alleged violation

of condition of suspension of the prison sentence imposed in that certain JUDGMENT SUSPENDING SENTENCE appearing of record in this case issued on the 11th day of October, 1972.

"From evidence presented, the Court finds as fact that within the specified period of suspension, the defendant has wilfully violated the terms and conditions of the probation judgment.

"It is ADJUDGED that defendant has breached a valid condition upon which the execution of said sentence was suspended, and it is ORDERED that such suspension be revoked and that said defendant be imprisoned: For the term of Not Less than three (3) years nor more than five (5) years In the North Carolina State Prison.

"It is ordered that the defendant be given credit for 113 days spent in jail."

Attorney General Robert Morgan by Sidney S. Eagles, Jr., Assistant Attorney General, and Conrad O. Pearson, Assistant Attorney General, for the State.

West & Groome by J. Laird Jacob, Jr., for defendant appellant.

BRITT, Judge.

Defendant contends that he was not provided with proper notice of the hearing at which his probation was revoked, that evidence presented at time of hearing does not support the judgment, and that the court failed to make specific findings of fact as to his violation of the terms of the judgment placing him on probation.

In *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376 (1958), our Supreme Court held that in order to activate a suspended sentence the trial court must find that the defendant has violated a valid condition of suspension and that such violation was without lawful excuse; and when the court *fails to find specific facts* supporting the conclusion that the violation was without lawful excuse, there is insufficient predicate for the order putting the suspended sentence into effect.

In *State v. Davis,* 243 N.C. 754, 92 S.E. 2d 177 (1956), the Supreme Court held that where the trial court fails to find

wherein the defendant had violated the conditions of suspension, defendant is entitled to have the cause remanded for *a specific finding* in regard thereto, since only by such finding may the defendant test the validity of the condition for violation of which the suspended sentence was activiated.

In *State v. Langley,* 3 N.C. App. 189, 164 S.E. 2d 529 (1968), this court held that where, in a proceeding to revoke a judgment of probation, the trial court fails to make *specific findings* as to what condition of probation the defendant had violated, the order revoking the probation judgment must be vacated and the cause remanded for specific findings relating thereto.

For failure of the trial judge in the case at hand to make specific findings as to what condition of the suspended sentence or judgment of probation defendant had violated, this cause must be remanded for further hearing.

Remanded.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. RONALD WEIDERMAN C/O MAJOR LEAGUE LANES, INC.

No. 7327SC781

(Filed 14 November 1973)

Criminal Law § 18— judgment for defendant on motion to quash — appeal to Superior Court — jurisdiction of Superior Court

Where the State was properly allowed to appeal to the Superior Court from the judgment of the District Court which gave judgment for defendant upon defendant's motion to quash, and the Superior Court entered an order reversing the allowance of the motion to quash, the case should remain in the Superior Court for trial *de novo,* since the State's appeal gave the Superior Court the same jurisdiction as the District Court had in the first instance. G.S. 15-179(3); G.S. 7A-271(b).

APPEAL by defendant from *Friday, Judge,* 27 August 1973 Session of Superior Court held in GASTON County.

Defendant was charged with a violation of an ordinance of the City of Gastonia. The District Court allowed defendant's

motion to quash, and the State appealed to the Superior Court where an order was entered reversing the allowance of the motion to quash and remanding the case to the District Court for trial. Defendant gave notice of appeal.

Attorney General Robert Morgan by Millard R. Rich, Jr., Assistant Attorney General; Mullen, Holland & Harrell, P.A. by Graham C. Mullen, attorneys for the State.

Sanders & LaFar by W. Marshall LaFar for defendant appellant.

VAUGHN, Judge.

In criminal cases defendant may appeal to the Appellate Division from convictions in the Superior Court. G.S. 15-180. A defendant may not appeal from an order denying a motion to quash an indictment or warrant. *State v. Baker,* 240 N.C. 140, 81 S.E. 2d 199.

On our own motion, we modify that part of the order of the Superior Court Judge which directs that the case be remanded to the District Court for trial. The State was properly allowed to appeal to the Superior Court from the judgment of the District Court which gave judgment for defendant upon defendant's motion to quash. G.S. 15-179(3). The appeal by the State from the District Court to the Superior Court gave the Superior Court the same jurisdiction as the District Court had in the first instance. G.S. 7A-271(b). The case remains in the Superior Court for trial *de novo.*

Appeal dismissed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. MINT LYDAY CHRISTOPHER, SR.

No. 7326SC597

(Filed 14 November 1973)

APPEAL by defendant from *Grist, Judge,* 5 March 1973 Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a bill of indictment, proper in form, with armed robbery.

The State's evidence tended to show that on 24 December 1972 two men entered the Sharon-Amity Little General Store in Charlotte, North Carolina, and at gunpoint, forced State's witness Lula Mae Thomas (Thomas), an employee of the Little General Store, to fill an empty paper sack with money from the cash register, totaling $76.00.

State's witness James F. Perrone (Perrone), employed by the Charlotte City Police Department, in off-duty status on the date and time in question, observed two men in the vicinity of the intersection of Central Avenue and Sharon-Amity Road, running across a gas station parking lot toward a parked car. Perrone followed the vehicle from the area until he could obtain an adequate description of the car and its license plate number. Perrone then returned to the Little General Store, called the police, and gave a description of the two men, the vehicle in which they were riding, the tag number of the vehicle, and informed the police that the two men had just held up the Sharon-Amity Little General Store.

Officer Wayne Haigler of the Charlotte City Police Department testified that he stopped the vehicle in question containing three men shortly after receiving a radio description of the car. When Officer Haigler observed a .22 caliber pistol lying on the front seat of the car after walking up to the vehicle, he held the occupants of the vehicle at gunpoint while he notified the police dispatcher of the apprehension at the intersection of Central Avenue and Morningside, approximately 2½ miles from the Little General Store.

Following the arrival of the Detectives Rowe and Fesperman of the Charlotte City Police Department, Detective Fesperman found a brown paper bag with $76.00 in it underneath the right front seat. The occupants of the vehicle were returned to the Little General Store where Thomas identified Harold Broome (Broome) and Michael Lee Sherrill (Sherrill) as the two men who had robbed the store. The witness testified at the same time that she had seen the defendant in the store twice earlier that day.

Both Broome and Sherrill testified for the State that they had been riding with the defendant on 24 December 1972; that the defendant had suggested the robbery of the store; that de-

fendant had loaded the .22 caliber pistol while Broome and Sherrill were in the car; that defendant waited outside in the car for Broome and Sherrill, with a door open and the motor running; that defendant drove away when the two returned to the vehicle with the money.

At the close of the State's evidence the defendant moved to dismiss as of nonsuit; the motion was denied.

Defendant testified in his own behalf that he had not been in the Little General Store prior to being taken there by police; that he did not load a gun for Sherrill; that he did not know either Broome or Sherrill had guns; that he parked in a gas station while Broome and Sherrill left the car "to visit a friend"; that he panicked and drove away when Broome and Sherrill informed him upon their return that they had just "knocked the place off." Defendant also testified that he was beaten by officers while in their custody.

The jury returned a verdict of guilty of armed robbery. Defendant was sentenced to a term of not less than eighteen nor more than twenty-five years in the State's Prison.

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

J. Robert Rankin for defendant-appellant.

BROCK, Chief Judge.

Counsel has been unable to point out error in the trial, but requests this Court to review the record for possible error. We have carefully reviewed the entire record. In our opinion, defendant had a fair trial, free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES LOUIS YOUNG

No. 7326SC699

(Filed 14 November 1973)

ON *certiorari* to review judgment of *Snepp, Judge,* entered at the 30 April 1973 "C" Criminal Session of MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment, proper in form, with armed robbery. He pleaded not guilty, a jury found him guilty as charged, and from judgment imposing prison sentence of 15 years, with credit for time spent in jail awaiting trial, defendant gave notice of appeal. On 4 May 1973, defendant went before Judge Robert M. Martin and moved to withdraw his notice of appeal. After due inquiry, Judge Martin allowed the motion and ordered issuance of commitment. Thereafter, on 29 June 1973, defendant's petition to this court for writ of certiorari in lieu of appeal was allowed.

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

William O. Austin for defendant appellant.

BRITT, Judge.

A careful review of the record on appeal fails to disclose any error prejudicial to defendant. We conclude that he received a fair trial and the sentence imposed is well within the limits permitted by statute.

No error.

Judges PARKER and HEDRICK concur.

AMENDMENTS TO COURT OF APPEALS RULES

ANALYTICAL INDEX

WORD AND PHRASE INDEX

AMENDMENTS TO THE RULES OF PRACTICE IN THE COURT OF APPEALS

The Rules of Practice in the Court of Appeals as published in 1 N.C. App. 634, *et seq.*, and as subsequently amended, are now amended as follows:

I. All of the present provisions of Rule 1, together with the caption thereof, are deleted. In substitution therefor, the following is adopted as Rule 1: "1. Appeals—When Heard. Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. For the transaction of other business the Court of Appeals shall be open at all times."

II. All of the provisions of the first paragraph of Rule 6 are deleted.

III. All of the provisions of Rule 7, together with the caption thereof, are deleted. Hereafter Rule 7 will read: "7. Retained for future use."

IV. All of the provisions of Rule 8, together with the caption thereof, are deleted. Hereafter Rule 8 will read: "8. Retained for future use."

V. All of the provisions of Rule 9, together with the caption thereof, are deleted. Hereafter Rule 9 will read: "9. Retained for future use."

VI. All of the provisions of the second paragraph of Rule 10 are deleted.

VII. All of the provisions of Rule 15, together with the caption thereof, are deleted. Hereafter Rule 15 will read: "15. Retained for future use."

VIII. The following, which begins on line 10 thereof, is deleted from Rule 17: "The motion may be allowed within ten days or at the first session of the Court thereafter, with leave to the appellant within thirty days and after five days notice to the appellee to apply for the redocketing of the cause;". The period after the word "settled," which immediately precedes the deleted portion, is changed to a semicolon and followed by the word "provided."

IX. The following words and figures, "and Rule 17," now appearing on the second and third lines thereof, are deleted from Rule 18.

X. The words, "at the same session," appearing in line 8 thereof, and the words "to be heard at the next session" appearing in line 9 thereof, and the comma after the word "appeal" in line 9 thereof, are deleted from Rule 24.

XI. All of the provisions of paragraph (a) of Rule 34 are deleted. In substitution therefor the following is adopted as paragraph (a) of Rule 34: "(a) When Certiorari Applied For. Generally, the writ of certiorari, as a substitute for an appeal, must be applied for within the time in which the appeal should have been docketed under these rules; or, if no appeal lay, then within thirty days after the date of the order or determination complained of."

XII. The words following the word "returnable" in the third sentence of the first paragraph of Rule 43(b), to wit, "on the first day of the next ensuing session," are deleted and the words "on a day named" are substituted therefor.

XIII. All of the provisions of the second paragraph of Rule 43(b) following the word "returnable" in line *three* thereof are deleted and the words "on a day named" are substituted therefor.

XIV. All of the provisions of Rule 45 are deleted. In substitution therefor, the following is adopted as Rule 45: "45. Sittings of the Court. Panels of the Court will sit as scheduled by the Chief Judge."

XV. All of the provisions of Rule 47, together with the caption thereof, are deleted. Hereafter Rule 47 will read: "47. Retained for future use."

The foregoing amendments shall become effective on the 1st day of January, 1974.

Adopted by the Supreme Court of North Carolina in conference on this the 28th day of September, 1973.

MOORE, J.

For the Court

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

ACTIONS

§ 10. Method of Commencement and Time from which Pending

Action was commenced when summons was issued and plaintiff was granted an extension of time to file his complaint, not when the complaint was actually filed, notwithstanding defendant was not personally served but service was thereafter made by publication. *Sink v. Easter*, 151.

ADMIRALTY

Civil War cannons recovered from the bottom of the Roanoke River were underwater archaeological artifacts whose ownership rested in the State. *S. v. Armistead*, 704.

ADVERSE POSSESSION

§ 7. Possession by One Tenant in Common Against Other Tenants in Common

Evidence was sufficient for the jury on the issue of whether plaintiff tenants in common obtained the interest of a cotenant by adverse possession where it tended to show that plaintiffs and those under whom they claim have been in exclusive possession of the property for more than 20 years without a demand by the cotenant for an accounting of rents and profits. *Collier v. Walker*, 617.

APPEAL AND ERROR

§ 6. Orders Appealable

There was no order from which respondent could appeal where the judge made a statement in court but actually entered no order. *In re Cox*, 657.

§ 7. Parties Who May Appeal

Purported appeal by "John Doe and Richard Roe" is dismissed for lack of appeal by a natural or other legal person. *Moore v. John Doe*, 131.

§ 9. Moot Questions

Appeal from preliminary injunction should be dismissed where appeal was not docketed until month after injunction was dissolved. *Moore v. John Doe*, 131.

§ 12. Necessity for Motion to Present Question for Review

Motion to dismiss for failure to pay court costs comes too late when made for first time on appeal. *Atkins v. Walker*, 119.

§ 14. Appeal and Appeal Entries

Appeal should be dismissed where no notice of appeal was given. *Moore v. John Doe*, 131.

§ 16. Jurisdiction and Powers of Lower Court After Appeal

Trial court had no jurisdiction to hold hearings and enter judgment providing for child custody, child support, permanent alimony and counsel fees while defendant's appeal from a judgment granting plaintiff a divorce from bed and board was pending. *Bowes v. Bowes*, 373.

APPEAL AND ERROR — Continued

§ 26. Exceptions and Assignments of Error to Judgment

Where there is no exception to any finding of fact, the court assumes an implied exception to the signing and entry of judgment. *Burroughs v. Realty, Inc.*, 107.

Assignment of error to signing and entry of judgment presents face of record proper for review. *County of Currituck v. Upton*, 45; *Lincoln County v. Skinner*, 127; *Atkins v. Walker*, 119.

§ 42. Presumptions in Regard to Matters Omitted from Record

Where evidence heard by the trial judge is not in the record, it is presumed that he set aside entry of default for good cause. *Moseley v. Trust Co.*, 137.

§ 57. Findings or Judgments on Findings

Evidence was sufficient to support trial court's findings that defendants furnished and installed flooring as required by their contract. *Lincoln County v. Skinner*, 127.

Where no evidence is included in the record on appeal, it is assumed that findings of fact objected to were supported by competent evidence. *Potts v. Potts*, 193.

ARREST AND BAIL

§ 3. Right of Officer to Arrest without Warrant

Officers lawfully arrested defendant in motel room where officers observed defendant from adjoining room sitting near a pistol and knew that he was a convicted felon. *S. v. Wilson*, 672.

Defendant's warrantless arrest for possession of narcotic drugs made while defendant was in a car was lawful. *S. v. McMillan*, 721.

ARSON

§ 2. Indictment and Burden of Proof

Indictment was sufficient to charge defendant with the unlawful burning of a mobile home used as a dwelling. *S. v. Reavis*, 497.

§ 3. Competency of Evidence

Trial court erred in admission of opinion testimony by State's expert witness as to cause of a fire. *S. v. Reavis*, 497.

Evidence of meetings of defendants prior to the alleged offense and of proceedings at the meetings was competent in an arson trial. *S. v. Grant*, 401.

ASSAULT AND BATTERY

§ 8. Defense of Self, Home or Property

Trial court in a felonious assault prosecution did not err in exclusion of testimony by defendant that the victim had beaten defendant's estranged wife several times and had broken her brother's arm. *S. v. Mize*, 663.

§ 11. Indictment and Warrant

Indictment for assault with a firearm with intent to kill will not support a verdict of guilty of assault with a deadly weapon with intent to

ASSAULT AND BATTERY — Continued

kill inflicting serious injury or a verdict of guilty of assault with a deadly weapon inflicting serious injury. *S. v. Bryant,* 676.

§ 15. Instructions

Trial court's instructions with respect to intentional pointing of a gun by defendant were adequate. *S. v. Moore,* 575.

Trial court in a prosecution for discharging a firearm into an occupied vehicle erred in refusing to instruct jury on self-defense. *S. v. Evans,* 731.

§ 17. Verdict

Where the jury was permitted to consider four lesser included offenses as well as the offense charged, the verdict of "guilty as charged" was not ambiguous. *S. v. Coleman,* 389.

AUTOMOBILES

§ 3. Driving after Suspension of License

Warrant charging defendant with operating a motor vehicle while his license was suspended was not fatally defective in alleging he operated the vehicle on a "highway" rather than on a "public highway" or a "highway of the State." *S. v. Bigelow,* 570.

§ 45. Relevancy and Competency of Evidence

In a damages action for negligent operation of a vehicle, defendant is entitled to a new trial where plaintiff's counsel made specific reference to liability insurance in questioning prospective jurors. *Maness v. Bullins,* 386.

§ 53. Failing to Stay on Right Side of Highway

Defendant's evidence did not establish her negligence as a matter of law in skidding partially across the center line when the car in front of her stopped suddenly. *Ramsey v. Christie,* 255.

§ 56. Hitting Vehicle Stopped on Highway

Plaintiff's evidence was sufficient to support jury finding that collision on ice-covered bridge was caused by defendant's negligence. *Picklesimer v. Robbins,* 280.

§ 62. Striking Pedestrian

Verdict was properly directed for defendant driver who struck plaintiff pedestrian as she crossed a street at a place other than a marked or unmarked crosswalk. *Campbell v. Doby,* 94.

Evidence was insufficient to show negligence of defendant driver in striking plaintiff pedestrian. *Johnson v. Williams,* 185.

§ 63. Striking Children

Trial court properly directed verdict for defendants in an action to recover for personal injuries sustained by plaintiff's minor child when she was struck by defendants' automobile. *Kinlaw v. Tyndall,* 669.

§ 75. Contributory Negligence in Stopping or Parking

Evidence was insufficient to support jury finding that plaintiff's driver was negligent in sliding into the curb on an ice-covered bridge. *Picklesimer v. Robbins,* 280.

AUTOMOBILES — Continued

§ 127. Sufficiency of Evidence and Nonsuit in Prosecution Under G.S. 20-138

Evidence was sufficient to be submitted to the jury in a prosecution for driving under the influence, third offense. *S. v. Gurkins*, 226.

Evidence was sufficient to be submitted to the jury in a drunken driving case. *S. v. Payne*, 511.

Evidence was sufficient to withstand defendant's motion for nonsuit in a prosecution for driving under the influence and hit and run driving. *S. v. Moore*, 742.

§ 129. Instructions in Prosecutions Under G.S. 20-138

Use of the words "appreciable extent" rather than "appreciable impairment" when instructing as to the effect which intoxicating liquor must have upon an individual to sustain a conviction for driving under the influence did not constitute prejudicial error. *S. v. Payne*, 511.

§ 135. Illegal Parking

Trial court did not err in denial of defendant's motion to quash a warrant charging her with overtime parking in a metered zone. *S. v. Jeffries*, 516.

BAILMENT

§ 3. *Liabilities of Bailee to Bailor*

Plaintiff insurer's evidence was insufficient for the jury in an action to recover for damages to insured's curtains and bedspread by shrinkage when dry cleaned by defendant. *Insurance Co. v. Dry Cleaners*, 444.

BILLS AND NOTES

§ 20. Presumptions and Burden of Proof; Sufficiency of Evidence

Trial court erred in entering summary judgment for plaintiff upon a consideration of the pleadings alone in an action to recover a sum allegedly due from defendant under a Transfer of Interest Agreement executed by defendant. *Commercial Credit Corp. v. McCorkle*, 397.

BRIBERY

§ 2. Indictment

An indictment charging defendant with offering a police officer money in return for a breathalyzer test report of a third person and additional money upon entry of a nolle prosequi in the case against the third person was sufficient to charge defendant with bribery. *S. v. Stanley*, 684.

BROKERS AND FACTORS

§ 8. Licensing and Regulation

Real estate licensing board erred in suspending real estate broker's license on the basis of the broker's plea of nolo contendere to a charge of wilfully filing a fraudulent income tax return. *Licensing Board v. Coe*, 84.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

Evidence of defendant's possession of property not listed in the warrant or indictment was not prejudicial to defendant. *S. v. Bryant,* 55.

§ 5. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for break-in of a dress shop. *State v. Baugess,* 79.

It is not necessary that the State show a breaking to support a conviction of breaking or entering. *S. v. Houston,* 542.

§ 6. Instructions

Trial court did not commit prejudicial error in instructing the jury that the State relied on the doctrine of "recent possession" where the court thereafter correctly instructed on the doctrine of possession of recently stolen goods. *S. v. Bryant,* 55.

§ 7. Verdict and Instructions as to Possible Verdicts

Trial court in a prosecution for felonious breaking and entering did not err in failing to submit an issue of nonfelonious breaking and entering on the ground that the jury could have disbelieved testimony as to felonious intent. *S. v. Hudson,* 440.

Where only evidence of felonious intent in a felonious breaking and entering case was circumstantial, trial court properly submitted question of defendant's guilt of lesser offense of nonfelonious breaking and entering. *S. v. Dozier,* 740.

BURIAL ASSOCIATIONS

Statute which affected contract provisions for payment of funeral benefits was not unconstitutional where the contract specifically provided that it could be amended by statute. *Adair v. Burial Assoc.,* 492.

When funeral services are provided by a director of any mutual burial association in good standing in N. C. for a decedent who was a member of another such association, benefits must be paid in cash to the funeral director who actually rendered services. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10. Sufficiency of Evidence

Evidence was sufficient for jury on issue of direct fraud or constructive fraud on the part of a pastor who was also president of the church conference in inducing grantors to sign a deed by falsely representing that the deed had been drawn so that only the local church would own the property conveyed. *McLamb v. McLamb,* 605.

CARRIERS

§ 2. State Franchise and Petition to Increase Service

Commission rule requiring an applicant seeking to relocate a common carrier franchise route over a new highway to show only that the proposed route will provide safer, quicker and improved service is a proper rule. *Utilities Comm. v. Coach Co.,* 597.

Evidence supported Commission's approval of applicant's relocation of a bus route between Raleigh and Durham, and supported Commission's

CONSTITUTIONAL LAW — Continued

CONTEMPT OF COURT

§ 2. Direct or Criminal Contempt

Trial court did not err in warning defendant about his misbehavior, removing him from the courtroom and informing him that he could return when he promised to behave. *S. v. Brown,* 480.

CONTRACTS

§ 17. Term and Duration of Agreement

A 1929 contract of indefinite duration in which a power company agreed to sell the city its electric lines and other equipment located within a newly annexed area had been in effect for a reasonable time when the power company notified the city in 1965 it was terminating the contract. *City of Gastonia v. Power Co.,* 315.

§ 20. Impossibility of Performance as Excusing Nonperformance

Defendants were liable to plaintiffs for any damages sustained by their failure to provide the property sold by them with water and sewer connections as required by their guaranty even though performance was rendered impossible by governing authorities of the city and county. *Helms v. Investment Co.,* 5.

§ 27. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to support trial court's findings that defendants furnished and installed flooring as required by their contract. *Lincoln County v. Skinner,* 127.

CORPORATIONS

§ 15. Liability of Officers and Directors for Torts

Individual who controls corporate defendant is subject to personal liability for damages resulting from corporate defendant's piracy of plaintiff's recordings. *Records v. Tape Corp.,* 207.

COUNTIES

§ 5. County Zoning

Trial court properly entered order requiring defendants to remove a mobile home from area zoned for low density residential and agricultural use. *County of Currituck v. Upton,* 45.

§ 7. Real Property and Conveyances

Trial court did not err in continuing a preliminary injunction pending a final trial in this action to restrain a board of county commissioners from selling lots owned by the county with restrictions limiting use of the lots to medical purposes. *Puett v. Gaston County,* 231.

COURTS

§ 21. What Law Governs; as Between Laws of This State and of Other States

The law of the place of contract governs an action for breach of warranty. *Williams v. General Motors Corp.,* 337.

Substantive rights of the parties under the doctrine of res ipsa

COURTS — Continued

loquitur and under the doctrine of strict liability are governed by the laws of the state where the accident occurred. *Ibid.*

Substantive law of this State applies to an action to recover additional death benefits under life insurance contracts completed in New York where insured was a resident of this State at the time of his death. *Rossman v. Insurance Co.*, 651.

CRIMINAL LAW

§ 5. Mental Capacity in General

Exclusion of defendant's testimony as to prior psychiatric problems offered for the purpose of showing absence of specific intent to commit the crimes charged was harmless error where the jury returned verdicts of guilty of lesser crimes for which intent was not an element. *S. v. Curie*, 17.

Trial court properly instructed the jury on defendant's defense of unconsciousness brought on by use of alcohol and drugs. *S. v. Collins*, 446.

§ 7. Entrapment

There was insufficient evidence of entrapment in a case for distribution of marijuana to warrant an instruction to the jury. *S. v. Hendrix*, 99; *S. v. Stanback*, 375.

§ 9. Principals and Aiders and Abettors

Trial court's instructions in an arson case with respect to aiding and abetting were proper. *S. v. Grant*, 401.

The driver of a getaway car was present at the scene of the robbery and was a principal rather than an accessory before the fact. *S. v. Lyles*, 632.

§ 13. Jurisdiction in General

Trial court did not err in overruling 14-year-old defendant's motion that he be tried on a petition alleging him to be a delinquent child by reason of the felonious assault for which he was subsequently tried rather than on the bill of indictment. *S. v. Bridges*, 567.

§ 15. Venue

Trial court properly denied defendant's motion for change of venue. *S. v. Bryant*, 55.

The trial court in a prosecution for possession of marijuana did not err in the denial of defendant's motion for a change of venue on the ground that a recent rock festival in the county had stirred up public outrage against the use of marijuana to the extent that it would be impossible for defendant to receive a fair trial. *S. v. Haltom*, 646.

§ 18. Jurisdiction on Appeals to Superior Court

Upon the State's appeal to Superior Court from judgment for defendant on his motion to quash in the District Court, the Superior Court had the same jurisdiction as did the District Court in the first instance, and the case should remain in Superior Court upon entry of an order reversing the allowance of the motion to quash. *S. v. Weiderman*, 753.

§ 21. Preliminary Proceedings

Defendants were not entitled to a preliminary hearing as a matter of right. *S. v. Grant*, 401.

CRIMINAL LAW — Continued

§ 23. Plea of Guilty

Defendant's guilty plea was voluntary. *State v. Hyman,* 114.

Defendant's guilty plea was entered understandingly where the trial court found that he had been instructed as to the maximum sentence he could be given. *S. v. Harris,* 48.

Defendant's guilty plea was not involuntary where it was the result of plea bargaining. *S. v. McKinney,* 249.

Plea of guilty is stricken where the judgment and commitment stated that defendant pleaded guilty to breaking and entering and larceny but the transcript of plea referred only to the charge of breaking and entering. *S. v. Irby,* 262.

Trial court's error in accepting defendant's pleas of guilty to inconsistent counts of larceny and receiving was not prejudicial where defendant received only one sentence. *S. v. Myers,* 311.

There is no right to appeal from a plea of guilty after 30 March 1973. *S. v. Hunnicutt,* 581.

§ 34. Evidence of Defendant's Guilt of Other Offenses

In a joint trial of two defendants for possession of heroin, trial court committed harmless error in arraigning one defendant in the presence of the jury on charges of possession of marijuana and methadone and in withdrawing those charges from consideration after the trial had begun. *S. v. Keitt,* 414.

§ 42. Articles Connected with the Crime

Trial court did not err in refusing to allow defendant to examine the State's evidence before trial and in refusing to grant continuance to allow such examination. *S. v. Elam,* 451.

§ 43. Photographs

Photographs were properly admitted for illustrative purposes even though they depicted gruesome and revolting scenes. *S. v. Hamilton,* 436.

Motion picture of a burning stable was properly admitted in an arson trial where a witness testified that it accurately depicted the fire but appeared to have been taken two minutes before he arrived at the stable. *S. v. Grant,* 401.

Trial court in a murder prosecution did not err in permitting introduction into evidence of three color photographs of deceased's body. *S. v. Morrison,* 717.

§ 46. Flight of Defendant as Implied Admission

Evidence that defendant bolted from a police car shortly after his apprehension was sufficient to support an instruction to the jury on defendant's flight. *S. v. McKinney,* 177.

§ 50. Expert and Opinion Testimony

Trial court erred in admission of opinion testimony by State's expert witness as to cause of a fire. *S. v. Reavis,* 497.

§ 51. Qualification of Experts

Opinion testimony of a witness was admissible though the court failed to make a specific finding that the witness was an expert. *S. v. Stacy,* 35.

CRIMINAL LAW — Continued

§ 64. Evidence as to Intoxication

Trial court properly allowed an officer to give opinion testimony that one defendant was under the influence of marijuana at the time of the search of defendant's residence. *S. v. Walsh,* 420.

§ 66. Evidence of Identity by Sight

Trial court properly allowed the witness to make an in-court identification of defendant though the court's conclusions based on a voir dire examination of the witness were not entirely proper. *S. v. Steppe,* 63.

Trial court did not err in allowing the witness to stand in front of defendant to show how far from defendant he was at the crime scene. *Ibid.*

In-court identification of defendant was based on the witness's personal knowledge. *S. v. Hines,* 87.

Witness's in-court identification of defendant based on observation at the crime scene was proper. *S. v. McKinney,* 177; *S. v. Houston,* 542.

Trial court's failure to conduct a voir dire examination following defendant's objection to identification evidence was not error where there was no evidence of any lineup or photographic identification and in-court identification was based on the witness's observation of defendant at the time of the crime. *S. v. Hubbard,* 431.

Identification of defendants was based on witness's observation of defendants as he drove them in his cab. *S. v. Neal,* 426.

Where the identifying witness was given a stack of ten photographs, four of which were of the two defendants, the identification procedure was not impermissibly suggestive. *Ibid.*

Pretrial photographic identification of defendants did not constitute a lineup entitling defendants to have counsel present. *Ibid.*

Although robbery victim failed to identify defendant from photographs or at police lineup but identified defendant in a hallway prior to a preliminary hearing and at the hearing, the victim was properly allowed to identify defendant at the trial. *S. v. Pate,* 701.

§ 75. Tests of Voluntariness of Confession; Admissibility

Even if the court's findings of fact were insufficient to show that challenged in-custody statement was made freely and voluntarily, admission of the statement was harmless error beyond a reasonable doubt. *S. v. Ellison,* 38.

Fact that defendant had a subnormal mental capacity did not render defendant's confession incompetent. *S. v. Basden,* 258.

Defendant's written confession was made voluntarily and understandingly. *S. v. McClinton,* 734.

Trial court erred in allowing defendant's admission into evidence without first conducting a voir dire. *S. v. Thompson,* 693.

§ 77. Admissions and Declarations

Statement of defendant made to police was admissible in prosecution for parading without a permit. *S. v. Frinks,* 271.

§ 79. Acts and Declarations of Companions

Trial court could give testimony of an accomplice equal weight with other evidence in ruling on defendant's motion for nonsuit. *S. v. Hudson,* 440.

CRIMINAL LAW — Continued

§ 80. **Books, Records and Private Writings**

Sufficient foundation was laid for admission in evidence of a motel registration folio in a prosecution for possession of heroin found in a motel room. *S. v. Keitt,* 414.

§ 83. **Competency of Wife to Testify for or Against Spouse**

Defendant's wife was not a competent witness against defendant in a prosecution for burning a mobile home used by the wife as a dwelling. *S. v. Reavis,* 497.

§ 84. **Evidence Obtained by Unlawful Means**

Officers properly seized a package of heroin discarded by defendant as he ran upon their approach. *S. v. Ingram,* 92.

Officers' activity in entering and searching defendants' apartment did not render inadmissible marijuana, a capsule of phencyclidine, and various miscellaneous articles showing marijuana remnants and residue found and seized in the search. *S. v. Watson,* 160.

Where defendants were sufficiently heard on their pretrial motions to suppress evidence obtained by a search and seizure, they were not entitled to a further voir dire hearing at the trial. *S. v. Keitt,* 414.

Drugs seized upon search of defendant incident to his warrantless arrest were admissible in evidence where the arrest was lawful. *S. v. McMillan,* 721.

Failure of trial judge to make findings upon a voir dire to determine admissibility of evidence was not fatal. *S. v. Gurkins,* 226.

§ 85. **Character Evidence**

Evidence of specific character traits of defendant was inadmissible. *S. v. Grant,* 401.

Trial court properly allowed defendant's army supervisor to testify that defendant's reputation in the military community was not good for the purpose of impeaching defendant's testimony. *S. v. Walsh,* 420.

§ 87. **Direct Examination of Witnesses**

Trial court did not abuse its discretion or defeat the purpose of sequestration of the State's witnesses where the court allowed leading questions to be put to the witnesses. *S. v. Grant,* 401.

The trial court in a prosecution for assault with intent to commit rape did not err in allowing the solicitor to ask the victim a leading question. *S. v. Moshier,* 514.

Defendant was not prejudiced where the court allowed the solicitor to conduct a voir dire examination in lieu of the assistant solicitor who had begun the examination of the witness. *S. v. Houston,* 542.

§ 88. **Cross-Examination**

Trial court in homicide prosecution properly refused to permit inquiry into the past employment of the State's chief witness. *S. v. Hamilton,* 436.

§ 89. **Credibility of Witnesses, Corroboration and Impeachment**

Sheriff's testimony as to the contents of a written statement given him by a witness shortly after the homicide occurred was properly admitted for the purpose of corroborating the witness's testimony. *S. v. Bullard,* 76.

CRIMINAL LAW — Continued

Trial court properly allowed evidence of a prior inconsistent statement of a witness. *S. v. Steppe*, 63.

Trial court properly admitted the entire pretrial statements of witnesses into evidence where defendant objected to the statements in their entirety without specifying the objectionable portions. *S. v. Houston*, 542.

Although an accomplice's written statement admitted for the purpose of corroboration contained additional evidence going beyond testimony of the accomplice, trial court properly denied defendant's general objection to admission of the statement where portions of the statement were competent. *S. v. Perry*, 449.

§ 90. Rule that Party May Not Impeach Own Witness

Solicitor's repetition of a question to a 13-year-old witness whose answer was unexpected did not constitute impeachment of the witness; rather, it enabled the witness to understand the question. *S. v. Grainger*, 181.

§ 91. Time of Trial and Continuance

Trial court properly denied defendant's motion for continuance to obtain witnesses from Central Prison. *S. v. Bryant*, 55.

Defendant's motion for continuance for time to produce witnesses was properly denied. *S. v. Howes*, 155.

Defendant failed to show the trial court abused its discretion in denying his motion to continue where his motion was unsupported by affidavits. *S. v. Privette*, 398.

Trial court did not err in refusing to allow defendant to examine the State's evidence before trial and in refusing to grant continuance to allow such examination. *S. v. Elam*, 451.

Trial court in prosecution for possession of marijuana did not err in denial of defendant's motion for continuance made on the ground that the jury panel was in the audience in the preceding case and heard arguments made by defendant's counsel on voir dire on issues identical to those heard in the present case in the absence of the jury. *S. v. Haltom*, 646.

Trial court did not err in denial of defendants' motion for continuance when a co-defendant withdrew his plea of not guilty and entered a plea of guilty. *S. v. Lipscomb*, 747.

Trial court properly denied defendant's motion for continuance in order to obtain the presence of his Tennessee attorney and two Tennessee witnesses. *S. v. Morrison*, 717.

§ 92. Severance of Counts

Trial court did not err in denial of defendants' motions for separate trials on charges of possession of heroin. *S. v. Keitt*, 414.

§ 95. Admission of Evidence Competent for Restricted Purpose

Where evidence was competent as to one defendant only, the trial court committed error in failing to give a limiting instruction; however, that error was cured by subsequent instructions given before the formal jury charge. *S. v. Kelly*, 60.

Trial court's instruction that certain testimony of a witness was competent for restricted purpose was sufficient. *S. v. Bryant*, 55.

CRIMINAL LAW — Continued

§ 97. Introduction of Additional Evidence

Trial court erred in denial of defendant's motion to reopen the case in order to present testimony of additional alibi witnesses where the court's ruling was made under the misapprehension that some rule of law prevents a party from using more than three witnesses to prove any particular point. *S. v. Jackson*, 370.

Trial court did not err in allowing the State to reopen its case and present additional evidence after the State had rested and defendant had moved for nonsuit. *S. v. Hudson*, 440.

Where the possibility of a mistaken identification of defendant was present, the trial court should have allowed defendant's motion to reopen the case for additional evidence. *S. v. Allen*, 660.

Trial court erred in allowing the State to reopen its case for additional evidence while denying defendant an opportunity for rebuttal. *S. v. Thompson*, 693.

§ 98. Presence and Custody of Defendant

Trial court did not err in warning defendant about his misbehavior, removing him from the courtroom and informing him that he could return when he promised to behave. *S. v. Brown*, 480.

Incarceration of defendant was proper where there were no circumstances which would lead the jury to speculate about the court's opinion of the case. *S. v. Collins*, 553.

§ 99. Conduct of Court and Expression of Opinion on Evidence

Trial judge did not err in questioning witness on voir dire. *S. v. McKinney*, 177.

The trial court did not express an opinion in violation of G.S. 1-180 by several times sustaining objections to defendants' questions and saying to defense counsel, "He has answered your questions." *S. v. Grant*, 401.

Trial court expressed an opinion in questioning witnesses and in belittling counsel. *S. v. Hewitt*, 666.

Trial court did not favor the State in his discretionary rulings or otherwise aid the State by remarks made during the trial. *S. v. Walsh*, 420.

§ 101. Misconduct affecting Jury; Witnesses

The trial court in a prosecution for possession of marijuana did not commit prejudicial error in permitting the jury to take the State's evidence into the jury room. *S. v. Haltom*, 646.

Evidence of threatening calls received by a witness, though incompetent, was not prejudicial to defendant. *S. v. Smith*, 158.

§ 102. Argument and Conduct of Counsel or Solicitor

Reference in the jury argument to defendant's failure to take the stand was prejudicial error. *S. v. Jones*, 395.

Solicitor's argument to the jury that the evidence for the State was uncontradicted, while disapproved, did not place an impermissible burden on defendant's Fifth Amendment right to remain silent. *S. v. Morrison*, 573.

§ 112. Instructions on Burden of Proof

Trial court did not commit prejudicial error in instructing the jury that "the burden of proving an alibi does not rest upon the defendant to establish defendant's guilt." *S. v. Littlejohn*, 73.

CRIMINAL LAW — Continued

§ 113. Statement of Evidence and Application of Law Thereto

Trial court's instruction with respect to alibi of one defendant was proper but a second defendant was not entitled to an alibi instruction. *S. v. Grant,* 401.

Trial court did not err in using the disjunctive "either or both" in reference to the guilt of the two defendants. *S. v. Hubbard,* 431.

Trial court erred in failing to instruct the jury that defendant did not have the burden of proving alibi, although defendant did not request such instruction. *S. v. Moore,* 368.

Defendant was entitled to a specific instruction as to the legal principles applicable in the consideration of his alibi evidence, notwithstanding his failure to request such an instruction. *S. v. Smith,* 578.

§ 114. Expression of Opinion by Court on Evidence

Statement in the charge that a party has offered evidence which "tends to show" is not an expression of opinion. *S. v. Hubbard,* 431.

Trial judge expressed no opinion in his instruction though he devoted more time to the State's evidence. *S. v. Grant,* 401.

§ 115. Instructions on Lesser Degrees of Crime Charged

Trial court in a prosecution for aiding and abetting in armed robbery did not err in failing to submit lesser included offense of accessory before the fact. *S. v. Lyles,* 632.

§ 116. Charge on Failure of Defendant to Testify

Trial court's reference to defendant's failure to testify was harmless error beyond a reasonable doubt. *S. v. Grant,* 401.

§ 119. Request for Instructions

Defendant was entitled to a specific instruction as to the legal principles applicable in the consideration of his alibi evidence, notwithstanding his failure to request such an instruction. *S. v. Smith,* 578.

§ 121. Instructions on Defense of Entrapment

Trial court properly charged on the defense of entrapment. *S. v. Bland,* 560.

§ 126. Polling the Jury

Trial court properly denied defendant's motion to poll the jury made after the jury had been discharged and some of the jurors had left the courtroom. *S. v. Littlejohn,* 73.

§ 127. Arrest of Judgment

Defendant's conviction of possession of a firearm by a felon is vacated where, pending his appeal, defendant's citizenship rights were restored and he was thereby exempted from the provisions of the firearm statute. *S. v. Currie,* 241.

§ 131. New Trial for Newly Discovered Evidence

Trial court was without authority to entertain motion for new trial for newly discovered evidence filed after trial term and while appeal was pending. *S. v. Pate,* 701.

New trial for newly discovered evidence will not be awarded in a criminal case in the appellate division. *Ibid.*

CRIMINAL LAW — Continued

§ 138. Severity of Sentence

Defendant was not entitled to credit on his sentence for time spent on parole. *S. v. Davis*, 459.

Trial court did not err in considering defendants' backgrounds in determining the severity of their sentences. *S. v. Grant*, 401.

Trial court in an armed robbery case did not abuse its discretion in imposing a more severe sentence upon defendant than upon his co-defendant. *S. v. McClinton*, 734.

§ 143. Revocation of Suspension of Judgment

Where trial court failed to make specific findings as to what condition of suspension defendant had violated in its order revoking the suspension, the order must be vacated and the cause remanded for a specific finding relating thereto. *S. v. Sanders*, 751.

§ 144. Modification and Correction of Judgment

Trial court did not err in entering second judgment imposing active sentence without specifically vacating judgment entered earlier in the session imposing suspended sentence for the same crime. *S. v. Edmonds*, 105.

§ 149. Right of the State to Appeal

The State cannot appeal from a declaration of the trial court, in a prosecution for possession of marijuana with intent to distribute, that the State is prohibited from using the statutory presumptive rule of evidence and that the statute is unconstitutional only in that limited light. *S. v. Maggio*, 519.

§ 150. Right of Defendant to Appeal

There is no right to appeal from a plea of guilty after 30 March 1973. *S. v. Hunnicutt*, 581.

§ 155.5. Docketing of Record in Court of Appeals

Appeal is subject to dismissal for failure to docket the record on appeal within apt time. *S. v. Ingram*, 92.

§ 158. Conclusiveness and Effect of Record and Presumption as to Matters Omitted

Appellate court could not consider a purported "transcript of proceedings" upon defendants' motion to suppress evidence which was filed by defendants as an exhibit in the appellate court. *S. v. Keitt*, 414.

Validity of a search warrant is not presented where the warrant and supporting affidavit are not in the record on appeal. *S. v. Haltom*, 646.

The court on appeal does not reach the question of denial of defendant's right to counsel in district court where pertinent matter was omitted from the record on appeal. *S. v. McRae*, 579.

§ 161. Necessity for and Requisites of Exceptions and Assignments of Error

Assignment of error to the entry of judgment presents the face of the record for review. *S. v. Weathers*, 737.

An appeal itself constitutes an exception to the judgment and presents the face of the record for review. *S. v. Floyd*, 580.

CRIMINAL LAW — Continued

§ 162. Objection, Exceptions and Assignment of Error to Evidence and Motion to Strike

Defendant was not prejudiced by failure of the trial judge to rule on his objection to a question calling for hearsay testimony. *S. v. Norman*, 299.

Defendant's failure to move to strike a nonresponsive answer to a proper question waived objection thereto. *Ibid.*

Failure to make a motion to strike precluded defendant from raising the question of admissibility on appeal. *S. v. Neal*, 426.

Although an accomplice's written statement admitted for the purpose of corroboration contained additional evidence going beyond testimony of the accomplice, trial court properly denied defendant's general objection to admission of the statement where portions of the statement were competent. *S. v. Perry*, 449.

§ 164. Assignments of Error to Refusal of Motion to Nonsuit

Sufficiency of evidence is reviewable on appeal without exception. *S. v. Hines*, 87.

§ 167. Presumptions and Burden of Showing Error

Defendant was not prejudiced where the court allowed the solicitor to conduct a voir dire examination in lieu of the assistant solicitor who had begun the examination of the witness. *S. v. Houston*, 542.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Any error in denying defendant's motion to suppress evidence concerning a nearly empty liquor bottle found in his vehicle was subsequently rendered harmless by defendant's own testimony and failure to object. *S. v. Gurkins*, 226.

Evidence of threatening calls received by witness, though incompetent, was not prejudicial to defendant. *S. v. Smith*, 158.

§ 171. Error Relating to One Count or One Degree of Crime Charged

Trial court's error in accepting defendant's pleas of guilty to inconsistent counts of larceny and receiving was not prejudicial where defendant received only one sentence. *S. v. Myers*, 311.

Defendant was not prejudiced where he was charged and found guilty of two offenses arising from one incident but judgment was entered on one charge only. *S. v. Brown*, 480.

DEEDS

§ 20. Restrictive Covenants as Applied to Subdivisions

In an action to restrain violation of a restrictive covenant on a subdivision lot, trial court erred in entering summary judgment for plaintiffs where there was a triable issue as to whether, due to the existence of other violations of the restriction, plaintiffs were estopped from enforcing the particular violation in question. *Van Poole v. Messer*, 70.

Defendants who resubdivided a subdivision did not violate restrictive covenants in relation to new lot lines created by the resubdivision. *Robinson v. Investment Co.*, 590.

EASEMENTS

§ 4. Creation of Easement by Prescription

Plaintiff failed to show a right-of-way by prescription in a roadway over defendants' land where plaintiff's evidence tended to show permissive use. *Dickinson v. Pake*, 287.

EMINENT DOMAIN

§ 5. Amount of Compensation

Defendant may recover damages caused to remaining land where part of his land is taken for the impoundment of water. *City of Kings Mountain v. Cline*, 9.

§ 6. Evidence of Value

Trial court in condemnation proceedings erred in allowing the jury to consider evidence of damages to defendant's dairy business conducted on the land prior to its condemnation. *City of Kings Mountain v. Cline*, 9.

§ 7. Proceedings to take Land and Assess Compensation

Trial court erred in placing emphasis in its instructions on type of witnesses appearing on behalf of Highway Commission as contrasted to laymen who testified for landowner. *Highway Comm. v. Ferry*, 332.

EQUITY

§ 1. Nature of Equity and Maxims

Any tying arrangement plaintiff may have had concerning the production of its records or any refusal by plaintiff to sell to customers of defendants would not invoke the "clean hands" doctrine in an action seeking injunctive relief and damages for "pirating" of plaintiff's recordings. *Records v. Tape Corp.*, 207.

ESCAPE

§ 1. Elements of and Prosecutions for the Offense

Evidence of defendant's escape from a State prison was sufficient to be submitted to the jury. *S. v. Stewart*, 112.

Trial court did not err in failing to instruct the jury that defendant's escape actually occurred in Granville County and that defendant could not be convicted under a warrant charging escape in Vance County. *S. v. Sadler*, 641.

EVIDENCE

§ 29. Accounts, Ledgers and Private Writings

Sufficient foundation was laid for admission in evidence of a motel registration folio in a prosecution for possession of heroin found in a motel room. *S. v. Keitt*, 414.

§ 31. Best and Secondary Evidence

Oral testimony as to the status of a student pilot was inadmissible by reason of best evidence rule. *Aviation, Inc. v. Insurance Co.*, 557.

EVIDENCE — Continued

§ 32. Parol Evidence Affecting Writings

In action to recover for architectural services rendered under written contract, parol evidence rule was not violated by admission of testimony as to prior negotiations concerning the size, cost and time of completion of the building. *Williams and Associates v. Products Corp.*, 1.

§ 40. Nonexpert Opinion Evidence

In an action in which defendants counterclaimed for an amount necessary to correct plaintiff's faulty electrical work, trial court properly admitted testimony by defendant's employees as to defects they had encountered in their use of the electrical system installed by plaintiff. *Trotter v. Hewitt*, 253.

§ 48. Competency and Qualification of Experts

Trial court properly excluded testimony by defendants' witness as to the fair market value of necessary repairs to a building where defendants failed to offer evidence of the witness's qualifications as an expert. *Barnes v. Ange*, 306.

§ 57. Testimony by Accountants

Admission for illustrative purposes of a CPA's memorandum summarizing his findings in a study of the financial records of plaintiff and defendant, if erroneous, was not prejudicial to defendant. *Schafran v. Cleaners, Inc.*, 365.

FIDUCIARIES

Where plaintiff and defendant raised tobacco by their joint efforts and defendant held the proceeds from the sale thereof, he was under a duty to account to plaintiff for disposition of the proceeds. *Watson v. Fulk*, 377.

FORGERY

§ 2. Prosecution

Variance between indictment and proof as to the date the offenses allegedly took place was not fatal. *State v. Raynor*, 191.

State's evidence was sufficient for the jury in a prosecution for uttering a forged check. *S. v. Jackson*, 749.

FRAUD

§ 12. Sufficiency of Evidence and Nonsuit

Evidence was sufficient for jury on issue of direct fraud or constructive fraud on the part of a pastor who was also president of the church conference in inducing grantors to sign a deed by falsely representing that the deed had been drawn so that only the local church would own the property conveyed. *McLamb v. McLamb*, 605.

FRAUDS, STATUTE OF

§ 5. Contract to Answer for Debt of Another

Oral promises made by defendants to answer for the debt of another were unenforceable under the Statute of Frauds. *Burlington Industries v. Foil*, 173.

GARNISHMENT

§ 1. Nature and Grounds of Remedy

Service of process on the purchasing agent of the garnishee was sufficient. *Paper Co. v. Bouchelle,* 697.

GRAND JURY

§ 3. Challenge to Composition

Absence from the jury lists of names of persons between the ages of 18 and 21 did not constitute systematic exclusion of such age group from jury service. *S. v. Hubbard,* 431.

GUARANTY

Oral and unauthorized promises made by defendant to pay the debt of another were unenforceable. *Burlington Industries v. Foil,* 172.

HOMICIDE

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence of cause of death was insufficient for jury on the issue of defendant's guilt of involuntary manslaughter. *S. v. Cheek,* 308.

State's evidence was sufficient for submission to jury on issue of defendant's guilt of first degree murder by stabbing the victim with a knife. *S. v. Hamilton,* 436.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Any error in submission of the question of guilt of first degree murder was cured when the jury found defendant guilty of second degree murder. *S. v. Hamilton,* 436.

Trial court did not err in submitting the issue of defendant's guilt of second degree murder and in failing to submit the issue of defendant's guilt of manslaughter. *S. v. Morrison,* 717.

HUSBAND AND WIFE

§ 4. Conveyances Between Husband and Wife

In an action to have deeds conveying entirety property to a corporation and conveying the property back to the husband declared null and void for failure to comply with G.S. 52-6, the trial court properly entered summary judgment for defendants where plaintiff did not allege a specific intent to circumvent the statute and the undisputed facts did not reveal that the conveyances were void as a matter of law for noncompliance with the statute. *Moseley v. Trust Co.,* 137.

§ 11. Construction and Operation of Separation Agreement

Wife did not release her right to inherit as a surviving spouse from intestate's estate by a separation agreement entered into approximately one year before the death of intestate. *Lane v. Scarborough,* 32.

INDICTMENT AND WARRANT

§ 6. Issuance of Warrant

There is no requirement that an arrest warrant contain a "complaint"

INJUNCTIONS — Continued

from selling lots owned by the county with restrictions limiting the use of lots to medical purposes. *Puett v. Gaston County*, 231.

INSURANCE

§ 6. Construction of Policy

Trial court's construction of the endorsement of an aircraft insurance policy was proper. *Aviation, Inc. v. Insurance Co.*, 557.

§ 38. Permanent Total Disability

Plaintiff's evidence was sufficient to require submission of issues as to whether plaintiff was totally disabled during 52-week period after automobile accident from performing every duty of his occupation and as to whether after the 52-week period plaintiff was totally disabled from engaging in any occupation for wage and profit. *Shanahan v. Insurance Co.*, 143.

§ 46. Accident Insurance: Intentional and Untentional Acts

Plaintiff's evidence made out a prima facie case of death by accidental means where it tended to show that death of the insured was caused by an unexplained pistol shot. *McNeil v. Insurance Co.*, 348.

Insured's death did not result from "accidental bodily injury" where death was caused by his intentional intravenous injection of himself with methyl amphetamine. *Rossman v. Insurance Co.*, 651.

§ 51. Accident Insurance: Limitation As to Time

Where plaintiff offered into evidence the death certificate of insured showing that the interval between the accident and death was approximately 2½ hours, the trial court erred in directing verdict on the ground that plaintiff failed to prove that death of insured occurred within 90 days. *McNeil v. Insurance Co.*, 348.

§ 66. Notice and Proof of Loss Under Accident Policy

Proof by plaintiff that notice of insured's death had been delivered to defendant within 90 days was not required where defendant denied liability on other grounds. *McNeil v. Insurance Co.*, 348.

§ 69. Protection Against Injury by Uninsured Motorist

Where plaintiff commenced his wrongful death action after his claim against the uninsured motorist was already barred, he could not recover under the uninsured motorist endorsement on a policy issued by defendant. *Brown v. Casualty Co.*, 391.

§ 75. Payment and Satisfaction and Actions Against Tortfeasor

Since collision insurer was entitled to funds recovered by insured against tortfeasor only after insured's losses were paid, trial court properly awarded insurer the amount it had previously paid insured for damages to his vehicle less the amount of the judgment insured received against tortfeasor which remained unpaid. *Insurance Co. v. Supply Co.*, 302.

§ 79.1. Automobile Liability Insurance Rates

Order of the Commissioner of Insurance adopting a new private passenger automobile liability classification plan and rate structure was unsupported by the evidence and appropriate findings of fact. *Comr. of Insurance v. Automobile Rate Office*, 548.

LARCENY — Continued

§ 9. Verdict

Trial court's error in accepting defendant's pleas of guilty to inconsistent counts of larceny and receiving was not prejudicial where defendant received only one sentence. *S. v. Myers*, 311.

LIMITATION OF ACTIONS

§ 12. Institution of Action

Rule 41(a) permitting a new action to be commenced within one year after dismissal without prejudice of an action based on the same claim does not limit the time for bringing a new action to one year if the statute of limitations has not expired. *Whitehurst v. Transportation Co.*, 352.

MARRIAGE

§ 2. Validity and Attack

The sixth widow of deceased employee was entitled to workmen's compensation benefits where their marriage license was introduced into evidence and where deceased's fifth widow failed to prove the illegality of the sixth marriage. *Hendrix v. DeWitt, Inc.*, 327.

MASTER AND SERVANT

§ 1. Nature and Requisites of the Relationship

Plaintiff was no longer an employee of defendant bank within the meaning of the bank's profit sharing plan and stock option plan after the bank imposed early retirement on plaintiff. *McCraw v. Bancorp, Inc.*, 21.

§ 3. Distinction Between Employee and Independent Contractor

A specialist employed to repair machinery on the owner's premises free of any supervision by the owner is an independent contractor. *O'Briant v. Welding & Steel Service*, 13.

§ 9. Action to Recover Compensation

Bank could properly deduct from amount bank agreed to pay plaintiff from date of his early retirement until his 65th birthday payments made to plaintiff under bank's group disability plan. *McCraw v. Bancorp, Inc.*, 21.

§ 20.5. Liabilities of Contractor for Injuries to Contractee

Independent contractor was liable to the owner for fire damage to machinery caused by the contractor's negligence while welding machinery on the owner's premises. *O'Briant v. Welding & Steel Service*, 13.

§ 56. Causal Relation Between Employment and Injury

Evidence was sufficient to support Industrial Commission's determination that the manager of a drive-in restaurant was killed by accident arising out of and in the course of his employment when he was shot during a struggle with police officer in the restaurant parking lot. *Rosser v. Wagon Wheel, Inc.*, 507.

§ 65. Hernia and Back Injuries

Disc injury suffered by plaintiff while installing a stand on a steel beam some 70 feet above the ground resulted from an accident within the

MASTER AND SERVANT — Continued

meaning of the Workmen's Compensation Act. *Dunton v. Construction Co.*, 51.

There was competent evidence to support determination by the Industrial Commission that there was no causal connection between accident and plaintiff's hernia. *Lutes v. Tobacco Co.*, 380.

§ 79. Persons Entitled to Payment

The sixth widow of deceased employee was entitled to workmen's compensation benefits where their marriage license was introduced into evidence and where deceased's fifth widow failed to prove the illegality of the sixth marriage. *Hendrix v. DeWitt, Inc.*, 327.

§ 80. Rates and Regulations of Compensation Insurers

Evidence supported determination by the Comr. of Insurance that workmen's compensation insurers should be allowed a profit of 2.5% of total premium received and that a 3.4% increase should be allowed in workmen's compensation insurance rates. *Comr. of Insurance v. Attorney General*, 263.

In determining workmen's compensation insurance rates, Insurance Comr. is not required to consider amount of capital necessary to engage in the workmen's compensation insurance business in N. C., the rate of return needed to attract such investment capital, or investment income received by compensation insurers. *Ibid.*

Insurance commissioner had discretion to use countrywide expense data in fixing workmen's compensation insurance rates. *Ibid.*

§ 90. Notice to Employer of Accident

Industrial Commission properly deferred decision as to whether plaintiff's workmen's compensation claim was barred because of failure to give written notice of the accident to the employer within 30 days where there was no evidence upon which the Commission could determine whether plaintiff had reasonable excuse for failing to give notice or whether defendant employer had been prejudiced thereby. *Cross v. Fieldcrest Mills*, 29.

§ 91. Filing of Claim

Letter from plaintiff's counsel to the Industrial Commission sufficiently complied with the requirement that a claim be filed with the Commission within two years after the accident. *Cross v. Fieldcrest Mills*, 29.

MONOPOLIES

Plaintiff's refusal to sell its recordings to dealers who also sell the "pirated" tapes of defendants is not unlawful. *Records v. Tape Corp.*, 207.

MORTGAGES AND DEEDS OF TRUST

§ 18. Cancellation of Deeds of Trust

Trial court should have entered summary judgment for plaintiffs in their action to cancel a deed of trust executed to defendants. *Ryals v. Barefoot*, 564.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

Statutes providing for annexation of territory by municipalities with population less than 5000 do not constitute an unlawful delegation of legislative power. *Williams v. Town of Grifton*, 462.

Petition to have an annexation ordinance declared invalid sufficiently set out petitioners' exceptions to the annexation procedure. *Ibid.*

Where a map of a subdivison of an undeveloped tract of land had not been recorded in office of Register of Deeds, the municipality properly considered the land as farmland and not as separate lots in determining the character of the land to be annexed. *Ibid.*

Evidence was sufficient to support court's findings that proposed police protection for areas to be annexed was adequate, that proposed fire protection for one area was adequate but that proposed fire protection for a second area was inadequate in that there will be a deficiency in water pressure. *Ibid.*

§ 22. Purchase and Sale of Property

Trial court erred in denying plaintiff's motion for preliminary injunction to enjoin defendants from exercising rights of ownership over exchanged property where defendant Redevelopment Commission failed to comply with statutes governing disposition of city property. *Campbell v. Church*, 343.

§ 31. Review of Orders of Municipal Zoning Boards

Summary judgment was properly entered against defendant where the zoning ordinance in question required that a special permit be secured for the particular activity in which defendant was engaged and defendant failed to obtain a permit. *Forsyth County v. York*, 361.

NARCOTICS

§ 2. Indictment

Judgment was arrested for fatal variance between indictment and proof where defendant was charged with distribution of marijuana but found guilty of possession with intent to distribute. *S. v. Rush*, 109.

Indictment was insufficient to charge second offense of possession of heroin under Controlled Substances Act where previous conviction was under Uniform Narcotic Drug Act. *S. v. Cole*, 611.

§ 3. Competency and Relevancy of Evidence

A bag of marijuana was admissible where there was sufficient evidence identifying the marijuana as the same item sold by defendant. *S. v. Hendrix*, 99.

Defendants in a prosecution for possession of narcotic drugs were not prejudiced by erroneous admission of testimony that a bottle exploded two days after it was seized from their residence. *S. v. Walsh*, 420.

Trial court properly allowed an officer to give opinion testimony that one defendant was under the influence of marijuana at the time of the search of defendants' residence. *Ibid.*

Trial court did not err in permitting a State's witness to weigh a bag containing marijuana in the presence of the jury. *Ibid.*

NARCOTICS — Continued

Trial court did not err in permitting the jury visually to compare unanalyzed substances in packages seized from defendant with other seized packages analyzed as containing marijuana. *S. v. Haltom,* 646.

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in a prosecution for possession of marijuana with intent to distribute and distribution of marijuana. *S. v. Stanback,* 375.

Evidence was sufficient to withstand nonsuit in prosecution for feloniously distributing and dispensing a controlled substance where it tended to show that defendant sold drugs without a prescription. *S. v. Bland,* 560.

Evidence was sufficient to withstand defendant's motion for nonsuit in a prosecution for possession of marijuana with intent to distribute where it tended to show that defendant had in his possession and control an automobile when marijuana was found therein. *S. v. Haddock,* 714.

§ 4.5. Instructions

Failure of the trial court to instruct that defendant was guilty only in the event he knew that the package he sold to a police officer contained heroin was error. *S. v. Stacy,* 35.

Instruction that defendant was charged with manufacturing marijuana with intent to distribute and to find defendant guilty of that charge the jury must find defendant manufactured marijuana with intent to distribute, if erroneous, did not prejudice defendant. *S. v. Elam,* 451.

Trial court did not err in failing to charge that consent is a necessary element of criminal possession of narcotics. *S. v. Walsh,* 420.

§ 5. Verdict and Punishment

Sentence of three years imprisonment and two years probation for possession of marijuana with intent to distribute was proper. *S. v. Harris,* 48.

NEGLIGENCE

§ 5. Dangerous Machinery

The doctrine of strict liability would not apply in action against a car manufacturer to recover for injuries received in a one-car accident when the accelerator stuck. *Williams v. General Motors Corp.,* 337.

§ 6. Res Ipsa Loquitur

The doctrine of res ipsa loquitur would not apply in plaintiff's action against a car manufacturer to recover for injuries received in a one-car accident. *Williams v. General Motors Corp.,* 337.

§ 29. Sufficiency of Evidence of Negligence

Plaintiff's evidence was insufficient for the jury on the issue of negligence of the manufacturer of an automobile in an action to recover for injuries received in a one-car accident allegedly caused by a defective carburetor. *Williams v. General Motors Corp.,* 337.

Trial court erred in failing to allow defendants' motion for directed verdict in an action to recover for injuries sustained by minor plaintiff when he was run over by a forklift allegedly operated by defendants' minor son. *Anderson v. Butler,* 627.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 3. Actions

Trial court in a church property dispute erred in determining the issue on the basis of the two factions' departure from the doctrines and practices of the church prior to its division. *Atkins v. Walker*, 119.

ROBBERY

§ 3. Competency of Evidence

Defendants were not prejudiced by the introduction into evidence of a knife found on one defendant but not used in the commission of the crime charged. *S. v. Neal*, 426.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence that defendant, with a gun in his hand, demanded and received money from a restaurant operator was sufficient to support his conviction of armed robbery. *S. v. Hines*, 87.

To prove the element of intent in a robbery prosecution, the State must show only that the taking was with intent permanently to deprive the rightful possessor of the use of the property. *S. v. Meeks*, 195.

Evidence was sufficient to be submitted to the jury where it tended to show that defendants robbed a cab driver at knife point. *S. v. Neal*, 426.

State's evidence was sufficient for the jury on the issue of defendants' guilt of conspiracy to commit common law robbery and common law robbery of a store proprietor. *S. v. Lipscomb*, 747.

Identification testimony was sufficient for jury in armed robbery prosecution. *S. v. Pate*, 701.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Trial court in armed robbery prosecution was not required to instruct the jury on the lesser included offense of larceny. *S. v. Hubbard*, 431.

Trial court in armed robbery case adequately instructed the jury as to the specific intent with which the property must have been taken. *S. v. Moore*, 368.

Trial court in a prosecution for aiding and abetting in armed robbery did not err in failing to submit lesser included offense of accessory before the fact. *S. v. Lyles*, 632.

§ 6. Verdict and Sentence

Trial court in an armed robbery case did not abuse its discretion in imposing a more severe sentence upon defendant than upon his codefendant. *S. v. McClinton*, 734.

RULES OF CIVIL PROCEDURE

§ 3. Commencement of Action

Action was commenced when summons was issued and plaintiff was granted an extension of time to file his complaint, not when the complaint was actually filed, notwithstanding defendant was not personally served but service was thereafter made by publication. *Sink v. Easter*, 151.

§ 4. Process

In action in which service was by publication, plaintiff showed sufficient justification for omission of mailing of copy of complaint and

RULES OF CIVIL PROCEDURE — Continued

allegedly due from defendant under a Transfer of Interest Agreement executed by defendant. *Commercial Credit Corp. v. McCorkle,* 397.

§ 59. New Trial; Amendment of Judgment

Error in instructions in an action to probate a holographic will required a new trial. *In re Will of Herring,* 357.

§ 60. Relief from Judgment

A judge may not set aside a judgment under Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment" without a showing based on competent evidence that justice requires it. *Highfill v. Williamson,* 523.

§ 70. Judgment for Specific Acts; Vesting Title

Trial court erred in awarding plaintiff monetary damages for defendant's noncompliance with a consent judgment. *Elliott v. Burton,* 291.

Plaintiff's original cause of action became merged into a consent judgment and plaintiff could effect compliance with the judgment through methods provided in Rule 70. *Ibid.*

SALES

§ 17. Sufficiency of Evidence in Breach of Warranty Action

Plaintiff who was injured while driving a borrowed automobile could not recover from the manufacturer of the automobile on the theory of breach of warranty. *Williams v. General Motors Corp.,* 337.

§ 22. Action for Personal Injury Based Upon Defective Goods

The doctrine of res ipsa loquitur would not apply in plaintiff's action against a car manufacturer to recover for injuries received in a one-car accident, and plaintiff's evidence was insufficient to be submitted to the jury on the theory of negligence. *Williams v. General Motors Corp.,* 337.

§ 23. Inherently Dangerous Articles

The doctrine of strict liability would not apply in an action against a car manufacturer to recover for injuries received in a one-car accident when the accelerator stuck. *Williams v. General Motors Corp.,* 337.

SCHOOLS

§ 11. Liability for Torts

Duty of a landlord to an invitee applies to a board of education if the defense of sovereign immunity has been waived by the purchase of liability insurance. *Clary v. Board of Education,* 637.

A high school basketball player was contributorily negligent in colliding with a glass panel in the gymnasium wall some three feet from the end line of the basketball court while running wind sprints from one end of the court to another. *Ibid.*

§ 15. Interrupting or Disturbing Public Schools

Record fails to show that superior court judge, school superintendent or solicitor acted in bad faith in issuance of injunctions prohibiting broad scope of activities by the public relating to the schools. *Moore v. John Doe,* 131.

SEARCHES AND SEIZURES

STATE

STATUTES

§ 4. Construction in Regard to Constitutionality

Defendant's allegation of the unconstitutionality of a section of a city ordinance did not affect defendant's conviction under other sections of the ordinance where the sections were severable. *S. v. Frinks*, 271.

Where two constructions of a city ordinance requiring a permit to parade were possible, the court adopted the interpretation which prevented a finding of unconstitutionality and held that the ordinance was a reasonable regulatory provision which did not constitute an unconstitutional prior restraint on First Amendment rights. *Ibid.*

§ 11. Repeal

Defendant's conviction of possession of a firearm by a felon is vacated where, pending his appeal, defendant's citizenship rights were restored and he was thereby exempted from the provisions of the firearm statute. *S. v. Currie*, 241.

TAXATION

§ 9.5. Taxes on Exports and Imports

Where plaintiff imported, sorted and stacked parts for crawler-type vehicles, an entire shipment of parts did not constitute the "original package" for purposes of taxation by the defendant, and the sorting and stacking of the goods did not cause them to lose their immunity from taxation. *Wilson v. County of Wake*, 536.

§ 25. Ad Valorem Taxes

Defendant who was in possession of restaurant equipment which was the subject of a conditional sales agreement was the owner of the property and was the proper party to list the property for ad valorem taxes. *Food Service v. Balentine's*, 654.

TORTS

§ 3. Rights Inter Se of Defendants Joined by Plaintiff

Plaintiff insurer is not entitled to contribution from defendant where the jury in a third party's action against plaintiff's insureds and against defendant found no negligence on the part of defendant, although the jury found contributory negligence by defendant in her cross-action against plaintiff's insureds. *Insurance Co. v. Surratt*, 745.

TRIAL

§ 6. Stipulation

Stipulation between the parties' counsel did not compel the finding that deceased employee's marriage to his sixth widow was invalid. *Hendrix v. DeWitt, Inc.*, 327.

§ 58. Findings and Judgment of the Court

There is a presumption that the trial court in a nonjury trial did not consider hearsay evidence that was admitted. *Williams v. Town of Grifton*, 462.

TRUSTS

§ 6. Title, Authority and Duties of Trustee and Right to Convey

Where income of a trust was insufficient to meet the reasonable needs of the beneficiary, trustee could not terminate the trust by delivering to the beneficiary deeds to the real estate constituting the corpus or by delivering all of the proceeds of sale of the real estate to the beneficiary. *Jordan v. Campbell*, 97.

UNFAIR COMPETITION

Defendant's appropriation of recording performances owned by plaintiff by reproducing them on magnetic tapes for sale in competition with plaintiff's recordings constituted unfair competition. *Records v. Tape Corp.*, 207.

Any tying arrangement plaintiff may have had concerning the production of its records or any refusal by plaintiff to sell to customers of defendants would not invoke the "clean hands" doctrine in an action seeking injunctive relief and damages for "pirating" of plaintiff's recordings. *Ibid.*

Plaintiff's refusal to sell its recordings to dealers who also sell the "pirated" tapes of defendants is not unlawful. *Ibid.*

Individual who controls corporate defendant is subject to personal liability for damages resulting from corporate defendant's piracy of plaintiff's recordings. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 13. Form and Formation of Contract

Arbitration clause in yarn contracts sent to plaintiff was a proposal for addition to the contracts entered by telephone within the meaning of the U.C.C. *Hosiery Mills v. Burlington Industries*, 678.

Yarn contract sent by defendant to plaintiff after plaintiff ordered yarn from defendant by telephone did not meet the criterion of "confirmation of the contract" set forth in the statute of frauds provision of the U.C.C. *Ibid.*

§ 15. Warranties

Plaintiff who was injured while driving a borrowed automobile could not recover from the manufacturer of the automobile on the theory of breach of warranty. *Williams v. General Motors Corp.*, 337.

§ 27. Rights of Holder

Plaintiff, the beneficial owner of a car registered in his mother's name which was wrecked by a third person, did not take for value a draft given by the driver's insurer to plaintiff's mother and the driver in settlement of damages to the car and thus was not a holder in due course of the draft. *Bennett v. Guaranty Co.*, 66.

§ 71. Particular Transactions or Security Devices

An agreement between the parties whereby defendant was to use restaurant equipment for a given term at which time plaintiff agreed to transfer the equipment without further charge to defendant was a conditional sales contract. *Food Service v. Balentine's*, 654.

UTILITIES COMMISSION

§ 3. Carriers

Commission rule requiring an applicant seeking to relocate a common carrier franchise route over a new highway to show only that the proposed route will provide safer, quicker and improved service is a proper rule. *Utilities Comm. v. Coach Co.*, 597.

Evidence supported Commission's approval of applicant's relocation of a bus route between Raleigh and Durham, and supported Commission's denial of another carrier's application for authority to establish a route between the same two cities. *Ibid.*

Evidence of a need for local bus service to carry passengers to and from work does not establish the need for a new common carrier franchise route. *Ibid.*

The Utilities Commission had no authority to enter an order requiring two bus companies to renegotiate an equitable equipment interchange agreement to provide through passenger service between Durham and Wilmington. *Ibid.*

WATERS AND WATERCOURSES

§ 6. Title and Rights in Navigable Waters

Civil War cannons recovered from the bottom of the Roanoke River were underwater archaeological artifacts whose ownership rested in the State. *S. v. Armistead*, 704.

WEAPONS AND FIREARMS

Defendant's conviction of possession of a firearm by a felon is vacated where, pending his appeal, defendant's citizenship rights were restored and he was thereby exempted from the provisions of the firearm statute. *S. v. Currie*, 241.

WILLS

§ 8. Revocation of Will

Defendant's marriage in 1963 immediately revoked his will, notwithstanding subsequent statutory amendment enacted prior to testator's death which provided that a will was not revoked by a subsequent marriage. *In re Mitchell*, 236.

§ 23. Instructions in Caveat Proceeding

In a proceeding to probate an alleged lost holographic will of testatrix, propounders are entitled to a new trial where the trial court incorrectly instructed the jury on the quantum of proof required to show the existence of a lost instrument. *In re Will of Herring*, 357.

§ 28. General Rules of Construction

Intent of testator must be given effect in the construction of his will. *Trust Co. v. Lawrence*, 487.

§ 30. Presumptions

Where testator had many relatives in addition to those named in his will, it was reasonable to assume that he did not intend for them to be-

WILLS — Continued

come owners by intestacy laws of fractional undivided interests in his house and lot. *Trust Co. v. Lawrence*, 487.

§ 34. Life Estates and Remainders

Where testator devised a life estate in all his property to a named son and the remainder to "all my children," testator intended the son given the life estate to share in the remainder with testator's other children. *Coburn v. Gaylord*, 104.

§ 40. Devices with Power of Distribution

Where husband devised his wife a life estate with power to convey, the wife's exercise of her discretion with respect to the conveyance of the property was subject to the review of no one. *Hill v. Hill*, 42.

§ 52. Residuary Clauses

Words employed by the testator "all remaining funds after my estate is settled and all bills paid" were intended by him as a general residuary disposition to the plaintiff of his entire estate, including all of his real property. *Trust Co. v. Lawrence*, 487.

WORD AND PHRASE INDEX

PRINTED BY
COMMERCIAL PRINTING COMPANY, INC.
RALEIGH, NORTH CAROLINA