NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ROBERT E. HIGGINS AND WIFE, MARGARET G. HIGGINS v. BUILDERS AND FINANCE, INCORPORATED

No. 733SC759

(Filed 28 November 1973)

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

   Assignments of error not supported by reason or argument or the citation of authority in appellant's brief are deemed abandoned.

2. **Rules of Civil Procedure § 41— nonjury trial — motion for involuntary dismissal**

   In nonjury civil cases the appropriate motion by which a defendant may test the sufficiency of plaintiff's evidence to show a right to relief is a motion for involuntary dismissal under Rule 41(b).

3. **Appeal and Error § 58— appeal from injunction — authority of appellate court to make findings**

   While the findings of fact made by the trial court in an interlocutory order granting or denying injunctive relief are not binding on appeal, and the appellate court may review the evidence and make its own findings, the trial court's findings are binding if supported by the evidence when the appeal is from a judgment which is a final determination of the rights of the parties.

4. **Deeds § 20— restrictive covenants — single family dwelling — modification of duplex**

   The cutting of a 3-foot wide opening between the two portions of each of two duplex houses and the finishing of but one complete kitchen in each house did not constitute a sufficient modification of the duplexes so that they must be considered as conforming as a matter of law to a restrictive covenant prohibiting use of land in a subdivision for other than single family residential dwellings, and the trial court's findings were sufficient to support its conclusion

that the houses have not been converted into single family residential dwellings to conform to the restrictive covenant.

5. **Deeds § 20— restrictive covenants — single family dwelling — prohibition of unoccupied duplex**

Subdivision restrictive covenant providing that "no structure shall be erected, altered, placed or permitted to remain on any lot other than for use as a single family residential dwelling" is not merely a "use" restriction prohibiting the occupancy of each house by more than one family but would be violated by the erection of a duplex house on any lot, even though it remained vacant and unoccupied by even one family.

6. **Deeds § 20— restrictive covenants — single family dwelling — consent order permitting modification of duplexes — effect**

In an action for injunctive relief to enforce subdivision restrictive covenants, consent order permitting defendant to modify partially completed duplex structures into single family residential dwellings to conform with the restrictive covenants merely freed defendant from a temporary restraining order prohibiting construction on the structures and neither freed defendant from the effect of the restrictive covenants nor in any way inhibited the court's power to enforce them when defendant persisted in their violation.

APPEAL by defendant from *Tillery, Judge,* January 1973 Civil Session of Superior Court held in CRAVEN County.

Civil action for injunctive relief to enforce restrictive covenants in a residential subdivision. Plaintiffs are the owners of Lot 1 and defendant is the owner of Lots 2, 3, 4 and 5 of North Hills as shown on a plat of said subdivision recorded in the office of the Register of Deeds of Craven County. Plaintiffs acquired their lot on 20 June 1969 by deed from the defendant. The subdivision was developed by Guion E. Lee and wife, who are principal stockholders of defendant, under a general scheme of development set forth in the recorded map, and common restrictions apply to all lots of like character or similarly situated in said subdivision. The particular restrictive covenant applicable to the lots of plaintiffs and defendant and pertinent to this appeal is as follows:

> "(1) LAND USE AND BUILDING TYPE: No structure shall be erected, altered, placed or permitted to remain on any lot other than for use as a single family residential dwelling, with a private garage for not more than two (2) automobiles. . . ."

This action was commenced on 26 May 1972. In their complaint filed that date plaintiffs alleged that defendant had commenced constructions on Lots 3 and 4 of duplex apartments

or multi-family dwellings in violation of the recorded restrictive covenants, and prayed for relief as follows: (1) for an immediate order restraining defendant from continuing construction of the duplex houses then under construction and directing defendant to appear and show cause why such order should not be continued; (2) for a permanent injunction enjoining defendant from constructing other buildings in North Hills in violation of the restrictive covenants; and (3) for a mandatory injunction to compel the defendant to modify the buildings then under construction to the end that they will conform to the restrictive covenants, or to remove said buildings.

A temporary restraining order was issued on 29 May 1972, restraining defendant from performing work of any kind on Lots 2, 3, 4 and 5 and directing defendant to appear on 5 June 1972 to show cause why the restraining order should not be continued until the final determination of this action. At the request of defendant, the show cause hearing was continued until 24 July 1972, the temporary restraining order being continued in effect until that date. On 24 July 1972 there was filed an order, dated 14 July 1972, signed by Judge Robert D. Rouse, Jr., Resident Judge of Superior Court, and consented to by the parties and their counsel. This consent order recites that it appeared to the court from statement of counsel "that all matters and things in controversy have been settled between the parties by the defendant agreeing to modify the existing structures situate upon Lots 3 and 4 of North Hills Subdivision . . . to conform with the restrictive covenants for said North Hills Subdivision recorded in Book 714, at page 206, Craven County Registry." The order then provided that the restraining order theretofore entered be modified as follows:

"1. Defendant may, at its option, commence constructions upon the existing structure situate upon Lots Numbers 3 and 4 of North Hills Subdivision to modify the exising structures into a single family residential dwelling upon each lot to conform with the restrictive covenants for North Hills Subdivision.

"2. Upon completion of the modification of the existing structures into single family residential dwellings to conform with the restrictive covenants for North Hills Subdivision, this action shall be dismissed."

On 7 September 1972 plaintiffs filed a motion in the cause alleging that defendant was not converting the duplex houses

into single family dwellings but had merely cut a doorway between the two apartments of said duplex houses and was about to complete them in such manner that they are, in fact, duplex houses and not single family residences. In this motion plaintiffs asked for an immediate order restraining defendant from continuing the construction of the duplex houses then under construction on Lots 3 and 4, for an order directing defendant to show cause why it should not be held in contempt of court for violating the restraining order theretofore entered, and that the consent order of 14 July 1972 which modified the restraining order theretofore entered "be terminated and set aside." In response to this motion, Judge Walter W. Cohoon, Judge presiding at the September session of Superior Court held in Craven County, signed an order dated 8 September 1972 restraining defendant from performing work of any kind on Lots 2, 3, 4 and 5 of North Hills, and ordering defendant to appear and show cause why this restraining order should not be continued until final determination of this action. Defendant filed answer to plaintiffs' motion of 7 September 1972 and alleged that it was defendant's intention "that the existing structure on each lot will accommodate only one family," and that modification then in progress pursuant to the consent order of 14 July 1972 "complies with the restrictive covenants for North Hills Subdivision." Following a hearing held in response to the show cause order, Judge Cohoon signed an order, dated 25 September 1972, in which he found as a fact that the structures upon the lots of land in controversy were "still under construction by the defendant and that the temporary retraining order entered on September 8, 1972 is premature and should be dismissed." In accordance with this finding, Judge Cohoon dismissed the temporary restraining order which he had entered on 8 September 1972 and ordered that the consent order signed by Judge Rouse on 14 July 1972 be continued in full force and effect.

This case then came to trial before Judge Bradford Tillery, presiding at the 29 January 1973 civil session of Superior Court, trial being before the Judge sitting without a jury. After hearing evidence presented by plaintiffs and defendant, Judge Tillery signed judgment dated 7 February 1973 making findings of fact and conclusions of law. On motion of defendant to make additional findings of fact, this judgment was subsequently amended, the amended judgment being dated and filed on 19 April 1973. In this amended judgment the court made findings of fact as to the ownership of the lots by the parties and the application

thereto of the restrictive covenants of record under the general scheme of development of the North Hills Subdivision, and in addition made, among others, specific findings of fact as follows:

> "6. That the Defendant has recently completed two certain buildings or dwellings. One on Lot 3 of North Hills Subdivision and one on Lot 4 of North Hills Subdivision.
>
> "7. That at the time of the commencement of each of said dwellings they were intended by the Defendant to be built as duplex houses and as such were not constructed for use as single family residential dwellings."
>
> * * * * *
>
> "12. That the buildings on Lots 3 and 4 of North Hills are now complete and in their present condition they have not been modified so as to conform to the building conditions and restrictive covenants of North Hills for that: (a) They have the general outside appearance of duplex houses; (b) They have two electrical drop service wires from the public utility serving said subdivision of each of said houses; (c) that each of said houses has a wall completely dividing one end of the residence from the other and that this wall has been modified only to the extent of cutting a 3 foot opening between two rooms in the back portion of the house; (d) that each of said residences has two utility rooms; (e) that each of said residences has plumbing and electrical facilities to accommodate separate washing machines and dryers in each of the separate utility rooms in said residences; (f) that each of said residences has two front doors and two back doors; (g) that each of said residences has one complete kitchen and in addition has wiring and plumbing 'stubbed in' for an additional kitchen; (h) that each of said residences has two electrical meters to serve separate electrical circuits in each residence; (i) that the official postal enumerations placed on the residences by the City of New Bern are 1505A & B and 1507A & B; (j) that the buildings on Lots 3 and 4 each have two air conditioning systems and two heating systems to heat and cool the separate ends of said residence.
>
> "13. Only one structure has been built upon Lot Number 3 of North Hills Subdivision.
>
> "14. Only one structure has been built upon Lot Number 4 of North Hills Subdivision.

"15. The structure upon Lot 3 is vacant, unoccupied and not in use.

"16. The structure upon Lot 4 of North Hills Subdivision is vacant, unoccupied, and not in use."

On these findings of fact the court made conclusions of law in substance as follows: that the construction of duplex residences on Lots 3 and 4 in the manner originally contemplated by defendant is in violation of the recorded restrictions applying to all lots of a like character in North Hills Subdivision; that the consent order entered by Judge Rouse on 14 July 1972 has been violated "for that the defendant did not commence construction upon the structures existing upon Lots 3 and 4, North Hills, as of that date for the purpose of modifying said structures into single family residential dwellings to conform with the restrictive covenants for North Hills Subdivision"; that "said structures have not as a matter of law been converted into single family residential dwellings to conform with the restrictive covenants"; and that plaintiffs are entitled to "such injunctive relief as will afford them an equitable remedy for the defendant's violation of the restrictive covenants and its failure to comply with the terms of the consent order above referred to."

Upon these findings of fact and conclusions of law, the court in the judgment dated 19 April 1973, adjudged and decreed that defendant be permanently enjoined from constructing in North Hills Subdivision any building in violation of the recorded restrictive covenants, and granted plaintiffs' prayer for a mandatory injunction to compel defendant to modify the buildings on Lots 3 and 4 to make them conform to such restrictive covenants. In connection with granting plaintiffs' prayer for a mandatory injunction, Judge Tillery ordered defendant to submit to the court within thirty days "a plan under which it proposes to modify said dwellings," and provided that if at conclusion of the thirty-day period the defendant had not submitted a plan acceptable to the court, this cause should come on for hearing "for such other and further action as the Court may deem just and proper."

On 18 May 1973 defendant submitted the following plan under which it proposed to modify the structures on Lots 3 and 4 as provided in the 19 April 1973 judgment:

"(1) To build an outdoor court 12 feet x 23 feet 6 inches enclosed by a solid fenced wall completely closing off

the front steps on the north end of each structure. The only access to the court would be from the inside of the dwelling house.

"(2) Install a wrought iron rail around the stoop and down the steps on the south end of the structure situate on Lot No. 3 of North Hills Subdivision.

"(3) If the Court so orders, the partition in the family room will be removed. This, however, is not a part of the Modification Plan since the present occupant of the dwelling house on Lot No. 3 of North Hills Subdivision prefers that the wall remain as is."

This case then came on for hearing before Judge Tillery, presiding at the 28 May 1973 session of Superior Court held in Craven County, upon the foregoing plan of modification as submitted by the defendant. On 20 June 1973 Judge Tillery signed judgment in which he concluded as a matter of law that the plan of modification submitted by defendant on 18 May 1973 was inadequate and not acceptable to the court in that it "would be insufficient to make said buildings conform to the building conditions and restrictive covenants of North Hills Subdivision as the same are recorded in Book 714 at page 206, Craven County Registry." The court ordered defendant, within sixty days after receiving notice of the judgment, "to remove the buildings located upon Lots Nos. 3 and 4 of North Hills Subdivision either by razing said buildings or by removing them from the limits of North Hills," as the subdivision is shown on the recorded plat. Defendant excepted to this judgment and appealed.

Lee & Hancock by C. E. Hancock, Jr. and Moses D. Lasitter for plaintiff appellees.

Dunn & Dunn by Raymond E. Dunn for defendant appellant.

PARKER, Judge.

[1] No reason or argument has been stated and no authority has been cited in appellant's brief in support of appellant's first four assignments of error. Accordingly, these will be taken as abandoned. Rule 28, Rules of Practice in the Court of Appeals.

[2] At the close of the evidence the attorney for defendant moved under Rule 50 of the Rules of Civil Procedure for a

"directed verdict dismissing the plaintiffs' case." Denial of this motion is the subject of appellant's fifth assignment of error. Directed verdicts are appropriate only in jury cases. *Bryant v. Kelly,* 279 N.C. 123, 181 S.E. 2d 438. This case was tried without a jury. In nonjury civil cases the appropriate motion by which a defendant may test the sufficiency of the plaintiff's evidence to show a right to relief is a motion for involuntary dismissal under Rule 41(b). Though defendant's motion was incorrectly designated, we shall treat it as having been a motion for involuntary dismissal under Rule 41(b) and shall pass on the merits of the questions appellant seeks to raise by this appeal. *Neff v. Coach Co.,* 16 N.C. App. 466, 192 S.E. 2d 587; *Mills v. Koscot Interplanetary,* 13 N.C. App. 681, 187 S.E. 2d 372.

G.S. 1A-1, Rule 52(a)(1) provides as follows:

> "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 and direct the entry of the appropriate judgment."

[3] The trial judge in the present case, after denying defendant's motion to dismiss, properly complied with the requirements of Rule 52(a)(1) by entering judgment in which the court found the facts specially. While upon an appeal from an interlocutory order granting or denying injunctive relief the appellate court is not bound by the findings of fact made by the trial court but may review the evidence and make its own findings of fact, *Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545, the rule is otherwise when, as here, the appeal is from a judgment which is a final determination of the rights of the parties. In such a case the trial court's findings of fact are binding on appeal, if supported by the evidence. *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149. "The mere fact that equitable (injunctive) relief is granted gives us no authority to modify findings determinative of issues of fact raised by the pleadings." *Cauble v. Bell,* 249 N.C. 722, 107 S.E. 2d 557. In the present case, the judgment appealed from is a final determination of the rights of the parties. Therefore, in this case the trial court's findings of fact are conclusive on this appeal, just as would be the verdict of a jury in a case tried before judge and jury, if there be evidence to support them, and this is so even though the evidence might sustain findings to the contrary. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29. Accordingly, the initial question presented by

this appeal is whether the evidence was sufficient to support the trial court's findings of fact. If so, these findings are binding on this appeal and the only question remaining is whether the facts found by the trial court are, in turn, sufficient to support its conclusions of law and the judgment entered.

[4] There was ample evidence to support the trial court's findings of fact. Defendant's witness, Guion E. Lee, who was the principal stockholder and an officer of defendant corporation, testified: "I intended to build duplex houses when I started these in this case." This witness had been one of the original developers of the North Hills Subdivision and as such had signed the instrument dated 28 April 1967 by which the restrictive covenants applicable in this case had been imposed. He testified that "[t]he restrictions in this subdivision preclude the use of duplex or multi-family dwellings," but expressed the view that "these restrictions are out-moded." Indeed, appellant does not challenge the trial court's finding, contained in Finding of Fact No. 7 in the judgment dated 19 April 1973, that "at the time of the commencement of each of said dwellings they were intended by the defendant to be built as duplex houses. . . ." Nor does appellant challenge the detailed findings contained in subparagraphs (a) through (j) in Finding of Fact No. 12 as to the exact manner in which the buildings have actually been completed. On this appeal appellant challenges only that portion of Finding of Fact No. 7 in which the court found that the buildings "were not constructed for use as single family residential dwellings," and that portion of Finding of Fact No. 12 in which the court found that the completed buildings "have not been modified so as to conform to the building conditions and restrictive covenants of North Hills." Appellant contends that cutting a 3-foot wide opening between the two portions of each duplex house and particularly the finishing of but one complete kitchen in each house so modified them that as a matter of law they must now be considered as conforming to the restrictive covenants. We do not agree. Appellant's contention simply ignores all of the remaining factual findings made by the trial court in Finding of Fact No. 12, all of which are fully supported by the evidence, and all of which tend to show that each structure which defendant has erected is in fact and in law, a structure "other than for use as a single family residential dwelling." Appellant's contention ignores as well the obvious fact that the two minimal changes made by it in the structures have not effectively changed them from what admittedly de-

fendant originally intended them to be. The insertion of a door into the 3-foot opening and the installing of a range and a sink for which plumbing and wiring are already provided in the unfinished kitchen, are all that is required to restore these structures exactly to their original design. When all facts found by the trial court are considered together, they fully support the court's conclusion that the structures erected by defendant "have not as a matter of law been converted into single family residential dwellings to conform with the restrictive covenants of North Hills Subdivision."

[5] Appellant's contention that the restrictive covenant with which we are here concerned is a "use" restriction, and that the most that plaintiffs are entitled to is an injunction prohibiting the occupancy or "use" of each house by more than one family, is equally unpersuasive. In clear language the restriction prohibits the erection, altering, placing or permitting to remain on any lot of any structure other than for use as a single family residential dwelling. Erecting on any lot or permitting to remain thereon any duplex house, even though it remain vacant and unoccupied and not "used" at all, even by one family, would be a violation of the covenant.

[6] We also find without merit appellant's final contention, made in its brief, that the consent order entered by Judge Rouse on 14 July 1972 established "the law of the case" and that the "most Judge Tillery could do would be to spell out in exact terms what, if anything, is additionally needed to modify the existing structures into a single family residential dwelling in accordance with the consent judgment entered on July 14, 1972." Appellant's contention completely mistakes the effect of the consent judgment signed by Judge Rouse. That judgment did not abrogate the restrictive covenants applicable to defendant's lots nor did it render the court thereafter powerless to enforce them in this litigation. Rather, the consent judgment served merely to free defendant from the restraining order theretofore entered to the extent of permitting defendant, at its option, to commence construction upon the structures which it had begun to build on Lots 3 and 4 "to modify the existing structures into a single family residential dwelling upon each lot to conform with the restrictive covenants for North Hills Subdivision." The consent judgment neither freed defendant from the effect of the restrictive covenants nor in any way inhibited the court's power to enforce them when defendant persisted in their violation.

The record in this case indicates that each of the several Superior Court Judges who have been concerned with this litigation have exercised patience and care to give defendant every reasonable opportunity to comply with the restrictive covenants and to minimize any damage it might suffer as a result of its own initial deliberate attempt to violate them. The record also indicates that defendant failed to make any good faith effort to utilize the opportunities allowed it to bring itself into compliance with those restrictions. Indeed, the evidence in this case is indicative of a studied, deliberate and determined effort on the part of the defendant to persist in its original intention of violating the covenants. Defendant's own conduct led directly to the judgment of which it now complains, and defendant is solely responsible for such loss or expense as it may now incur by reason of being required to comply with that judgment. Defendant may not justly complain at the harshness of the judgment finally entered. Its own conduct made obvious that any less stringent measure would be ineffectual. The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge CAMPBELL concur.

MATTHEW N. MEZZANOTTE, AND WIFE, GENEVIEVE MEZZANOTTE v. JAMES J. FREELAND, AND WIFE, MAXINE H. FREELAND, DEFENDANTS

— AND —

DANIEL BOONE COMPLEX, INC., THIRD PARTY PLAINTIFF

No. 7315SC608

(Filed 28 November 1973)

1. **Frauds, Statute of § 2— contract to convey land — sufficiency of description**

The statute of frauds requires that any land sale contract or a memorandum thereof be put in writing and include a description of the land either certain in itself or capable of being reduced to certainty by something extrinsic to which the contract refers.

2. **Frauds, Statute of § 2— contract to convey land — reference to another writing — sufficiency of description**

An agreement between the parties whereby plaintiffs agreed to buy and defendants agreed to sell a particular tract of land was

sufficient to satisfy the statute of frauds where the agreement made reference to an "Attachment" which described the tract, the "Attachment" consisted of five deeds which provided an adequate description of the property, and the "Attachment," though not physically connected to the contract of sale, was delivered contemporaneously with the execution of the contract.

3. **Contracts § 4— contract for sale of land — promise of vendee to obtain loan — sufficiency of consideration**

A contract between the parties for the sale of land which was "contingent upon . . . [plaintiffs] being able to secure a second mortgage from NCNB on such terms and conditions as are satisfactory to them . . ." was a valid and enforceable contract, supported by consideration, since the contract included an implied promise by plaintiffs to use reasonable effort to procure a loan and to exercise good faith in deciding whether the terms of the loan were satisfactory.

4. **Contracts §§ 18, 20— contract for sale of land — failure to perform on time — waiver**

Where plaintiffs failed to tender performance on a contract for the sale of land within the required time limits, defendants could not claim that they were thereby relieved from performance since defendants did not furnish to plaintiffs an inventory of personalty and a list of outstanding leases in accordance with the terms of the contract, thus preventing plaintiffs from earlier compliance; furthermore, mutual agreement on a closing date some three months later than that specified in the contract constituted a waiver of any prior contractual deadlines for performance.

APPEAL by defendants from *McLelland, Judge,* 26 March 1973 Civil Session of Superior Court held in ORANGE County.

This is an action seeking specific performance of a contract of sale and damages for breach of contract.

On 2 May 1972 plaintiffs and defendants executed a contract under the terms of which plaintiffs agreed to buy and defendants agreed to sell a tract of land in Orange County, together with improvements and facilities, known as the Daniel Boone Complex. The contract set out the sales price and terms of payment which included a good faith deposit by plaintiffs of $5,000.00. It described the property being sold as:

> "a certain tract or parcel of land of approximately 85 acres situate in the County of Orange, State of North Carolina, together with all appurtenant buildings and other improvements and further together with all inventory presently owned by said parties of the first part located on the herein described premises and all equipment presently necessary to efficiently maintain the enterprises presently oper-

> ated by parties of the first part thereon; said parcel of real estate being more particularly described in Attachment hereof."

It was understood by the parties that the "Attachment" consisted of photocopies of five deeds which were never physically attached to the written instrument.

Among the other provisions of the 2 May 1972 agreement were the following:

> "2. This agreement is contingent upon parties of the second part [plaintiff] being able to secure a second mortgage from North Carolina National Bank on such terms and conditions as are satisfactory to them in order to finance the closing and to secure additional working capital. . . .
>
> "3. That the sale contemplated hereunder and all transfers and execution of documents in connection therewith shall be completed on the thirtieth (30th) day from the date of this Agreement, taxes to be pro rated as of the date of closing.
>
> "4. That as an Exhibit hereto and within ten (10) days after execution hereof, parties of the first part agree to furnish by said Exhibit copies of all written leases or memoranda describing all oral leases upon any buildings or properties located upon the herein described premises. . . .
>
> "5. Parties of the first part further agree to furnish as an additional Exhibit a full and complete inventory of all personal property and equipment located on said premises and any fixtures and buildings attached thereto and will further execute a Bill of Sale to all items described therein at the closing upon the execution of this Agreement. . . ."

On 17 June 1972 the parties executed an "Addendum" to their contract, affirming its continuing validity, extending the time for performance, and increasing the purchase price in view of the fact that additional motel units had been built.

Defendants did not furnish an inventory of personal property until August 15, and they did not furnish a list of outstanding leases until September 5.

In a letter dated 18 August 1972 defendant James J. Freeland wrote plaintiff Matthew N. Mezzanotte, "We will close out the sale of the Daniel Boone property on August 28, however, I would prefer closing it on September 5 if possible. Kindly let me know which day would be satisfactory with you. . . ." Plaintiffs agreed to the September 5, 1972 closing date. They were unable to obtain a loan from the North Carolina National Bank but raised the necessary funds through other sources and on 5 September tendered the required down payment of $200,000.00 together with note and deed of trust for the balance of the purchase price in accordance with the terms of the contract. Defendants rejected plaintiffs' tender and refused to complete the sale. Plaintiffs then brought this action.

The parties waived jury trial, and the case was heard by the court sitting without a jury.

The court made findings of fact and determined as a matter of law that the agreements executed by plaintiffs and defendants on 2 May 1972 and 17 June 1972 constituted a valid contract of sale. He further found that plaintiffs' tender of performance on 5 September 1972 was a substantial compliance with their contract obligations and that defendants' refusal to convey the property constituted a breach of their contract entitling plaintiffs to specific performance and damages which would reasonably compensate for the value of personal property previously sold by defendants and loss of profits after 5 September 1972.

From a judgment which directed defendants to convey the real and personal property described in the contract upon payment of the purchase price according to the terms of the contract and awarded $100,000.00 to plaintiffs as damages, the defendants have appealed.

Manning, Allen & Hudson, by Frank B. Jackson and John T. Manning, for plaintiff appellees.

Graham & Cheshire, by Lucius M. Cheshire, for defendant appellants.

BALEY, Judge.

In this case defendants have assigned errors which concern primarily the application of the law to facts which are not in serious dispute. There is no exception to the finding of

the court concerning the execution of the two agreements dated 2 May 1972 and 17 June 1972 which incorporate the terms of the proposed sale. Defendants take no exception to the findings of fact by the court that they did not supply any inventory of personalty until 15 August 1972 nor any list of outstanding leases until 5 September 1972. There is no apparent disagreement with the following specific findings of fact by the court:

> "6. After May 2nd, 1972, and again after June 17th, 1972, plaintiffs made numerous requests of defendants for certification of the personalty inventory and outstanding lease information, indicating that it was essential to plaintiffs' financial and promotional programs, but did not receive it. Plaintiffs employed consultants, made operational projections for establishment of a Daniel Boone chain or franchise operation, procured a survey of the realty (the plat of Robert A. Jones, Surveyor, June, 1972, is in evidence), a title search, title insurance, formed limited partnerships for projected financing and created a closed corporation, Daniel Boone Complex, Inc., third party plaintiff in this action.
>
> "7. The extended period for performance expired on August 1st, 1972. Neither plaintiffs nor defendants tendered performance before that date, and neither repudiated the agreement nor charged the other with breach.
>
> * * *
>
> "9. By letter of August 18th, 1972, defendants agreed to close the sale on August 28th, but expressed a preference for closing on September 5th, 1972. Plaintiffs agreed to close on September 5th."

Defendants have based their assignments of error upon three primary contentions. They contend that there is no enforceable contract of sale because

1. The description contained in the 2 May 1972 agreement was not sufficient to identify the property and comply with the statute of frauds.

2. There was no consideration on the part of plaintiffs since the liability of plaintiffs was contingent upon their ability to obtain financing satisfactory to themselves.

3. Plaintiffs did not tender payment and fulfill their obligation within the time required by the contract.

[1] First, the statute of frauds. G.S. 22-2 provides that any land sale contract "shall be void unless said contract, or some memorandum or note thereof, be put in writing." The memorandum must contain a description of the land "either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers." *Lane v. Coe,* 262 N.C. 8, 12, 136 S.E. 2d 269, 273. It need not be a single document, but may consist of several papers. *Hines v. Tripp,* 263 N.C. 470, 139 S.E. 2d 545; *Smith v. Joyce,* 214 N.C. 602, 200 S.E. 431; *Greenberg v. Bailey,* 14 N.C. App. 34, 187 S.E. 2d 505. The papers need not be physically attached if they are connected by internal reference. *Smith v. Joyce, supra.*

[2] Here the May 2 contract when considered together with the "Attachment" constitutes a memorandum sufficient to satisfy the statute of frauds. The contract specifically stated that the tract being sold was "more particularly described in Attachment hereof." The five deeds which constituted the "Attachment" provided an adequate description of the property, some covering the entire tract and others referring to portions of the entire tract which were obviously excluded as having been previously conveyed. There is no patent ambiguity. The surveyor was able to prepare a plat of the property which was offered in evidence. Even though the "Attachment" was not physically connected to the contract of sale, it was delivered contemporaneously with the execution of the contract, and the court found:

> "These copies had been procured by defendants' real estate agent who was present with such copies at the signing of the writing, and were, in the contemplation of the parties, attached to the writing. An accurate description of the Daniel Boone realty intended to be in part the subject of the contract of sale can be determined from these documents."

Under all the circumstances the meaning of the writing including the description is clear and certain, and it is sufficient to comply with the statute of frauds and bind the parties. *Gilbert v. Wright,* 195 N.C. 165, 141 S.E. 577.

[3] The second contention of the defendants that the contract on May 2 was not supported by valid consideration is dependent upon the interpretation to be placed upon the promise of plaintiffs to purchase the properties in accordance with the terms of

the contract. Defendants assert that since the agreement was contingent upon the plaintiffs obtaining "satisfactory" financing from North Carolina National Bank the promise to buy was illusory and cannot constitute consideration.

It seems clear that the parties in signing the contract of sale intended to be mutually bound to comply with its terms. They understood that plaintiffs would make an honest good faith effort to acquire financing satisfactory to themselves from NCNB. The contract implies that plaintiffs would in good faith seek proper financing from NCNB and that such financing in keeping with reasonable business standards could not be rejected at the personal whim of plaintiffs but only for a satisfactory cause. Where a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play. The record here indicates that the parties so understood their obligation and that plaintiffs applied for a loan from NCNB and obtained a verbal commitment but were not able to secure the loan and arranged other financing in order to meet their obligations under the contract. A promise conditioned upon an event within the promisor's control is not illusory if the promisor also "impliedly promises to make reasonable effort to bring the event about or to use good faith and honest judgment in determining whether or not it has in fact occurred." 1 Corbin on Contracts, § 149, at 659. The implied promise is enforceable by the promisee, and it constitutes a legal detriment to the promisor; therefore it furnishes sufficient consideration to support a return promise. In *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 147, 139 S.E. 2d 362, 368, our court approved this language concerning consideration:

> "It has been held that 'there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.' "

Although there are no North Carolina cases specifically in point, courts in other jurisdictions have recognized that a conditional promise may be accompanied by an implied promise of good faith and reasonable effort, and that it need not be illusory.

For example, in *Jay Dreher Corp. v. Delco Appliance Corp.*, 93 F. 2d 275 (2d Cir. 1937), defendant granted plaintiff a franchise to sell its products in a certain territory. Plaintiff agreed to sell these products and build up defendant's business in the specified territory. Defendant reserved the right to reject any order sent in by plaintiff, and plaintiff contended that this made defendant's promise illusory. In an opinion by Judge Learned Hand, the court held that the contract was supported by consideration, finding an implied promise "that the defendant will use an honest judgment in passing upon orders submitted." *Id.* at 277.

In *Commercial Credit Co. v. Insular Motor Corp.*, 17 F. 2d 896 (1st Cir. 1927), defendant, an automobile dealer, agreed to sell plaintiff all the time sales obligations of its customers for two years, and plaintiff agreed to purchase these obligations. The contract provided that plaintiff would purchase only "acceptable" time sales obligations. The court rejected defendant's contention that the contract lacked consideration. It held that the contract did not allow plaintiff to refuse arbitrarily to purchase defendant's obligations. "Acceptable does not mean acceptable by whim; it means acceptable within the usual business meaning of the word as applied to this kind of business dealings." *Id.* at 899-900.

In *Richard Bruce & Co. v. J. Simpson & Co.*, 40 Misc. 2d 501, 243 N.Y.S. 2d 503 (Sup. Ct. 1963), plaintiff agreed to underwrite a public offering of defendant's stock, and defendant agreed to pay plaintiff a commission. Defendant violated the agreement, and plaintiff sued for breach of contract. Defendant asserted that the contract was void for lack of consideration, pointing to a provision allowing plaintiff to terminate the contract if it "in its absolute discretion, shall determine that market conditions or the prospects of the public offering are such as to make it undesirable or inadvisable." The court held the contract enforceable, stating that plaintiff's discretion was only "a discretion based upon fair dealing and good faith—a reasonable discretion." *Id.* at 504, 243 N.Y.S. 2d at 506.

Several cases have upheld the validity of contracts quite similar to the one involved in the present case. In *Mattei v. Hopper*, 51 Cal. 2d 119, 330 P. 2d 625 (1958), plaintiff agreed to buy a tract of land from defendant. The contract provided that it was "[s]ubject to Coldwell Banker & Company obtaining leases satisfactory to the purchaser." The court held that plain-

tiff was bound by an implied promise to use good faith in determing whether Coldwell Banker's leases were "satisfactory." Therefore, his promise was not illusory and the contract was enforceable.

In *Kays v. Brack,* 350 F. Supp. 1243 (D. Idaho 1972), plaintiffs agreed to lease a tract of land and buy some corporate stock from defendants. The contract provided: "The Buyer's agreement to purchase is contingent upon the buyer being able to secure financing acceptable to the buyer, and if the buyer is unable, despite his best efforts, to obtain such financing within 10 days after all sellers have signed this agreement, the buyer shall notify the sellers and either party shall have the right to cancel this transaction." The court held that plaintiffs' promise was not illusory, since they were required to use their best efforts to obtain financing. A similar case is *White & Bollard, Inc. v. Goodenow,* 58 Wash. 2d 180, 361 P. 2d 571 (1961).

Most closely in point is *Sheldon Simms Co. v. Wilder,* 108 Ga. App. 4, 131 S.E. 2d 854 (1963). Here plaintiff entered into a contract to purchase real property from defendant. The contract provided: "This contract is contingent upon the purchaser's ability to obtain loan on said property of $24,000.00 with maximum interest of 6¼ percent per annum, for a maximum period of twenty years." The court held that the contract was valid and supported by consideration. Plaintiff was required to make "a diligent effort" to obtain a loan. *Id.* at 5, 131 S.E. 2d at 855. He could not frustrate the contract by deciding at whim not to get a loan.

All of these cases tend to indicate that the agreement signed on 2 May 1972 by the Mezzanottes and the Freelands was a valid and enforceable contract, supported by consideration. The contract included an implied promise by the Mezzanottes to use reasonable effort to procure a loan and to exercise good faith in deciding whether the terms of the loan were satisfactory.

[4] Finally, defendants contend that plaintiffs failed to fulfill their obligations under the contract by securing a loan from NCNB and tendering performance within the required time limits, thereby relieving them from any obligation to perform under the contract. Plaintiffs obtained other financing and the failure to acquire financing through NCNB was not detrimental to the interests of defendants. The court found that the defendants did not furnish to plaintiffs an inventory of personalty and

a list of outstanding leases in accordance with the terms of the contract and prevented the plaintiffs from earlier compliance. "One who prevents the performance of a condition, or makes it impossible by his own act, shall not take advantage of the nonperformance." *Navigation Co. v. Wilcox,* 52 N.C. 481, 482 (Pearson, C.J.); *accord, Mullen v. Sawyer,* 277 N.C. 623, 178 S.E. 2d 425; *Bank v. Supply Co.,* 226 N.C. 416, 38 S.E. 2d 503; *Barron v. Cain,* 216 N.C. 282, 4 S.E. 2d 618; *Harwood v. Shoe,* 141 N.C. 161, 53 S.E. 616; *Ashcraft v. Allen,* 26 N.C. 96 (Ruffin, C.J.); Restatement of Contracts § 295 (1932); 3A Corbin on Contracts, § 767.

The trial court also found that all parties had agreed to the closing date of 5 September 1972, and, by their conduct and mutual agreement, had waived any prior contractual deadlines for performance. We are in accord.

Plaintiffs are entitled to specific performance of the contract of sale and damages for any losses they have sustained. The judgment of the trial court is affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. CATHERINE R. ENGLISH AND DIXIE C. ENGLISH

No. 7328SC601

(Filed 28 November 1973)

1. **Highways and Cartways § 5— acquisition of rights of "view" — compensation**

   Statute authorizing the Highway Commission to acquire rights of "view," G.S. 136-89.52, refers to the purposes for which the Commission may acquire property and does not create a right of view or sight distance to and from a landowner's property for which compensation must be paid if the view is obstructed.

2. **Eminent Domain § 7; Highways and Cartways § 5— controlled-access highway — lack of access — instructions**

   In a proceeding to condemn a portion of defendants' land for the purpose of relocating an abutting road and for construction of a controlled-access highway, the trial court did not err in failing to instruct the jury in accordance to the second paragraph of G.S.

136-89.52 relating to the consideration of lack of access to a new controlled-access highway on the issue of damages where defendants' remaining property does not abut the new controlled-access highway and their remaining property has access to the relocated road in the same manner as their entire property had to such road before its relocation.

3. **Eminent Domain § 7; Highways and Cartways § 5— existing highway — loss of access — necessity for instructions**

In an action to condemn a portion of defendants' land for relocation of an abutting road and for construction of a controlled-access highway, the trial court did not err in failing to instruct the jury in accordance with the provisions of G.S. 136-89.53 relating to compensation for loss of access when an existing highway is included within a controlled-access facility where defendants have access to each roadway to which they had access prior to the condemnation.

4. **Highways and Cartways § 5— highway condemnation — instructions — loss of view**

In this proceeding to condemn land for relocation of an abutting road and for construction of an interstate highway, the trial court did not err in failing to instruct the jury specifically that it should consider loss of view and sight looking toward defendants' property from the south and looking from their property toward the south caused by the "fill" upon which the interstate highway was constructed where defendants failed to request special instructions relating thereto.

APPEAL by defendants from *Martin (Harry C.), Judge*, 22 January 1973 Session of Superior Court held in BUNCOMBE County.

This is a condemnation proceeding to acquire, for highway purposes, fee simple title to a portion of defendants' land. Defendants were the owners of a rectangular tract of land which is approximately 225 feet wide and approximately 632 feet long. The length of the rectangular tract runs approximately in a north-south direction. The rectangular tract was bordered on its southern end by Crayton Road and the full length of its western edge bordered on Sweeten Creek Road.

The date of the taking by the plaintiff of a portion of defendants' land was 13 October 1969. Of the total of 3.24 acres in defendants' rectangular tract of land plaintiff condemned 1.38 acres of the southern end thereof, leaving the northern end containing 1.86 acres. The taking was for the purpose of the relocation of Crayton Road and for the further purpose of the construction of a controlled access facility (Interstate 40).

Crayton Road was moved northward and relocated along the northern edge of the portion taken, causing the southern end of defendants' remaining property to border on Crayton Road similar to the manner in which the property bordered thereon prior to the taking. The western edge of defendants' remaining property continued to border on Sweeten Creek Road. Neither Crayton Road nor Sweeten Creek Road are controlled access facilities, and defendants' remaining property has access to both, similar to the access prior to the taking. There is no interchange in the vicinity of defendants' remaining property, between Interstate 40 and any road.

The controlled access facility (Interstate 40) lies to the south of the relocated Crayton Road and defendants' remaining property does not border thereon at any point; Crayton Road runs approximately parallel to Interstate 40 at this point and lies between defendants' remaining property and Interstate 40. The roadbed for Interstate 40 was elevated by a "fill" on both sides of Sweeten Creek Road in order that Interstate 40 would pass over Sweeten Creek Road. The "fill" on the east side of Sweeten Creek Road restricts the distance from which defendants' remaining property can be seen when approaching it from the south on Sweeten Creek Road. It also restricts the distance which can be seen from defendants' remaining property when one looks to the south along Sweeten Creek Road.

Defendants offered the testimony of seven witnesses upon the question of damages resulting from the taking of a portion of their land. Their opinions varied from a high of $56,175.00 to a low of $40,445.00. Plaintiff offered the testimony of three witnesses upon the same subject. Their opinions varied from a high of $11,500.00 to a low of $10,900.00. The jury awarded to the defendants the sum of $19,000.00 as just compensation for the appropriation of a portion of their property for highway purposes. Defendants appealed.

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

Bennett, Kelly & Long, by Robert B. Long, Jr., for the defendants.

BROCK, Chief Judge.

[1] Defendants argue that they have been deprived of sight distance along Sweeten Creek Road, looking *from* the south

towards their remaining property and looking *towards* the south from their remaining property, by the "fill" necessary to allow Interstate 40 to pass over Sweeten Creek Road. Upon this argument they assign as error that the trial judge failed to instruct the jury in accordance with the first sentence of G.S. 136-89.52. The first sentence of said statute reads, in pertinent part, as follows: "For the purposes of this article, the Commission may acquire private or public property and property rights for controlled-access facilities and service or frontage roads, including rights of access, air, *view* and light . . . " (Emphasis added). This grant of authority with respect to acquiring rights to view or sight distance is a grant of authority to the Commission to acquire an easement over or title to property not actually needed for roadbed, but needed to prevent blind intersections of highways or other hazardous situations. This sentence of the statute does not create a right of view or sight distance in individual landowners to and from their land. Nor does it suggest that an individual landowner has a right of view or sight distance for which compensation must be paid. The sentence referred to enumerates the purposes for which the Commission may acquire property or property rights. It is inapplicable to defendants' contention. This assignment of error is overruled.

[2] Defendants assign as error that the trial judge failed to instruct the jury in accordance with the second paragraph of G.S. 136-89.52 which reads as follows:

> "Along new controlled-access highway locations, abutting property owners shall not be entitled to access to such new locations, and no abutters' easement of access to such new locations shall attach to said property. Where part of a tract of land is taken or acquired for the construction of a controlled-access facility on a new location, the nature of the facility constructed on the part taken, including the fact that there shall be no direct access thereto, shall be considered in determining the fair market value of the remaining property immediately after the taking."

Defendants' situation is that their remaining property does not abut the controlled-access highway (Interstate 40). Crayton Road, to which there is access from defendants' remaining property, lies between Interstate 40 and defendants' remaining property. It is true that Interstate 40 is constructed upon property acquired from defendants, but the access to Interstate 40

which is denied is access from State Highway Commission property (acquired from defendants) which lies between Interstate 40 and Crayton Road. Defendants' remaining property, situated on the opposite side of Crayton Road from Interstate 40, has access to Crayton Road in a manner similar to that which defendants' whole property had before the condemnation began. Defendants have not been denied access from their remaining property to Crayton Road and their remaining property does not abut the controlled-access highway. The last sentence of the second paragraph of G.S. 136-89.52, when read in conjunction with the first sentence of said second paragraph, contemplates a situation where the remaining property abuts the new controlled-access highway. Defendants are not denied access to a highway or roadway which abuts their property. In view of these circumstances we hold that the trial judge was correct in not instructing the jury in accordance with the second paragraph of G.S. 136-89.52. This assignment of error is overruled.

[3] Defendants assign as error that the trial judge failed to instruct the jury in accordance with the second sentence of G.S. 136-89.53, which reads as follows: "When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking or injury to their easements of access." This provision has no application to the present proceeding. The existing highway, Crayton Road, was relocated outside of the controlled-access area. The quoted sentence applies where an existing street or highway is designated a controlled-access facility thereby depriving a landowner of access from his property which he once had. In the present case, as pointed out, defendants have access from their property to each highway or roadway to which they had access prior to this proceeding. We hold that the trial judge was correct in not instructing the jury in accordance with the above quoted sentence. This assignment of error is overruled.

[4] Defendants assign as error that the trial judge failed to instruct the jury specifically that it should consider loss of view and sight distance looking *towards* defendants' property from the south and looking *from* defendants' property towards the south. It is noted that His Honor instructed the jury that the "compensation must be full and complete and include everything which affects the value of the property taken and in relation

to the entire property affected." Also he instructed the jury that it should "include compensation for the part actually appropriated or taken by the Highway Commission and compensation for damages, if any, to the remaining portion." Defendants' witnesses were permitted to testify concerning the loss of sight distance caused by the "fill" upon which Interstate 40 was constructed, and to testify that they took this factor into consideration in their estimation of market value after the taking. The jury was permitted to view defendants' exhibits (photographs) which clearly portrayed the "fill" and loss of sight distance along Sweeten Creek Road looking *towards* defendants' property from the south and looking *from* defendants' property towards the south. The trial judge is not required to instruct the jury upon the law applicable to each item of evidence or testimony. Particularly, this is true where there is no request for special instructions. We note that at the conclusion of his instructions the trial judge asked counsel for defendants if they had any "additions or corrections to the charge?" Their reply was, "no sir." In our view the instructions given by the trial judge were sufficient to present to the jury all questions of damage as raised by defendants' evidence. This assignment of error is overruled.

Defendants assign as error other portions of the charge to the jury. Reading the charge as a whole, as we must do, we hold that the trial judge fairly instructed the jury upon the principles of law applicable to the case. The jury was permitted to consider all of defendants' relevant evidence and it has made its determination of just compensation.

No error.

Judges CAMPBELL and BRITT concur.

HARRY E. STEWART v. OCCIDENTAL LIFE INSURANCE COMPANY OF NORTH CAROLINA

No. 7310SC723

(Filed 28 November 1973)

1. Contracts § 27— breach of contract — insufficiency of evidence to establish contract

Plaintiff's evidence was insufficient to establish an employment contract with defendant where it showed that a conference was held

between plaintiff and officers of defendant to discuss the terms of a contract for plaintiff's continued employment as a regional manager for defendant, that certain terms of compensation were offered to plaintiff during the conference without any correlative conditions of employment, duties of plaintiff, or provisions for termination, and that plaintiff rejected the only offer communicated to him.

2. **Quasi Contracts § 1— breach of contract action — failure to submit quasi contract issue**

In an action to recover damages for breach of an employment contract, the trial court did not err in failing to submit an issue of *quantum meruit* to the jury for services rendered defendant in 1968 where plaintiff's evidence showed that defendant paid plaintiff in excess of $80,000 in 1968 for services rendered and plaintiff did not allege or contend that defendant is further indebted to him for services rendered in 1968.

APPEAL by plaintiff from *Hobgood, Judge,* 24 April 1973 Session of Superior Court held in WAKE County.

This is an action for damages for breach of an alleged contract of employment.

Plaintiff's evidence tended to show that plaintiff had been employed by defendant in various capacities, under three separate contracts. The first agreement in question dated 1956 was an "Agent's Agreement" for the sale of life insurance, supplemented in 1957 by an agent's agreement for accident and sickness insurance.

In 1959, a second agreement was reached appointing plaintiff as supervisor of the company in the territory designated "Eastern Carolina Agency." The second agreement was supplemented at that time by a "Net Gain Bonus Agreement," providing incremental bonuses for net gains realized over the previous year. In 1967, the management agreement of 1959 was modified so that plaintiff received a basic salary of $400.00 a month, a net gain bonus of 7% of new premiums received during the year in the Eastern Carolina area, plus a renewal bonus of 2.4% of renewal premiums paid in the previous year, which renewal bonus was paid out over the next twelve calendar months, and was designated as "salary" in addition to plaintiff's basic monthly salary.

In February 1968, discussions commenced between plaintiff and defendant concerning plaintiff's continued association with defendant-corporation. Plaintiff contended that an agree-

ment was reached in a discussion between plaintiff and defendant by and through its President, Chairman of the Board of Directors, and Vice President - Marketing Division, that plaintiff would continue in his present capacity for a term of three years with compensation in 1968 being the same as 1967, but with increased adjustments in all categories for the years 1969 and 1970.

Plaintiff later put into a written memorandum the substance of what he contended the discussion contained. He submitted the memorandum to defendant's Vice President - Marketing, David D. East, in March 1968. In September 1968, a conference was held between plaintiff and the Chairman of the Board, Woodson, and East, representing defendant, to discuss compensation for plaintiff as Regional Manager for 1969. Plaintiff rejected the compensation proposal which varied from the terms of plaintiff's memorandum.

The agreements previously executed between the parties were in the form of continuing contracts terminable by either party upon written notice. The net gain bonus agreement was renewable annually, and also provided for termination of the agreement by either party upon written notice.

On 13 November 1968, plaintiff was informed by East that plaintiff's decision not to continue as Regional Manager in 1969 had been accepted by the defendant-corporation as indicative of resignation, and that the 1969 management agreement would terminate 30 November 1968, with compensation accruing until 31 December 1968, at which time plaintiff's agents' agreements would also terminate.

Defendant moved for a directed verdict at the close of plaintiff's evidence upon grounds that the testimony of plaintiff in regard to the discussion had at the February 1968 meeting of plaintiff with the officers of defendant-corporation, did not constitute a contract because of failure of consideration, vagueness of terms, and lack of mutuality of agreement. Defendant's motion was allowed and plaintiff appealed.

Sanford, Cannon, Adams & McCullough, by E. D. Gaskins, Jr., and J. Allen Adams, for plaintiff-appellant.

Ragsdale & Liggett by George R. Ragsdale, for defendant-appellee.

BROCK, Chief Judge.

The essential question presented upon appeal is whether plaintiff's evidence shows the formation of a contract requiring defendant to employ plaintiff for the years 1968, 1969 and 1970.

Plaintiff's main contention is that the discussion between the parties which took place in the February 1968 conference resulted in a valid and enforceable contract for employment. Plaintiff testified that the February conference "was for the purpose of arriving at a contract and we discussed a contract."

Plaintiff's recapitulation of the discussions which took place at the February conference is the only evidence in the record of the alleged agreement. Plaintiff testified that Mr. M. F. Browne (Browne), President of Occidental Life (defendant), made the following statements:

"In 1968 we will give you the same contract under which you operated in 1967 . . . . In 1969 we will pay you $38,000 plus $500.00 a month. In 1970 we will pay you $38,000 plus $1,000 a month, and this will be in lieu of your renewal commission . . . . In 1969 and 1970 we will change your net gain bonus from a percentage of premiums to a percentage of commission. How does that sound to you?"

Plaintiff testified that he reduced Browne's terms to writing and submitted them to Mr. David East (East), Vice President - Marketing, requesting East to " . . . type it up and send it to me and I'll sign it." Plaintiff never received a contract in the format of the memorandum submitted to East, but continued to work under the same conditions as the 1967 agreement. Subsequent memoranda in correspondence between the parties proved unsatisfactory and objectionable to plaintiff who continued to work for defendant without a new contract, while submitting items to East which plaintiff desired in his contract when the contract was "finalized." Plaintiff was advised by defendant on 25 November 1968 that all agreements between parties would terminate 30 November 1968, and plaintiff's compensation would accrue until 31 December 1968.

"In order to constitute a valid contract there must be an agreement of the parties upon the essential terms of the contract, definite within themselves or capable of being made definite." 2 Strong, N. C. Index 2d, Contracts, § 1, p. 292.

"Accordingly, in order to constitute a valid contract there must be an offer and an acceptance in the exact terms and the same sense, and the acceptance must be communicated to the offeror."

"An offer must be definite and complete, and a mere proposal intended to open negotiations which contains no definite terms but refers to contingencies to be worked out cannot constitute the basis of a contract, even though accepted." 2 Strong, N. C. Index 2d, Contracts, § 2, p. 294.

[1] Plaintiff, at best, has presented us with details of a conference convened at his request to discuss the terms of an employment contract for continued association with the defendant. We are given terms of compensation allegedly proffered to plaintiff during the course of the discussion, without any correlative conditions of employment, duties of the plaintiff, or provisions for termination. The only offer which plaintiff has testified was communicated to him, was unacceptable to him, and immediately rejected.

In the absence of an agreement reflecting a meeting of the minds based upon a sufficient consideration, with an offer and acceptance or mutuality of obligations or promises, we can find no contractual agreement based upon plaintiff's recapitulation of the discussion which took place in the February 1968 conference. Plaintiff, therefore, has shown no right to recover damages under a breach of contract theory. All other contentions by plaintiff, based upon an existing contract, are likewise without merit.

[2] Plaintiff has also asserted that the case should have gone to the jury on the issue of *quantum meruit,* even if plaintiff failed to prove an express contract.

We agree with plaintiff's contention that under the law of quasi contracts, when one party renders services to another without an express contract for payment for such services, the law implies a promise to pay fair compensation, and failure to establish an express contract will not preclude recovery upon the implied promise. *See* 6 Strong, N. C. Index 2d, Quasi Contracts, § 1. However, we do not agree with plaintiff that he did not receive fair compensation for his services rendered in 1968.

Plaintiff testified that his W-2 form for the year 1968 reflected gross payment to plaintiff by defendant in the amount

of $80,676.34 for services rendered. Plaintiff nowhere alleges or contends that defendant is further indebted to him for services rendered for the year 1968.

In our opinion the trial court properly directed a verdict for defendant, and the judgment should be

Affirmed.

Judges HEDRICK and BALEY concur.

MYRON W. DEAL v. PILOT LIFE INSURANCE COMPANY

No. 7325SC706

(Filed 28 November 1973)

1. **Master and Servant § 60; Insurance § 44— group insurance policy — injuries arising out of employment not covered — sufficiency of evidence**

Where the evidence tended to show that plaintiff supervised ten N. C. branch offices of his employer including the offices in Charlotte and Monroe, that on the date of the accident plaintiff was working in Charlotte, that plaintiff drove to Monroe to have lunch with the manager of his employer's branch office there but he did not intend to and did not in fact conduct any business in Monroe, that plaintiff accepted the branch manager's invitation to fly in the manager's plane to S. C., that plaintiff did not know the nature of the trip to S. C. but went because he wanted to fly in his friend's plane, and that plaintiff was injured when the plane crashed in its landing attempt in S. C., the evidence was sufficient to support a jury finding that plaintiff's injuries sustained in the plane crash did not arise out of and in the course of his employment; therefore, in an action to recover certain hospital, surgical and emergency treatment benefits under a group insurance policy which was issued by defendant and did not provide coverage for injury arising out of and in the course of employment, the trial court properly denied defendant's motions for directed verdict and for judgment n.o.v.

2. **Insurance § 44; Witnesses § 6— action on group insurance policy — attempt to impeach witness — competency of evidence**

In an action to recover under a group insurance policy for injuries sustained in a plane crash, the trial court did not err in excluding evidence with respect to plaintiff's ability to collect from a liability insurance carrier or plaintiff's right to make a workmen's compensation claim since cross-examination of plaintiff with respect to those matters did not tend to show inconsistent statements or claims by plaintiff, nor was the evidence relevant to the issue being tried.

3. Insurance § 44; Trial § 33— action on group insurance policy — policy exclusions — sufficiency of instructions

In an action to recover under a group insurance policy which excluded coverage for any sickness entitling insured to benefits under the Workmen's Compensation Act, the trial court's instruction with respect to plaintiff's business activities at the time he sustained injuries was proper.

APPEAL by defendant from *Ervin, Judge,* 24 April 1973 Civil Session CATAWBA Superior Court.

Plaintiff instituted this action to recover certain hospital, surgical and emergency treatment benefits under a group insurance policy issued by defendant to M and J Finance Corporation and Affiliates (M & J) insuring plaintiff as a member of such group. In its answer defendant admitted the issuance of the policy but alleged that its benefits accrued only if the hospital confinement resulted from "(a) any sickness not entitling you or your dependent to benefits under any Workmen's Compensation Act or similar law or (b) any injury not arising out of or in the course of employment." Defendant further averred that plaintiff's hospitalization was for treatment of injuries sustained in an airplane accident which arose out of and in the course of his employment with M & J.

The parties stipulated that the only issue for jury determination was whether defendant is liable to plaintiff under the terms of the policy. Whereupon, the following issue was submitted: "Was the plaintiff, Myron W. Deal, confined as a patient in a hospital as a result of any injury not arising out of or in the course of his employment, as alleged in the complaint?"

The jury answered the issue in the affirmative and from judgment entered on the verdict in favor of plaintiff for $11,581.21, plus interests and costs, defendant appealed.

Forrest A. Ferrell, Jeffrey Thomas Mackie, and Sigmon & Clark by William R. Sigmon for plaintiff appellee.

Patrick, Harper & Dixon by Charles D. Dixon for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the refusal of the trial judge to grant its motions for directed verdict and for judgment notwithstanding the verdict.

Defendant's motions raised the question of whether, as a matter of law, plaintiff's evidence was insufficient to show that his injuries did not arise out of and in the course of his employment with M & J. In fact, defendant contends that plaintiff's evidence shows affirmatively that the injuries which he sustained did arise out of or in the course of his employment. Viewing the evidence in the light most favorable to plaintiff and giving him the benefit of every reasonable inference, as is required on the motions, we conclude that the trial judge did not err in denying defendant's motion for directed verdict and judgment n.o.v.

Pertinent evidence in plaintiff's favor tends to show: On 17 September 1970, and for several months prior thereto, plaintiff resided in the Winston-Salem area and was employed as a supervisor by M & J whose main office was in Shelby, N. C. Plaintiff's supervisory duties were applicable to ten North Carolina branch offices of M & J including offices in Charlotte and Monroe. On the date of the accident, plaintiff was in Charlotte visiting a branch of M & J and performing business for the company. During the morning plaintiff decided to drive to Monroe (approximately 25 miles), have lunch with the manager of the M & J branch there, and then return to the Charlotte branch later in the afternoon. As plaintiff arrived at the Monroe branch, the manager, William McInnis (McInnis), was leaving. Plantiff invited McInnis to have lunch with him, but McInnis informed plaintiff that he had to go to Darlington, South Carolina, and invited plaintiff to go along. Plaintiff declined the invitation initially because he had to return to Charlotte that afternoon but, upon learning that McInnis intended to fly his plane, plaintiff accepted, thinking that he could return in time to get back to Charlotte that afternoon. Plaintiff had gone to Monroe to see McInnis, not on business, but because he considered McInnis a friend and wanted to have lunch with him. He decided to go to Darlington with McInnis because he wanted to fly in McInnis's airplane and not because M & J had cars being sold that day at the car auction in Darlington; in fact, he did not know the nature of the trip to Darlington until after the plane was in the air. In the landing attempt in Darlington, the plane crashed and plaintiff sustained personal injuries, in the treatment of which he incurred various medical, surgical, and hospital expenses.

No case has been cited, and our research discloses none, in which the courts of this State have been called upon to decide

the question of whether the accident arose out of and in the course of employment in the context of this case, but there is a sizeable body of law dealing with the situation in which the employee has deviated from the normal course of his employment and seeks to recover under the Workmen's Compensation Act.

It is clear that there may be no recovery if the act performed is solely for the benefit or purpose of the employee or a third person. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955). Where the employee is performing acts for his own benefit, not connected with his employment, the injury does not arise out of his employment even if the acts are performed with the consent of the employer and the employee is on the payroll at the time. *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680 (1952). An employee is not entitled to compensation if his acts are not connected with his employment, but are for his own benefit, at the time of injury even if he is injured while he is required to be away from his home and place of regular employment for a period of time on a mission for his employer. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E. 2d 218 (1962). Ordinarily, employees whose work entails travel away from the employer's premises are within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E. 2d 790 (1969).

In view of these cases, we are of the opinion that there was sufficient evidence presented in the case at hand to survive the motion for directed verdict. There was evidence from which the jury could have concluded that the conduct of plaintiff *was* within the course of his employment, but the weight of the evidence is for the jury and does not enter into the determination of a motion for directed verdict since the evidence must be viewed in the light most favorable to the nonmovant.

[2] Defendant assigns as error the exclusion of certain evidence. It contends the court erred in excluding evidence that tended to show plaintiff's financial interest in asserting that the accident did not arise out of his employment. Defendant argues that by pursuing the present course plaintiff is able to collect $50,000 from McInnis's liability insurance carrier by way of settlement and $11,558.21 if successful in the present action; that if plaintiff had made a claim under the Workmen's

Compensation Act on the grounds that the injury arose out of and in the course of his employment, he could have collected only $35,113.79.

Defendant attempted to establish this contention by cross-examination of plaintiff, and the court conducted a voir dire in the absence of the jury to determine the admissibility of the evidence. Following the voir dire, the court ruled that it would not permit defendant's counsel to question plaintiff regarding the $50,000 settlement or the Workmen's Compensation claim.

Of course, it is proper to show inconsistent statements or claims by cross-examination, but we do not think the proffered questions and answers tended to show inconsistent statements or claims by plaintiff in this case. Considering the answers given by plaintiff, the $50,000 settlement was not relevant to the issue being tried. With respect to the Workmen's Compensation claim, we cannot see how defendant would have benefited from the answers given by plaintiff.

The heart of this method of impeachment is that the conduct in question is inconsistent with the present claim. As it is put in 3A Wigmore, Evidence, § 1040 (Chadburn rev. 1970): " . . . [I]t is not the mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required." Thus we look to the statement to see if in fact there is any inconsistency in the conduct of the plaintiff and his agent. Looking to the totality of the circumstances we feel that there is no inconsistency. Again we quote Wigmore, *supra:* "As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but the *whole impression or effect* of what has been said or done." We perceive no prejudice to defendant by the exclusion of the evidence.

[3] By its third assignment of error defendant contends that the trial judge committed error in his jury charge by leaving the impression with the jury that in order for the injury to be compensable under the Workmen's Compensation Act, the trip had to be solely for business purposes. The contention has no merit. The judge clearly charged that if the plaintiff made the trip in order to perform one or more of his duties as supervisor for his employer, then the jury would answer the issue in the negative.

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

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. TALMADGE WALTON INGRAM

No. 7325SC756

(Filed 28 November 1973)

Criminal Law § 66— pretrial photographic and lineup identification — in-court identification — legality — insufficiency of findings

Where the trial court in an armed robbery case failed to make sufficient findings of fact as to whether the victim's in-court identification of defendant was tainted by the illegality, if any, of pretrial photographic and lineup identifications, the case is remanded to superior court for such determination.

APPEAL by defendant from *Falls, Judge,* 7 May 1973 Session CALDWELL Superior Court.

Defendant was tried on a bill of indictment, proper in form, with the armed robbery of Boyd Kirby (Kirby), manager of a Winn-Dixie Store in Lenoir, N. C. Defendant pleaded not guilty.

The evidence presented by the State tended to show: On 27 October 1972, at approximately 9:00 p.m., Kirby left the Winn-Dixie Store of which he was manager with two bank deposit bags containing $22,746.16 in cash and checks belonging to his employer. Traveling alone in his automobile, he proceeded to the Bank of Granite on South Main Street in Lenoir for purpose of depositing the money and checks in a night depository. After Kirby stopped his car near the depository, pulled up the emergency brake, reached over and got the deposit bags, he opened the door of his car at which time he saw a man standing nearby with a shotgun "pointed at me between the frame of the car and the door." Kirby delivered the two bags to the man who then told Kirby to "get out of here." The robber walked backward to a car parked on the bank lot after which Kirby drove to the police station and reported the crime. Kirby did not know the

robber but described him to police. Some time later, Kirby identified defendant from several photographs presented him by police and later on, in November, identified defendant in a lineup at the Caldwell County Sheriff's Department.

Defendant's evidence tended to show that at all times on the night in question he was at a tourist court operated by his sister in Wilkesboro, N. C.

A jury found defendant guilty as charged and from judgment imposing prison sentence of not less than 25 nor more than 30 years, defendant appealed.

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

Townsend and Todd by Bruce W. Vanderbloemen for defendant appellant.

BRITT, Judge.

In his brief defendant brings forward and argues four assignments of error. In No. 3, he contends the court erred in admitting, over objection, certain testimony for purpose of corroboration when the testimony did not in fact corroborate the original testimony. In No. 4, he contends the court erred in its jury charge by failing to restate all of the testimony of the witness Kirby when he was recalled by defendant. We find no merit in assignment No. 3 nor assignment No. 4 and they are overruled.

In assignment No. 1, defendant contends the trial judge erred in the questions he asked defendant at the voir dire hearing. In view of our treatment of assignment No. 2, and the disposition of this appeal, we find it unnecessary to consider assignment No. 1.

In his second assignment of error, defendant contends the court erred in failing to make complete and adequate findings of fact and in failing to make conclusions of law based on those findings following a voir dire hearing relating to testimony of the witness Kirby. This assignment has merit and is sustained.

When Kirby was asked at trial to identify the person who robbed him, defendant objected and, in the absence of the jury, the court conducted a voir dire hearing with respect to the identification of defendant. At the voir dire, Kirby testified

that defendant was the man who robbed him and that his identification was based on his seeing defendant at the time of the robbery. On cross-examination Kirby testified that although he had never seen the person who robbed him prior to the robbery, and it was dark and raining at the time, the area where the robbery occurred was well lighted and he had occasion to observe the robber, including his face and profile, for some 30 or 45 seconds. Kirby further testified on cross-examination that subsequent to the robbery he selected defendant's photograph from approximately 12 photographs shown him by police and that he identified defendant in a lineup with seven or eight other people at the Sheriff's Department. There was no showing that defendant's attorney was present at the lineup.

The record before us discloses that, after the voir dire hearing, the following occurred:

> "THE COURT: All right, Miss Young, put this in the record: that the witness, Mr. Kirby, made an identification of the defendant in open Court in the course of this trial, after which counsel for the defendant approached the bench and asked that a voir dire be conducted to determine whether or not the in-court identification was tainted in any way by a lineup or any other confrontation, at which point the jury was excused and the voir dire conducted in their absence. And the Court finds as a fact that the witness, Mr. Kirby, stated that his in-court identification was not tainted in anywise by the lineup or by any pictures which were shown to him prior to the lineup or by any other subsequent confrontation."

The foregoing is preceded by "FINDINGS OF FACT on Voir Dire."

It has been held many times that an accused person is constitutionally guaranteed counsel at an in-custody lineup identification, and when counsel is not present at the lineup, testimony of witnesses that they identified the accused at the lineup is rendered inadmissible, and *any in-court identification* is also rendered inadmissible unless the trial judge first determines on a voir dire hearing that the in-court identification is of independent origin and is untainted by the illegal lineup. *State v. Harris,* 279 N.C. 177, 181 S.E. 2d 420 (1971); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967). We are aware of the opinion of the United States Supreme Court in

Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972) which seems to modify *Wade;* however, in *Kirby* no formal charges had been preferred when the accused was identified by the robbery victim at the jail in a "showup." In the instant case, formal charges had been preferred at the time of the lineup.

It also appears that where photographs are used by police as an aid in identification, and there is an objection to an in-court identification and requests for a voir dire hearing, the court must make a factual determination as to whether the State has established by clear and convincing proof that the in-court identification is of independent origin, untainted by the illegality, if any, underlying the photographic identification. *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. McDonald,* 11 N.C. App. 497, 181 S.E. 2d 744 (1971), cert. den. 279 N.C. 396; *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968).

Suffice to say, the findings by the trial judge in the instant case were not sufficient. Nevertheless, we hold that defendant is not entitled to a new trial unless the superior court, upon a remand of this cause as hereinafter ordered, fails to find that the in-court identification of defendant was of independent origin, untainted by the illegality, if any, of the lineup or photographic identifications.

Our disposition of this appeal finds support in *United States v. Wade, supra,* a landmark case involving a police lineup identification of an accused bank robber. We quote from page 1166 (18 L.Ed. 2d) of the opinion:

> ". . . On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error. *Chapman v. California,* 386 U.S. 18, 18 L.Ed. 2d 705, 87 S.Ct. 824, and for the District Court to reinstate the conviction or order a new trial, as may be proper. . . ."

Our disposition of this appeal also has precedent in this jurisdiction. See *State v. Tart,* 199 N.C. 699, 155 S.E. 609 (1930), cited in *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969); also *State v. Roberts,* 18 N.C. App. 388, 197 S.E. 2d 54 (1973), cert. den. 283 N.C. 758; and *State v. Martin,* 18 N.C. App. 398, 197 S.E. 2d 58 (1973), cert. den. 283 N.C. 757.

Therefore, this case is remanded to the Superior Court of Caldwell County where the presiding judge, at a session of the court authorized to hear criminal cases, will conduct a hearing, with defendant and his counsel present, to determine whether the witness Kirby's identification of defendant at the trial of this cause was of independent origin, untainted by the illegality, if any, of the lineup or photographic identifications. If the presiding judge determines that the identification was not of independent origin, he will find the facts and enter an order vacating the judgment, setting aside the verdict, and granting defendant a new trial. If the presiding judge determines that the identification was of independent origin, untainted by the illegality, if any, of the lineup or photographic identifications, he will find the facts and order commitment to issue in accordance with the judgment entered at the 7 May 1973 Session of Caldwell Superior Court.

Remanded with instructions.

Chief Judge BROCK and Judge CAMPBELL concur.

PEELER INSURANCE & REALTY, INC. v. FRED HARMON

No. 7327SC640

(Filed 28 November 1973)

Brokers and Factors § 6— exclusive right to sell realty — owner's sale to agent's prospect — liability for commissions

Where a contract gave a real estate agent the exclusive right to sell the owner's property at a specified price and provided that the owner would pay the agent a commission of 5% of the sales price "if the property is sold or exchanged by you, by me, or by any other party before the expiration of this listing, at any terms accepted by me, or within three months thereafter, to any party with whom you or your representative have negotiated," the owner who sold the property in competition with the real estate agent to the agent's prospect is liable for the brokerage commission called for in the contract.

APPEAL by plaintiff from *McLean, Judge,* 27 March 1973 Civil Session CLEVELAND Superior Court.

In this action plaintiff seeks to recover brokerage commissions alleged to be due under a contract from defendant to plaintiff for the sale of certain lands belonging to defendant.

The parties stipulated that defendant executed the written contract alleged in the complaint. The contract is dated 1 April 1971, bears the heading "EXCLUSIVE LISTING CONTRACT," and contains the following provisions:

> "In consideration of your agreeing to list the above-described property for sale and in further consideration of your services and efforts to find a purchaser, you are hereby granted the exclusive right, for a period of 6 month(s) from date, to sell the said property for the price of $108,000 and on terms of all cash to me or upon such other terms and conditions as may be agreed upon later.
>
> "If the property is sold or exchanged by you, by me, or by any other party before the expiration of this listing, at any terms accepted by me, or within three months thereafter, to any party with whom you or your representatives have negotiated, I agree to pay you a commission of 5% of the gross sales price."

Plaintiff's evidence tended to show: C. M. Peeler, Jr., is the president of plaintiff corporation and had been in the real estate business in Cleveland County since 1961 when he was licensed as a real estate broker, his license being in effect continuously since that time. In 1971 Mrs. Marie Callahan was employed by plaintiff as a licensed real estate "salesman." At her request defendant executed the contract in question after which she advertised the subject property for sale and showed it to various persons including Mr. Camp. Following several conversations with him, Mrs. Callahan obtained from Camp a written offer (dated 18 June 1971) of $90,000 for the property. She communicated the offer to defendant who stated that he would not accept $90,000 for the property and pay a brokerage commission but that he would accept $90,000 net to him. Mrs. Callahan advised defendant that Camp would not pay more than $90,000, that she "could not afford to work for nothing," and that she would try to find another buyer for the property. Mrs. Callahan advised Camp that defendant had refused the offer

and that Camp would have to increase his offer in order to get the property. Camp informed Mrs. Callahan that he would not increase his offer and further stated that he was going to contact defendant directly about the property. Mrs. Callahan told Camp "that only the real estate agent was supposed to do that" but Camp stated that he did not care about that and restated his intention of talking with defendant.

The parties stipulated that in July 1971 defendant sold and conveyed the lands in question to Camp (and wife) for $90,000.

At the conclusion of plaintiff's evidence defendant's motion for a directed verdict, pursuant to G.S. 1A-1, Rule 50, was allowed and from judgment dismissing the action, plaintiff appealed.

Yelton & Lamb, P.A., by Robert W. Yelton for plaintiff appellant.

Whisnant and Lackey by N. Dixon Lackey, Jr., for defendant appellee.

BRITT, Judge.

Did the court err in allowing defendant's motion for directed verdict and dismissing the action? We hold that it did.

Brokerage contracts can be classified both as to type of listing and method of payment to the broker. The former category may be subdivided into two groupings: those in which the listing is exclusive and those in which the listing is nonexclusive. Likewise the latter category may be subdivided into two groupings: those in which the broker is to receive a percentage of the purchase price and those in which the broker is to receive everything he can get over a certain amount.

Our research fails to disclose a case from an appellate court of this State involving an exclusive listing contract. However, by stating that the particular contract in question was not an exclusive listing contract, it would appear that our Supreme Court has recognized the existence of this classification by implication. *Thompson v. Foster,* 240 N.C. 315, 82 S.E. 2d 109 (1954) and *Sparks v. Purser,* 258 N.C. 55, 127 S.E. 2d 765 (1962).

We are faced with the question, does the principal breach his contract by selling in competition with his broker who has

an exclusive listing? Before we can reach this question, however, we must first determine the nature of the exclusive listing in this case. R. Lee, North Carolina Law of Agency and Partnership, § 38, p. 54 (3d ed. 1967) indicates two types of "exclusive agencies." The first of these is the true "exclusive agency," and is denominated as such, which, ". . . precludes the principal from hiring another agent to sell the same property, but it does not preclude principal himself from procuring a customer without paying compensation." The second of these is properly denoted an "exclusive right to sell" and, " . . . precludes the principal himself from competing with the agent."

Although the term "exclusive right to sell" appears in the portion of the contract in the case at hand quoted above, a reading of the cases of other jurisdictions leads us to believe that mere use of this term should not be determinative. Since the right of alienation has become such an integral part of property, it is only proper that the contract specifically negative this right before it is lost. See Annot., 88 A.L.R. 2d 936 (1963) for a listing of cases so indicating.

This brings us to the question of whether the terms in this contract specifically negative the right of defendant to sell his property in competition with his broker during the term of the contract. We feel that they do and that such a holding is compatible with the general theory of the law of this State as evidenced by those cases dealing with nonexclusive listings. The clear meaning of the second quoted paragraph is that if the property were sold by *anyone,* including the principal, at any terms accepted by the principal, to someone with whom the agency had negotiated, then the agency would be entitled to compensation. In *DeBoer v. Geib,* 255 Mich. 542, 238 N.W. 226 (1931), "If, said property is sold . . . by you, by myself, or any other person . . . , " was interpreted as giving an exclusive right to sell. A similar passage was so interpreted in *Rubin v. Beville,* 132 So. 2d 783 (Fla. App. 1961). See also Annot., 88 A.L.R. 2d 936 (1963) for other cases so holding. The sale in this case clearly falls within the term of the contract.

While the facts in *Realty Agency, Inc. v. Duckworth & Shelton, Inc.,* 274 N.C. 243, 251, 162 S.E. 2d 486, 491 (1968), are quite different from those in the case at hand, our holding finds support, albeit in a negative way, in the following language by Justice Sharp: " * * * This is not a situation in which an

owner, who has listed real estate with the broker at a specified price, reduces the price and sells it to the broker's prospect. When that occurs, clearly the broker is entitled to compensation. (Citations.)" See also *Aiken v. Collins*, 16 N.C. App. 504, 192 S.E. 2d 617 (1972).

We conclude that plaintiff's evidence was sufficient to withstand defendant's motion for directed verdict. The judgment appealed from is

Reversed.

Chief Judge BROCK and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. HERBERT HILL WILLIS

No. 7315SC673

(Filed 28 November 1973)

1. **Criminal Law § 86— cross-examination of defendant — impeachment — specific criminal acts**

   In a prosecution for speeding in excess of 80 mph, the trial court did not err in allowing the solicitor to ask defendant on cross-examination whether he saw a highway patrolman who clocked him traveling 94 mph in a 65 mph zone on another occasion.

2. **Criminal Law §§ 162, 169— placing excluded testimony in record — failure to request at time of ruling**

   The trial court did not abuse its discretion in the denial of defendant's motion made at the close of the evidence to place in the record answers which would have been given to questions to which objections were sustained on the ground that no request was made at the time the ruling was made that the witness be permitted to place his answer in the record.

3. **Automobiles § 117— speeding case — evidence of defendant's intoxication**

   In a prosecution for speeding in excess of 80 mph, defendant was not prejudiced by the admission of testimony by a highway patrolman regarding the odor of alcohol on defendant's breath and his staggering condition.

4. **Automobiles § 117; Criminal Law §§ 114, 169— instructions — comment by court — harmless error**

   In this prosecution for speeding in excess of 80 mph, defendant was not prejudiced by the court's remark that the pattern jury instruction given by the court on the lesser offense of excessive speed "doesn't make one bit of sense on earth."

APPEAL from *Bailey, Judge,* 30 April 1973 Session of ALAMANCE County Superior Court.

Defendant in this case was charged with driving 90 miles per hour in a 65 mile-per-hour zone in contravention of G.S. 20-141. Following defendant's plea of not guilty, the State presented evidence which tended to establish the following:

Colonel Edward C. Guy — at that time the head of the Highway Patrol — was travelling north in the west lane on Interstate 85 passing a vehicle which was going 60 miles per hour. The posted speed limit was 65 miles per hour. He saw the headlights of a car approaching him rapidly from the rear, and when he pulled over into the right lane, the car passed him at a speed in his opinion of between 85 and 90 miles an hour. As he pursued the car — a 1970 two-tone blue Continental — he "clocked" him in excess of 90 miles per hour. When the car pulled off the ramp, Colonel Guy stopped it, the defendant got out of the car, and Colonel Guy arrested him for speeding 90 miles per hour and driving under the influence of alcohol.

E. W. Clemmons of the Highway Patrol testified that he and Trooper Sanders arrived at the scene shortly after Colonel Guy had apprehended the defendant. On cross-examination, Clemmons testified that Willis was found not guilty of driving under the influence. On redirect examination, Clemmons was allowed to testify that he detected a strong odor of alcohol on defendant's breath, and defendant staggered when he walked.

Defendant took the stand, and the solicitor was allowed over objection to ask him the following question:

> "Did you see Trooper Willis — Trooper Willis, will you stand up, please. On September 19, 1971, did you see that highway patrolman, when he clocked you traveling 94 miles per hour in a 65 mile zone?"

At the conclusion of defendant's evidence, counsel for the defense moved to place into the record what the answers would have been to certain questions, the objections to which were sustained. The trial court denied the motion on the basis that "no request was made at the time the question was asked, or at the time the ruling was made, that the witness was permitted to put his answer in the record."

The trial court charged the jury on the various verdicts they might return. To the following portion of the charge, defendant excepts:

> "Excessive speed differs from operating a motor vehicle at a speed in excess of seventy-five on a highway where the limit is less than seventy in that the defendant need not have exceeded seventy-five, but must have operated at a speed in excess of sixty-five and greater than sixteen miles above the posted limit, which doesn't make one bit of sense on earth."

The jury found defendant guilty of speeding in excess of 80 miles per hour as charged, and defendant's motion to set aside the verdict was denied. From the judgment imposing an active sentence of 90 days, defendant appeals.

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

Alston, Pell, Pell and Weston, by E. L. Alston, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant presents as his first assignment of error the trial court's allowing the solicitor to question him concerning another speeding violation. Specifically, the solicitor asked defendant whether he saw a certain highway patrolman who "clocked" him travelling 94 miles per hour in a 65-mile-per-hour zone. This assignment of error cannot be sustained.

The law regarding impeachment by reference to prior offenses was succinctly stated by the Supreme Court in *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). A witness—including a criminal defendant — may not for purposes of impeachment be cross-examined as to whether he has been accused—formally or informally—, arrested, indicted or whether he is under indictment for an offense other than the one for which he is on trial. The Supreme Court in the *Williams* decision overruled prior decisions on this point, but it specifically reaffirmed the rule that a witness—including a criminal defendant —is subject to cross-examination as to prior convictions.

In *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972), the Supreme Court elaborated on the rules established by

Williams, supra, by holding that while a witness may not, for purposes of impeachment, be asked whether he has been accused, arrested, or indicted for a specific offense, he may nevertheless be asked whether he has committed specific criminal acts or has been guilty of specific reprehensible conduct. Accord, *State v. Lassiter,* 17 N.C. App. 35, 193 S.E. 2d 265 (1972).

The question as set out hereinabove is proper within the rule established by *State v. Gainey, supra,* and *State v. Lassiter, supra.* The trial court did not err in allowing it.

[2] The trial court was likewise correct in its denial of defendant's motion—made at the close of his case—to let the record show the answers that would have been given to questions to which the objections were sustained. Defendant is correct that G.S. 1A-1, Rule 43(c) does not state time to be of the essence in making such a motion. Nevertheless, we do not sustain this assignment of error. We recognize the well-established right of the trial court in its discretion to control the conduct of the parties, counsel and the witnesses. See 7 Strong, N. C. Index 2d, Trial, § 9.

[3] Defendant further assigns as error the trial court's allowing Patrolman Clemmons to testify regarding the alcohol on defendant's breath and his staggering condition. Assuming, *arguendo,* that this was error, we fail to perceive how defendant has been prejudiced. As defendant points out, he was found not guilty of driving while intoxicated. It is not enough that defendant show error, he must show that it 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).

[4] Defendant's final assignment of error is to the trial court's instructions to the jury. Though the trial court's remarks concerning the unintelligible nature of the pattern jury instruction is highly irregular, we fail to discern any way in which defendant has been prejudiced thereby. The charge when read as a whole fairly stated the law and fairly applied the law to the evidence in the case.

No error.

Judges CAMPBELL and VAUGHN concur.

LILLIAN HARRIETT WILSON, PLAINTIFF
v.
BOB ROBINSON'S AUTO SERVICE, INC., DEFENDANT AND THIRD PARTY PLAINTIFF
v.
GENUINE PARTS COMPANY, INC., FIRST THIRD PARTY DEFENDANT AND SECOND THIRD PARTY PLAINTIFF
v.
PRIOR SOUTHWEST, INC., SECOND THIRD PARTY DEFENDANT

No. 7326SC771

(Filed 28 November 1973)

1. **Appeal and Error § 6; Trial § 30— orders of dismissal — subsequent mistrial — appeal of dismissal orders**

Where plaintiff brought an action to recover for property damage and injuries sustained by her in an automobile accident which occurred when brakes installed in her vehicle by defendant failed, the trial court dismissed plaintiff's claims for relief based on breach of contract to repair and negligence and dismissed the cross-action of the original vendor of the brake assembly for contribution or indemnity, and the trial court withdrew a juror and declared a mistrial when the jury appeared hopelessly deadlocked, plaintiff and the original vendor could properly appeal from the orders of the trial court to dismiss.

2. **Torts § 4; Rules of Civil Procedure § 13— damages sustained in automobile collision — cross-claim for contribution or indemnity proper**

Where plaintiff brought an action for injuries sustained by her in an automobile accident which occurred when brakes installed by defendant failed, the original vendor who rebuilt the brake assembly and sold it to a parts company who in turn sold it to defendant could properly maintain a cross-action against defendant in this lawsuit.

WE have allowed *Certiorari* to review the order of *Ervin, Judge,* at the 3 October 1972 Session of the MECKLENBURG Superior Court.

The plaintiff instituted this civil action to recover for property damage and personal injuries sustained in an automobile accident which occurred on January 10, 1968. The plaintiff took her 1958 Buick automobile to defendant's garage (Bob Robinson's) to have the brakes repaired. Bob Robinson's found it necessary to install a master cylinder and power brake booster. Bob Robinson's, due to the age of the vehicle and unavailability of parts, installed a used, rebuilt brake assembly which it had purchased from Genuine Parts Company, Inc., (Genuine

Parts). This rebuilt brake assembly had been rebuilt and sold to Genuine Parts by Prior Southwest, Inc., (Southwest). The plaintiff picked up her car, left Bob Robinson's, and as she approached the first stoplight she encountered, she applied the brakes and they failed. The plaintiff's automobile struck the rear of one of the automobiles stopped at the stoplight. Subsequent investigation led to discovery of some foreign matter in the master cylinder which, according to some of the expert testimony at trial, could have caused the failure.

The plaintiff in her action against Bob Robinson's alleged three claims for relief: (1) breach of contract, (2) negligence and (3) breach of implied warranty. Bob Robinson's, as first third-party plaintiff, filed a third-party complaint against the first third-party defendant, Genuine Parts, seeking indemnity. Genuine Parts, as second third-party plaintiff, filed a third-party complaint seeking indemnity from Southwest, second third-party defendant. Southwest then filed a cross-action against the defendant, Bob Robinson's, seeking contribution or indemnity.

At the close of all the evidence, the trial court allowed the motions of Bob Robinson's for a dismissal of two of plaintiff's claims for relief on breach of contract to repair and negligence. The court also allowed Bob Robinson's motion to dismiss Southwest's cross-action for contribution or indemnity. The issues are not in the record, but the action was apparently submitted to the jury on the plaintiff's claim for relief for implied warranty. After the jury deliberated a considerable period of time and appeared hopelessly deadlocked, the trial court withdrew a juror and declared a mistrial. The plaintiff and Southwest appealed from the trial court's granting of the motions to dismiss, and we have treated these appeals as petitions for certiorari which we have allowed.

Allen A. Bailey by Douglas A. Brackett and Martin L. Brackett, Jr., for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by John G. Golding for defendant and first third-party plaintiff appellee, Bob Robinson's Auto Service, Inc.

Craighill, Rendleman & Clarkson, P.A., by James B. Craighill for second third-party defendant appellant, Prior Southwest, Inc.

CAMPBELL, Judge.

[1] Bob Robinson's contends that this appeal is premature and should be dismissed since under G.S. 1A-1, Rule 54, no final judgment has been entered. Motions to that effect have been filed. However, in *Gillikin v. Mason*, 256 N.C. 533, 124 S.E. 2d 541 (1962), the Supreme Court reviewed the allowance of a motion for nonsuit in a case involving a mistrial. Bob Robinson's contention that the trial court's orders allowing the motions in the case at bar are binding in the trial *de novo* but that the plaintiff and Southwest have no present right of appeal as to those orders is not consistent with *Gillikin, supra.*

The motions to dismiss here are to be construed as motions for directed verdicts. *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E. 2d 885 (1970). In considering the sufficiency of the evidence to withstand a motion for directed verdict, we must consider the evidence in the light most favorable to the non-moving party. *Gillikin v. Mason, supra; Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). We find that the evidence was sufficient to go to the jury and that the directed verdicts against the plaintiff should not have been granted. Since the matter was set for retrial anyway and our decision merely allows a complete trial *de novo,* we do not deem it necessary to review the evidence as it may be different upon retrial.

Bob Robinson's contends that the cross-action of Southwest must be dismissed since, if Southwest were held liable for indemnity to Genuine Parts, then it could obviously not be entitled to indemnity or contribution from Robinson's who would have had to have been found without fault as to Genuine Parts.

[2] We do not find the connection so obvious. The question of indemnity between Robinson's and Genuine Parts and the question of indemnity between Genuine Parts and Southwest are wholly separate questions from that of passive or active negligence as between Robinson's and Southwest and whether there is joint or several liability as between Robinson's and Southwest. We would note that G.S. 1B-1 would not require a judgment in favor of the plaintiff against Southwest for Southwest to be successful in its cross-action against Robinson's. Therefore, Southwest's cross-action is quite properly a part of this lawsuit. We thus face a question of the sufficiency of the evidence to withstand a motion for a directed verdict as to Southwest's cross-action. We find the evidence sufficient but do

not deem it necessary to review such evidence as it may be different upon retrial.

Reversed.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. JOEL ERNIE INGLE

No. 7329SC735

(Filed 28 November 1973)

1. **Bastards § 7— failure to support illegitimate child — notice of birth — request for support — instructions**

   In a prosecution for wilful refusal or neglect to support an illegitimate child, the trial court erred in instructing the jury that a finding that the prosecuting witness demanded support from defendant before issuance of the warrant "and at any time from the time she became aware that she was pregnant" would be sufficient upon the question of notice or request, since to support a conviction there must be notice and request for support after the child is born and a wilful neglect and refusal to support the child before the charge is formally laid.

2. **Bastards § 8— failure to support illegitimate child — new trial — no relitigation of paternity issue**

   Where error in the charge related only to the issue of wilful neglect or refusal to support an illegitimate child and the evidence was sufficient to support the jury's finding that defendant is the father of the child in question, the issue of paternity will not be disturbed and may not be relitigated, and the case will be remanded for a new trial only upon the issue of wilful neglect or refusal to support.

ON *certiorari* to review a trial before *Winner, Judge,* 5 March 1973 Session of Superior Court held in RUTHERFORD County.

Defendant was charged in a warrant, proper in form, with the willful neglect and refusal to support and maintain his illegitimate child (G.S. 49-2). He was found guilty in the District Court and appealed to the Superior Court where he received a trial de novo. He was found guilty in the Superior Court.

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

J. Nat Hamrick for the defendant.

BROCK, Chief Judge.

The statute under which defendant was charged (G.S. 49-2) reads, in part, as follows: "Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor . . . "

To support a conviction under this statute two basic facts must be established: First, that defendant *is a parent* of the illegitimate child in question; and, second, that the defendant has *willfully neglected* or *has refused* to support and maintain the illegitimate child in question. The total of the evidence bearing upon these two basic facts is the following testimony of the mother of the child:

> "My name is Debra Johnson; I am twenty, I am not married; I know Joel Ernie Ingle, I have known him for five years and I have a child named Vicky "Lorraine" Johnson. She was born on May 17, 1972 and the father is Joel Ernie Ingle. I have made demand on Joel Ernie Ingle for support, but he has not supported the child.
>
> "At the time I was courting Joel, I was not courting anybody else. At the time I got pregnant, I had not had sexual relations with anybody else.
>
> "Joel gave me $65.00 when I was pregnant carrying the child. He wrote me a $40.00 check to pay the doctor bill and he wrote me a $25.00 check to pay on the doctor bill, and when he signed the check, he wrote, "pay to the Order of Debra Johnson, for the support of the baby," he wrote that on the check. I had no further conversation with him about support or anything about the future of the baby. I tried to get him to help me, but he wouldn't. He has never given me anything other than what I stated above since the baby was born. My mother and I have been supporting the child."

It seems reasonably clear from the foregoing testimony that the only notice given defendant or demand made upon him was prior to the birth of the child. The evidence is completely silent upon the question of whether defendant was ever aware of the birth of the child. From the record it seems likely he was not made aware of the birth until the warrant was issued. The mother testified that the child was born on 17 May 1972, and the record shows that the warrant was issued on 20 May 1972.

The offense condemned by the statute is the willful neglect or the refusal to support and maintain an illegitimate child. There can be no offense until there is a child. "The mere begetting of an illegitimate child is not denominated a crime. Likewise, the failure of the father to pay the expenses of the mother incident to the birth of his illegitimate child is not a criminal offense." *State v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157. Also it is clear that the conviction must be based upon the facts as they existed at the time the charge is formally made (the issuance of the warrant). A conviction cannot be supported by evidence relating only to willful neglect or a refusal to support occurring after the warrant is issued. *State v. Perry,* 241 N.C. 119, 84 S.E. 2d 329.

It is difficult to see how an accused could willfully neglect or could refuse to support his illegitimate child until the accused is aware that such an illegitimate child has been born. True, he might state in advance of the birth that it is his intention not to support and maintain the child, but there can be no willful neglect or refusal to support, within the meaning of the statute, until the child is born and the accused is aware of the birth.

[1] In this case the trial judge instructed that a finding by the jury that the prosecuting witness demanded support from defendant before the issuance of the warrant and at any time from the time she became aware that she was pregnant would be sufficient upon the question of notice or request. We hold this to be error. Notice and request for support made prior to the birth of the child is not sufficient to place a defendant on notice that the child has been born and support is requested for his illegitimate child. To support a conviction, there must be a notice and request after the child is born and thereafter a willful neglect and refusal to support the child must occur before the charge is formally laid. The offense of nonsupport under G.S. 49-2 is a continuing one, and a new warrant may be filed charging defendant with violation of the statute if such has occurred since the issuance of the warrant upon which he has been tried. The decision upon this appeal will not preclude further prosecution in keeping with the factual situation.

[2] It appears that the foregoing evidence supports the finding of the jury that defendant is the father of the child in question, Vicky Lorraine Johnson. Also we find the trial judge's instruc-

tions upon the issue of paternity to be free from prejudicial error. Therefore, the answer to the first issue, finding that defendant is the father of the child, will not be disturbed and may not be relitigated. See *State v. Ellis,* 262 N.C. 446, 137 S.E. 2d 840.

Because of the error in the trial court's instructions, defendant is entitled to a new trial upon the issue of willful neglect and refusal to support his illegitimate child as alleged in the present warrant, if the State elects to proceed thereon.

New trial.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. WILLIAM JAMES JOHNSON, JR.

No. 7326SC684

(Filed 28 November 1973)

1. **Robbery § 2— ownership of property taken — sufficiency of allegations in indictment**

   Since the gist of the offense of robbery is not the taking, but a taking by force or the putting in fear, an indictment for robbery need not specify the person who owned the property taken, but it is sufficient if it shows that the property taken was the subject of larceny and that defendant was not taking his own property; therefore, an indictment charging defendant with armed robbery of a named individual was sufficient though the evidence indicated that the money taken actually belonged to the Charlotte Housing Authority.

2. **Criminal Law § 66— in-court identification of defendant — observation at crime scene as basis**

   Evidence in an armed robbery prosecution that two witnesses observed defendant and talked with him for fifteen minutes at the crime scene supported the trial court's finding that the witnesses' in-court identification testimony was not tainted by an illegal lineup, and such finding was binding on the court on appeal.

3. **Criminal Law § 66— out of court photographic identification of defendant — admissibility of evidence**

   The trial court in an armed robbery prosecution did not err in allowing photographic identification testimony where the evidence tended to show that a police officer showed a witness five photographs, one of which was that of defendant, that the witness, without prompting from the officer, picked out defendant as the man who had robbed her, and that the same procedure was followed with a second witness.

APPEAL by defendant from *Grist, Judge,* 12 March 1973 Session of Superior Court held in MECKLENBURG County.

Defendant was tried on a bill of indictment, proper in form, charging him with armed robbery.

At the trial the State's evidence tended to show that on 1 November 1972, a man came into the rental office of Earle Village Homes, a public housing project in Charlotte, and filled out an application for an apartment. He spent approximately fifteen minutes in conversation with the two employees, Betty Culp and Jeanette Wrenick. Before leaving he produced a paper bag and pointed a gun at the two employees demanding money. Betty Culp unlocked the cash drawer and gave him $211.00 and some change. He left with the bag of money.

Defendant was identified in the courtroom by Mrs. Culp and Mrs. Wrenick as the man who had robbed them. After a voir dire hearing the court permitted them to testify that they had identified a photograph of defendant from a group of photographs presented by a police officer shortly after the robbery. Evidence of a lineup was excluded, but the court found after exhaustive inquiries that the in-court identification of the witnesses had not been tainted by the lineup nor by presentation of photographs for purposes of identification.

The defendant testified and denied any participation in the robbery.

From a jury verdict of guilty and the sentence imposed, defendant has appealed.

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

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

BALEY, Judge.

[1] Defendant contends that there is a fatal variance between the indictment charging armed robbery of Betty Culp and the evidence which indicated that the money taken actually belonged to the Charlotte Housing Authority. In larceny cases it is important that the ownership of the stolen property be alleged and proved, *State v. Jessup,* 279 N.C. 108, 181 S.E. 2d 594, but the criminal offense here charged is armed robbery.

In robbery cases under G.S. 14-87, "[t]he gist of the offense is not the taking, but a taking by force or the putting in fear." *State v. Sawyer,* 224 N.C. 61, 65, 29 S.E. 2d 34, 37. Therefore an indictment for robbery need not specify the person who owned the property taken. A robbery indictment is sufficient if it shows that the property taken was the subject of larceny *(see State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14) and that defendant was not taking his own property. *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881; *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525; *State v. Lynch,* 266 N.C. 584, 146 S.E. 2d 677; *State v. Sawyer, supra.* The indictment in the present case satisfies these criteria.

[2] Defendant asserts that the trial court erred in admitting the identification testimony of Mrs. Culp and Mrs. Wrenick. The court properly held a voir dire hearing on this testimony. "When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts." *State v. McVay,* 277 N.C. 410, 417, 177 S.E. 2d 874, 878; *accord, State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677; *State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7; 1 Stansbury, N. C. Evidence (Brandis rev.), § 57, at 176-77.

There is ample evidence to support the court's finding that the witnesses' in-court identification testimony was not tainted by the illegal lineup. Both Mrs. Culp and Mrs. Wrenick testified that defendant was in their office for at least fifteen minutes. During this time he engaged in conversation with each of them. Clearly, both witnesses had sufficient time to become familiar with defendant's appearance; they did not learn to recognize him for the first time at the lineup.

[3] There is also competent evidence supporting the trial court's decision to admit the photographic identification testimony. H. R. Thompson, a member of the Charlotte police department, testified that he showed Mrs. Culp a group of five photographs, one of which was a photograph of defendant. He later showed the same photographs to Mrs. Wrenick. Both picked out defendant as the man who had robbed them. Thompson stated that he did not suggest to either witness that she should

choose the photograph of defendant. An examination of the five photographs shows that none of the five men pictured is strikingly different in appearance from the other four. It was entirely appropriate for the court to conclude that no improperly suggestive procedures had been used in obtaining the photographic identification testimony.

The trial court committed no error in upholding the bill of indictment or in the admission of testimony. Defendant's conviction was proper and should be affirmed.

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROSANA TOMS

No. 7329SC749

(Filed 28 November 1973)

1. **Criminal Law § 180— writ of error coram nobis — proper court for consideration**

   The superior court judge properly refused to consider defendant's petition for a writ of error *coram nobis* since that petition should have been addressed to the district court in which defendant was tried.

2. **Criminal Law §§ 180, 181— writ of error coram nobis — superseded by Post-Conviction Hearing Act**

   The writ of error *coram nobis* has been superseded by the Post-Conviction Hearing Act, G.S. 15-217 to -222, with respect to defendants who have been sentenced to prison; however, the writ is still available to defendants who have been convicted but not imprisoned.

APPEAL by defendant from *Thornburg, Judge,* 7 May 1973 Session of Superior Court held in RUTHERFORD County.

Defendant was charged in a valid warrant with issuing a worthless check in violation of G.S. 14-107. She entered a plea of guilty in the District Court of Rutherford County on 30 September 1971 and received a six-month sentence suspended on condition that she make restitution to the payee of the check. There was no appeal.

On 4 August 1972 upon a showing that defendant had failed to make restitution and comply with the terms upon which the

prison sentence was suspended, District Court Judge Robert T. Gash ordered the active sentence into effect. Defendant filed notice of appeal to the superior court.

Defendant then filed a petition for writ of error *coram nobis* or a writ of habeas corpus in the superior court before Judge Lacy H. Thornburg contending that her plea of guilty had been the result of coercion by the State and that she was not in fact guilty. Judge Thornburg denied any relief by habeas corpus and declined to consider the petition for writ of error *coram nobis* upon the ground that such petition should be addressed to the district court where defendant was tried.

From the action of the court in declining to consider the petition for writ of error *coram nobis,* defendant has appealed.

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

Deborah G. Mailman for defendant appellant.

BALEY, Judge.

[1] The refusal of the trial court to consider the petition for a writ of error *coram nobis* upon its merits is affirmed. It is clear that this petition should be addressed to the district court in which the petitioner was tried. *State v. Green,* 277 N.C. 188, 176 S.E. 2d 756. This rule is equally applicable whether the defendant was tried in superior court or in an inferior court. In *Green* the petitioner was convicted of nonsupport in the Reidsville Recorder's Court, an inferior court which has now been replaced by the district court. He petitioned the Rockingham County Superior Court for a writ of error *coram nobis,* and the Supreme Court held that the petition should have been addressed to the Recorder's Court. The Court explained its decision as follows: " 'The writ of error *coram nobis* "is brought for an alleged error of fact, not appearing upon the record, and *lies to the same court,* in order that it may correct the error, which it is presumed would not have been committed had the fact in the first instance been brought to its notice." ' " *Id.* at 192, 176 S.E. 2d at 759.

[2] Under the common law a defendant could use the writ of error *coram nobis* "to challenge the validity of a conviction by reason of matters extraneous to the record." *Id.* at 191, 176 S.E. 2d at 759. In North Carolina this writ has been superseded by

the Post-Conviction Hearing Act, G.S. 15-217 to -222, with respect to defendants who have been sentenced to prison. The writ is still available, however, to defendants who have been convicted but not imprisoned. *State v. Green, supra. See also Dantzic v. State,* 279 N.C. 212, 182 S.E. 2d 563; *State v. Daniels,* 231 N.C. 17, 56 S.E. 2d 2; *In re Taylor,* 230 N.C. 566, 53 S.E. 2d 857.

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

COOPER-HARRIS, INC.
v.
VICTOR E. ESCALLE, JR. AND EDGAR EARL CARTER
v.
ANDREW V. WILLIAMS, THIRD PARTY DEFENDANT

No. 7315DC724

(Filed 28 November 1973)

Automobiles § 90; Negligence § 40— proximate cause — foreseeability — instructions

An instruction that the proximate cause of an injury is one that produces the result in continuous sequence and without which it would not have occurred is erroneous in failing to include foreseeability as an element of proximate cause.

APPEAL from *Peele, Judge,* 26 March 1973 Civil Session of CHATHAM County District Court.

Plaintiff instituted this action to recover property damages suffered in a collision between a wrecker owned by plaintiff and a vehicle owned and operated by the original defendants. Original defendants counterclaimed, seeking to recover for property damage and personal injuries. In addition, original defendants impleaded the third party defendant—driver of the wrecker truck owned by plaintiff—to recover damages to personal property and personal injuries.

The evidence presented at the trial tended to show the following:

That on 7 June 1972 the third party defendant, an employee of plaintiff, was operating a wrecker owned by plaintiff in a westerly direction on U. S. Highway No. 64. Defendant

Escalle an employee of defendant Carter—was operating a vehicle owned by Carter, in a westerly direction on 64, and he was to the rear of the vehicle driven by Williams. The vehicle driven by Escalle pulled out to pass the Williams vehicle, and as it did so, the Williams vehicle attempted to make a left turn off the road, and the two vehicles collided. Escalle contended that he sounded his horn before attempting to pass. Williams contends that he gave a left turn signal before attempting to turn. Each party denies the contention of the other.

At the close of plaintiff's evidence, defendant moved for a directed verdict. At the close of all the evidence, plaintiff moved for a directed verdict, and defendant renewed his motion. All motions were denied and the case was submitted to the jury on the following charge:

> "Now, in order to answer the first issue 'yes,' you should be satisfied of three things. First, that this vehicle was damaged; second, that the defendants—that the defendants were negligent; and third, that the defendants' negligence was a proximate cause of the damage.
>
> * * *
>
> By proximate cause I mean that an act is the proximate cause of an injury when in a natural and continuous sequence unbroken by any new and independent cause produced the injury complained of and without which the injury would not have occurred."

The jury returned a special verdict in favor of the original defendants, whereupon the trial court entered judgment that plaintiff recover nothing of the original defendants and that original defendants recover from plaintiff and third party defendant. To the signing and entry of this judgment, plaintiff and third party defendant appeal.

Gunn and Messick, by Paul S. Messick, Jr., for plaintiff appellant.

Miller, Beck, and O'Briant, by Adam W. Beck, for defendant appellees.

MORRIS, Judge.

Plaintiff presents multiple assignments of error, including the failure of the trial court to instruct the jury on foreseeability as an element of proximate cause. We do not deem it necessary

to discuss all the assignments of error, since the latter assignment of error is dispositive of plaintiff's appeal.

It is well established that foreseeability is an element of proximate cause in North Carolina. *Ratliff v. Power Co.*, 268 N.C. 605, 151 S.E. 2d 641 (1966); *Pettus v. Sanders*, 259 N.C. 211, 130 S.E. 2d 330 (1963). See also Byrd, *Proximate Cause in North Carolina Tort Law*, 51 N.C. L. Rev. 951 (1973).

It is equally well established that the trial court's failure to include foreseeability as an element of proximate cause is error, and the party prejudiced thereby is entitled to a new trial. *Barefoot v. Joyner*, 270 N.C. 388, 154 S.E. 2d 543 (1967); *Ratliff v. Power Co., supra; Regan v. Player*, 13 N.C. App. 593, 186 S.E. 2d 688 (1972); *Keener v. Litsinger*, 11 N.C. App. 590, 181 S.E. 2d 781 (1971). In *Barefoot* and *Ratliff, supra,* the Supreme Court specifically rejected charges on proximate cause which—like the charge before us—were "but for" tests of proximate cause.

The distinction between the "but for" test of proximate cause and a test which includes the element of foreseeability has been ably stated by Justice Lake.

> "An event which is a 'but for' cause of another event—that is, a cause without which the second event would not have taken place—is not, necessarily, the proximate cause of the second event. While one event cannot be the proximate cause of another if, had the first event not occurred, the second would have occurred anyway, *Henderson v. Powell,* 221 N.C. 239, 19 S.E. 2d 876, the reverse is not necessarily true. A 'but for' cause may be a remote event from which no injury to anyone could possibly have been foreseen. Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which the plaintiff seeks to recover damages. *Nance v. Parks,* 266 N.C. 206, 146 S.E. 2d 24." *Ratliff v. Power Co., supra,* at 614.

Since foreseeability is an element of proximate cause and the trial court's charge was erroneous in this respect, plaintiff is entitled to a

New trial.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RANDOLPH LANDIS BRIGGS

No. 7328SC566

(Filed 28 November 1973)

1. **Jury § 6— improper examination of prospective jurors**

The trial court properly refused to allow defendant to ask prospective jurors if they would be able to return a verdict of not guilty if they thought defendant was probably guilty.

2. **Constitutional Law § 32; Criminal Law § 66— photographic identification — no right to counsel**

A suspect has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for the purpose of identification regardless of whether he is at liberty or in custody at the time.

3. **Criminal Law § 66— in-court identification — necessity for voir dire**

The trial court did not err in failing immediately to hold a *voir dire* regarding identification of defendant upon testimony that a witness saw defendant on a certain date where defendant interposed no timely objection and did not request a *voir dire* and where the court on its own motion held a *voir dire* when the witness began testifying about the means of identifying defendant; furthermore, defendant would not have been prejudiced if a *voir dire* had not been held since the record shows that a pretrial photographic identification was not impermissibly suggestive and that the witness's in-court identification had an independent origin based upon the witness's observation of defendant when he tried to use a stolen credit card.

APPEAL by defendant from *Martin (Harry C.), Judge,* 19 February 1973 Session of BUNCOMBE Superior Court.

The defendant was charged pursuant to G.S. 14-113.9(a)(1) with credit card theft, allegedly taking and withholding a Master Charge card from the possession of Edward S. Prince. The jury returned a verdict of guilty and judgment was entered sentencing the defendant to a term of not less than two nor more than three years. Defendant appealed.

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

Ervin L. Ball, Jr., for defendant appellant.

CAMPBELL, Judge.

[1] The defendant contends that the trial court erred in refusing to allow defendant on examination of prospective jurors to ask if they would be able to return a verdict of not guilty if

they thought the defendant was probably guilty. This issue is controlled by *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972), and warrants no further discussion.

Defendant also contends that it was improper for the police to show the prosecuting witness photographs of possible suspects, from which he identified the defendant without the presence of defendant's counsel.

[2] It has already been decided that "[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. . . . Such pretrial identification procedure is not a critical stage of the proceeding. . . ." *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970).

[3] Defendant also contends that it was error for the trial court not to immediately hold a voir dire inquiry regarding identification of the defendant upon the first testimony about such. This contention has no merit.

It is required that "[w]hen 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* . . . such *voir dire* should be conducted in the absence of the jury and the competency of the evidence evaluated. . . ." *State v. Accor, supra.*

Here the State asked, "Will you state whether or not you saw the defendant, Briggs, on that day?" to which the witness replied, "Yes, sir, I did." No objection was made until after the answer was given, and no motion to strike was made. The defendant neither made a *timely* objection nor did he request a voir dire, both being conditions imposed by *Accor, supra.*

However, when the witness began to testify about the means of identifying the defendant, the court, on its own motion, held a voir dire inquiry in the absence of the jury, thus satisfying Accor in every respect.

Here, even if no voir dire had been held, no prejudicial error would have appeared since the record clearly shows that the pretrial photographic identification was not impermissibly sug-

gestive and that the in-court identification had an independent origin based upon the witness's fifteen minute observation of the defendant at the First Union National Bank while the defendant was attempting to get this witness to approve a cash advance on the Master Charge card. *State v. Stepney, supra; State v. McLamb,* 13 N.C. App. 705, 187 S.E. 2d 458 (1972), *cert. denied,* 281 N.C. 316, 188 S.E. 2d 899 (1972).

We have reviewed defendant's other assignments of error and find them without merit.

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. CHARLES EDWARD PICKENS

No. 7328SC645

(Filed 28 November 1973)

1. **Constitutional Law § 32— right to counsel — notice — determination of indigency**

   An accused is entitled as a matter of due process of law to be informed that he is entitled to counsel; to an inquiry and determination as to his indigent state at every stage of the proceedings if he appears without counsel; and to court-appointed counsel if he is found to be indigent unless he understandingly and voluntarily waives counsel.

2. **Constitutional Law § 32— right to counsel — insufficient evidence of indigency — waiver**

   The trial court erred in requiring defendant to go to trial without benefit of counsel where the court's implied finding that defendant was not indigent was unsupported by evidence and where defendant was not informed of his constitutional right to counsel and thus could not have waived that right.

ON *certiorari* to review the order of *Thornburg, Judge,* 24 July 1972 Session of Superior Court held in BUNCOMBE County.

This is a criminal action in which defendant, Charles E. Pickens, was charged with the felony of receiving stolen goods. The case was originally set for trial on 24 January 1972 but was continued for the State until 5 June 1972. On 5 June 1972,

defendant appeared with purported counsel but had not finalized his representation and the case was continued until 10 July 1972 in order that defendant might have ample time to employ counsel. On 12 July 1972 the defendant was informed that he must employ counsel and prepare for trial and on 13 July 1972, the defendant appeared with purported counsel but counsel advised the court that he could not represent the defendant. At that time an order was entered continuing the case until 24 July 1972. The order in part stated:

> "[The court] would on that date call the case for trial, and the defendant having positively assured the court that he would appear with counsel and be ready for trial at that time, and the court having advised the defendant in open court that he would be tried on the 24th of July 1972, whether or not he made arrangements for counsel. . . ."

On 24 July 1972 defendant appeared in court without counsel and an order was entered which in pertinent part provided:

> "[T]hat the defendant now on 24 July 1972 appears in court without counsel, undertaking to appear in his own behalf and offers no excuse as to why he does not have counsel; and the court finding as a fact that the defendant has failed and neglected, after having more than ample opportunity to employ counsel, to retain counsel to appear with him;
>
> * * *
>
> . . . IT IS THE ORDER OF THE COURT that the case proceed to trial and that Charles Edward Pickens, the defendant, appear in his own behalf, if he chooses to do so, and that the trial continue without counsel appearing in behalf of the defendant."

The defendant entered a plea of not guilty and was found guilty. From a sentence of eight to ten years, the defendant gave notice of appeal which was not perfected. The defendant made application for a Writ of Certiorari which was granted on 22 March 1973.

Attorney General Robert Morgan and Assistant Attorney General Donald A. Davis for the State.

David G. Gray, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the failure of the trial court to determine his indigency and the failure to appoint counsel to assist him in the defense of the charge against him. An accused is entitled as a matter of due process of law to be informed that he is entitled to counsel; to an inquiry and determination as to his indigent state at every stage of the proceedings if he appears without counsel; and to court-appointed counsel if he is found to be an indigent unless he understandingly and voluntarily waives counsel. *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972); *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1969).

[2] A careful review of the record in the instant case reveals that at no time was defendant informed of his constitutional right to be represented by counsel and that an insufficient inquiry as to defendant's indigent state was made. The record presents a confusing state of affairs as to defendant's indigency, with defendant at one point indicating he could not afford a lawyer and at another point answering a question propounded by the court in the following manner: "Yes sir, I can make the money to employ a lawyer. * * * I have a job and I'm working and I'm self-employed." Notwithstanding this conflict in the evidence, the trial judge at no point made an *express* finding as to defendant's indigent or non-indigent condition. Based upon the paucity of evidence elicited as to defendant's financial circumstances, we are of the opinion that a finding of non-indigency, which appears to have been made impliedly in this case, is not supported by sufficient evidence, and that defendant is entitled to a more detailed investigation into his economic situation. We are not persuaded by the cases cited by the State as we find them factually distinguishable from the present case. In each of the cases relied upon by the State a much more complete inquiry into defendants' economic circumstances was present. In the case now before us there is no indication of what type of work defendant does, the salary he is paid, any indebtedness he might have or other information which might aid the court in its evaluation of defendant's financial worth.

Although we find that it was incumbent upon the trial court to make a more sufficient inquiry into defendant's financial status and to determine the question of his indigency, defendant is not prejudiced unless he can show that he did not

voluntarily and intelligently waive counsel. The trial court, in its order of 24 July 1972, stated:

> "Based upon the foregoing findings of fact, the court concludes as a matter of law that the defendant has wilfully and intentionally waived his right to counsel by his indolent behavior and his refusal and neglect to employ counsel to appear in his behalf."

Our Supreme Court quoted with approval in *State v. Morris,* 275 N.C. 50, 59, 165 S.E. 2d 245, 251 (1969), the following passage from *Carnley v. Cochran,* 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 2d 70 (1962):

> "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

Certainly we do not condone the actions of defendant; however, there being a noticeable absence in the record of any court offer of counsel to defendant, the defendant cannot be said to have waived his right to counsel. *Carnley v. Cochran, supra.*

For failure of the trial judge to determine indigency and appoint counsel to represent defendant, the judgment must be vacated and a new trial ordered.

New trial.

Judges VAUGHN and BALEY concur.

STATE OF NORTH CAROLINA v. CHARLES E. BLANTON

No. 7327SC683

(Filed 28 November 1973)

Homicide § 27— unintentional shooting — instruction on manslaughter proper

The trial court properly instructed in a manslaughter case "that the Law in this State is that where a person points a gun at another, though without intention of discharging it, if the gun does accidentally fire and kills, it is manslaughter under the Law of this State." G.S. 14-34.

APPEAL by defendant from *Thornburg, Judge,* 12 March 1973 Criminal Session GASTON Superior Court.

By indictment, proper in form, defendant was charged with the murder of Harry Cordell on 8 October 1972. When the case was called for trial, the solicitor announced that the State would seek no verdict greater than voluntary manslaughter as the evidence might warrant.

The evidence tended to show: Defendant and Cordell were friends, and on the night in question Cordell and his wife were visiting defendant in his home. The two men were in the kitchen, sitting at a table, drinking intoxicants and talking. Cordell asked defendant if he could still do his "fast draw" trick, the trick being explained by witnesses thusly: a person, while sitting or standing, would hold his hands extended forward several inches apart; defendant, with a pistol in a holster strapped to his body, would attempt to draw his pistol and place it between the hands of the other person before that person could clap his hands together. Defendant replied that he could still do the trick and proceeded to try it with a .22 caliber pistol. The pistol discharged, a bullet struck Cordell in the front of his head and killed him almost instantly. When police recovered the pistol shortly after the tragedy, it contained four live cartridges and one spent cartridge. Defendant told police that he had forgotten that he loaded the pistol some three or four days earlier.

The court submitted the case to the jury on the question of involuntary manslaughter. From a verdict of guilty and judgment imposing prison sentence of not less than four nor more than five years, with recommendation for work release, defendant appealed.

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

Robert E. Gaines for defendant appellant.

BRITT, Judge.

All of defendant's assignments of error relate to the court's instructions to the jury. He contends that the court erred in charging (1) that defendant's act was unlawful if he pointed a pistol at Cordell and (2) "that the Law in this State is that where a person points a gun at another, though without inten-

tion of discharging it, if the gun does accidentally fire and kills, it is manslaughter under the Law of this State."

In 4 Strong, N. C. Index 2d, Homicide, § 6, p. 198, we find involuntary manslaughter defined as follows:

> "Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty."

Quoted with approval by Chief Judge Mallard in *State v. Lawson,* 6 N.C. App. 1, 169 S.E. 2d 265 (1969).

G.S. 14-34 provides that if any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault.

In *State v. Foust,* 258 N.C. 453, 459, 128 S.E. 2d 889 (1963), Justice (later Chief Justice) Parker, writing for the court, said: "It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. (Citations.)"

The trial court's instructions are supported by the statute and authorities cited. In the trial of this case, we find

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. NATHANIEL LEE TORAIN

No. 7315SC805

(Filed 28 November 1973)

Robbery § 4— driver of getaway car — presence at robbery scene

The State's evidence in an armed robbery case was sufficient to establish defendant's presence at or near the store that was robbed where it tended to show that defendant, accompanied by two companions, drove an automobile to a store "to get some money," that defendant's companions entered the store and robbed the proprietor by use of a shotgun and pistol, that defendant "stayed with the car," that later that night defendant and one companion were together en route to the bus station when the police stopped them and that defendant told the police several days later where they could find the stolen money.

ON *certiorari* to review judgment of *Cooper, Judge,* 30 October 1972 Session Superior Court held in ORANGE County.

In a bill of indictment, proper in form, defendant was charged with armed robbery. He entered a plea of not guilty, was found guilty as charged and from judgment imposing prison sentence of twenty years with recommendation for work release, he appeals.

Attorney General Robert Morgan by Norman L. Sloan, Associate Attorney, for the State.

Haywood, Denny & Miller by James H. Johnson III, and William N. Farrell, Jr., for the defendant.

BRITT, Judge.

Defendant assigns as error the denial of his motions for judgment of nonsuit. The evidence, considered in the light most favorable to the State, tended to show:

Around 8:45 p.m. on Friday, 25 August 1972, defendant, accompanied by Keith and Jackie Graves, drove an automobile to the grocery store of Julian Ray on Highway 54 near Carrboro. The purpose in going to the store was "to get some money." Defendant stopped the car at the store and Keith and Jackie Graves entered the store, one with a sawed-off shotgun and the other with a pistol. The two who entered the store forced Ray to open the cash register and give them the money which was in it. They also took Ray's wallet. The cash register contained

approximately $300 and the wallet between $500 and $600. Defendant stayed with the car. Later that night defendant and Jackie Graves were together and were stopped by Burlington police en route "to the bus station." While riding in the police car, Jackie Graves hid the money under the front seat of the car and, pursuant to information provided by defendant on 2 September 1972, the money was found in the Burlington police car on 5 September 1972.

It is well settled that when two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty. *State v. Sellers,* 266 N.C. 734, 147 S.E. 2d 225 (1966); *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967). To be guilty as an aider and abettor, a defendant's actual presence is not necessary as he may be constructively present. *State v. Sellers, supra; State v. Bell, supra.*

In the case at bar, defendant contends the evidence was insufficient to establish his presence at or near Ray's store at the time of the robbery. We reject this contention. The evidence tending to show that defendant drove the automobile that carried the Graves men to the store, that to the knowledge of defendant the Graves men entered the store, one of them armed with a shotgun and the other with a pistol, that defendant "stayed with the car," that later that night they were together en route to the bus station when Burlington police "stopped" them and that defendant told police several days later where they could find the stolen money, was sufficient to support an inference that defendant was constructively present at the time of the robbery. The assignment of error is overruled.

Defendant's other assignments of error relate to the trial court's instructions to the jury. After carefully reviewing the instructions, with particular reference to those assigned as error, we conclude that the instructions were free from prejudicial error.

Defendant received a fair trial and the sentence imposed was within the limits provided by statute.

No error.

Judges MORRIS and BALEY concur.

STATE OF NORTH CAROLINA v. HARRY S. BROWN

No. 733SC758

(Filed 28 November 1973)

1. **Narcotics § 3— distribution of codeine — access of defendant to drug — relevancy of evidence**

In a prosecution for distribution of tablets containing the controlled substance codeine, the trial court did not err in allowing the solicitor to cross-examine defendant as to what his employer, a pharmaceutical company, manufactured, since such information was relevant to show defendant's access to the drug he was charged with unlawfully distributing.

2. **Narcotics § 1— distribution of codeine — possession of codeine not lesser included offense**

Since possession of a controlled substance and distribution of the same controlled substance are separate and distinct crimes, and each may be punished as provided by law, unlawful possession cannot be considered a lesser included offense of the crime of unlawful distribution; therefore, the trial court in a prosecution for distribution of codeine did not err in failing to submit to the jury the question of defendant's guilt of the offense of simple possession of codeine.

3. **Criminal Law § 161— assignments of error abandoned**

Assignments of error not argued in defendant's brief are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals.

APPEAL by defendant from *Tillery, Judge,* 18 June 1973 Session of Superior Court held in PITT County.

Defendant was tried upon an indictment, proper in form, charging that on 16 January 1973 he feloniously distributed 31 tablets containing a controlled substance, codeine, to SBI Agent Riggsbee. Defendant pled not guilty, was found guilty as charged, and from judgment imposing prison sentence of not less than three nor more than five years, defendant appealed.

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

Ernest C. Richardson III, for defendant appellant.

PARKER, Judge.

[1] On cross-examination of defendant by the solicitor the following occurred:

Question: "On January 16, 1973, where were you employed?"

Answer: "I was employed at Burroughs Wellcome."

Question: "A pharmaceutical plant?"

Answer: "Yes sir."

Question: "What do they manufacture?"

"OBJECTION OVERRULED"

Answer: "They manufacture medicine."

Appellant assigns error to the overruling of his objection to the solicitor's question as to what defendant's employer manufactured. This assignment of error is without merit. The question was well within the range of permissible cross-examination within the rule prevailing in this State. 1 Stansbury, N. C. Evidence, Brandis Revision, § 35. Defendant's counsel interposed no objection or motion to strike when, during the further cross-examination of defendant by the solicitor, the defendant testified that he had "heard that they manufacture codeine." The information elicited was relevant to show defendant's access to the drug he was charged with unlawfully distributing.

[2] Appellant assigns error to the trial court's failure to submit to the jury the question of defendant's guilt or innocence of the offense of simple possession of codeine, contending that such offense is a lesser included offense of the offense charged in the bill of indictment. Our Supreme Court has held, however, that possession of a controlled substance and distribution of the same controlled substance are separate and distinct crimes, and each may be punished as provided by law, even where the possession and distribution in point of time were the same. *State v. Thornton,* 283 N.C. 513, 196 S.E. 2d 701; *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481. Under the holding of these cases unlawful possession cannot be considered a lesser included offense of the crime of unlawful distribution.

[3] Upon oral argument in this Court appellant's counsel abandoned the only remaining assignment of error which was brought forward in appellant's brief. No reason or argument has been stated and no authority cited in appellant's brief in support of other assignments of error appearing in the record, and these will also be taken as abandoned. Rule 28, Rules of Practice in

the Court of Appeals. We have, nevertheless, carefully reviewed the entire record and in the trial and judgment appealed from find

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. JAMES CLAY PENLAND

No. 7328SC693

(Filed 28 November 1973)

Criminal Law § 116— instruction on defendant's failure to testify — no error

While it is better, in the absence of a request, to give no instruction, the trial court's instruction on defendant's failure to testify which incorporated the precise language of G.S. 8-54 was not error.

APPEAL by defendant from *Lanier, Judge,* 26 February 1973, Criminal Session, BUNCOMBE Superior Court.

The defendant was charged with armed robbery. From a verdict of guilty and a sentence of not less than 15 years and not more than 20 years, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney William Woodward Webb for the State.

Robert S. Swain and Joel Stevenson for defendant appellant.

CAMPBELL, Judge.

The defendant's only contention is that error was committed when the trial court, without being requested to do so, instructed the jury that the defendant had not testified in his own behalf and that the law of North Carolina gave him the right to do so. Defendant contends that he was prejudiced because the trial court did not instruct the jury that it was not to consider the defendant's action in any manner in reaching their verdict.

The actual instructions to the jury on this point were:

"Now the defendant in this case has not testified. The law of North Carolina gives him this privilege. He may or

may not testify in his own behalf as he sees fit. This same law also assures him that his decision not to testify shall not create any presumption against him."

In *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971), *cert. denied*, 404 U.S. 1023, 92 S.Ct. 699, 30 L.Ed. 2d 673 (1972), the court stated: "Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by the defendant." While it is better, in the absence of a request, to give no instruction, nevertheless, we find no error in this instance. An instruction such as the one here which incorporates the precise language of G.S. 8-54 is not only acceptable, it has often been suggested as being the preferred instruction. *State v. McNeill*, 229 N.C. 377, 49 S.E. 2d 733 (1948); *State v. Powell*, 11 N.C. App. 465, 181 S.E. 2d 754 (1971), *cert. denied*, 279 N.C. 396, 183 S.E. 2d 243 (1971); *State v. House*, 17 N.C. App. 97, 193 S.E. 2d 327 (1972); *State v. Phifer*, 17 N.C. App. 101, 193 S.E. 2d 413 (1972), *cert. denied*, 283 N.C. 108, 194 S.E. 2d 636 (1973).

The defendant had a fair and impartial trial free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. RALPH NETTLES

No. 737SC743

(Filed 28 November 1973)

Criminal Law §§ 116, 117; Narcotics § 4.5— credibility of witnesses — failure of defendant to testify — requests for instructions required

The trial court in a prosecution for possession of heroin and LSD did not err in failing to instruct the jury on the credibility of witnesses and on defendant's failure to testify where defendant did not request such instructions.

APPEAL by defendant from *Webb, Special Judge*, 9 April 1973 Session of Superior Court held in NASH County.

Defendant was tried in the Superior Court of Nash County for possession of heroin and LSD (lysergic acid diethylamide) in

violation of G.S. 90-95. He pled not guilty and was convicted by the jury.

The State's evidence tended to show that two police officers observed defendant standing at an intersection in the city of Rocky Mount and saw him drop from his hand two shiny objects which proved to be tinfoil packets. The packets were sent to the State Bureau of Investigation Crime Laboratory where the contents were analyzed and found to be heroin and LSD.

Defendant offered no evidence.

From judgment imposing a sentence of five years, he has appealed.

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

Moore, Diedrick & Whitaker, by L. G. Diedrick, for defendant appellant.

BALEY, Judge.

Defendant contends that the trial court erred in failing to instruct the jury on the credibility of witnesses and on his failure to testify. No request was made for these instructions. " 'Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contention of the parties, it complies with G.S. 1-180, and a party desiring further elaboration on a particular point . . . or a charge on a subordinate feature of the case, must aptly tender request for special instruction.' " *State v. Hunt,* 283 N.C. 617, 623, 197 S.E. 2d 513, 517; *accord, State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14; *State v. Garrett,* 5 N.C. App. 367, 168 S.E. 2d 479, *cert. denied,* 276 N.C. 85.

It is proper for the judge to charge the jury on the credibility of witnesses, in the absence of a request for such an instruction, but it is not mandatory that he do so. *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *State v. Hardee,* 6 N.C. App. 147, 169 S.E. 2d 533.

In the same way, the court is not required to give an instruction on the defendant's failure to testify when there has been no request for such an instruction. In fact, "[o]rdinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is

requested by defendant." *State v. Barbour,* 278 N.C. 449, 457, 180 S.E. 2d 115, 120.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. EDWARD SPEED

No. 7318SC655

(Filed 28 November 1973)

APPEAL by defendant from *Crissman, Judge,* 23 October 1972 Regular Criminal Session of Superior Court held in GUILFORD County, Greensboro Division.

Defendant, Fred Crawford, and Ralph Wayne Rankin were charged in separate bills of indictment with the larceny of $15.00 from the person of Lucille M. Langston on 7 October 1972. All three were found guilty by a jury. From judgments imposing prison sentences the defendant and Ralph Wayne Rankin filed separate appeals to this Court.

The *Rankin* case has been heard and this Court, with Judge Hedrick dissenting, found no error. *State v. Rankin,* 18 N.C. App. 252, 196 S.E. 2d 621. It was then appealed to the North Carolina Supreme Court, and in an opinion by Justice Lake, filed 14 November 1973 and reported in 284 N.C. 219, 200 S.E. 2d 182, the Supreme Court affirmed the decision of the Court of Appeals. The opinions in the companion *Rankin* case in both the Court of Appeals and the Supreme Court set out in detail the facts and legal issues involved in the present appeal.

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

Frye, Johnson & Barbee, by Marquis D. Street, for defendant appellant.

BALEY, Judge.

The case of *State v. Ralph Wayne Rankin,* 284 N.C. 219, 200 S.E. 2d 182 (filed 14 November 1973), is controlling on all questions presented by this appeal. The facts concerning

defendant and Ralph Wayne Rankin as participants in the larceny are identical, and there is no valid distinction in the application of the law to their cases.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES MICHAEL MITCHELL

No. 7325SC546

(Filed 28 November 1973)

APPEAL by defendant from *Martin (Robert M.), Judge,* 15 January 1973 Session of Superior Court held in BURKE County.

Defendant was charged in a warrant with driving a motor vehicle on the public highway while his operator's license was in a state of revocation. Defendant was found guilty in District Court and appealed. In the Superior Court defendant applied for the appointment of counsel, but, upon a finding by the trial judge that defendant was not indigent, the application was denied. Defendant tendered a plea of guilty. Upon due inquiry, the trial judge found that the plea of guilty was freely and understandingly tendered, and ordered that the plea of guilty be recorded. After hearing evidence for the State and evidence for the defendant, the trial judge imposed a term of six months imprisonment.

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

No counsel contra.

BROCK, Chief Judge.

We have fully reviewed the record and it appears that defendant was afforded a full and complete hearing. It seems that his plea of guilty was advisedly entered because the State's evidence would fully support a conviction. We find no prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. MATTHEW PARKER, JR.

No. 737SC768

(Filed 28 November 1973)

APPEAL by defendant from *James, Judge,* 16 April 1973 Session of Superior Court held in EDGECOMBE County.

By indictment, proper in form, defendant was charged with the armed robbery of one John Willey. He pled not guilty. The State's evidence showed that on the night of 29 March 1973 defendant attacked Willey in the men's rest room of the Rocky Mount bus station, threw him to the floor, held a knife to his throat, and took from him a wallet containing $16.00. Aroused by Willey's cries, other persons in the bus station seized defendant and detained him until the police arrived. The jury returned a verdict finding defendant guilty as charged. From judgment on the verdict sentencing defendant to prison for the term of not less than 18 nor more than 20 years, defendant appealed.

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

W. O. Rosser for defendant appellant.

PARKER, Judge.

We have carefully reviewed the entire record. In defendant's trial and in the judgment imposed we find

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

F. F. GOFORTH AND WIFE, LILLIE GOFORTH v. JIM WALTER, INC.

No. 7228SC706

(Filed 12 December 1973)

1. **Mortgages and Deeds of Trust §§ 35, 39— wrongful foreclosure — directed verdict proper**

The trial court properly granted defendant's motion for a directed verdict with respect to plaintiffs' claim for wrongful foreclosure on a deed of trust where a stipulation entered into by the parties established that it was not the defendant which caused the deed of trust to be foreclosed and where there was no evidence to show that the deed of trust was not properly subject to foreclosure or that the power of sale contained therein was not properly invoked and fully complied with.

2. **Rules of Civil Procedure § 33— unanswered interrogatories — information sought not pertinent**

The trial court did not err in sustaining defendant's objections to certain of plaintiffs' interrogatories where the information requested could in no view of the pleadings have been pertinent to the litigation; furthermore, even if the court erred in sustaining defendant's objections to certain other interrogatories, plaintiffs failed to show that such error was prejudicial.

3. **Contracts § 29— breach of contract — award of no more than nominal damages proper**

In an action for monetary damages resulting from defendant's alleged breach of contract in failing to construct a home on plaintiffs' land in a workmanlike manner and in accordance with contract specifications, the trial court properly instructed the jury that if they found that defendant breached its contract, they might award no more than nominal damages since plaintiffs failed to present any evidence as to what it would have cost to bring the house up to contractual standards or as to the difference in value between the house as constructed and as contracted for.

4. **Contracts § 26; Mortgages and Deeds of Trust § 39— breach of contract — wrongful foreclosure — evidence of fair market value of land — relevancy**

Evidence with respect to the fair market value of plaintiffs' land was properly excluded in an action for breach of contract and wrongful foreclosure on a deed of trust where that evidence would have been relevant only in connection with plaintiffs' claim for wrongful foreclosure as to which defendant's motion for directed verdict was properly allowed.

5. **Contracts §§ 28, 29— breach of contract — instructions on nominal damages**

In an action for breach of contract where nominal damages were all that were justified by the evidence, the trial court did not err in rejecting the jury's original verdict on the damage issue of " . . . the

reasonable market value of the land as of the date of the contract" and repeating his instructions that they could return a verdict for no more than nominal damages.

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

By written contract dated 11 June 1969 defendant agreed to build a house according to certain plans and specifications upon a one-acre tract of land belonging to plaintiffs, and in return plaintiffs agreed to execute a promissory note to defendant in the amount of $13,824.00 payable in monthly installments and to secure the same by a deed of trust on the aforementioned property. Plaintiffs executed and delivered the note and deed of trust called for in the contract, and defendant, through subcontractors, caused a house to be built upon plaintiffs' land.

On 30 November 1970 plaintiffs filed complaint in this civil action alleging two claims for relief: (1) A claim for rescission of the contract or, in the alternative, for recovery of monetary damages resulting from defendant's alleged breach of the contract in failing to construct the house in a workmanlike manner and in accordance with contract specifications, and (2) a claim for monetary damages resulting from the alleged wrongful foreclosure of the deed of trust by the defendant. Defendant answered, denying it had breached the contract, and as a defense to plaintiffs' first claim alleged that it had proceeded through its subcontractors to perform its obligation under the contract, but that when the house was almost completed plaintiffs, without justification, placed "No Trespassing" signs upon the property and prevented completion of the house. As a defense to plaintiffs' second claim, defendant alleged it had assigned the note executed to it by plaintiffs to Mid-State Homes, Inc., which corporation, upon default by plaintiffs, caused the deed of trust to be foreclosed under the terms of the power of sale contained therein, and that defendant was not a party to the foreclosure proceeding and had never acquired title to the property.

Upon the trial and at the close of plaintiffs' evidence, the court allowed defendant's motion for a directed verdict dismissing the claim for wrongful foreclosure. At the close of all the evidence, plaintiffs' first claim was submitted to the jury on issues (1) as to defendant's breach of the contract and (2) as to damages. The jury answered the first issue in plaintiffs'

favor. Under instructions from the court that, if they answered the first issue for plaintiffs they could award only nominal damages, the jury answered the second issue in the amount of $9.99. From judgment in accord with the verdict, plaintiffs appealed.

Brock & Howell by Ronald W. Howell for plaintiff appellants.

W. Faison Barnes and Anne King for defendant appellee.

PARKER, Judge.

[1] There was no error in the trial court's granting defendant's motion for a directed verdict with respect to plaintiffs' claim for wrongful foreclosure. At the commencement of the trial the parties entered into certain stipulations, including the following:

> "It is further stipulated and agreed that for valuable consideration the defendant assigned the Note executed to the defendant by Plaintiffs to Mid-State Homes, Inc. and that upon default by the plaintiffs, Mid-State Homes, Inc. caused said deed of trust to be foreclosed under the terms of the power of sale contained therein, and said property was sold by public auction under such power of sale; and the same was conveyed by trustees deed copy of which is marked Exhibit 4 and may be admitted in evidence by either party without further identification."

This stipulation established that it was not the defendant, but Mid-State Homes, Inc., which caused the deed of trust to be foreclosed. Neither the trustee in the deed of trust nor Mid-State Homes, Inc., was made a party to this action, and there was no allegation in the complaint that either had acted improperly in connection with the foreclosure. Indeed, Mid-State Homes, Inc., was not even mentioned or referred to, directly or indirectly, in the complaint. Furthermore, there was simply no evidence to show that the deed of trust was not properly subject to foreclosure or that the power of sale contained therein was not properly invoked and fully complied with. Thus, plaintiffs' evidence not only failed to show that defendant acted in any way improperly in connection with the foreclosure, but it even failed to show that anyone else had. Plaintiffs had the burden of presenting evidence to support their claim for wrong-

ful foreclosure, and in the absence of such evidence defendant's motion for a directed verdict as to that claim was properly allowed.

[2] Prior to the trial plaintiffs served upon defendant written interrogatories under Rule 33 of the Rules of Civil Procedure in which they asked forty questions relating to various matters. The court sustained defendant's objections to certain of these, and defendant answered the remainder. On this appeal plaintiffs contend that the trial court committed error in sustaining objections to their interrogatories regarding the internal organization of the corporate defendant and regarding defendant corporation's relationship to Mid-State Homes. Inc. Certain of the interrogatories as to which defendant's objections were sustained were clearly improper in that the information requested could in no view of the pleadings have been pertinent to this litigation, and the asking of these questions indicated no more than plaintiffs' desire to embark upon a wide-ranging fishing expedition throughout defendant's corporate structure. If it be assumed *arguendo* that defendant might properly have been required to answer certain of plaintiffs' other questions as to which objections were sustained, plaintiffs have failed to show that any error prejudicial to them resulted from the trial court's action in sustaining defendant's objections to such questions. The information sought in questions relating to the identity of certain of the local agents and employees of the defendant would have been relevant, if at all, only as it related to the first issue submitted to the jury, and that issue was in any event, answered in plaintiffs' favor. While information as to defendant's relationship, if any, with Mid-State Homes, Inc., might have been relevant had plaintiffs alleged that Mid-State Homes, Inc., acted in connection with the foreclosure as defendant's agent or alter ego, no such allegation was made. Moreover, as above noted, plaintiffs failed to present evidence that defendant or Mid-State Homes, Inc., or anyone else acted improperly in connection with the foreclosure. On this record plaintiffs have simply failed to show how they were prejudiced by the court's sustaining objections to certain of their interrogatories, and their assignments of error relating thereto are overruled.

[3] Appellants contend that the trial judge erred in instructing the jury that if they answered the first issue in plaintiffs' favor, thereby finding defendant breached its contract, they might award no more than nominal damages. Under the evi-

dence in this case, the instruction was proper. While evidence was presented as to the respects in which the house as constructed failed to meet the standards and specifications contracted for, there was a complete lack of any evidence either as to what it would have cost to bring the house up to contractual standards or as to the difference in value between the house as constructed and as contracted for. "When plaintiff proves breach of contract he is entitled at least to nominal damages," *Sineath v. Katzis,* 218 N.C. 740, 12 S.E. 2d 671, but "[i]n order to recover compensatory damages in a contract action, plaintiff must show that the damages were the natural and probable result of the acts complained of and must show loss with a reasonable certainty, and damages may not be based upon mere speculation or conjecture." *Pike v. Trust Co.,* 274 N.C. 1, 161 S.E. 2d 453. In the present case, the plaintiffs had the burden of presenting evidence from which the jury could determine with a reasonable certainty, and not by mere speculation or conjecture, the amount of damages which resulted from defendant's breach of contract. Absent such evidence, plaintiffs were entitled to no more than nominal damages.

[4] Plaintiffs' contention that the trial court erred in excluding evidence as to the fair market value of their land is without merit. Such evidence would have been relevant only in connection with plaintiffs' claim for wrongful foreclosure as to which defendant's motion for directed verdict was properly allowed. *Childress v. Trading Post,* 247 N.C. 150, 100 S.E. 2d 391, cited and relied on by plaintiffs, is not here apposite. In that case there was evidence from which the jury might find that the foundation of the house which defendant in that case had built under contract with plaintiffs was so weakened by cracks as to endanger the house itself, so that the house had no substantial value; hence, rescission should be permitted. An issue was tendered for the purpose of having the jury pass upon the substantiality of the asserted breaches, but the trial court declined to submit the issue. On appeal, our Supreme Court held that *under the evidence in that case* the tendered issue should have been submitted so that the nature and extent of the defaults could be determined. The opinion of the court pointed out that *if the defaults are of sufficient magnitude to justify cancellation,* plaintiffs would be entitled to be restored to the condition they occupied on the day the contract was entered into. The opinion also pointed out, however, that "[n]ot every breach

of a contract justifies a cancellation and rescission. The breach must be so material as in effect to defeat the very terms of the contract." In the case now before us, there was no evidence that defendant's breaches were so material nor was any issue tendered for the purpose of having the jury pass upon the question of whether the alleged breaches by defendant were of such magnitude as to render the house without substantial value, thereby justifying a rescission of the contract. On the contrary, the record discloses that the house constructed by defendant in this case was in fact ultimately repaired and that following the foreclosure it has been occupied and used as a residence by other parties.

[5] Finally, appellants contend that the trial judge erred in refusing to accept the jury's verdict as originally returned on the damage issue. In this connection the verdict first brought back by the jury was "Yes, the reasonable market value of the land as of the date of the contract." The trial judge correctly rejected this verdict on the second issue and repeated his instructions to the jury that they could return a verdict on the second issue for no more than nominal damages. As above noted, nominal damages were all that were justified by the evidence presented.

While unquestionably plaintiffs have suffered loss of their land by the events disclosed by the record in this case, this loss resulted not from such breaches of the contract by the defendant as the evidence disclosed, but from plaintiffs' own intransigence in insisting on their right to rescind the contract in the face of defendant's efforts to correct the defects in the house, and from plaintiffs' refusal to honor their own obligations under the deed of trust.

In the judgment appealed from we find

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM J. "BILL" DOOLEY

No. 7327SC695

(Filed 12 December 1973)

1. **Searches and Seizures § 2— voluntariness of consent to search — necessity for voir dire**

Though the trial court did not conduct a *voir dire* and make specific findings as to whether defendant's consent to search his premises was voluntarily and understandingly given, evidence in the record was sufficient to sustain a finding of voluntariness where it tended to show that officers approached defendant as he sat on the porch of his home, defendant was given the *Miranda* warnings after which he told officers that the gun used in the murder was in the house and they could get it, and defendant accompanied the officers into his house while the gun was retrieved from its hiding place.

2. **Criminal Law § 75— Miranda warnings given — voluntariness of statements**

Where defendant was given the *Miranda* warnings at least two times following his arrest and before he made inculpatory statements, such statements were freely, understandingly and voluntarily made and were not the product of interrogation, prodding or any coercion.

3. **Criminal Law § 77— self-serving declarations — exclusions proper**

Where statements made by the defendant to a police officer were not part of the *res gestae*, the trial court properly excluded the statements as self-serving declarations.

APPEAL by defendant from *McLean, Judge,* 9 April 1973 Session of Superior Court held in GASTON County.

This is a criminal action in which the defendant, William J. "Bill" Dooley, was charged in a bill of indictment, proper in form, with the first degree murder of Troy L. (Towhead) Thomas. At the call of the case the State elected to proceed only on second degree murder or manslaughter as the evidence might show. The defendant entered a plea of not guilty.

On 18 January 1973 as a result of a telephone call to assist another unit with reference to a shooting, Officer Sprott went to defendant's home at 1013 Airline where he found the deceased lying across the railroad track approximately twenty feet from a fence which was located at the top of a bank south of defendant's back door. Thomas appeared to be alive but unconscious when Officer Sprott arrived at the scene. From the railroad track, Officer Sprott could see the defendant standing inside the back door entrance of his home.

Officers Bell and Grant arrived at defendant's residence shortly after Officer Sprott and found defendant sitting on the front porch of his house. The officers could tell that defendant had been drinking some alcoholic beverage; and because the defendant insisted on talking, they advised him of his constitutional rights. Defendant revealed the location of the pistol; and Officer Bell, testifying on voir dire, described the events which resulted in the discovery of the gun as follows:

> "We asked him would he get the gun for us, and he said, 'It's in the house, go get it.' And we didn't go until we give him time to get up, and he took us in the house—myself, and Officer Sprott, and Officer Homer Grant. Mr. Dooley went in the house and sat on the couch, and he told Mr. Grant where the gun was at, located in a bedroom, and I followed Mr. Grant into the bedroom, and he found the gun between the pillow and the mattress. That was after I advised him of his rights."

The gun (State's Exhibit No. 3) was determined to be a .22 caliber pistol and had three spent shells in it when found.

The defendant was taken to the police station where he was again advised of his rights and at that time the defendant kept saying to the detectives, "I killed the son-of-a-bitch [and] Towhead Thomas was no good."

The defendant testified and offered evidence tending to show that on 18 January 1973, he was in his backyard with his wife's .22 caliber pistol to shoot rats which had been killing his puppies. While the defendant was in the backyard, Robert Cunningham and Towhead Thomas came by and the three engaged in conversation at the fence. Thomas asked the defendant for a drink, and Cunningham was dispatched to purchased a bottle of wine. While Cunningham was gone, the defendant and the deceased discussed the fact that Dooley would not have anything to do with Towhead. When Cunningham returned, Thomas drank all but a small portion of the wine which defendant drank. Dooley testified:

> "Well, then he [Thomas] said, 'Well, we'll just shake hands and be friends,' and I said, 'Good,' and I said, 'We'll be on good speaking terms.' We shook hands over the fence and he started off. I don't know how far he got. The first thing I knowed, I seen him coming back running up the bank, and

he said, 'I'll just kill you, you son-of-a-bitch, or you'll kill me, one.' And I shot in the ground. Yes, sir, I saw a knife on him at that time. It was in his right hand. I shot in the ground, and he kept coming, and I fired twice in the air. At the time he was coming up the hill with the knife, and after he threatened me, I asked him to stop, yes, sir. That is when I fired in the ground, yes, sir. I attempted to move backwards. I got about three foot from the fence before I fell, almost to the top of the bank. Well, I lost one of my crutches, and fell down and had to get up and get the other crutch together. Didn't go plumb down, went almost down and lost my crutch. [Dooley had only one leg.] He was three foot of the fence.

He was coming straight on just as hard as he could come. I fired once in the ground and then I fired twice in the air, and he was still coming right towards me. Then he turned around and went back toward the railroad track down the bank incline there. I then went in the house. I put the gun under the pillow in the bedroom. Yes, sir, I had something to drink in the house. I had about a pint or half-pint of liquor. I drank that. I went out on the front porch and set down until the police came. And Detective Bell, Sergeant Posey and the other officers, and Captain Elmore came up and a deputy sheriff, too.

I told them where the gun was at, yes, sir. I told them it was under a pillow in the bedroom."

The jury found the defendant guilty of manslaughter and from a judgment imposing a prison sentence of not less than twelve nor more than fifteen years, he appealed.

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

Harris and Bumgardner by Don H. Bumgardner for defendant appellant.

HEDRICK, Judge.

[1] Defendant's Exceptions II, III, IV, V, and VI relate to the admission into evidence of the .22 caliber pistol found in defendant's home and the statements allegedly made by him at the Police Station. First, defendant contends the gun was the product of an illegal search and seizure. We do not agree.

In *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971), we find the following:

> "The owner of the premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent. (citations omitted) To have such effect, the consent of the owner must be freely and intelligently given, without coercion, duress, or fraud, and the burden is upon the State to prove that it was so, the presumption being against the waiver of fundamental constitutional rights. *State v. Little,* 270 N.C. 234, 154 S.E. 2d 61. However, the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, in order to make competent a confession made in custody, need not be given by officers before obtaining the consent of the owner to a search of his premises. *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25."

While the court did not conduct a voir dire and make specific findings as to whether the defendant's consent to search his premises was voluntarily and understandingly given, we think such a finding is implicit in the ruling on defendant's objection to the admission of the gun in evidence. Immediately before the gun was offered into evidence, the court conducted a voir dire with respect to the admission of certain statements allegedly made by the defendant when he was arrested on his front porch. The record shows that the defendant was given the "Miranda" warnings and that he told the officers that the gun was in the house, "go get it." The defendant accompanied the officers into his house and sat in the living room while the gun was retrieved from its hiding place under the pillow in the bedroom. Therefore, in our opinion, there is plenary, uncontroverted evidence in the record to sustain a finding that the defendant understandingly and voluntarily gave the officers permission to retrieve the gun with which the crime was committed.

[2] With respect to the admission into evidence of the inculpatory statements made by the defendant at the police station, he contends:

> "The court erred in allowing the statement by the defendant into evidence on the grounds that the defendant was not properly warned of his rights and was not in a

physical condition to voluntarily and knowingly waive his rights against self-incrimination."

The record reveals that the defendant was arrested about 2:00 p.m. and taken to the police station where he made the statements challenged by these exceptions. Officer Bell testified:

> "I had occasion to see the defendant at the City Hall. It would have been between 2:05 and 2:57, in that period of time—it was around—2:15 or 2:57, in that period of time—approximately an hour. No officer was questioning him at that time, he was just sitting in there in the City Hall at the chair in the Detective Bureau and nobody was asking him anything at that time."
>
> "Mr. Dooley kept saying to the detectives, 'I killed the son-of-a-bitch.' Stated that 'Tow-head Thomas was no good.'
>
> * * * The defendant was talking on his own, at that time."

In *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965), the court concluded, as summarized below, the following:

> Where there is plenary evidence to sustain a finding that the confession was voluntary and no evidence to the contrary and defendant merely objects to the admission of the confession but offers no evidence in regard to its voluntariness, the ruling of the court admitting the confession amounts to a finding that the confession was voluntary, and the absence of a specific finding of voluntariness is not fatal.

The defendant was given the "Miranda" warnings when he was arrested at his home and was again given the "Miranda" warnings, the record shows, "between 2:05 and 2:57." While it would have been better had the trial court upon the defendant's objection conducted a *voir dire* and made findings and conclusions regarding the admissibility of the proffered testimony, *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), we are of the opinion that there is plenary evidence in the record to sustain a finding that the defendant was given the "Miranda" warnings at least two times following his arrest and before he made the inculpatory statements which are the subject of these exceptions and that such statements were freely, understandingly, and volun-

tarily made and were not the product of interrogation, prodding, or any coercion. Furthermore, we do not perceive how the defendant could have been prejudiced by the admission into evidence of either the gun or his inculpatory statements since he testified in his own behalf that he shot the deceased with the .22 caliber pistol, put it under his pillow, and told the officers where to find it. These exceptions are not sustained.

With respect to the cross-examination of Officer Bell, the record discloses:

> "I had occasion later on to talk with Mr. Dooley, later that day and the next day. At this time he made a statement to me. I have that statement with me. The statement was made at about 2:57 and I had arrived at the scene at 2:05. It was signed by myself—Prior to giving that statement, Mr. Dooley was advised of his rights. He was at the police office at the time it was given.
>
> Q. Would you read the statement what he told?
>
> OBJECTION: SUSTAINED.
>
> MR. BUMGARDNER: Your Honor, may I be heard outside of the presence of the jury?
>
> COURT: All right, members of the jury, step out to your room.
>
> (JURY LEAVES COURTROOM)
>
> Mr. Bumgardner argues to the court concerning the ruling on the objection, and asks the court to permit him to have the statement proffered into evidence . . . DENIED by the court.
>
> EXCEPTION NO. VII"

[3] Defendant argues that since the court admitted the inculpatory statements of defendant which were the subject of Exception No. VI, it was error not to allow Officer Bell on cross-examination to read into evidence the complete statement given to Officer Bell which he (the officer) had reduced to writing. We do not agree. It being clear that the statements made by the defendant to Officer Bell which the defendant sought to have the officer read into evidence on cross-examination were not a part of the res gestae, the court properly excluded the statements as self-serving declarations, *State v. Mitchell,* 15

N.C. App. 431, 190 S.E. 2d 430 (1972); *State v. Davis,* 13 N.C. App. 492, 186 S.E. 2d 180 (1972); *State v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250 (1942).

Furthermore, since the oral statements admitted by the court were not the same or a part of the written statement excluded by the court, there is no merit in defendant's contention that the latter was admissible under the general rule that:

> "When a party's declaration is offered against him as an admission, he is entitled to have everything brought out that was said at the time in connection with the point in controversy and explanatory of the admission, as well those parts which tend to discharge him as those which tend to charge him." Stansbury's North Carolina Evidence, Brandis Revision, Volume 2, Admissions, Sec. 181, at p. 60.

Additionally, defendant contends the court erred in denying his motion for judgment as of nonsuit, in admitting the spent shells found in the gun into evidence and in failing to instruct the jury as requested on the defendant's right to defend his habitation and curtilage from a trespasser. We have carefully examined these contentions and find them to be without merit.

The defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. DANIEL LEE LONG

No. 735SC731

(Filed 12 December 1973)

1. Automobiles § 3— driving after license revoked — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of operating a motor vehicle on a public highway while his license was revoked where defendant stipulated that his license had been permanently revoked prior to the incident in question, and a Highway Patrolman testified that he found defendant sitting in the driver's seat of the car some 30 seconds after

he observed the car being driven from the traveled portion of the highway onto the shoulder, and that when he tapped on the window defendant and a female companion exchanged places in the front seat.

2. **Criminal Law § 102— jury argument — diagram by solicitor — objection sustained — absence of instruction to disregard**

Where the court sustained defendant's objection to a diagram drawn on the blackboard by the solicitor during his jury argument, defendant was not prejudiced by the court's failure to instruct the jury to disregard any reference to the diagram.

3. **Criminal Law §§ 86, 119— prior convictions — impeachment — necessity for limiting instructions**

In a prosecution of defendant for driving while his license was suspended, the trial court did not err in failing to instruct the jury that evidence of defendant's previous convictions for violations of motor vehicle laws was not competent as substantive evidence but was competent only as bearing on his credibility as a witness where defendant made no request for such an instruction until the jury had begun its deliberations. G.S. 1-181.

APPEAL by defendant from *Rouse, Judge,* 21 May 1973 Schedule "B" Criminal Session of Superior Court held in NEW HANOVER County.

Defendant was charged in a warrant with operating a motor vehicle on a public highway on 16 March 1973 while his operator's license was revoked. He was convicted in the District Court and appealed. At trial *de novo* in the Superior Court, defendant's counsel stipulated that defendant's operator's license was, as of 16 March 1973, permanently revoked. The State's only witness was the arresting Highway Patrolman, who testified in substance as follows: At approximately 11:55 p.m. on 16 March 1973 he was driving his patrol car on U. S. Highway 421 traveling south toward Carolina Beach. At that point the highway is a straight, four-lane road, with a median between the north and southbound lanes. He observed a Rambler automobile traveling north on the highway. The Rambler decreased its speed and pulled over to the shoulder of the road. The patrol car was then right at a crossover, and the patrolman, thinking the driver of the Rambler possibly was having trouble with his car, crossed over the median and turned his patrol car in the same direction that the Rambler was going. The patrolman testified:

> "I was driving approximately 45 or 50 miles an hour, I slowed down right at the median to get back up to

where, behind the car, and it was probably no longer than 30 seconds, between the time I crossed the median and came up behind this car. This car was approximately 100 feet north of the median at that time. I had to travel only a 100 feet to come up behind the car. At this time I pulled up behind the car with my lights on bright and stepped out of the car with my flashlight and started to the car, at this time there was a man sitting under the driver's seat with the motor running, and there was a woman beside him and he had his arm around her in such a manner as to embrace, and I tapped on the window and there was a sort of scramble. At this time there was a sort of scramble like they were switching drivers.

"The woman switched drivers (sic) with the male driver who was sitting under the wheel. He crawled over her and she slid under him. The front seat was a bench type seat. I was standing at the driver's door when I saw this. There was nothing to obstruct my view and keep me from seeing in the car. I had the flashlight and was right at the window. When I walked up the male was sitting in the seat on the driver's side and the female in the passenger's seat. The male who was sitting under the wheel is Mr. Long, the defendant."

* * * * *

"From the time I first observed this vehicle going up the road, I made my turn and kept the car in observation the whole time. The weather conditions were clear. There was nothing to keep me from observing this car all of the time until it stopped. I made my left turn and I checked back on the traffic from my right and there was none coming, and as soon as I made the turn I was facing right at the car. I was facing the car and the lights were shining in the car. I could not identify the people in the car, but I could see people inside the car.

"The car was actually stopped by the time I turned around. I don't know if Mr. Long and his female companion had switched places before I got there or not.

"If they had switched before I got there, they switched again after I got there."

Defendant testified that he had not driven the car at any time that night; that his girl friend had driven the car to

where it was stopped off of the road; that the car had been parked some ten minutes before the officer came up; and that when the officer came up, he was sitting beside his girl and on the passenger's side at all times.

The jury found defendant guilty, and from judgment imposing a sentence of imprisonment, defendant appealed.

Attorney General Robert Morgan by Associate Attorney John R. Morgan for the State.

Stephen E. Culbreth for defendant appellant.

PARKER, Judge.

Appellant assigns error to the denial of his motions for a directed verdict of not guilty made at the close of the State's evidence and renewed at the close of all of the evidence. In a criminal case the motion for a directed verdict of not guilty, like the motion for judgment of nonsuit, challenges the sufficiency of the evidence to take the case to the jury, *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305; *State v. Woodlief*, 2 N.C. App. 495, 163 S.E. 2d 407, and in passing upon such a motion the same rule applies, i.e., the evidence must be viewed in the light most favorable to the State and the State must be given the benefit of all inferences in its favor which may be reasonably drawn. When so viewed, the evidence in this case was sufficient to require submission of the case to the jury and to support the verdict rendered.

[1] Defendant stipulated that on the date he was arrested his operator's license was permanently revoked. All of the evidence showed that on that date the car in which defendant was riding had been operated upon a public highway by someone. The patrolman's testimony that he found defendant sitting in the driver's seat only a few seconds after he observed the car being driven from the traveled portion of the highway to its parking place on the shoulder of the road gave rise to a reasonable inference that defendant had been the driver. The case was properly submitted to the jury and there was no error in denying defendant's motions for a directed verdict.

[2] While arguing to the jury, the solicitor drew a diagram on the blackboard in the courtroom. Defendant's counsel objected, and the trial judge sustained the objection. Appellant now contends that he suffered prejudicial error in that the trial

judge, after sustaining the objection, failed to go further and to instruct the jury to disregard any reference to the diagram. The contention is feckless. While the record does not disclose what the diagram purported to show, appellant's brief states that it was "a diagram of the arrest scene," but does not contend that as such it was in any way inaccurate nor does appellant give any reason to support his contention that he suffered any prejudice by reason of the fact that the solicitor drew the diagram and referred to it during the course of his argument to the jury. Appellant's assignment of error to the trial judge's failure to do more than sustain his objection to the diagram is overruled.

[3] Finally, appellant assigns as error that the trial judge failed to charge the jury that evidence of the defendant's previous driving record goes only to the defendant's credibility and is not substantive evidence of his guilt on this occasion. In this case defendant testified but did not otherwise put his character in issue. During cross-examination the solicitor asked him concerning his prior convictions and defendant admitted that he had been convicted on several different occasions for violations of the criminal laws relating to operation of motor vehicles. For purposes of impeachment, defendant was subject to cross-examination as to his convictions for unrelated prior criminal offenses, 1 Stansbury's N. C. Evidence, Brandis Revision, § 112, including convictions for violations of motor vehicle laws. *Ingle v. Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265. However, in this case defendant's admissions as to such convictions were not competent as substantive evidence but were competent only as bearing on his credibility as a witness, and he was entitled, upon making timely request, to have the jury so instructed. *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362. However, the record shows that no such timely request for an instruction was made in this case. No objection was noted to any question asked by the solicitor during cross-examination of the defendant nor was the trial judge requested to make the limiting instruction at any time during the trial up to and including the time the court completed its charge to the jury. G.S. 1-181 provides, among other things, that requests for special instructions must be in writing and must be submitted to the trial judge before the judge's charge to the jury is begun. The record in this case shows that only after the jury retired to consider their verdict did defendant's counsel ask the judge if he could "have instructions as to any previous record." The

judge answered that he would "call them back if you want me to." To this, defendant's counsel replied, "No, sir. I have argued it to them." Thus, in this case not only was no timely request made, but defendant's counsel seems to have waived such request as he did make.

Absent a request in apt time to limit the evidence of defendant's prior convictions to impeachment purposes, the trial judge was not required to give such instructions. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310; *State v. Williams,* 272 N.C. 273, 158 S.E. 2d 85.

Defendant has failed to show prejudicial error and the verdict and judgment will not be disturbed.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

PATRICIA MORSE, EMPLOYEE v. MRS. KATHRYN F. CURTIS, EMPLOYER, AND INSURANCE COMPANY OF NORTH AMERICA, CARRIER

No. 7329IC592

(Filed 12 December 1973)

Master and Servant § 75— workmen's compensation — medical expenses — necessity for itemized bills

The Industrial Commission erred in ordering defendants to reimburse claimant's father a sum of $21,163.91 for medical and related expenses he testified he had paid as a result of treatment rendered claimant for her injuries where no itemized bills for such medical and related expenses were submitted to the Industrial Commission, and the cause is remanded for an additional hearing with respect to such expenses. G.S. 97-26; G.S. 97-90.

APPEAL by defendants from opinion and award of the Industrial Commission entered 5 March 1973.

Plaintiff sustained serious personal injuries on 15 August 1964 while employed by defendant Kathryn F. Curtis. After the determination of various jurisdictional and procedural matters (*Morse v. Curtis,* 6 N.C. App. 591, 170 S.E. 2d 493; *Morse v. Curtis,* 6 N.C. App. 620, 170 S.E. 2d 491; and *Morse v. Curtis,* 276 N.C. 371, 172 S.E. 2d 495) the case was heard in pertinent

part before Deputy Commissioner A. E. Leake on 10 November 1970. By stipulation the issues to be determined at such hearing were "what amount the plaintiff is entitled to receive as compensation for temporary total disability, temporary partial disability, for permanent disability, and . . . what medical and incidental benefits she is entitled to receive."

The evidence submitted at the hearing before Deputy Commissioner Leake by the plaintiff concerned the extent of her injuries and medical treatment. Over objection by the defendants the father of the plaintiff was permitted to testify that he had incurred expenses in the amount of $21,163.91 as a result of the treatment rendered his daughter for her injuries. No itemized bills for medical, surgical, hospital service, nursing or other incidental medical benefits were submitted in support of the testimony of plaintiff's father. On 23 July 1971 Deputy Commissioner Leake filed an opinion and award allowing plaintiff $12,000.00, the maximum permissible amount, as compensation for her injuries, and this amount the defendants have paid. The opinion also made the following finding of fact concerning the medical and related expenses:

> "10. The plaintiff's total medical expenses in Hendersonville, North Carolina, in 1964 in connection with the treatment of her injury by accident amounted to $1,193.87. The total medical and related expenses incidental to plaintiff's first trip to New York City for the purpose of undergoing treatment for injury received in the stipulated accident amounted to $7,551.13. The total medical and incidental expenses of the plaintiff's second trip to New York City for the same purpose amounted to $8,693.11. In the treatment of the plaintiff's injuries received in the stipulated accident the plaintiff incurred total medical and related expenses amounting to $21,163.91. These expenses have been paid by the plaintiff's father, Mr. Bleecker Morse."

and provided:

> "6. Defendants shall pay all medical expenses and hospital expenses arising as a result of the plaintiff's injury, after bills for the same have been submitted to and approved by the North Carolina Industrial Commission."

Plaintiff never submitted any bills for the Commission's approval. However, on 23 February 1972, without notice to

defendants, Deputy Commissioner Leake modified paragraph six of his award by adding the following sentence:

> "Certain of these bills in the total amount of $21,163.91 having heretofore been paid by Bleecker Morse, father of the plaintiff, as set out in finding of fact number 10, are hereby approved, and the defendants are hereby ordered to make payment to Bleecker Morse in the amount of $21,163.91 to reimburse him for funds expended by him for treatment of plaintiff's injuries."

From this action of the Deputy Commissioner defendants appealed to the Full Commission. The Full Commission affirmed, and defendants have appealed to this Court.

Uzzell & DuMont and Francis M. Coiner, by Harry DuMont, for plaintiff appellee.

Roberts and Cogburn, by Landon Roberts, for defendant appellants.

BALEY, Judge.

The defendants in this compensation case do not deny that they are liable for the payment of medical and related expenses incurred by plaintiff or her father as a result of injuries sustained by her from an accident arising out of and in the course of her employment. They contend, however, that such expenses are subject to the approval of the Industrial Commission based upon competent evidence as to their validity and amount.

G.S. 97-90 authorizes the Commission to exercise control over the legal and medical charges permitted under the Workmen's Compensation Act as follows:

> "(a) Fees for attorneys and physicans and charges of hospitals for services and charges for nursing services, medicines and sick travel under this Article shall be subject to the approval of the Commission . . . . "

See also Worley v. Pipes, 229 N.C. 465, 50 S.E. 2d 504; *Matros v. Owen,* 229 N.C. 472, 50 S.E. 2d 509; *Wake County Hospital v. Industrial Comm.,* 8 N.C. App. 259, 174 S.E. 2d 292, *cert. denied,* 277 N.C. 117.

G.S. 97-26 provides:

> "The pecuniary liability of the employer for medical, surgical, hospital service, nursing services, medicines, sick travel or other treatment required when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person . . . . "

Even when the employer has voluntarily paid for medical care of an employee, the court in *Biddix v. Rex Mills,* 237 N.C. 660, 664, 75 S.E. 2d 777, 781, stated:

> "When liability for the medical care of an employee who has suffered an accident is voluntarily incurred by the employer, the bills therefor must be approved by the Commission before the employer can demand reimbursement from its insurance carrier. In this manner such expenditures are kept within the schedule of fees and charges adopted by the Commission. G.S. 97-26."

The clear intent of these statutes and judicial opinions is to assure that medical and related expenses incurred by an injured employee for which the employer or his insurance carrier is to be liable shall be kept within reasonable and appropriate limits, and the responsibility for the enforcement of these limits rests upon the Industrial Commission. Indeed, under G.S. 97-90, it would be a misdemeanor for any person to receive fees which were not approved by the Commission.

In the present case an opinion and award was entered 23 July 1971 by a Deputy Commissioner which directed the defendants to pay all medical expenses and hospital expenses arising as the result of the plaintiff's injury "after bills for the same have been submitted to and approved by the North Carolina Industrial Commission." No bills were submitted to or approved by the Commission, and seven months later, on 23 February 1972, the Deputy Commissioner without further hearing found that "certain of these bills" totaling $21,163.91 had been paid by the father of plaintiff and ordered that defendants reimburse the father for such payments. In our opinion the Deputy Commissioner was without authority to change his order *ex mero motu* and deprive defendants of a material right to have the bills for medical and related services

submitted to and approved by the Commission. *Stanley v. Brown*, 261 N.C. 243, 134 S.E. 2d 321. Approval by the Commission is required by statute as well as the original order of the Deputy Commissioner and is not to be a routine or perfunctory act, but the exercise of a discretionary judgment based upon the evidence.

In *Brice v. Salvage Co.*, 249 N.C. 74, 83, 105 S.E. 2d 439, 446, the court in a case involving the approval by the Commission of a legal fee stated: "And the word 'approve' as used in decisions of this Court implies the exercise of discretion and judgment. . . . Indeed, Black's Law Dictionary defines it '" the act of approval" imports the act of passing judgment, the use of discretion and determination as a deduction therefrom.'"

The action of the Deputy Commissioner denied to the defendants the opportunity to question specific bills concerning medical and related expenses of the plaintiff and to aid the Commission in determining if the charges were excessive. Until the bills were known, defendants were not in any position to object to them or to offer any evidence that they exceeded the limits for such charges as prevail in the same community for similar treatment. *See Bass v. Mecklenburg County,* 258 N.C. 226, 235, 128 S.E. 2d 570, 576.

Upon review before the Full Commission the only evidence in the record with respect to the medical and related expenses is the testimony of the father of the plaintiff. He testified that he had paid the sum of $21,163.91 for such expenses as the result of treatment rendered to plaintiff for injuries received in the accident. With very limited exceptions there is no evidence showing to whom these payments were made, at what time, or for what purpose. The medical doctors who testified did not specify the compensation which they received for their specific services, and there is no statement from any hospitals setting out the expense of plaintiff's hospitalization, the time involved, or any of the details of the treatment. The burden of showing the medical and related expenses incurred *as a result of a compensable injury* is upon the claimant who seeks payment therefor. *Mitchell Motor Co. v. Burrow*, 37 Ala. App. 222, 66 So. 2d 198 (1953); *Boyer v. Service Distribs., Inc.*, 366 Mich. 319, 115 N.W. 2d 101 (1962); *Gonzales v. Johnston Foil Mfg. Co.*, 305 S.W. 2d 45 (Mo. App. 1957). The award of the Full Commission shows that the Commission "would have preferred

that a detailed statement of the medical expenses incurred by plaintiff would have been placed in evidence" and recites that "[a] strict view of the evidence in the case regarding expenditures for medical services could require a remand of the case for the purpose of receiving additional evidence regarding such question."

While it is unfortunate that a settlement of this matter must be further delayed, the defendants are entitled to know the medical and related expenses which they are required to pay and to have an opportunity to be heard concerning their validity and amount. Accordingly, this cause is remanded to the Industrial Commission for additional hearing with respect to the medical and related expenses incurred by plaintiff as a result of her compensable injury.

Remanded.

Judges MORRIS and VAUGHN concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR OF THE ESTATE OF LEWIS PENN HUNTER, DECEASED v. BURKE FARMERS COOPERATIVE DAIRY, INC., YADKIN VALLEY DAIRY COOPERATIVE, INC., AND RICHARD EDWARD STYLES

No. 7329SC666

(Filed 12 December 1973)

Automobiles § 62— striking of pedestrian walking along highway — insufficient showing of negligence

Plaintiff's evidence was insufficient to show negligence on the part of defendant driver in striking plaintiff's intestate where it tended to show only that the intestate was walking at night in an easterly direction along the south side of the highway, that defendant driver was driving a milk truck in the same direction, that as the milk truck was meeting another vehicle a mirror which extended some eight inches from the truck struck the intestate, that the intestate was found with his head lying "just about on the pavement," and that the total width of the milk truck, including two outside rearview mirrors, might have been a few inches wider than the lane of the highway in which it was traveling, there being no evidence of deceased's position at the time of impact, how long he had been there, or whether defendant driver could have seen him in time to have avoided the collision.

APPEAL by plaintiff from *Thornburg, Judge,* 19 February 1973 Session of Superior Court held in McDOWELL County.

In this action plaintiff seeks to recover damages for personal injuries sustained by, and the wrongful death of, plaintiff's testate, Lewis Penn Hunter (Hunter), allegedly caused by the defendants' milk truck striking Hunter. From judgment allowing motions for directed verdicts in favor of defendants, plaintiff appeals.

Everett C. Carnes and Roy W. Davis, Jr., for plaintiff appellant.

Dameron and Burgin and Patton, Starnes & Thompson by Thomas M. Starnes for defendant appellee.

BRITT, Judge.

Plaintiff assigns as error the court's allowance of defendants' motion for a directed verdict in accordance with Rule 50 of the North Carolina Rules of Civil Procedure at the close of plaintiff's evidence. The question of law presented by defendants' motion is whether plaintiff's evidence was sufficient for submission to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

The evidence, viewed in the light most favorable to plaintiff, and giving it the benefit of every reasonable inference, as is required, tended to show:

At about 7:15 p.m. on 26 February 1968, Hunter left his rural home to take a walk, as was his custom, along Fairview Road which intersected Highway 226 across from Hunter's home. Fairview was a rural road, paved with asphalt for a width of approximately 18 feet. It was divided by a center line into two traffic lanes of approximately equal width, and had shoulders on each side of from two to five feet wide.

As Hunter walked eastwardly along the south side of the road, somewhere between 7:15 and 7:30, defendant Styles (Styles) turned east onto Fairview Road, alone in his 1964 Chevrolet one-ton milk truck, en route home with a load of milk for the next day's deliveries. Fairview Road runs east from Highway 226, takes a slight turn to the south, straightens out for about 500 feet with a slight downgrade to a bridge, and then turns sharply to the north. Hunter was some 210 feet east of the first curve when the truck approached him.

The truck was 82 inches in width and carried a refrigerated van for milk. At the front of the cab, about 5 feet behind the

headlights, 5 feet off the ground, and on the outside of each side was a rearview mirror. Each mirror was 6 inches by 8 inches and on an arm of approximately 4 inches so as to extend 8 inches beyond the van of the truck. The lights of the truck were in perfect condition and when on dim had a range of visibility of 100 feet or more.

Just before making the turn from Highway 226 onto Fairview Road, Styles had met another vehicle and had turned his lights to dim, it being dark enough to require lights. Styles entered the first curve on Fairview at a speed of between 25 and 30 m.p.h. and then speeded up to 35 to 40 on the downhill straightaway, the speed limit being 55 m.p.h. Another vehicle approached from the east on Fairview and Styles' attention was directed away from the shoulder to the oncoming vehicle. Proceeding in the middle of the right lane, Styles heard a "thump" on the right side of his truck just before meeting the other vehicle. Styles stopped his truck 100 feet from where he had heard the sound and went back to see what had caused it. He then saw Hunter lying with his head resting on his elbow "just about on the pavement," his feet off the pavement toward the east, and his body at a 45 degree angle with the road and between the road and a fence which ran parallel to the road. Hunter was a rather large man, more than six feet tall, and at the time was wearing a "greenish black" overcoat. With the help of a passerby, Styles took Hunter to the local hospital. In his answer, Styles admitted that at the time he was injured Hunter was walking in an easterly direction "on or near the southern margin of the asphalt surface" of Fairview Road. Later that night Styles examined his truck and found that the right rearview mirror had been "pushed back."

On the next day Robert Rowe visited the scene and found Hunter's hat, watch, and glove 23 feet from the south side of the road in a pasture. The shoulder of the road at this point was about 5 feet wide and then dropped off into a ditch. On the other side of the ditch was a barbed wire fence and then the pasture in which the three articles were found.

Hunter was treated at the local hospital for eight days and released. While there a dislocated left shoulder was "set" and he was treated for other injuries which were external. The day after he returned home from the hospital, Hunter's condition took a turn for the worse and three days later he was carried to a hospital in Asheville. The next day (two weeks after receiv-

ing his injuries) Hunter died from what was later diagnosed as a subdural hematoma and brain injury resulting from an injury to his head.

Plaintiff relies on five theories of negligence: (1) failure to keep a proper lookout, (2) failure to decrease speed in light of a hazard, (3) failure to yield the right-of-way to a pedestrian, (4) failure to pass to the left at a sufficient distance to avoid hitting a pedestrian, and (5) failure to warn deceased of the approach of the vehicle or the danger presented by the rear-view mirror.

A review of the authorities impels us to conclude that the evidence was not sufficient to establish actionable negligence and that the court did not err in allowing the motions for directed verdict.

In *Pack v. Auman*, 220 N.C. 704, 18 S.E. 2d 247 (1942), the evidence tended to show: Around 7:00 p.m. on 8 November 1939, plaintiff's intestate was found, fatally wounded, in a ditch about 3½ feet off the paved portion of the highway, his head being some 2 feet from the pavement. He was taken to a hospital where he died the following day. The scene of the fatality was near the town of Aberdeen and defendant driver drove some two blocks into Aberdeen and reported to Chief of Police Beck that "he had hit somebody up on the highway." Beck and the driver immediately went to the scene of the accident and found a piece of 12 inch board near the center of the highway; the board was broken at an angle, with the short side 2½ feet and the long side 3½ feet in length. Beck compared the piece of board found on the highway to a piece of board found on the truck and the two pieces matched. The driver stated that "he never did see anybody but he thought he felt the truck hit something." There were one or more other pieces of lumber on the truck which had been used to haul gravel, the pieces of lumber having been placed against the standards to hold the gravel. At the time of the accident the truck was empty and there was nothing to keep the lumber from bouncing about, it not being tied or nailed down to the flat floor of the truck. In both directions from the scene of the accident the highway was straight, with an unobstructed view for many yards. At the hospital plaintiff's intestate was found to have a very severe bruise and wound on the lower part of his abdomen. The wound was caused by an external injury, "a rather heavy blow" from "something with an edge on it . . . . " and

resulted in death. In affirming a judgment of nonsuit, the court said:

> "If it be conceded that the plaintiff's intestate was injured and killed upon the highway by being struck by the defendants' truck, or by a board or piece of lumber on said truck, in the absence of any evidence of where on the highway the intestate was at the time of being stricken, or of when he got on the highway, or of how long he had been on the highway before being stricken, the plaintiff's case must fail. The mere fact that he was injured and killed does not constitute evidence that his injury and death were proximately caused by the negligence of the defendants. *Mills v. Moore,* 219 N.C., 25, 12 S.E. (2d), 661, and cases there cited."

The facts in *Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879 (1954), appear to present a stronger case of liability than the facts in the instant case. In *Whitson,* Chief Justice Barnhill summarized the essential evidence as follows: "When the evidence contained in this record is sifted to its essentials and weighed in the balance provided by these rules of law, we find we have just these bare facts established, *prima facie,* by the evidence. The infant defendant was operating a pickup truck on Highway 26 at night. At the time, his right headlight was not on. The decedent, a pedestrian, was on the same highway, headed in the opposite direction. The right front fender struck deceased, apparently throwing his body up between the fender and the hood from which it fell or was thrown down the steep embankment. The decedent received injuries which caused his death. The defendants knew the headlight was not in proper working condition. Everything else is left to pure speculation."

The opinion in *Whitson* is concluded in the following language:

> "Where was deceased when he was struck? Was he standing or walking? If defendant had been keeping a proper lookout and his truck had been equipped with proper headlights, could he have seen deceased in time to avoid the collision, or did deceased fail to yield the right of way or suddenly step in front of the oncoming vehicle?
>
> "Thus it is the testimony does no more than engender speculation. *Ray v. Post, supra.* There is no evidence from which an inference may be drawn either one way or an-

other. Consequently, the line of cases represented by *Pack v. Auman*, above cited, is controlling here . . . . "

In *Whitson* there was a showing that defendant's vehicle had defective lights and that plaintiff's intestate, a pedestrian, was on the side of the highway declared proper for pedestrians by statute. In the instant case, there was no *definite* showing that the milk truck was defective, only the slight inference that its total width including outside rearview mirrors *might* have been a few inches wider than the lane of the paved portion of the road in which it was traveling. The crucial questions unanswered by the evidence in *Whitson* are unanswered by the evidence in the instant case. We think the decisions of the Supreme Court in *Pack* and *Whitson* are controlling here.

This case notes another highway tragedy. The record reveals that the deceased was a valuable citizen, having served in the 1959 General Assembly of North Carolina and from 1961 until his death, he served as postmaster of Marion, N. C. As a colleague of Penn Hunter in the 1959 General Assembly, the writer can attest to Hunter's sterling character and the high quality of his public service. Nevertheless, the evidence presented at trial failed to establish that defendant Styles was legally responsible for Hunter's injuries and death, and actionable negligence on the part of Styles was prerequisite to liability of the other defendants.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

LOWE'S COMPANIES, INC. T/D/B/A LOWE'S OF ASHEVILLE v. HERBERT J. LIPE AND A. A. J. KRAMERS

No. 7328SC603

(Filed 12 December 1973)

Uniform Commercial Code § 13— sale of goods — statute of frauds — insufficiency of writings

Documents signed by defendant in which defendant promised to be responsible for payment for materials furnished a builder who was

constructing a home for defendant did not constitute an enforceable contract under G.S. 25-2-201.

APPEAL by plaintiff from *Martin (Harry C.), Judge,* at the 9 April 1973 Session of BUNCOMBE Superior Court.

This is a civil action to recover $5,101.28, plus interest, as the unpaid balance for materials supplied in the construction of a home. The defendant Kramers employed defendant Lipe as a contractor to construct a home in Buncombe County, North Carolina. Kramers was to pay Lipe $30,800.00 for the construction of the home. There was a controversy between Kramers and Lipe in connection with the construction of the home, and cross-actions were filed between them in this action; but that controversy has been severed from the trial of plaintiff's cause of action, and said cross-action has been continued and is not involved in the present controversy between plaintiff and Kramers.

Plaintiff alleged:

"III. That on or about the month of August, 1970, the Plaintiff and the Defendants entered into an agreement whereby the Plaintiff agreed to furnish the Defendants with various building materials and the Defendants agreed to pay for the same on a monthly basis.

IV. That on numerous occasions since said date the Plaintiff has furnished the Defendants with said building materials.

V. That the Defendants are now indebted to the Plaintiff in the amount of $5,101.28, plus interest which is the balance due on the materials furnished."

Kramers answered those allegations as follows:

"3. That the allegations contained in Paragraph 3 are denied except it is admitted that defendant, Herbert J. Lipe entered into an agreement whereby the plaintiff agreed to furnish Herbert J. Lipe with various building materials and said defendant agreed to pay for the same on a monthly basis.

4. That the allegations of Paragraph 4 are denied except it is admitted that the defendant, Herbert J. Lipe, was furnished with building materials by plaintiff.

5. That the allegations of Paragraph 5 are denied."

Kramers filed, in addition to the portion of the Answer above quoted, an affirmative defense pleading the provisions of G.S. 25-2-201 in bar of any recovery by the plaintiff for that any writing pertaining to the transaction between the plaintiff and the defendant Kramers does not show any quantity of goods being sold.

The defendant Lipe confessed judgment in favor of the plaintiff for the amount of the indebtedness, namely, $5,101.28, plus interest, from 31 August 1970.

The defendant Kramers signed two documents which the plaintiff relies upon to make out its right of recovery. These documents read:

"To Whom It Concerns.

Mr. H. J. Lipe—contractor for project—Pine Acre Boulevard, acts on behalf of undersigned, in securing the highest quality of materials for said project.

Undersigned will be fully responsible for the financial consequences of all transactions to the amount as contracted.

Under equal terms Lowe's must commit itself to supply to Mr. H. J. Lipe selected materials of supreme quality, without exception. Any deviation therefrom may lead to cancellation of any outstanding and future orders.

A. A. J. KRAMERS

The second document reads:

"HOME OWNER'S LIABILITY STATEMENT

LOWE'S, INC.

DATE ________________

TO:

We are indeed happy that you, through your contractor or workman, have selected Lowe's as the place to buy your material. We are confident that we will be able to give you the finest service and that we will be able to place in your home the finest products.

We trust our service to you will be satisfactory in every respect, and we assure you that it will be mutually profitable to both of us. As a convenience to our many customers, we have adopted the policy of advancing credit to different parties who are engaged in home construction through this area, and in such event there will be added to the cost of the material as a carrying charge one percent of the unpaid balance each 30 days until the purchase price has been paid in full. However, where credit is advanced, the law has imposed upon us a duty which we must pass on to you to a certain extent. We are required by the lien laws of the State of North Carolina to notify you that there is being purchased from our place of business material which is going into the construction of your home. We know the invoices for this material will be promptly and fully met unless something unforeseen takes place; however, in operating a business as large as ours, it is necessary that we adopt a definite policy with respect to all accounts. Pursuant to this policy, we send letters to each home owner or to each person who is engaged in the construction of the home and purchasing materials, either directly or through some other person from our place of business, advising them of such purchase. This enables the home owner or the person building the building to have an opportunity to see that these accounts are paid. Since you are now engaged in building and certain products from our business are going into your building, we would appreciate it if you would acknowledge the receipt of this notice.

Enclosed is a self-addressed, stamped envelope for your convenience in answering this letter. Also enclosed is an acknowledgment which you may use in answering this letter.

Very truly yours,

LOWES, INC.

ACCEPTANCE:

We hereby accept the liability of this account and will see that the merchandise is paid for and the residence or property described herein on the reverse side of this notice is responsible for such payment.

WITNESS:

Mr. A. A. J. KRAMERS (SEAL)

Mrs. ------------------------- (SEAL)

LOWE'S OFFICE MUST COMPLETE REVERSE SIDE OF THIS STATEMENT

COMPLETE EVERY BLANK IF POSSIBLE:

YOU MUST SECURE ASSIGNMENT OF CONSTRUCTION FUNDS IF CUSTOMER HAS SECURED A CONSTRUCTION LOAN.

CONSTRUCTION LOAN INFORMATION

Amount of Loan $ N.A.

Lending Institution N.A.

Does Lowe's have Construction Loan Assignment?

Yes -------- No x Amount $---------------

Is it in file? Yes -------- No x Loan made to ---------------

MORTGAGE LOAN INFORMATION

Amount of Loan $ N.A. Lending Institution N.A.

Does Lowe's have Mortgage Loan Assignment?

Yes -------- No x Amount $---------------

Is it in file? Yes --------- No x Loan Made to ---------------

Total Amount covering entire project deposited at Merryll Lynch Co.

OWNER OF LAND WHICH BUILDING IS CONSTRUCTED

(Give names of Husband and Wife if private home.)

DESCRIPTION OF LAND

15 Pine Acre Boulevard
Asheville
Buncombe County, N. C.

Give State, County, City, and Civil District (if known), and Township of location. Also, give book and page number where deed is recorded or deed description of land.

Is this job on a 'cost-plus' or 'fixed sum' basis between owner and contractor? Contract with special provisions

Contractor's Name: H. J. Lipe — Asheville

If purchases are for more than one job, we should have a separate form completed for each job and identifiable with charges to this account either by job number or job name so that all materials purchased may be identified if it is necessary to file a lien.

If job is on a 'fixed sum' basis (Between owner and contractors), the owner of the property should be notified of the indebtedness and the following notation made on bills sent to the owner — 'Enclosed herewith is statement of material furnished .... for construction of your house.'

If this property is owned by contractor to be transferred to buyer when house is completed, answer following:

(1) House is built on speculation .... contract x.

(2) Price of house and lot is $............

Information secured By .... Approved by .... Limit Approved $............"

It was stipulated and agreed that there was no question of fact to be determined by the jury, and "that the Defendant Lipe did not question the amount of money owed nor the delivery of the materials for said amount." Plaintiff and defendant each moved for summary judgment. The trial court granted Kramers' motion for summary judgment and denied plaintiff's motion and denied any recovery for plaintiff against Kramers. Plaintiff appealed from said order and judgment.

Wade Hall by J. Lawrence Smith for plaintiff appellant.

Uzzell and DuMont by J. William Russell for defendant appellee.

CAMPBELL, Judge.

No matter on what theory the plaintiff might have been able to make out a case entitling it to a recovery, it is obvious

from the complaint filed by the plaintiff that the plaintiff sought to recover from Kramers on a contract for the sale of goods for a price in excess of $500.00.

We must consider the case on the same theory in which it was presented in the trial court. *Leffew v. Orrell,* 7 N.C. App. 333, 172 S.E. 2d 243 (1970). The two documents relied upon by the plaintiff and signed by the defendant Kramers do not make out an enforceable contract under North Carolina General Statute 25-2-201. We think the trial court was correct.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. DELDON LEACH STRIDER

No. 7319SC216

(Filed 12 December 1973)

1. **Criminal Law § 88— cross-examination**

In a prosecution for drunken driving, the trial court did not limit the scope of cross-examination of the State's witnesses in such way as to preclude the presentation of a proper defense.

2. **Criminal Law § 169— failure of record to show excluded testimony**

The sustaining of an objection to a question directed to a witness, whether on direct or cross-examination, will not be held prejudicial when the record does not show what the answer would have been had the objection not been sustained.

3. **Automobiles § 129; Criminal Law § 99— drunken driving — statutory consent to breathalyzer — comment by court during evidence**

In this prosecution for drunken driving, the trial court did not assume defendant's guilt when, during redirect examination of the arresting officer, the court stated that "the statute provides that everyone who operates a motor vehicle on the highways of this State consents to take a breathalyzer test when driving under the influence"; nor did the court err in failing to expound on other portions of the statute dealing with the consequences of refusal to take the test since defendant did not refuse.

4. **Automobiles § 129— drunken driving — breathalyzer results — instructions**

In this prosecution for drunken driving, the court's inadvertence in referring to the evidence as showing ".17 percent or more" by

weight of alcohol in defendant's blood could not have misled the jury where it was corrected in a subsequent portion of the charge, and the court adequately instructed the jury on the presumption created by G.S. 20-139.1(a)(1).

APPEAL by defendant from *McConnell, Judge,* 23 October 1972 Session of Superior Court held in MONTGOMERY County.

Defendant was charged in a warrant with operating a motor vehicle on a public highway while under the influence of intoxicating liquor. After trial and conviction in the District Court he appealed to the Superior Court, where he again pled not guilty. The State presented the testimony of the arresting highway patrol officer, who testified in substance to the following: At about 2 o'clock p.m. on 21 May 1972 he saw defendant driving a pickup truck on U.S. Highway 27. Defendant's truck was in a line of traffic going east and the patrolman was in a line of traffic going west. Defendant pulled out and passed in face of oncoming traffic and forced the vehicle in front of the patrolman off on the shoulder of the road. The patrolman turned around and pursued defendant's truck. While the patrolman was overtaking him, the defendant "crossed the white line three or four times" and also "operated crooked in his own lane." When stopped, defendant had a strong odor of alcohol on his breath, his eyes were red and his face flushed. he was "very staggery," weaved rather badly on the balance test, had some trouble with the finger to nose test, and staggered badly during the walking test. From the patrolman's observation of defendant's driving and from his personal observation of defendant, the patrolman was of the opinion that defendant was highly intoxicated at the time he was operating his vehicle. On cross-examination, the arresting officer testified that when stopped, the defendant had no trouble parking his truck, there was nothing unusual about the way and manner in which he stopped and parked, he got out of the truck without help, "seemed to be very cool and calm," and gave the patrolman his license when asked for it. This witness also testified on cross-examination that he was acquainted with the defendant and "[i]t is true his eyes are red at all times."

Defendant was given a breathalyzer test which resulted in a reading of .17. The officer who administered the test testified that from his personal observation of defendant and independently of the results of the breathalyzer test, he was of the opinion that defendant was highly intoxicated.

Defendant did not introduce evidence. The jury found him guilty, and from judgment entered on the verdict imposing a six months active prison sentence, defendant appealed.

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

Charles H. Dorsett for defendant appellant.

PARKER, Judge.

[1, 2] Appellant first contends that the trial court limited the scope of cross-examination of the State's witnesses in such a way as to preclude the presentation of a proper defense. The record however, does not support this contention. On the contrary, the record shows that defendant's counsel was permitted to cross-examine the two witnesses for the State as fully and effectively as the nature of the case permitted. Indeed, the only two instances referred to in appellant's brief to support his first contention are the following: During cross-examination of the arresting officer, defendant's counsel asked, with reference to the walking test, "Isn't it true that a lot of people have a problem with this?" and during cross-examination of the breathalyzer operator, defendant's counsel asked, "You disagree with me that 0.17 percent alcohol presumes to indicate that the defendant's blood was 17 parts by weight of alcohol in every 10,000 part (sic) of blood?" The court sustained the solicitor's objections to each of these questions. Without passing on the correctness of these rulings, it is clear that on this record no prejudicial error has been made to appear. The record does not show what the answers of the witnesses would have been had the solicitor's objections not been sustained, and it is well established that the sustaining of an objection directed to a witness, whether on direct or cross-examination, will not be held prejudicial when the record does not show what the answer would have been had the objection not been sustained. *State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239; *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416; *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342. Appellant's contention that his counsel's cross-examination was unduly limited is without merit and the assignments of error relating thereto are overruled.

[3] Appellant's second assignment of error is directed to a statement made by the trial judge. The record shows that at some time while the arresting officer was testifying on redirect ex-

amination, the judge made the statement that "[t]he statute provides that everyone who operates a motor vehicle on the highways of this State consents to take a breathalyzer test when driving under the influence." What may have prompted the making of this statement cannot be ascertained from the record before us. None of the questions asked or the testimony given by the witness on re-direct examination is included, and the context in which the court's statement was made cannot be known. Appellant complains that the statement is incomplete in that the judge did not explain that the statute also provides that no test shall be given to a motor vehicle operator who refuses to take the test, but that the refusal will bring a mandatory revocation of his license, and appellant contends that this "therefore left the jury with an insufficient understanding of the statute." Even so, appellant has failed to show how he was prejudiced. In this case he did not refuse to take the test, and the portions of the statute which were omitted from the judge's statement did not come into play. Nor do we agree with appellant's contention that the judge's statement "assumed the guilt of the defendant and severely prejudiced him in the eyes of the jury." While the statement as it appears in this record is neither a complete exposition of the statute nor couched in the most felicitous words, we fail to see how the jury could have been given any impression that the judge was assuming the guilt of the defendant. No prejudicial error having been made to appear, we find appellant's second assignment of error without merit.

[4] By assignment of error number 7 appellant brings forward a number of exceptions to the court's charge to the jury. These we also find to be without merit. The court's definition of "reasonable doubt" was in substantial accord with definitions approved by our Supreme Court. The court correctly explained the portion of our statute, G.S. 20-16.2, relating to the consent deemed given by the operator of a motor vehicle upon the highway to take a breathalyzer test in connection with a charge of driving while under the influence of intoxicating liquor, and, as above noted, there was no occasion for the court to expound on other portions of the statute dealing with the consequences of a refusal to take the test, since in this case the defendant did not refuse. The court's inadvertence in referring to the evidence as showing ".17 percent or more" by weight of alcohol in defendant's blood was adequately corrected in a subsequent portion of the charge and could not have misled the jury. The

court's instruction concerning the effect to be given to the statutory presumption created by G.S. 20-139.1(a)(1) was in substantial compliance with the holding in *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165; while it might have been preferable to have used the words "permissive inference" in describing the presumption, the court did expressly instruct that the statutory presumption did not shift the burden to the defendant but was to be considered by the jury along with all other evidence in arriving at their verdict. When the charge is considered contextually and as a whole, we find it to be free from prejudicial error.

We have considered all assignments of error which are brought forward in appellant's brief, and in the trial and in the judgment appealed from we find

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES HENRY PRIDGEN

No. 737SC755

(Filed 12 December 1973)

1. **Criminal Law §§ 33, 169— reason for absence of charges against minor**

   In a prosecution for possession and sale of nontaxpaid whiskey, defendant was not prejudiced by an officer's testimony that he did not bring charges against a fifteen-year-old boy because he "did not figure anything would really be gained by charging a juvenile with this type of offense" when the witness didn't believe it was the juvenile's whiskey.

2. **Criminal Law § 7— sale of nontaxpaid whiskey — entrapment**

   Defendant was not entrapped when a State's witness allowed law enforcement officers to hide inside a box on his truck while he bought nontaxpaid whiskey from defendant.

3. **Criminal Law § 7— instructions on entrapment**

   Trial court's instructions on the defense of entrapment were sufficient.

4. **Criminal Law § 101— conduct of juror during recess — absence of prejudice**

   In a prosecution for possession and sale of nontaxpaid whiskey, defendant was not prejudiced when, during a recess, a juror got into a box in which officers had hidden while whiskey was bought from

defendant and stated that he could see the back of the sheriff's chair, and the sheriff asked the juror whether he could see a picture on the wall in the back of the courtroom.

APPEAL by defendant from *Webb, Judge,* June 1973 Session of Superior Court held in NASH County.

Defendant was charged in a warrant with unlawfully and willfully having in his possession and selling forty-two (42) gallons of nontaxpaid alcoholic beverages. Defendant was found guilty in District Court and upon appeal was tried de novo in the Superior Court.

The State's evidence tended to show that on 4 August 1971, the defendant agreed to sell seven cases of whiskey to one Michael Gregory (Gregory), who was working under the supervision of one C. V. Favre (Favre) of the Alcohol, Tobacco and Firearms Division of the U. S. Department of the Treasury. Gregory contacted Favre and one Alfred Joyner, who secreted themselves within a box in the bed of the pickup truck driven by Gregory. Gregory then drove to the defendant's trailer where he was met by defendant and a colored male. Defendant instructed Gregory that the whiskey was $30.00 per case, and that the colored male would assist in loading. Following directions given by the colored male accompanying Gregory, Gregory drove a short distance from defendant's trailer to a house where Randy Pridgen, nephew of defendant, instructed the two to drive to another house. The colored male and Randy then loaded the whiskey in the truck. Gregory paid Randy $210.00. Gregory then drove to Rocky Mount and turned over the whiskey to Investigator Favre and ABC Officer Joyner.

Defendant's evidence tended to show that Gregory had been on probation twice in Sampson County, having been charged with manufacturing nontaxpaid whiskey; that Gregory, according to his former probation officer, had a general character and reputation for untruthfulness; that Gregory had approached one Willie House, a prisonmate of Gregory's at Smithfield, North Carolina, and urged House to go into the "bootlegging business" with him; that Randy Pridgen, nephew of the defendant, did not sell liquor nor assist in the loading of the pickup truck on 4 August 1971.

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

Vernon F. Daughtridge for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that the testimony of witness Favre on redirect examination is incompetent and highly prejudicial to the defendant because it allowed an officer of the law to explain his failure to enforce the law as to one individual, Randy Pridgen. Favre had testified that he did not charge Randy Pridgen, a fifteen-year-old minor on 4 August 1971, with a violation of the law because Randy Pridgen was a juvenile and the witness "not figure anything would really be gained by charging a juvenile with this type of offense," when the witness did not believe it was the juvenile's whiskey.

"The burden is on defendant not only to show error but also to show that the error complained of affected the result adversely to him. . . ." 3 Strong, N. C. Index 2d, Criminal Law, § 167, p. 126. In the light of the other evidence we fail to see how defendant was prejudiced by this statement of the witness. The assignment of error is overruled.

[2] Defendant's second contention is that the defendant was entrapped by State's witness Gregory, and that the trial judge should have allowed defendant's motion for nonsuit made at the close of State's evidence and at the close of all of the evidence. Only the motion made at the close of all of the evidence is before us for review.

"G.S. 15-173 provides in pertinent part: "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." When the defendant offers evidence, he waives the motion lodged, either actually or by statute, at the close of the State's evidence and only the motion lodged at the close of all the evidence is considered. *State v. Paschall,* 14 N.C. App. 591, 188 S.E. 2d 521.

Defendant contends that the series of events leading up to the arrest of defendant constituted entrapment. "Mere initiation, instigation, invitation, or exposure to temptation by enforcement officers is not sufficient to establish the defense of entrapment, it being necessary that the defendants would not have committed the offense except for misrepresentation, trickery, persuasion, or fraud." 2 Strong, N. C. Index 2d, Criminal Law, § 7, p. 487.

The only trickery involved was that of the law enforcement agents secreting themselves inside the box on the bed of the pickup, and the failure of the witness Gregory to inform the defendant that he was working in conjunction with law enforcement agencies. This assignment of error is overruled.

[3] Defendant argues that the court failed to give the jury sufficient instructions as to the defense of entrapment. The trial court instructed the jury as follows:

"Now, in this case the defendant has raised the defense of what is called 'entrapment,' and entrapment is a complete defense to the offense charged.

"Now, the burden of proving entrapment is upon the defendant. However, the defendant is not required to prove entrapment beyond a reasonable doubt, but only to your satisfaction."

The trial court then instructed the jury as to the elements of entrapment. Before the jury retired to consider its verdict, both parties were asked if either desired anything else to be charged; both answered in the negative.

We find no error in the charge of the trial court to the jury. This assignment of error is overruled.

[4] Defendant contends that the trial court should have granted defendant's motion to set aside the verdict and order a new trial, based upon conversations and events which occurred while the court was in recess.

While the court was in recess, one of the jurors got into the box in which the officers had hidden while riding in the back of the pickup truck, the box having been introduced by defendant as an exhibit. While the juror was in the box, he stated that he could see the back of the Sheriff's chair, but his response to the Sheriff's question of whether he could see a picture on the wall in the back of the courtroom is uncertain. The juror testified that he could see the back of the courtroom through the hole in the box.

Defendant contends that the actions and conversation of the jurors amounted to a discussion of the evidence for deliberation, and obtaining evidence improperly. Also, defendant contends that the actions of Sheriff Womble were improper communications with the jury concerning evidence of the case. We see no merit in these arguments.

The trial court heard defendant's motion, and, after conducting a hearing as to the events which had transpired during the recess, determined that no prejudice had been shown. The finding of the trial court on a motion to set aside the verdict and grant a new trial is conclusive when supported by the evidence. *See* 3 Strong, N. C. Index 2d, Criminal Law, § 175, p. 148. This assignment of error is overruled.

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

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. THOMAS PAUL RUSSELL

No. 7312SC277

(Filed 12 December 1973)

1. **Criminal Law § 66— in-court identification — photographic identification — viewing defendant in courthouse hall**

   The evidence on *voir dire* supported the trial court's determination that a robbery victim's in-court identification was of independent origin and not tainted by a photographic identification at which the victim was shown three photographs and told that the photographs were of persons then in custody for similar offenses or by seeing the defendant in the courthouse accompanied by a police officer on the morning of the trial.

2. **Criminal Law § 75— admissibility of confession**

   The evidence on *voir dire* supported the trial court's determination that defendant's written confession was made freely and voluntarily after he had been given the *Miranda* warnings and had knowingly and intelligently executed a written waiver of counsel.

APPEAL by defendant from *James, Judge,* 6 November 1972 Special Criminal Session of Superior Court held in CUMBERLAND County.

Defendant was tried under a bill of indictment, proper in form, charging him with armed robbery. He pled not guilty, was found guilty as charged, and from judgment imposing a prison sentence, appealed.

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

Thomas H. Williams for defendant appellant.

PARKER, Judge.

[1] Defendant brings forward two assignments of error. The first concerns the trial court's refusal, at the close of the voir dire examination, to suppress prosecutrix Effie Tilley's in-court identification of defendant as one of the two men who, at approximately 1:00 a.m. on 28 December 1971, came into the motel operated by Mrs. Tilley and her husband and robbed them at gunpoint. Facts pertinent to the in-court identification are as follows: Mrs. Tilley and her husband managed the motel and lived in an apartment adjoining the motel's office. On the night of the robbery two men came into the motel office and asked for a room. One, later identified by Mrs. Tilley as the defendant, walked to the desk and filled out a registration card. After the men finished registering, Mrs. Tilley picked up the card, but one of them took it back, saying that he forgot something. One of the men then said, "Don't scream, it's a robbery." During the ensuing scuffle before the intruders fled with $35.00 in cash, both Mr. and Mrs. Tilley were struck by the defendant. At the voir dire hearing, Mrs. Tilley testified:

> "I am 57 years old. At the time of the robbery there was a bright light with three bulbs overhead and a bright light on at the desk. The room was well lighted. I was able to see the man who filled out the card very well. He was the [defendant]. At the time of the robbery he was in my presence twenty to thirty minutes. When the suspect was signing the registration card I was close enough to him to touch him. I was sitting at the desk and looking at him all this time. I did touch [him] later when I pulled him off my husband."

Several days after the robbery, officers came to the motel and showed Mrs. Tilley photographs of three black males, telling her that the photographs were of persons who were then in custody in Carthage for similar offenses. Mrs. Tilley picked out defendant's photograph as being a picture of one of the men who had robbed her. Following the robbery, Mrs. Tilley did not see defendant in person until the morning of the trial, 8 November 1972, when she saw him, accompanied by a uniformed officer, walking in the hall of the courthouse.

The trial court entered an order making findings of fact which in salient detail are as narrated above, and defendant does not challenge their accuracy. Rather, defendant takes exception to the court's ensuing conclusion that Mrs. Tilley's in-court identification of defendant was based on her observation at the time and scene of the robbery and was not tainted by viewing the photographs several days after the robbery or by seeing the defendant in the courthouse on the morning of the trial.

The record furnishes but meager support for defendant's contention that impermissibly suggestive procedures may have been employed by the officers when the photographs were exhibited to the witness and furnishes no support whatever for a contention that anything untoward occurred when she chanced to see defendant at the courthouse on the morning of the trial. However, if it be conceded, *arguendo,* that the possibility of misidentification might have been minimized by exhibiting to the witness a wider assortment of photographs and by withholding from her information that the pictures were of persons already in custody on charges of similar offenses, nevertheless, evidence in the record overwhelmingly supports the trial court's findings and conclusion that her in-court identification was of independent origin. The circumstances of the crime, its duration and commission in a well-lighted area, the opportunity which the prosecutrix had to observe the defendant for a substantial period while he stood immediately in front of her, his lack of any disguise, all support the witness's testimony and the trial court's findings and conclusion that her in-court identification "was based on her observations at the time and scene of the robbery and was not influenced or tainted by any other identification acts or procedures prior to the calling of the case for trial." We hold that defendant's motion to suppress the in-court identification was properly denied and the evidence was properly admitted.

[2] The second assignment of error challenges the admission into evidence, after voir dire examination, of defendant's written confession. Defendant argues that the evidence indicates that the statement was made after inadequate *Miranda* warnings given when the defendant's sensibilities had been numbed by three days of continuous interrogation. The record, however, does not support this reconstruction of the events surrounding the making of defendant's confession. The trial court found that on 3 January 1972, only a few days after the robbery, Detective

Poole of the Cumberland County Sheriff's Department was sent to the Moore County jail, where, reading from a card, he advised defendant of his constitutional rights. Defendant then signed both an acknowledgment of the same and a written waiver of counsel. At this time, defendant had been incarcerated for three days, was not under the influence of drugs or alcohol, and thereafter answered Poole's questions in a coherent and intelligent fashion. Poole wrote down defendant's answers and defendant signed the completed statement, in which he admitted his participation in the armed robbery of a man and a woman at a motel on the night of 27 December 1971.

Reviewing the record, we find these findings of fact clearly supported by competent evidence, and hence conclusive upon appeal. *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634; *State v. McVay and Simmons,* 277 N.C. 410, 177 S.E. 2d 874. We note especially that Detective Poole, according to his uncontradicted testimony at voir dire, read to defendant the essentials of the standard *Miranda* warnings. Furthermore, the possibility that Poole unfairly suggested or inaccurately copied the critical portions of defendant's confession is highly unlikely; while the confession and Mrs. Tilley's testimony were in no manner contradictory and in fact shared many critical specifics, Detective Poole had performed no investigatory work in the case prior to 3 January 1972 and was not otherwise familiar with the robbery at the time defendant's confession was made. The trial court's findings of fact fully support its conclusion that defendant "made a knowing, intelligent and conscious waiver and freely and voluntarily made the statement which he signed."

In the trial and judgment appealed from we find

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. CALLOWAY HEARD AND RONALD EXCELL JONES

No. 733SC642

(Filed 12 December 1973)

1. **Constitutional Law § 31; Criminal Law § 95— implicating statement of testifying codefendant**

Defendant was not prejudiced by his joint trial with a codefendant and by the admission of the codefendant's in-custody statements implicating defendant where the codefendant took the stand and was cross-examined by defendant.

2. **Constitutional Law § 31; Criminal Law § 95— implicating statement of nontestifying codefendant — harmless error**

Although the trial court erred in the admission of a nontestifying codefendant's in-custody statements which implicated defendant, such error was harmless beyond a reasonable doubt in light of the State's other evidence of defendant's guilt.

APPEAL by defendants from *Blount, Judge,* 23 April 1973 Session of Superior Court held in CRAVEN County.

Defendants were charged in separate bills of indictment with the armed robbery of Jessie Wilson on 9 February 1973 and taking from him the sum of $12.00. They pleaded not guilty.

Evidence presented by the State tended to show:

On 9 February 1973, Wilson was operating a store some three miles north of Vanceboro on Highway 43. Between 10:00 a.m. and 12:00 noon, defendants and three others went to Wilson's store, played one or two games of pool, defendant Jones bought and ate a sandwich, and then they all left. Around 2:00 p.m. of the same day, Mr. Mumford delivered some gasoline to Wilson, and while Wilson and Mumford were settling for the gasoline, defendants entered the store again. Defendant Heard put a gun near Wilson's face and "shot" him with a blank. When Wilson asked defendant Heard what he meant, Heard "shot" him in the face again and said it was a hold-up. About that time defendant Jones "shot" Mumford in his face, told him to "stand over there and chunk his pocketbook on the drink box." Thereafter, defendant Heard took a filled Pepsi-Cola bottle and beat Wilson over his head with it "until it shattered all to pieces except for a piece of the neck." Blood from Wilson's head spattered on the wall of the store to the extent "it looked like it had

been a hog killing." Heard took Wilson's wallet containing $8.00 or $10.00 from Wilson's pocket after which defendants left the store. Police were called and Wilson was taken to New Bern to the hospital where some 20 stitches were taken to close the wounds on his head.

Around 2:00 p.m. or a little later, Deputy Sheriff Rowe and Deputy Sheriff Pritchard, after getting information over their radio about the robbery including descriptions of defendants, began patrolling the roads in the vicinity of Wilson's store. After a short while, they observed two black males (later identified as defendants) walking toward them on a dirt road approximately a mile and a half from Wilson's store. Upon approaching the two males, Deputy Rowe observed a red substance on defendant Heard's coat in the right wrist area. The deputies drove up to defendants, stopped and got out. After a few words were exchanged between the police and defendants, a .22 caliber blank pistol that would expel blank cartridges or gas, and a .22 caliber revolver containing six live bullets, were removed from Heard's pants pocket. The blank pistol had six expelled blank cartridges in it.

Defendants were placed under arrest and were carried to the courthouse in New Bern. After having their rights explained to them, each defendant signed a waiver of rights and agreed to answer questions. (A voir dire hearing in the absence of the jury was conducted by the court, and the statements made by them were adjudged to be freely and voluntarily given.)

Defendant Heard told police that he went to Wilson's store with two other persons for purpose of robbing the store; that they all "knew what they were going for"; that he shot his gas gun three or four times and got Wilson's wallet; that he hit Wilson twice with a Pepsi-Cola bottle and glass from the bottle cut his hand; that he took $8.00 from the wallet. Defendant Jones strenuously objected to the introduction of the statement made by defendant Heard and the court instructed the jury to consider the statement only as against defendant Heard.

Deputy Rowe testified that defendant Jones admitted going to Wilson's store and telling the other boys "let's get out of here"; that they went to the store in a Plymouth automobile belonging to defendant Jones; that "they had to have money to get back to Alabama." Defendant Heard objected to the introduction of Jones' statement to the officers and the court instructed

the jury to consider that statement only as against defendant Jones.

Defendant Heard offered no evidence. Defendant Jones, as a witness for himself, gave testimony summarized in pertinent part as follows: He is a resident of Grifton, N. C. On 9 February 1973 he got up around 9:30 a.m. and he, together with his brother-in-law, Chester Atkinson, a resident of Alabama, and defendant Heard (whom Jones had known for several months) proceeded to go riding in Jones' Plymouth. With Jones driving, they went to Winton, N. C., drinking intoxicants as they traveled. At Winton they purchased a pint of whiskey and some beer, turned around and went to Williamston where Jones turned the driving chore over to Atkinson. Jones' back was hurting so he took a pill and lay down on the back seat. He overheard Heard and Atkinson talking about needing some money. They drove up in front of Wilson's store and Jones and Heard went in, Jones going in for purpose of getting some cigarettes. Very soon after they entered the store, to Jones' surprise, Heard pulled a pistol and began shooting something like tear gas that burned Jones' eyes. Jones then saw Heard beating Wilson after which Jones ran to the door and said, "Man, let's get away from here." When Jones got out of the store, his car and Atkinson were gone. Jones was soon joined by Heard and they left the store walking. Some distance down the road they went to a house and tried to get a lady to take them to Grifton but the lady did not have a car. They returned to the road and were walking when police picked them up. Jones did not hit anybody in the store, did not take anything and had no evil purpose in going to the store. Jones denied that he and Heard went to Wilson's store that morning.

The jury for their verdicts found each defendant guilty of armed robbery and from judgments imposing prison sentences of not less than 25 nor more than 30 years on each of them, with credit for time spent in custody awaiting trial, defendants appealed.

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

Robert G. Bowers for defendant appellant Calloway Heard.

Michael P. Flanagan and C. H. Pope, Jr., for defendant appellant Ronald Excell Jones.

BRITT, Judge.

DEFENDANT HEARD'S APPEAL

[1] Defendant Heard assigns as error the consolidation of his and defendant Jones' cases for trial, contending that he was prejudiced by the joint trial of the cases and particularly the evidence relating to the in-custody statement made by defendant Jones. We find no merit in the assignment.

It is well settled that ordinarily the trial court may order that prosecutions of several defendants for offenses growing out of the same transaction be consolidated for trial. 2 Strong, N. C. Index, Criminal Law, § 92, pp. 623-624. However, this principle appears to be subject to the holding stated in *State v. Fox,* 274 N.C. 277, 291, 163 S.E. 2d 492, 502 (1968), as follows:

> ". . . [I]n joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra* [250 N.C. 113, 108 S.E. 2d 128]), and (2) that the declarant will not take the stand. *If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation.* See *State v. Kerley, supra* [246 N.C. 157, 97 S.E. 2d 876] at 160, 97 S.E. 2d at 879." (Emphasis added.)

See also *State v. Wright,* 282 N.C. 364, 192 S.E. 2d 818 (1972).

In the case at bar, defendant Jones (the declarant) took the witness stand and was cross-examined by defendant Heard. Therefore, we perceive no prejudice to defendant Heard.

DEFENDANT JONES' APPEAL

[2] Although in his brief defendant Jones argues several assignments of error, he placed greatest stress on assignment number 2 in which he contends the trial judge erred by allowing into evidence the in-custody confession of codefendant Heard. The part of the confession that defendant Jones contends was most damaging to him was the following statement: "That

he and two other men went to the store; that all of them knew what they were going there for and what they were going to do after they got there, and he and two other persons stated and agreed that if they got caught they would not tell on the other."

Inasmuch as defendant Heard did not take the witness stand, we think the holding in *Fox,* quoted above, applies and the court committed error as to defendant Jones in admitting that part of defendant Heard's confession implicating defendant Jones. However, considering the strong admissible evidence presented against defendant Jones, we hold that the error was harmless beyond a reasonable doubt. *State v. Cox,* 281 N.C. 275, 188 S.E. 2d 356 (1972); *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972); *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969).

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

In the trial of both defendants, we find

No error.

Judges MORRIS and BALEY concur.

STATE OF NORTH CAROLINA v. DANIEL MOORE BOND

No. 736SC808

(Filed 12 December 1973)

Criminal Law § 99— court's questioning of defense witnesses — expression of opinion

The trial court expressed an opinion on the evidence in violation of G.S. 1-180 by asking defendant and his witnesses questions which tended to impeach them and to cast doubt on their credibility.

ON *certiorari* to review judgment of *Perry Martin, Judge,* entered at the 8 May 1972 Session of BERTIE Superior Court.

By indictments, proper in form, defendant was charged with (1) the murder of William C. Bond and (2) assault with a deadly weapon with intent to kill inflicting serious injuries

on James Frank Smallwood. Both offenses were alleged to have occurred on 15 August 1971. When the cases were called for trial, the solicitor announced that with respect to the murder charge the State would seek no greater verdict than murder in the second-degree. Defendant pleaded not guilty. A jury returned verdicts finding defendant not guilty on the assault charge but guilty of second-degree murder. From judgment imposing prison sentence of not less than 18 nor more than 20 years, defendant appealed.

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

Jones, Jones & Jones by L. Herbin, Jr., for defendant appellant.

BRITT, Judge.

By his assignment of error number 4, defendant contends the trial judge expressed an opinion to the jury in violation of G.S. 1-180 by extensively questioning defendant and his witnesses. The assignment is sustained.

The record reveals that in the initial presentation of its case, the State introduced three witnesses. On the initial presentation, the trial judge did not ask two of the witnesses any questions and asked the third witness two questions. Defendant then presented nine witnesses in addition to himself, the first of his witnesses being Columbus (Lump) Williams. After the examination, cross-examination and redirect examination of Williams, the following occurred:

"THE COURT: Was she open?

ANSWER BY WITNESS: No, sir.

THE COURT: What did you stop by there for if the store was closed?

ANSWER BY WITNESS: I seen a whole lot of cars up there so I went by there.

THE COURT: What business did you have there?

ANSWER BY WITNESS: I didn't have no business up there.

THE COURT: When did you stop drinking?

ANSWER BY WITNESS: That has been in 1971.

THE COURT: When were you convicted of driving under the influence?

ANSWER BY WITNESS: April.

THE COURT: What year?

ANSWER BY WITNESS: 1971."

Columbus Williams was followed on the witness stand by William Heckstall and his cross-examination was interrupted by the trial judge as follows:

"THE COURT: Mr. Heckstall, have you heard William Smallwood make a statement more than one time about whether or not he was at the scene of the death?

ANSWER BY WITNESS: I have not heard it but one time and that was when he came to my house.

THE COURT: You have not heard him say anything about it since then?

ANSWER BY WITNESS HECKSTALL: No, not since that Sunday morning.

THE COURT: After the death?

ANSWER BY WITNESS: Yes, after the death."

While defendant was on the witness stand and following his direct examination, cross-examination, redirect examination and further cross-examination, the record discloses the following:

"EXAMINATION BY THE COURT:

Q. Are you all through? At the time you saw Stanley Bond could you tell that he had been in trouble?

A. Well, not exactly, but he blowed real loud when he gets out of breath.

Q. He blows real loud ordinarily?

A. Sometimes.

Q. Was he lying in the ditch?

A. No, he was standing in the ditch.

Q. And you wanted to go ahead and take him home?

A. That is right.

Q. And you had gotten in the car and sat down?

A. Right.

Q. How far away were these two men you said were James Frank Smallwood and Willie C. when you saw them?

A. About half a car length.

Q. You were already sitting in the car?

A. I was standing there then waiting for Stanley to sit down.

Q. Waiting on him?

A. Yes, sir.

Q. Did the car have glasses in it where you could roll them up and down?

A. Yes, sir.

Q. Did it have locks on the doors?

A. It had some, but the door was not locked.

Q. The glass on your side did have a glass in it, the window on your side, didn't it?

A. Yes, sir.

Q. And the door on the left side did have a lock in it?

A. The left-hand side?

Q. The driver's side?

A. Had a lock?

Q. Had a button to push down?

A. Yes, sir.

Q. Did you at any time call your wife that night and let her know where you were, did you?

A. I don't have a phone.

Q. You don't have one at your home?

A. No, sir."

Following the examination and cross-examination of defense witness Stanley Haywood Bond, the record sets forth the following:

"EXAMINATION BY THE COURT:

Q. Mr. Bond, you indicated in your testimony you were receiving a check from the government each month, is that correct?

A. Yes, sir.

Q. What is the check for?

A. Well, during my tour in Viet Nam like I stated earlier I got wounded in Viet Nam and so the check is for that.

Q. Because you were wounded in service?

A. Yes, sir. The check is for that.

Q. For the injury in your heel?

A. Yes, sir.

Q. What percent of disability do you draw?

A. Like you say 100% maybe.

Q. Do you draw 100%?

A. Yes, sir.

Q. Is the only disability you have in your heel?

A. Well, no. While I was in the VA hospital I applied for more, well, disability.

Q. Why?

A. Why?

Q. Yes.

A. Because, first of all, I stutter sometime.

Q. You stutter?

A. Yes, sir.

Q. Did you stutter before you went into the army?

A. No, sir.

Q. Do you have any card to show your disability that you draw?

A. What type of card?

Q. Anything in your pocketbook. Any type or piece of paper in your pocketbook that would show the type of disability that you are drawing?

A. No, sir.

Q. Do you have anything like that anywhere?

A. Somewhere? Some card or papers?

Q. Yes.

A. That would show the disability that I draw?

Q. Yes.

A. That is a broad statement, but let's see. Ah, oh, no sir, no sir.

Q. Do you have a copy of your discharge?

A. Papers?

Q. Yes, sir.

A. Yes, at home.

Q. Do you know what I mean by 308 or 309 discharge?

A. No, but you can explain it to me.

Q. Are you not in fact drawing 100% disability for mental disability?

A. Well, with a combination of the three, these can be compared as one, you know, to come together as one problem.

Q. That is as clear as you can answer my question, is it not?

A. Yes, sir.

THE COURT: All right."

After defendant rested his case, the State offered several witnesses in rebuttal. Among those was Marie Smallwood and

at the conclusion of her testimony the record discloses the following:

> "COURT: 'All of these men were out there without their wives as far as you know, weren't they?' Answer by witness: 'I don't know, I was not there.'"

It is well settled that in the trial of criminal actions, the court may ask a witness questions designed to obtain a proper understanding and clarification of the witness' testimony or to bring out some fact overlooked, but the court may not ask a defendant or a witness questions tending to impeach him or to cast doubt upon his credibility. *State v. McEachern,* 283 N.C. 57, 194 S.E. 2d 787 (1973); *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128 (1971); *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24 (1968); *State v. Lowery,* 12 N.C. App. 538, 183 S.E. 2d 797 (1971); *State v. Pinkham,* 18 N.C. App. 130, 196 S.E. 2d 290 (1973). The judge must exercise great care to see that nothing he does or says during the trial can be understood by the jury as an expression of an opinion on the facts or conveys an impression of judicial leaning. *State v. Lynn,* 246 N.C. 80, 97 S.E. 2d 451 (1957); *State v. Battle,* 18 N.C. App. 256, 196 S.E. 2d 536 (1973). See also *State v. Sharp,* 18 N.C. App. 136, 196 S.E. 2d 371 (1973) and *State v. Hewitt,* 19 N.C. App. 666, 199 S.E. 2d 695 (1973).

We hold that in the case at bar, the court's questions tended to impeach defendant and his witnesses or to cast doubt on their credibility, entitling defendant to a new trial. We find it unnecessary to discuss the other assignments of error argued in defendant's brief.

New trial.

Judges CAMPBELL and MORRIS concur.

BELL HOUSE WEAVER v. HOME SECURITY LIFE INSURANCE COMPANY

No. 736DC674

(Filed 12 December 1973)

Insurance § 45— aspiration of vomitus — double indemnity provision — external means

Death from asphyxiation when insured, who had been drinking for several days, regurgitated gastric contents and aspirated the vomitus did not result from external means within the meaning of a clause of a life insurance policy providing double indemnity for death caused by "external, violent and accidental means."

APPEAL by plaintiff from *Blythe, Judge,* 27 June 1973 Session of District Court held in HALIFAX County.

This civil action was instituted by the plaintiff, as the beneficiary of an insurance policy, for the recovery of one thousand dollars ($1,000) which sum represents the double indemnity benefits under a policy of life insurance issued by the defendant, Home Security Life Insurance Company, on the life of Herman Garland Weaver, Sr., husband of the plaintiff. The defendant admits that the policy was 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 the policy to the beneficiary, although it has refused to pay the double indemnity benefits.

Both parties moved for summary judgment pursuant to G.S. 1A-1, Rule 56, Rules of Civil Procedure. The record discloses the uncontroverted facts to be as follows:

The insured, Herman Garland Weaver, Sr., died on 26 April 1972 as a result of anoxia or lack of oxygen in the body. Insured had been drinking for several days prior to his death, and the lack of oxygen was precipitated by the fact that he regurgitated gastric contents, aspirated this vomitus, and died as a result of asphyxiation. The parties stipulated that the death was not the result of suicide nor from natural causes.

The trial court concluded, among other things, as a matter of law:

"That plaintiff is not entitled to recover of the defendant for double indemnity benefits as provided for in the supplemental provision for double indemnity benefits at-

> tached to the policy as Henry G. Weaver did not die by drowning within the meaning of the policy and as defined by law as contended by the plaintiff . . . ."

and entered summary judgment for defendant. The plaintiff appealed.

Allsbrook, Benton, Knott, Allsbrook & Cranford by J. E. Knott, Jr., for the plaintiff appellant.

W. Lunsford Crew for defendant appellee.

HEDRICK, Judge.

There being no genuine issue as to any material fact, the sole question for our determination is whether defendant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c), Rules of Civil Procedure. Resolution of this matter necessitates the construction of the double indemnity provision of the insurance policy in question and particularly the following portion:

> "The Company will pay to the beneficiary under this policy, in addition to the amount otherwise payable according to the terms of this policy, an additional amount equal to the Sum Insured, as defined on the first page hereof, upon receipt at the Home Office of due proof of the death of the Insured, while this supplementary provision is in effect, *as the result, directly or indirectly of all other causes, of bodily injuries caused solely by external, violent, and accidental means;* provided (a) that there was evidence of such injuries by a visible contusion or wound on the exterior of the body, except in the case of drowning or of internal injuries revealed by an autopsy . . . . "

While the trial court concluded that the insured's death did not result from drowning within the meaning of the policy and the parties have concentrated their argument upon the drowning feature of the above quoted clause, we are of the opinion that another determination must be made before reaching the issue of whether the insured's death resulted from drowning within the meaning of the proviso in the policy. The first step which must be hurdled is the requirement that the death be "caused solely by external, violent, and accidental means." Although we have found no North Carolina decision dealing with this factual situation, other jurisdictions have been confronted

with similar factual circumstances and the identical policy terms of "external, violent, and accidental means." *McCallum v. Mutual Life Insurance Co. of N. Y.*, 274 F. 2d 431 (4th Cir. 1960); *Towner v. Prudential Insurance Co.*, La. App., 137 So. 2d 449 (1962); *Strowmatt v. Volunteer State Life Insurance*, Fla. App., 176 So. 2d 563 (1965); *Hatcher v. Southern Life and Health Insurance Co.*, Fla. App., 207 So. 2d 316 (1968); *Radcliffe v. National Life and Accident Insurance Co.*, Tex. Civ. App., 298 S.W. 2d 213 (1957); *Spott v. Equitable Life Insurance Co.*, 209 Cal. App. 2d 229, 25 Cal. Rptr. 782, 98 A.L.R. 2d 315 (1962). In each of the cases cited, the court determined that death did not result from external means and thus recovery was precluded. We agree with this viewpoint and hold that the record discloses that the death of the insured was the result of internal and not external means as required by the terms of the policy. Our decision renders it unnecessary for us to discuss whether this death was the product of "accidental and violent means."

Summary judgment for defendant is

Affirmed.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. JAMES ROBERT COLE AND RONZEL SPENCER

No. 7320SC711

(*Filed 12 December 1973*)

Criminal Law §§ 86, 89; Rape § 4— reputation of rape victim

The trial court in a rape case erred in striking defense testimony by a deputy sheriff that, based on his investigation of the case, he was of the opinion that the alleged victim's reputation in the community "wasn't any good," since evidence of the victim's reputation was competent for the purpose of impeaching the victim's testimony and as bearing upon the question of consent.

APPEAL by defendants from *McConnell, Judge*, 23 April 1973 Session of Superior Court held in MOORE County.

The two appealing defendants, along with one Lester Spencer, were jointly indicted for the felony of rape. The jury found

defendant Cole guilty of assault on a female and judgment imposing an active sentence of six months was entered. The jury found Ronzel Spencer guilty of an assault with intent to commit rape and judgment imposing an active sentence of five to eight years was imposed. The jury also found the third defendant, Lester Spencer, guilty of assault on a female. Judgment was entered suspending a two year sentence and placing him on probation. Lester Spencer did not appeal.

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

Seawell, Pollock, Fullenwider, Van Camp and Robbins, by James R. Van Camp, for the defendants.

BROCK, Chief Judge.

After the alleged victim, Fayette Spinks, testified and the State rested its case, each of the three defendants testified. Their testimony tended to show that Ronzel Spencer had sexual intercourse with Fayette Spinks with her consent after he had given her $20.00, which he later retrieved. That Fayette Spinks became angry when Ronzel Spencer took back the $20.00 and she told him she was going to indict them for rape. Defendants' testimony tended to show that Lester Spencer and James Robert Cole did not assault or otherwise molest Fayette Spinks.

Defendants offered the testimony of William F. Nicely, a deputy sheriff of Moore County. Deputy Nicely testified that he had investigated the case and in doing so had talked with people in the community in which Fayette Spinks lived. He stated that based upon his investigation, he had an opinion as to the general reputation of Fayette Spinks in the community. The Deputy answered: "It wasn't any good." Upon objection and motion by the District Attorney to strike the answer, the trial court sustained the objection and instructed the jury not to consider the answer.

Admittedly the answer was not clear, but it could have been clarified had it not been stricken. The action of the trial court effectively cut off defendants' opportunity to offer evidence of the reputation of the prosecutrix. This we hold to be error.

One of the most common methods of impeaching a witness is by showing that the witness' character is bad. Stansbury,

North Carolina Evidence, Brandis Revision, § 43. The most generally permissible method of proving character is by evidence of the witness' reputation. A stranger who has investigated a person's reputation in the appropriate community may testify to the result of his investigation. Stansbury, supra, § 110.

The purpose of impeachment is to discount the credibility of the witness, and an accused has a right to impeach the State's witness by competent evidence of bad reputation of the witness. In addition to the right to attack the credibility of the State's witness, the character of the alleged victim in a rape prosecution may be shown by evidence of her reputation as bearing upon the question of consent. *See* Stansbury, supra, § 105.

The remaining assignments of error are not discussed because the questions probably will not arise on a new trial.

New trial.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. CLIFTON WOOTEN, JR.

No. 733SC694

(Filed 12 December 1973)

Searches and Seizures § 3— search warrant for heroin — sufficiency of affidavit

An affidavit, though inartfully drawn, was sufficient to support issuance of a search warrant for heroin where the affidavit was made upon information supplied by a reliable informer who had furnished accurate information to police in the past, the informant had seen several people at a named address with marijuana and heroin in their possession on the day in question, and the affidavit specifically described defendant by race, age, sex, height and weight as having the contraband on his person.

APPEAL by defendant from *Tillery, Judge,* 14 May 1973 Session of Superior Court held in PITT County.

Defendant was charged in an indictment, proper in form, with the felony of possession of heroin. The State's evidence tended to show that police officers, armed with a warrant to search the person of defendant, executed the search and found a quantity of heroin in defendant's trousers pocket.

Defendant testified that he was unaware of the heroin being in his pocket until the officers removed it.

From a verdict of guilty and a judgment of confinement for five years, defendant appealed.

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

Laurence S. Graham for the defendant.

BROCK, Chief Judge.

Defendant assigns as error that the affidavit to obtain the search warrant executed in this case does not justify a finding of probable cause to issue the warrant, and therefore, the evidence obtained by the search should be suppressed. This assignment of error is without merit.

The affidavit upon which the search warrant was issued in this case is made upon information supplied by a reliable informant, who had furnished accurate information to the police in the past. The informant saw (on the same date the affidavit was executed) several male and female negroes at 1307-B Fairfax Avenue in possession of marijuana and heroin. The affidavit particularly describes the premises where the male and female negroes were located, and specifically described defendant by race, age, sex, height, and weight as having the contraband on his person. Admittedly, the affidavit is inartfully drawn both as to arrangement of content, grammar and sentence structure. The affidavit was issued immediately upon receipt of the information and immediately taken before the issuing magistrate. The record shows that the affidavit was executed at 2:00 a.m., and the search warrant was signed at 2:15 a.m. It is reasonably clear that the persons and the contraband would likely disappear if the officers did not proceed with dispatch. Viewed in the light of the circumstances in which the affidavit was written, it is not surprising that it was inartful.

We note that when defendant objected to the testimony concerning the apprehension and search of defendant and requested a voir dire, the trial judge properly excused the jury. However, unless the District Attorney proposes to offer evidence considered by the magistrate in his determination of probable cause which evidence is not included in the affidavit, we see no point in offering witnesses. The affidavit speaks for

itself and can be examined by the presiding judge to determine its sufficiency. If the defendant desires to attack the credibility of the facts stated or the motives of the officer who executed the affidavit, the defendant is free to call such witnesses as are pertinent. If the facts set out in the affidavit are sufficient within themselves to justify the finding of probable cause, the affidavit is a sufficient showing on voir dire. *See State v. Logan,* 18 N.C. App. 557, 197 S.E. 2d 238.

The evidence in this case is clear that defendant was caught "red-handed" by alert officers.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. ARVIL LEE JOHNSON

No. 7317SC641

(*Filed 12 December 1973*)

1. **Criminal Law § 181; Habeas Corpus § 4— post-conviction proceeding — habeas corpus proceeding — review by writ of certiorari**

   Except in cases involving the custody of minor children, no appeal lies from a judgment entered in a habeas corpus proceeding, nor does an appeal lie from a final judgment entered in a proceeding for post-conviction review; rather, such judgments are reviewable only by writ of *certiorari.*

2. **Criminal Law § 181— appeal from post-conviction hearing — treatment as petition for certiorari**

   Defendant's attempted appeal from a post-conviction proceeding is treated as a petition for writ of *certiorari* by the Court of Appeals and is denied where the record indicates that defendant's constitutional rights were not denied him in any respect before, during or after his trial.

PURPORTED appeal by defendant from *Kivett, Judge,* 7 May 1973 Session of Superior Court held in SURRY County.

At the 3 January 1972 Session of Superior Court held in Surry County defendant was found guilty of second-degree murder. From judgment entered he appealed to this Court, which found no error in opinion filed 28 June 1972. *State v. Johnson,* 15 N.C. App. 244, 189 S.E. 2d 542.

On 4 December 1972 defendant filed in the Superior Court in Surry County a document entitled "Application for Writ of Habeas Corpus." In this he alleged certain deprivations of his constitutional rights in connection with the return of the indictment against him and in connection with his trial, including allegations that he had been denied effective assistance of counsel. After this document was filed, defendant was found to be an indigent and his present counsel was appointed to represent him in connection with the further proceedings in this matter. By motion to amend, filed 4 May 1973, defendant alleged additional grounds in support of his contentions that he had been deprived of effective assistance of counsel at his trial and in connection with the appeal therefrom.

Hearing was held on defendant's application and the amendment thereto before Judge Charles T. Kivett at the 7 May 1973 Session of Superior Court in Surry County, the matter being treated as a post-conviction proceeding and the petitioner being present and represented by his present court-appointed counsel. At conclusion of the hearing Judge Kivett signed an order, dated 11 May 1973, in which he made full findings of fact on the basis of which he concluded that none of defendant's constitutional rights had been denied him in any respect before, during or after his trial. In accord with this conclusion, Judge Kivett denied defendant any relief. To this order defendant excepted and now attempts to appeal.

Attorney General Robert Morgan by Assistant Attorney General Ralf F. Haskell for the State.

Franklin Smith for defendant petitioner.

PARKER, Judge.

[1] Except in cases involving the custody of minor children, no appeal lies from a judgment entered in a habeas corpus proceeding, such judgment being reviewable only by way of *certiorari* if the court in its discretion chooses to grant such writ. *Surratt v. State,* 276 N.C. 725, 174 S.E. 2d 524; *In re Wright,* 8 N.C. App. 330, 174 S.E. 2d 27. Similarly, no appeal lies from a final judgment entered in a proceeding for post-conviction review, in such case also review being available only by way of *certiorari.* G.S. 15-222; *In re McBride,* 267 N.C. 93, 147 S.E. 2d 597; *Aldridge v. State,* 4 N.C. App. 297, 166 S.E. 2d 485; *State v. Green,* 2 N.C. App. 391, 163 S.E. 2d 14; *Nolan v. State,* 1 N.C. App. 618, 162 S.E. 2d 88.

[2] Petitioner has filed in this Court a motion that this purported appeal be considered as a petition for a writ of *certiorari.* This motion has been allowed, and we have so considered the record docketed in this Court. After careful review of the entire record, we find that petitioner has had a full and fair hearing on his petition, there was ample evidence to support Judge Kivett's findings of fact, and these in turn support the court's conclusions of law and the judgment entered which denied petitioner any relief. We find no reason to grant the petition for the writ of *certiorari.*

Accordingly, the record docketed in this Court, considered as an attempted appeal, is dismissed, and, considered as a petition for writ of *certiorari,* is

Denied.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. SAMUEL RAY DUNN

No. 7320SC682

(Filed 12 December 1973)

1. **Criminal Law § 76— voluntariness of confession — voir dire procedure**

The trial court's determination of the voluntariness of defendant's alleged confession was not made upon an improper *voir dire* hearing where the court conducted a *voir dire,* found facts and concluded that defendant's statement was voluntary, then allowed the defendant, upon his request, to testify on *voir dire,* recalled the jury without making further findings, received defendant's statement into evidence, then conducted a second *voir dire* on the issue, and finally made findings reiterating the findings of the first *voir dire.*

2. **Criminal Law § 111— instructions — crime charged but not prosecuted**

In a prosecution for housebreaking and larceny the trial court did not err in instructing that defendant had been charged also with receiving stolen property but that the State was proceeding only on the charges of breaking and entering and larceny.

3. **Criminal Law § 117— instructions — scrutiny of defendant's testimony**

The trial court did not err by instructing the jury to scrutinize carefully the defendant's testimony but after considering the influence of defendant's interest in the result, if they found defendant to be telling the truth, then to give his testimony the same weight as any truthful witness.

APPEAL by defendant from *McConnell, Judge,* 30 April 1973 Session UNION Superior Court.

Defendant was charged in a bill of indictment with the felonies of housebreaking, larceny, and receiving stolen property, but the State elected not to proceed upon the receiving charge. Defendant pleaded not guilty, the jury returned a verdict of guilty on both counts submitted, and defendant appeals from the entry of judgment imposing a prison term of not less than five nor more than seven years with a recommendation for work release and psychiatric treatment.

Attorney General Robert Morgan by I. Beverly Lake, Jr., Assistant Attorney General, and Robert P. Gruber, Associate Attorney, for the State.

Kenneth W. Parsons for the defendant.

BRITT, Judge.

[1] By his first assignment of error defendant contends that the court's determination of the voluntariness of defendant's alleged confession was made upon an improper *voir dire* hearing. The State sought to introduce the confession through testimony of Deputy Sheriff Roy Tysinger (Tysinger), who, along with Sheriff Frank Fowler (Fowler), had conducted an in-custody interrogation of defendant. The court excused the jury, and the solicitor elicited from Tysinger facts showing that defendant had, without duress, compulsion, or promise, voluntarily and intelligently waived his constitutional rights, of which he had been warned, and admitted his guilt. The court asked defense counsel if he had any questions, to which he replied that he did not, and the solicitor advised that the State would present no other evidence. The court then found facts and concluded that defendant, "without any threats or promises having been made, while in normal condition, made a statement freely, voluntarily and intelligently after having waived his rights in writing, a copy of said waiver being attached to the record."

Thereafter, defendant expressed the desire to take the stand on *voir dire* and was allowed to do so. He testified that he had been promised leniency if he would confess, that he did sign a waiver of his rights, but that he signed no statement. The jury was recalled without further findings by the court, and the prosecution continued with its evidence. After the examina-

tion of Tysinger, the State called Sheriff Fowler who read a statement purportedly made by defendant. He further testified that the written confession was prepared by Deputy Tysinger from the statement of defendant, and that while defendant refused to sign the confession, he admitted it to be true. At this point the jury was excused for lunch and the court expressed a desire to hear from Sheriff Fowler on a further *voir dire.* Fowler then testified that no promises were made to defendant, no coercion was used, and that defendant was lucid and sober at the time he was questioned. The court then made findings reiterating the previous findings that defendant's statement was voluntarily and intelligently made.

Defendant contends the court erred in not making new findings after his testimony on *voir dire* and by making a final determination from the *voir dire* after the confession had already been admitted. We reject this contention. Though the procedure followed was somewhat unusual, it met the minimum requirements and is not reversible error. When the State offers a confession and defendant objects, its competency is a question for the determination of the trial judge by a preliminary inquiry in the absence of the jury. The court's findings as to voluntariness and other facts determining whether it meets the requirements of admissibility are conclusive if they are supported by competent evidence in the record. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970). In the instant case, since the court's findings are conclusive, as there is competent evidence to support them, it is presumed that the judge heard nothing in defendant's testimony which would cause him to alter his prior determination. Furthermore, the second *voir dire* indicated a desire of the judge to give defendant every protection, even though the necessity for it has not been established. When he made his findings and conclusions following the second *voir dire,* he had the benefit of the testimony of the officers and of the defendant. The assignment of error has no merit.

[2] Defendant assigns as error that portion of the court's jury instructions stating that defendant had been charged also with receiving stolen property but that the State was proceeding only on the charges of breaking and entering and larceny. We can perceive no prejudice to defendant by the instruction and hold that the assignment is without merit.

[3] On his final assignment of error, defendant contends the court committed error by instructing the jury to scrutinize care-

fully the defendant's testimony but after considering the influence of defendant's interest in the result, if they found defendant to be telling the truth, then to give his testimony the same weight as any truthful witness. This instruction has been approved many times and we find the assignment without merit. See *State v. Walker,* 6 N.C. App. 740, 171 S.E. 2d 91 (1969) and *State v. Best,* 13 N.C. App. 204, 184 S.E. 2d 905 (1971).

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. JERRY PARKER

No. 734SC586

(Filed 12 December 1973)

1. **Evidence § 28; Criminal Law § 80— certified copy of automobile registration — admission in criminal case**

   A copy of an automobile registration certificate signed by the Director of the Registration Division of the Department of Motor Vehicles and certified under the seal of the Department of Motor Vehicles was properly admitted in a housebreaking and larceny trial. G.S. 20-42(b); G.S. 8-35.

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

   The State's evidence was sufficient for the jury on the issue of defendant's guilt of breaking and entering and larceny where it tended to show that a witness followed a car driven by defendant from a mobile home whose owner was out of the State, that the witness observed a guitar, gun and other items on the back seat of the car, that it was thereafter discovered that the mobile home had been broken into and that various items, including guns and a guitar, had been stolen therefrom, and that fingerprints of the owner of the car driven by defendant were found on a jewelry box in the mobile home.

APPEAL by defendant from *Braswell, Judge,* 21 March 1973 Criminal Session ONSLOW Superior Court.

Defendant was charged in a bill of indictment with the felonies of housebreaking and larceny. He entered a plea of not guilty, was found guilty on both charges, and from judgment imposing a prison term of seven years with a recommendation for work release, he appeals.

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

Ellis, Hooper, Warlick, Waters & Morgan by John D. Warlick, Jr., for the defendant.

BRITT, Judge.

[1] Defendant first assigns as error the admission into evidence of a copy of a registration certificate signed by J. H. Stamey, Director, Registration Division, Department of Motor Vehicles, State of North Carolina, and certified under the seal of the Department of Motor Vehicles. G.S. 20-42(b), after stating the charge for a copy of any record of the Department of Motor Vehicles, provides, " . . . and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof, without further certification." G.S. 8-35 provides that copies of the records of any public office of the State shall be received in evidence when certified under the seal of the office by the chief officer or agent in charge of the public office.

Clearly the cited statutes provide for the admission of the properly certified copy in this instance. G.S. 8-37, which specifically provides for the admission of such a copy in civil actions, does not foreclose its admission in a criminal action. G.S. 8-37 has as its purpose the creation of a method of proving ownership of vehicles involved in the infliction of injury or other damage. The introduction of the copy in this case served only to show that someone named Charles Velton Hall received a specific license number. What inferences the jury may make from this fact, when considered with other circumstances of the case, is clearly for the jury to decide. See *State v. Lewis,* 7 N.C. App. 178, 171 S.E. 2d 793 (1970). The assignment of error is overruled.

[2] Defendant assigns as error the failure of the court to grant his motion for judgment as of nonsuit interposed at the close of the evidence. Viewing the evidence in the light most favorable to the State, it tends to show:

On 15 June 1971, as Abraham Hewitt (Hewitt) approached his home in the Ten Mile Section of Onslow County near the Duplin-Onslow county line, he saw a car pulling out of the driveway of Lowell Sly (Sly), his brother-in-law. Hewitt knew that

Sly was out of the State at the time. Hewitt followed the car for a short period of time until it turned into a dirt road and then into a driveway. Hewitt drove in behind the car, got out of his truck, walked up to the other vehicle, and started to talk to the driver of the vehicle, who was the defendant. While standing beside the vehicle, Hewitt noted some items on the back seat, among them being a gun and a guitar. There was also a passenger in the car but Hewitt could not see him well enough to identify him. Hewitt was able to identify the car as a 1961 or 1962 model green and white Ford bearing N. C. 1971 license number EF 309.

After Hewitt asked defendant what he had been doing at Sly's, defendant put the car in reverse, drove around Hewitt's truck, and headed toward the county line with Hewitt following him. Just before defendant reached the line, it appeared to Hewitt and Roe Lee Swinson, who was in the truck with Hewitt, that the passenger with defendant pulled a gun and pointed it at the back glass of the car. Hewitt then dropped back until he saw the other car go toward Pin Hook on a dirt road, at which time he stopped at a store and called the Duplin County Sheriff's office, telling a person there the license number of the car and the direction it was heading.

Duplin County Deputy Sheriff Thigpen came to the store and accompanied Hewitt to Sly's trailer home where they found the front door pulled loose and the inside in disorder. Hewitt then called the Onslow County Sheriff's Department and Naman Cannon came to the trailer home. Hewitt advised him of the events and Thigpen took fingerprints, including prints from a jewelry box. An S.B.I. examination of the prints from the jewelry box revealed that they belonged to Charles Velton Hall. A copy of the records of the Department of Motor Vehicles showed that N. C. 1971 license number EF 309 had been issued to Charles Velton Hall.

Three or four days after the occurrence, Sly returned from Iowa. A check of the premises by Sly revealed that a Black and Decker Skill saw, a jig saw, a twenty gauge shotgun, a case for a twenty-two rifle, a twenty-two rifle, sixty assorted stereo records, a Spanish lesson consisting of records and books, an electric guitar, a jewelry box, an Elgin watch, and an ivory flowered necklace, with a total value of $588, were missing.

We hold that the evidence was sufficient to withstand the motion for nonsuit. Careful consideration of defendant's other

assignments of error leads us to conclude that they too are without merit.

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

SYBIL MANNING v. AMOS L. MANNING

No. 733DC703 and No. 733DC734

(Filed 12 December 1973)

1. **Divorce and Alimony § 18— alimony pendente lite — dependent spouse — sufficiency of findings**

In an action for alimony *pendente lite* and counsel fees, findings by the trial court as to the earnings of the parties were insufficient to support the court's conclusion that the wife was a dependent spouse without an additional finding that the plaintiff wife was substantially dependent upon her husband for her maintenance and support or that she was substantially in need of maintenance and support from her husband.

2. **Divorce and Alimony § 18— alimony pendente lite — findings necessary to support award**

Trial court's factual findings were insufficient to support an award of alimony *pendente lite* under G.S. 50-16.3 where there were no findings or conclusions with respect to whether plaintiff wife was entitled to the relief demanded by her in the action in which the application for alimony *pendente lite* was made or with respect to whether the wife had not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

3. **Divorce and Alimony § 18— award of counsel fees — necessity for award of alimony pendente lite**

Where the trial court's order was deficient in findings to establish that plaintiff was entitled to alimony *pendente lite* pursuant to G.S. 50-16.3, the award of counsel fees under G.S. 50-16.4 was also unsupported and must be reversed.

4. **Divorce and Alimony § 23— child support — failure to make necessary findings**

Where the trial court did not make appropriate findings based on competent evidence as to what were the reasonable needs of the parties' children for health, education and maintenance, it was error for the court to direct defendant to make payments for their support.

5. Divorce and Alimony § 18; Rules of Civil Procedure § 8— alimony pendente lite — sufficiency of complaint

In an action for alimony *pendente lite*, counsel fees and child custody and support, plaintiff's complaint was insufficient and inadequate where it alleged in the exact language of the alimony statute that defendant treated the plaintiff cruelly and offered indignities to her person but did not allege any specific act of cruelty or indignity committed by defendant.

APPEAL by defendant Amos Manning from *Roberts, District Judge*, at the 14 May 1973 Session of PITT County District Court.

This is an action for a legal separation, alimony pendente lite, counsel fees, child custody, child support, and division of personal property. The complaint alleges that the defendant, as supporting spouse, by cruel and barbarous treatment, endangered the life of the plaintiff dependent spouse within the meaning of North Carolina General Statute 50-16.2(6) and that the supporting spouse has offered such indignities to the person of the dependent spouse as to render her condition intolerable and life burdensome within the meaning of North Carolina General Statute 50-16.2(7).

The trial court found the following facts:

1. That the parties are properly before the Court and the Court has jurisdiction of all things and matters raised herein.

2. That plaintiff-wife is the dependent spouse as alleged in the Complaint and within the meaning of G.S. 50-16.1(3) *et seq.*

3. That defendant-husband is the supporting spouse as alleged in the Complaint.

4. That the husband is able-bodied and is making approximately $183.00 gross wages per week.

5. That the wife is unemployed and has no income.

6. That both the husband and wife are fit and proper persons to have custody of the minor children born of this marriage.

7. That pending further hearings and orders of this Court in this cause the plaintiff-wife is a fit and proper person to have temporary custody of the two minor children born of this marriage and that the welfare of the children would be best served if the plaintiff-wife is given temporary custody of the

minor children, to-wit: Amy Manning, age ten, and Allen Manning, age eight, pending further orders of this Court.

Based upon the above findings, the Court then ordered:

1. Plaintiff-wife was given temporary custody of the minor children.

2. The defendant-husband was given certain visitation rights.

3. That neither the defendant nor any member of his family should interfere with, "contact either directly or indirectly, follow or cause to be followed the Plaintiff wife."

4. Defendant to pay $75.00 a week into the office of the Clerk of Superior Court for the use and benefit of his wife and children.

5. Defendant to deliver possession of the 1965 Ford automobile to the plaintiff-wife and transfer the title to same to her.

6. The Pitt County Social Services Department to make an investigation of both parents with regard to the care of the minor children.

7. Both parties to go to Pitt County Mental Health clinic for family counseling at the expense of the defendant-husband.

8. The home belonging to the parties to be given to the wife for her exclusive use and occupancy.

9. The plaintiff-wife not to remove any items other than her personal items from the house.

10. Neither party to transfer title to any personal property or real property.

11. Defendant-husband to maintain hospital and medical insurance for his wife and children.

12. Defendant-husband to pay all costs incurred by plaintiff-wife and in addition thereto the sum of $200.00 as counsel fees for plaintiff's attorney.

13. The defendant nor any member of his family not to contact directly or indirectly, molest or bother the plaintiff-wife at her residence or any place she may be.

To the entry of this order, defendant excepted and appealed.

David T. Greer for plaintiff appellee.

Crisp & Henderson by Nelson B. Crisp and Deborah A. Henderson for defendant appellant.

CAMPBELL, Judge.

[1] Defendant's assignments of error challenging the validity of the order on the grounds that the trial court made insufficient findings of fact must be sustained. "[T]he trial judge must make sufficient findings of the controverted material facts at issue to show that the award of alimony *pendente lite* is justified and appropriate." *Austin v. Austin,* 12 N.C. App. 286, 183 S.E. 2d 420 (1971).

This case is controlled by *Presson v. Presson,* 13 N.C. App. 81, 185 S.E. 2d 17 (1971), where this Court held that a mere finding that one party is a "dependent spouse" within the meaning of G.S. 50-16.1(3) is insufficient. Such a finding amounts to no more than a conclusion without the appropriate supporting findings of fact needed to satisfy G.S. 50-16.1(3) and G.S. 50-16.3(a). The *Presson* case, *supra,* holds that to find a spouse to be a "dependent spouse" there must be a finding that one of the two alternatives in G.S. 50-16.1(3) is a fact. The two alternatives referred to in the statute are: (1) when one spouse "is actually substantially dependent upon the other spouse for his or her maintenance and support," and (2) when one spouse "is substantially in need of maintenance and support from the other spouse." Here, the trial court made factual findings as to the earnings of the parties, but made no finding of fact that the wife in this case is either "substantially dependent" upon her husband for her maintenance and support or that she is "substantially in need of maintenance and support" from her husband. The finding that the wife is unemployed and that she has no income is not sufficient and the sparse record does not foreclose the possibilities suggested in G.S. 50-16.1(3) that the wife may be dependent upon and supported by someone other than her husband or that she may not need any support at all.

[2] Even had there been sufficient factual findings to support the court's conclusion that plaintiff-wife is a "dependent spouse," the court's factual findings would still have been insufficient to support the award of alimony pendente lite under

G.S. 50-16.3 or to support the order for counsel fees under G.S. 50-16.4. Under G.S. 50-16.3(a) a dependent spouse who is a party to an action for divorce, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

> "(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and
>
> (2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

In the case at bar there were no findings or conclusions with respect to whether the dependent was "entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made" or with respect to whether the dependent spouse had "not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

[3] Under G.S. 50-16.4 an order for reasonable counsel fees for the benefit of a dependent spouse may be entered "[a]t any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3"; since the order here appealed from is deficient in findings to establish that plaintiff is entitled to alimony pendente lite pursuant to G.S. 50-16.3, the award of counsel fees under G.S. 50-16.4 is also unsupported and must be reversed.

[4] The trial court did not make appropriate findings based on competent evidence as to what were the reasonable needs of the children for health, education and maintenance. Therefore, it was also error for the trial court to direct the payments for their support without findings of fact from which it could be determined that the order was adequately supported by competent evidence. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967); *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967); *In re Moore,* 8 N.C. App. 251, 174 S.E. 2d 135 (1970); *Presson v. Presson, supra; Austin v. Austin, supra.*

Lastly the trial court failed to separately state and identify the allowances for alimony pendente lite and child support as required by G.S. 50-13.4(e).

In addition to what has been stated above with regard to the errors contained in the order which was entered, the defendant has presented an even more fundamental question in that the defendant moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim for relief. Actually the motion was intended to challenge the specificity of the claim for relief stated in the complaint. Rather than a motion to dismiss for failure to state a claim under Rule 12(b)(6), we feel that the motion should have been made under Rule 12(e) as being a more appropriate motion requiring a more definite statement of the claim for relief. We will therefore treat the motion as having been made under Rule 12(e).

To review this motion, this Court allowed a writ of certiorari in case No. 733DC734. The complaint alleged:

> "8. That the supporting spouse by cruel and barbarous treatment on many occasions endangered the life of the dependent spouse within the meaning of North Carolina G.S. 50-16.2(6).
>
> 9. That the supporting spouse has offered such indignities to the person of the dependent spouse as to render her condition intolerable and life burdensome within the meaning of North Carolina G.S. 50-16.2(7)."

The defendant asserts that the complaint in the instant case has violated Rule 8(a) of the North Carolina Rules of Civil Procedure. While this Rule does not require detailed fact pleading, nevertheless, we hold that it does require a certain degree of specificity. "It is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant and the Court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery." 2A, Moore's Federal Practice, Paragraph 8.13, 1705 (2d Ed.) " . . . For the true test is whether the pleading gives fair notice and states the elements of the claim plainly and succinctly, . . . " 2A, Moore's Federal Practice, Paragraph 8.13, 1700 (2d Ed.). Also, see, Wright & Miller, Federal Practice and Procedure, § 1215 at 112-13.

[5] In the instant case the complaint merely alleges that the defendant treated the plaintiff cruelly and offered indigni-

ties to her person, using the exact language of the alimony statute, but it does not (as required by Rule 8(a)) refer to any "transactions, occurrences or series of transactions or occurrences intended to be proved." It does not mention any specific act of cruelty or indignity committed by the defendant. It does not even indicate in what way defendant was cruel to plaintiff or offered her indignities. For all the complaint shows, the alleged cruelty and alleged indignities may consist of nothing more than occasional nagging of the plaintiff or pounding on a table. Such a complaint does not give defendant fair notice of plaintiff's claim. It is merely an "assertion of a grievance," (North Carolina Rules of Civil Procedure, Rule 8, Comment (a)(3)), and it does not comply with Rule 8(a). While the North Carolina Rules of Civil Procedure were primarily patterned after the Federal Rules, nevertheless, Rule 8(a) was also based in part on Section 3013 of the New York Civil Practice Law and Rules, and New York case law is relevant in interpreting this rule. *Sutton v. Duke*, 277 N.C. 94, 101, 176 S.E. 2d 161, 165 (1970). Also, see Note, 48 N.C.L. Rev. at 637-43. Under the New York rule a plaintiff seeking divorce on the ground of cruelty must allege specific acts of cruelty in the complaint. *Kaplan v. Kaplan*, 56 Misc. 2d 860, 290 N.Y.S. 2d 345 (Sup. Ct. 1968), *aff'd*, 31 App. Div. 2d 247, 297 N.Y.S. 2d 881 (1969).

We hold that in the instant case the complaint was not adequate and sufficient, and the motion of the defendant, when treated as a motion under Rule 12(e) should be granted; and to that end the case is remanded to the trial court for an order to the plaintiff to file an amended complaint within a specified time or else the case be dismissed.

Error and remanded.

Chief Judge BROCK and Judge PARKER concur.

KATHLEEN WRIGHT WILSON, ADMINISTRIX OF THE ESTATE OF BESSIE H. WRIGHT v. RUTH ENGLAND MILLER AND TOM WRIGHT

No. 7327SC772

(Filed 12 December 1973)

1. **Automobiles § 56— striking car stopped partly on highway — negligence**

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence where it tended to show that plaintiff's intestate was a passenger in a car driven by defendant in the outside lane of a divided four-lane highway, that another motorist had stopped her car partly in that lane and was talking to a person standing on the shoulder of the highway, that the car in front of defendant swerved to the inside lane and defendant's vehicle struck the vehicle which was partly on the highway, and that at the time of the accident the other motorist had her turn signal on and had her arm out the window waving cars around her, the person standing on the shoulder was waving his arms to get approaching traffic to switch lanes, and there was no traffic in the inside lane.

2. ***Automobiles § 55— parking or leaving vehicle standing on highway***

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in parking or leaving her vehicle standing on the highway in violation of G.S. 20-161(a) where it tended to show that defendant stopped her car partly in the outside lane of a four-lane highway and was talking to a person standing on the shoulder of the highway, that there was ample room on the shoulder for defendant to have completely pulled her car off the highway, and that a car in which plaintiff's intestate was a passenger, driving in the outside lane, collided with defendant's car.

3. **Death § 9; Negligence § 44; Torts § 6— negligence by surviving spouse and another — death not related to accident — rule that one cannot profit from own wrong**

Where the jury found that an intestate's injuries were proximately caused by defendant and by the intestate's surviving spouse, but the intestate died from causes not related to the accident, defendant was not entitled to have the judgment against her reduced by the amount the surviving spouse would receive through the estate of his deceased spouse on the theory that he should not profit by his own wrongdoing.

APPEAL by defendants from *McLean, Judge,* at the 7 May 1973 Session of GASTON Superior Court.

This is a civil action to recover for personal injuries sustained by Bessie H. Wright in an automobile accident on 7 November 1969. Bessie H. Wright died, from nonrelated causes, pending the trial and the administratrix of her estate was substituted as plaintiff. On the date of the accident as the defendant

Miller was traveling west in the outside lane of U. S. Highway 74 (a four-lane highway) between Gastonia and Kings Mountain, she noticed one Edward Mullinax on the west shoulder waving her down. Mrs. Miller stopped, and according to some testimony, pulled at least halfway off the highway; and according to other testimony, she stopped with all four wheels on the paved portion of the highway. She engaged in a conversation with Mullinax whom she knew and whose automobile was stalled in the nearby median between the eastbound and westbound traffic lanes. This was outside of a business or residential district.

The plaintiff's intestate was a passenger in the car driven by her husband, defendant Tom Wright. Defendant Wright, some two minutes behind Mrs. Miller, was proceeding west in the outside lane of U. S. Highway 74 at approximately 45 miles per hour. He was following two other vehicles and noticed the car in front of him switching lanes back and forth then finally swerving into the inside lane. The Wright vehicle then collided with the Miller vehicle resulting in the alleged injuries.

Mr. Wright testified that he saw no brake lights on the Miller vehicle, nor any turn signal or arm signals. Wright also stated that he saw no warnings of any kind being given by the man (Mullinax) standing on the shoulder beside the Miller car. He further stated that he could not pull to the right because of the presence of Mullinax nor to the left due to the presence of other cars passing in the inside lane.

Mrs. Miller testified that despite the fact that there was ample room on the shoulder, she did not pull completely off the road due to the presence of Mullinax. Mrs. Miller also stated that at the time of the accident she had her turn signal on; that she had her arm out the window waving cars around her; that Mullinax was waving his arms to get the approaching cars to switch lanes; and that there was no traffic in the inside lane.

From a judgment of Five Thousand Dollars ($5,000) against them, both defendants appealed.

Ramseur & Gingles by Donald E. Ramseur for plaintiff appellee.

Carpenter, Golding, Crews & Meekins by James P. Crews for defendant appellant Ruth England Miller.

Hollowell, Stott & Hollowell by Grady B. Stott for defendant appellant Tom Wright.

CAMPBELL, Judge.

[1] Defendant Wright asserts that his motions for directed verdict and judgment notwithstanding the verdict were improvidently denied and that the defendant Miller's actions were the sole proximate cause of the accident. In determining the sufficiency of a plaintiff's evidence to withstand a defendant's motion for directed verdict and for judgment notwithstanding the verdict, "all evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving to plaintiff the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor." *Pergerson v. Williams,* 9 N.C. App. 512, 176 S.E. 2d 885 (1970); *Horton v. Insurance Co.,* 9 N.C. App. 140, 175 S.E. 2d 725 (1970), *cert. denied,* 277 N.C. 251 (1970). We find that the evidence, considered in the proper light, was sufficient to present a jury question.

[2] Defendant Miller also appealed the denial of her motions for directed verdict and judgment notwithstanding the verdict. She contends that she was not in violation of G.S. 20-161(a) which read in pertinent part at the time in question as follows:

> ". . . No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in both directions upon such highway: . . ."

Violation of the section is negligence *per se*. *Hughes v. Vestal,* 264 N.C. 500, 142 S.E. 2d 361 (1965). But whether such a violation is the proximate cause of injury in a particular case is ordinarily a question for the jury. *Barrier v. Thomas & Howard Co.,* 205 N.C. 425, 171 S.E. 626 (1933). The plaintiff notes that the terms "park" and "leave standing" as used by the statute do not include a mere temporary stop for a necessary purpose when there is no intent to break the continuity of travel. *Peoples v. Fulk,* 220 N.C. 635, 18 S.E. 2d 147 (1942). Examples of cases in which this principle has been applied are: *Meece v. Dickson,* 252 N.C. 300, 113 S.E. 2d 578 (1960), reversed on other grounds, *Melton v. Crotts,* 257 N.C. 121, 125 S.E. 2d 396 (1962) (disabled vehicle); *Leary v. Bus Corp.* and *McDuffie v. Bus Corp.,* 220 N.C. 745, 18 S.E. 2d 426 (1942) (bus stopping to let passenger alight); *Skinner v. Evans,* 243 N.C. 760, 92 S.E. 2d 209 (1956) (deputy sheriff stopped in highway to get intoxicated person on opposite side of road to get in police car); and *Kinsey v. Town of Kenly,* 263 N.C. 376, 139 S.E. 2d 686 (1965) (police car stopped in road alongside of vehicle which policeman had stopped). We feel that these cases are distinguishable on their facts and that in this particular case *Sharpe v. Hanline,* 265 N.C. 502, 144 S.E. 2d 574 (1965) is more applicable.

In *Sharpe, supra,* a truck with mechanical difficulties was left protruding onto the highway despite the availability of a fifteen to eighteen foot wide shoulder. The parked truck did not have lights or reflectors on it that could be observed by approaching motorists. The court in *Sharpe, supra,* found that there was sufficient evidence to go to the jury. Taking the evidence in the proper light in the case at bar we find no error in the trial court's submitting to the jury the issue of defendant Miller's negligence. *Parrish v. Bryant,* 237 N.C. 256, 74 S.E. 2d 726 (1953).

Defendant Miller contends that the charge was erroneous in its application of G.S. 20-161(a). This contention is without merit as the trial court's instruction was both clear and complete.

[3] Finally, defendant Miller contends that any judgment against her be reduced by the amount that defendant Wright would be entitled to receive through the estate of his deceased wife on the theory he should not profit by his own wrongdoing.

However, any wrongdoing by the defendant Wright did not contribute to the death of his wife. This is not a wrongful death case and the wrongful death statute has no application to personal injury claims. *Hoke v. Greyhound Corp.*, 226 N.C. 332, 38 S.E. 2d 105 (1946). Wright will get no direct benefit which bypasses his wife's estate. The recovery merely becomes part of the general assets of the estate of the injured party. The surviving spouse does not lose his right of inheritance because the claim arose on account of the negligence of the surviving spouse since negligence is not one of the grounds for forfeiture of marital rights as set out in G.S. 31A-1. The recovery should not be reduced.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. DR. ROBERT FRANKS

No. 7316SC804

(Filed 12 December 1973)

1. **Criminal Law § 92— consolidation of charges for trial**

   The trial court properly consolidated for trial eight charges against defendant for obtaining telephone service by use of a fictitious telephone credit number.

2. **Criminal Law §§ 34, 169— use of fictitious telephone credit number — evidence of other calls**

   In a trial of defendant upon eight charges of obtaining telephone service by use of a fictitious telephone credit number, error, if any, in the admission of testimony that defendant had made 285 calls by the use of the same fictitious number was not prejudicial in light of the State's evidence pointedly establishing defendant's guilt of making the eight calls with which he was charged; furthermore, defendant waived objection to such testimony when testimony of the same import was thereafter admitted without objection.

3. **Criminal Law § 80; Evidence § 29— use of fictitious telephone credit number — evidence of rejection of number by computer**

   In a prosecution upon eight charges of obtaining telephone service by use of a fictitious telephone credit number, the trial court properly admitted testimony that the charges for the telephone calls were rejected by the telephone company's computer because they would not match up with an assigned credit number and that the witness

investigated company records and found that the credit number was fictitious.

4. **Criminal Law § 84— legality of search — failure to hold voir dire at time requested**

Defendant was not prejudiced by the trial court's failure to hold a *voir dire* at the time defendant requested it to determine the legality of a search of defendant where the court thereafter conducted a *voir dire* before the State completed the testimony concerning the evidence seized and concluded that the search was legal.

5. **Criminal Law § 84— legality of search — voir dire — failure to make findings**

Failure of the trial court to make findings of fact following a *voir dire* hearing to determine the legality of a search and seizure was not error where defendant offered no evidence on the *voir dire* and the State's evidence was uncontradicted.

ON *certiorari* to review a trial before *McLelland, Judge,* 9 April 1973 Session of Superior Court held in ROBESON County.

Defendant was charged in eight warrants with obtaining telephone service by the use of a fictitious telephone credit number in violation of G.S. 14-113.1. He was found guilty in District Court upon each of the eight charges. Upon appeal to the Superior Court he was tried *de novo* before a jury and again found guilty of each of the eight charges.

The State's evidence tended to show the following: Each of the eight telephone calls which were charged to the telephone credit number in question was from the Lumberton area (in Robeson County) and to a Mr. Nelson in Greensboro, N. C. The eight telephone calls were made during July, August, and September of 1972. During July, August, and September of 1972, defendant was confined in the Robeson County Prison Unit. During these months defendant made a telephone call every day from the pay telephone which was available to prisoners. Each time that he made a call he would give the operator a credit card number. A Nelson N. Johnson who identified himself as working for both a Youth Organization for Black Unity and as a consultant for the Commission on Racial Justice testified that he received calls in Greensboro from a person who identified himself as Dr. Robert Franks during the months in question. Each of the eight telephone calls in question was made by giving the operator telephone credit number 175-8669-072-M. After the toll ticket was made out by the operator, the charge was rejected by the IBM equipment because it would not match up

with an assigned number. Thereafter, it was determined by Southern Bell Telephone Company that such an account number did not exist. There was a total of 285 calls made by giving the operators this credit number.

The State's evidence further tends to show that when defendant was searched in November 1972 he was carrying in his pocket a calendar notebook upon one sheet of which was written the fictitious number 175-8669-072-M. Also in this same calendar notebook the following was written: "Student Youth Black Organization — Unity — YOBU — Comrade Nelson N. Johnson." Following this notation there were the two Greensboro telephone numbers to which the eight telephone calls had been made.

The defendant offered no evidence.

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

Musselwhite, Musselwhite and McIntyre, by Charles S. McIntyre, Jr., for the defendant.

BROCK, Chief Judge.

[1] The trial judge is expressly authorized by G.S. 15-152 to order consolidation for trial of two or more charges in which defendant is charged with crimes of the same class. Defendant has failed to show prejudicial error in the consolidation of the eight charges against the defendant in this trial.

[2] Defendant assigns as error that the trial judge permitted testimony concerning 285 calls which had been made with the use of the same fictitious number. Defendant argues that he was charged only with making eight calls and that evidence as to the other 277 calls was prejudicial to him. Defendant is in no position to complain of this testimony. Although defendant made objections to some references to 285 calls, the following testimony was admitted without objection: "Some of the other 285 calls originated over in Rockingham. There is a prison camp over there. My investigation revealed that the defendant was an inmate over there." The admission of testimony over objection is ordinarily harmless when testimony of the same import is theretofore or thereafter introduced without objection. 3 Strong, N. C. Index 2d, Criminal Law, § 169, p. 132. In any event in view of the evidence pointedly establishing defendant's use of

the fictitious number to make the eight calls to Greensboro, if it were error to permit reference to the 285 calls, it was harmless.

[3] Defendant assigns as error the admission of testimony to establish that the charges for the telephone calls were rejected by the computer. The witness explained how the charge was initiated and placed upon a punch card; that this punch card was supposed to match an account by that number; that the computer was unable to match the charge number with an existing account; and that it was rejected by the computer. The witness further testified that he personally investigated the company records and found that the charge number was fictitious. We see no error in the admission of this evidence. If entries are 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. *See,* Stansbury, North Carolina Evidence, Brandis Revision, § 155.

[4, 5] Defendant assigns as error the admission of evidence seized as a result of a search of defendant's person while in custody of the Department of Correction as a prisoner. When the warrants in these cases were brought to the unit of the Department of Correction from which defendant was scheduled to be discharged, the Sergeant in charge searched defendant prior to placing him in the lockup. During this search, the pocket calendar notebook was seized containing the fictitious account number and the two telephone numbers in Greensboro to which the eight calls in question were placed. Defendant complains that the trial court failed to conduct a voir dire at the time defendant requested it to determine the legality of the search. Although the trial court did not hold the voir dire at the time requested by defendant, the voir dire was later conducted and the search was found to be legal. This was done before the State completed the testimony concerning the evidence seized. The trial court having found, upon competent evidence, that the search was legal, we hold that the failure to conduct the voir dire at the time requested by defendant was not prejudicial. Defendant's further argument that the trial judge failed to find the facts upon which he concluded the search to be legal must fail. Defendant offered no evidence on voir dire, and the State's evidence which supports the trial court's conclusion is uncontradicted. There was no requirement for findings of fact under these circumstances.

We have given careful consideration to defendant's remaining assignments of error and find them to be without merit.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. GAREFIELD (GARFIELD) McLAMB

No. 734SC381

(Filed 12 December 1973)

1. **Criminal Law § 30; Homicide § 23— solicitor's announcement not to try defendant for first degree murder — absence of prejudice**

Defendant was not prejudiced by the solicitor's announcement and by repetition of the announcement in the court's instructions that the State would not seek a conviction of first degree murder as charged in the indictment but would seek a conviction of second degree murder or manslaughter.

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

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of second degree murder where two eyewitnesses testified for the State that defendant, cursing and telling the unarmed victim to die, shot him three times, the third time after the victim had fallen to the ground.

3. **Criminal Law § 172; Homicide § 26— instructions on second degree murder — error cured by manslaughter verdict**

Defendant's conviction of voluntary manslaughter rendered harmless error, if any, in submitting to the jury the question of defendant's guilt of second degree murder in the absence of a showing that the verdict of guilty of the lesser offense was affected thereby.

4. **Homicide § 28— instructions on accident**

In this homicide prosecution, the trial court properly instructed the jury as to defendant's contention that the shooting was accidental, and the jury could not have been misled into the mistaken understanding that the defense of accident applied only to the charge of second degree murder but not to the charge of manslaughter.

APPEAL by defendant from *Brewer, Judge,* 4 December 1972 Session of Superior Court held in SAMPSON County.

Defendant was indicted for the murder of one Glenn Terry Weeks. When the case was called for trial, the solicitor an-

nounced in open court that the State would not seek a conviction of murder in the first degree but would seek a conviction of murder in the second degree or manslaughter, or such verdict as the law and evidence in the case might warrant. Defendant pled not guilty. The jury returned verdict finding defendant guilty of voluntary manslaughter. Judgment was entered that defendant be imprisoned for the term of ten years.

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

Holland, Poole & Groce, P.A., by Billie L. Poole and Edwin R. Groce for defendant appellant.

PARKER, Judge.

[1] Appellant contends prejudicial error resulted from the announcement made by the solicitor when the case was called for trial and by the repetition of that announcement when the court, in its instructions to the jury, charged:

> "Now members of the jury, the solicitor announced at the beginning of the trial of this case the State would not seek a conviction of murder in the first degree as charged in the bill of indictment, the State would seek a conviction of murder in the second degree or guilty of manslaughter, or such verdict as the law and the evidence in the case might warrant."

As grounds for this contention appellant asserts (1) that he was never actually charged with first-degree murder because the indictment did not allege that he had killed "with premeditation and deliberation" and (2) that the reference to another charge against him prejudiced him with the jury in violation of the holding in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174. Neither ground has merit. The bill of indictment was drawn under G.S. 15-144 and was sufficient to charge murder in the first degree. *State v. Haynes*, 276 N.C. 150, 171 S.E. 2d 435. The holding in *Williams* was 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 for a criminal offense *other than that for which he is then on trial.* Here, the solicitor's announcement and the judge's instructions referred only to the same homicide for which defendant was tried. The jury could not have been prejudiced against the de-

fendant merely by learning that the solicitor thought the State's evidence would not justify submitting the highest degree of that crime.

[2] Appellant next contends that nonsuit should have been allowed as to the charge of second-degree murder because some of the State's evidence "negates the elements of intent and malice on the part of the defendant." If it be conceded that some of the State's evidence, *if viewed in the light most favorable to the defendant,* might tend in that direction, the same evidence, when viewed in the light most favorable to the State, was amply sufficient to justify submitting to the jury an issue as to defendant's guilt of second-degree murder. Two eyewitnesses testified for the State that defendant, cursing and telling the unarmed Weeks to die, shot him three times, the third time after Weeks had fallen to the ground. That defendant's witnesses gave a somewhat different version of the affair has no bearing on the question raised by the motion for nonsuit.

[3] While we hold that the evidence was amply sufficient to justify submitting second-degree murder as a possible verdict, we point out that defendant's conviction of voluntary manslaughter would in any event render harmless an error, had error been committed, in submitting to the jury the question of defendant's guilt of the more serious offense, at least absent any showing that the verdict of guilty of the lesser offense was affected thereby. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745; *State v. Sallie,* 13 N.C. App. 499, 186 S.E. 2d 667.

[4] Finally, appellant contends that the trial court erred in failing to instruct the jury adequately as to the defendant's contention that the shooting was accidental. Specifically, appellant contends that the court failed to relate this defense clearly to the offense of manslaughter. We disagree. The court instructed the jury fully and clearly as to defendant's contention that the shooting had been unintentional and accidental. After instructing the jury as to the elements of second-degree murder, voluntary manslaughter, and involuntary manslaughter, the court then clearly instructed the jury that if the deceased died by accident or misadventure, defendant would not be guilty, and that "[t]he burden of proving accident is not on the defendant, his assertion of accident is merely a denial that he has committed any crime." The jury simply could not have been misled, as appellant seems to contend, into the mistaken understanding that the defense of accident applied only to the charge

of second-degree murder but not to the charge of manslaughter. We find the charge free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. HOMEZELLE BENTHALL

No. 7315SC287

(Filed 12 December 1973)

1. **Assault and Battery § 13— evidence that defendant shot victim on other occasions**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries, testimony by the prosecutrix that defendant had shot her on four previous occasions was competent to show that defendant shot the prosecutrix intentionally rather than accidentally as he contended.

2. **Assault and Battery § 13— defendant's contacts with victim subsequent to shooting**

In a felonious assault prosecution, testimony by the prosecutrix and her son concerning contacts defendant had made with them subsequent to the shooting did not constitute prejudicial error.

APPEAL by defendant from *Clark, Judge,* 14 September 1972 Session of Superior Court held in ORANGE County.

By indictment, proper in form, defendant was charged with felonious assault with a deadly weapon with intent to kill inflicting serious injuries. He pled not guilty.

The prosecuting witness, Martha Louise Gaddis, testified in substance to the following: She had known the defendant for two years and had dated him until two months prior to this charge. On the night in question defendant came to her home in Chapel Hill and tried to borrow money from her. When she refused, he began cursing, so she asked him to leave. Defendant left but a short time later returned, broke the glass in the front door, and came in, shooting and yelling "I am going to kill you." Defendant had a pistol and fired one shot outside the house and three shots inside. Two shots hit her, one passing through her lungs and one by her heart. Mrs. Gaddis was taken to the

hospital, where she remained for almost three weeks, a part of that time in intensive care. Joe Gaddis, the twenty-four-year-old son of the prosecuting witness, who was in the house at the time of the shooting, also testified as a witness for the State and corroborated his mother's testimony.

Defendant testified in substance to the following: On the night in question, Mrs. Gaddis was drinking heavily and got "pretty drunk." He walked to the front door and started out. She asked him where he was going, and when he told her he was going out on the porch, she called him a "damn liar" and shot him, the bullet hitting his left hand. As she was trying to shoot again, he grabbed her and pressed both of her hands up to her chest, and the gun went off and hit her. Joe Gaddis jumped up and got a shotgun. Defendant ran out the back door, and as he did so, Joe Gaddis shot him and knocked him into the street. Defendant got up and went to Durham.

The jury found defendant guilty as charged. Defendant was sentenced to prison for a term of not less than seven nor more than ten years. Defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin for the State.

Thomas D. Higgins III for defendant appellant.

PARKER, Judge.

The evidence, when viewed in the light most favorable to the State, was amply sufficient to withstand defendant's motions for nonsuit. There was substantial evidence of every element of the crime charged.

[1] Defendant contends that the court erred in overruling his objections to admission of testimony as to defendant's actions toward the prosecutrix both prior and subsequent to the occurrence which gave rise to the charge in the present case. In this connection the prosecutrix testified that defendant had shot her on previous occasions and that the shooting in this case was the fifth occasion that he had shot her. There was no error in admitting this evidence. It was relevant to show that defendant shot the prosecutrix intentionally rather than accidentally. 1 Stansbury's N. C. Evidence, Brandis Revision, § 92.

[2] The prosecutrix and her son also testified over defendant's objections to contacts the defendant had made with them subsequent to the shooting. The testimony concerning what was said or done on these occasions could not reasonably be considered as prejudicial to defendant and its admission resulted in no prejudicial error.

Finally, defendant contends that the court committed error in its charge to the jury when restating the contentions of the State to the jury. However, we have reviewed the charge as a whole and are of the opinion that prejudicial error has not been shown.

Defendant has had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. OLIVER HELTON DICKERSON

No. 7318SC259

(Filed 12 December 1973)

Larceny § 7— automobile larceny — value of stolen vehicle

In a prosecution for felonious larceny of an automobile, the State's evidence was sufficient to support a jury finding that the value of the automobile exceeded $200 on the date it was stolen where the evidence showed that the owner had purchased it only a few months previously for $1,800 and nothing in the evidence suggested any reason to suppose that such rapid depreciation could have occurred as to reduce its fair market value to $200 or less between the date of purchase and the date it was stolen.

APPEAL by defendant from *Exum, Judge,* 18 September 1972 Criminal Session of Superior Court held in GUILFORD County.

Defendant was charged by indictment, proper in form, with the felonious larceny of a 1966 Plymouth of the value of $1,800.00, the property of Lula Mae Parks Roberts. Defendant pled not guilty, and, after signing a written waiver of counsel which was sworn to by defendant and certified to by the trial judge, represented himself at trial in Superior Court.

In summary, the State's evidence showed: On 1 May 1972, Mrs. Roberts owned a 1966 Plymouth automobile, which she had purchased the previous June for $1,800.00 and on which there was a balance of the purchase price still outstanding. She parked it in front of her residence. Leaving the motor running and the keys in the ignition, she went into her house. Upon returning about five minutes later, she found the car missing. Mrs. Roberts had not given anyone permission to move the Plymouth and promptly reported its theft. At approximately 12:30 a.m. on 1 May 1972, Officer Davis, a High Point Police Officer, observed a 1966 Plymouth in the Union Bus Station parking lot. Davis approached the Plymouth and discovered the defendant lying down on the front seat with his hand up under the dashboard. Defendant consented to drive the Plymouth to the police station, where a check revealed that the engine number—PH 43662131862—matched that of Mrs. Roberts's missing automobile. Mrs. Roberts subsequently came to the station and took custody of the car.

Defendant neither testified nor offered evidence in his defense. From a verdict of guilty as charged and judgment entered thereon imposing prison sentence of seven to ten years, defendant appealed through court-appointed counsel.

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

Assistant Public Defender Richard S. Towers for defendant appellant.

PARKER, Judge.

Defendant contends that the trial court erred in denying his motion for nonsuit. The State's evidence, summarized above, was clearly sufficient to take the case to the jury on the charge of felonious larceny. What argument there is on this appeal concerns primarily the quantum of evidence as to the value of the stolen personalty on the date of the theft. We find the State's evidence on this element was sufficient to support the jury finding that the value of the Plymouth exceeded $200.00 on the date it was stolen. There was evidence that only a few months previously the owner had purchased it for $1,800.00, and nothing in the evidence even suggests any reason to suppose that such extraordinary and rapid depreciation could have occurred as to reduce its fair market value to $200.00 or less during the relatively

short time intervening between its purchase and the date it was stolen. The trial court properly charged the jury that to find defendant guilty of the felonious larceny charged in the bill of indictment, they must find from the evidence and beyond a reasonable doubt not only that defendant took and carried away the automobile without the owner's consent, knowing that he was not entitled to take it and intending at the time to deprive the owner of its use permanently, but also that the automobile was worth more than $200.00. Since all of the evidence in this case indicated that the value of the stolen property exceeded $200.00, the trial court did not err by failing to instruct the jury to consider in addition an issue as to defendant's possible guilt or innocence of the lesser included offense of misdemeanor larceny.

In the trial and judgment appealed from we find

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. DONALD SAMUEL LAWSON

No. 733SC621

(Filed 12 December 1973)

1. **Criminal Law § 75— incriminating statement by defendant — voluntariness**

   In a drunken driving case, evidence on *voir dire* that defendant was arrested for public intoxication, placed in a patrol car and given the *Miranda* warnings and that defendant was asked a series of questions and admitted that he was the driver of his automobile was sufficient to support the trial court's finding that defendant's statements were understandingly and voluntarily made.

2. **Automobiles § 127— drunken driving — sufficiency of evidence**

   The trial court in a drunken driving case properly denied defendant's motion for nonsuit where the evidence tended to show that defendant was behind the wheel of a vehicle, the motor was running, the lights were on, defendant was intoxicated, and by his own incriminating statements defendant admitted he was the driver of the automobile.

APPEAL by defendant from *Rouse, Judge,* 30 April 1973 Session of Superior Court held in CARTERET County.

This is a criminal action in which defendant, Donald S. Lawson, was charged with driving an automobile on the public highway while under the influence of intoxicating liquor.

The State's evidence tended to show that on 20 January 1973 at approximately 1:40 a.m., Officer Askew of the Highway Patrol observed defendant in a car backed in a ditch on Old Highway 70. Defendant was sitting behind the wheel of the car, with the motor running and the lights on. The Officer assisted defendant in getting out of his car and at that time noticed that defendant was under the influence of some intoxicating beverage. Defendant was then arrested for appearing in a public place in an intoxicated condition, placed in a patrol car, and advised of his constitutional rights. In response to a question asked by the patrolman, the defendant admitted that he was operating the vehicle when it left the highway. After the officer completed his investigation, he took the defendant to the police department in Newport, where he was given a breathalyzer test which registered a reading of .35.

The defendant offered evidence tending to show that he was not driving the automobile on this occasion but rather that the vehicle was being driven by another person whose lack of familiarity with the operation of the car caused the vehicle to run into the ditch.

Defendant was found guilty as charged and sentenced to jail for six (6) months, suspended for fifteen (15) months on condition that he not operate a motor vehicle for fifteen (15) months and pay a fine of $150.00 and costs. Defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Ralf F. Haskell for the State.

Wheatly and Mason by L. Patton Mason for defendant appellant.

HEDRICK, Judge.

[1] Seven of defendant's assignments of error, in effect, serve to raise only one issue: Did the court err in admitting into evidence over defendant's objection defendant's inculpatory statements made to the highway patrolman at the scene after the defendant had been arrested for public drunkenness?

When the State proposed to offer into evidence the defendant's incriminating statements, the defendant objected, and the

trial court, following the accepted practice, conducted a voir dire into the circumstances surrounding the challenged statements. *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). On voir dire the State offered evidence that the defendant was arrested for public intoxication, placed in a patrol car and given the Miranda warnings. In response to a series of questions asked by the patrolman, the defendant admitted, among other things, that he was the driver of the automobile. The defendant presented no evidence on voir dire and at the conclusion of the voir dire, the trial judge made findings of fact which included the finding that the defendant had been advised of his constitutional rights. Based upon the facts found, the trial judge concluded as a matter of law that the defendant's statements were voluntarily and understandingly made, and thus admissible. The trial judge did not make an express finding of fact as to whether defendant's intoxicated condition was such as to prevent him from comprehending the import of the Miranda warnings; however, there being no conflict in the evidence, it was not incumbent upon the trial judge to make a finding of fact as to this matter. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971); *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511 (1967); *State v. McCloud,* 7 N.C. App. 132, 171 S.E. 2d 470 (1969).

Since there was plenary competent evidence to support the court's findings, those findings are binding on this court, and the findings support the conclusion that the challenged statements were understandingly and voluntarily made. *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610 (1970); *State v. McCloud, supra.*

[2] Next, defendant contends that the trial court committed error in denying his motion for nonsuit. The evidence, when considered in the light most favorable to the State, establishes that defendant was behind the wheel of the vehicle, the motor was running, the lights were on, defendant was intoxicated, and by his own incriminating statements defendant admitted he was the driver of the automobile. This evidence is sufficient to withstand the motion for nonsuit. *State v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411 (1961).

Also without merit is defendant's assertion that the trial court erred in its charge to the jury with regard to the presumption created by the breathalyzer reading of over .10. The portion

of the charge in question, when considered with the charge in its entirety, did not suggest, as defendant contends, that the defendant was required to offer proof of rebuttal or that the burden of proof had shifted to the defendant but rather indicated that the burden of proof remained on the State to satisfy the jury beyond a reasonable doubt of all elements of the crime charged.

In defendant's trial, we find

No error.

Judges MORRIS and VAUGHN concur.

WALTON PETER BURKHIMER, JR., PLAINTIFF v. BARNEY EDWARD HARROLD, AND WIFE GEORGIA FAW HARROLD, DEFENDANTS v. WALTON PETER BURKHIMER, THIRD PARTY DEFENDANT

No. 7325SC572

(Filed 12 December 1973)

Automobiles § 56— hitting stopped vehicle — insufficient evidence of negligence

Evidence was insufficient to support a finding that defendant's negligence was a proximate cause of plaintiff's property damage and third party defendant's personal injuries where the evidence tended to show that defendant was followed by two vehicles and the third party defendant, the third party defendant was traveling at 50 mph and could see the taillights of the three vehicles in front of him, the defendant executed a turn which required that the vehicle behind her come to a stop, two of the vehicles behind her did stop, but the third party defendant did not stop but collided with the stopped vehicle directly in front of him.

APPEAL by plaintiff and third party defendant from *Winner, Judge,* 19 March 1973 Session of Superior Court held in CALDWELL County.

This is a civil action in which the plaintiff, Walton P. Burkhimer, Jr., and his father, the third party defendant, seek to recover from defendants damages for injury to person and property, emanating from the collision of plaintiff's car (driven by the third-party defendant) with the car of another not a party to this present suit.

The evidence presented by plaintiff and third party defendant tends to establish the following:

On a clear night in November 1969, the third party defendant was driving alone in his son's automobile which had been left with him while his son was in the military service. The third party defendant, heading west on N. C. Highway #90 and traveling at a speed of approximately fifty miles per hour, was in the process of overtaking several vehicles traveling in the same direction but at a slower rate of speed. Directly ahead of the third party defendant was a 1955 Chevrolet automobile driven by Gordon White, and ahead of the White vehicle was a 1969 Plymouth being driven by McArthur Austin. In front of the Austin vehicle was the automobile driven by the defendant Mrs. Harrold. These vehicles had their headlights and taillights on, and the third party defendant testified that he could see the taillights on these vehicles.

As the vehicle driven by Mrs. Harrold reached the entrance to a service station located on Highway #90 she attempted to make a left turn into the driveway of the station, but she missed the driveway and had to back up to be able to enter the driveway. Austin testified:

> "[S]he started to turn into the store and she misjudged where the turn was and started in the ditch. I was watching because I knew she was going to do something there and I saw her back-up lights come on in the road and I stopped. She backed to where I would say her bumper was across the yellow line."
>
> "I was some 15 feet from her car when I stopped."

The White vehicle, following immediately behind Austin, came to a complete stop six or eight feet behind Austin's car and remained stationary at that time for an estimated ten seconds before he was struck from the rear by the vehicle driven by the third party defendant. The vehicle driven by the third party defendant left skid marks of 69 feet and did not come into contact with any vehicle other than the one driven by Gordon White.

At the conclusion of the presentation of plaintiff's and third party defendant's evidence, the defendants moved for a directed verdict which motion was granted. The plaintiff and third party defendant appealed.

L. H. Wall for plaintiff appellant.

Townsend and Todd by Bruce W. Vanderbloemen for defendent appellees.

Fate J. Beal and L. H. Wall for third party defendant.

HEDRICK, Judge.

It is fundamental that plaintiff and the third party defendant, in order to prevail on the contention that their personal injuries and property damages were the direct result of defendant's actionable negligence, must present evidence sufficient to support both a finding of negligence and that such negligence was the proximate cause of their injuries and property damage. *Pittman v. Frost,* 261 N.C. 349, 134 S.E. 2d 687 (1964).

Assuming *arguendo* that the actions of defendant Harrold were negligent, we find no evidence sufficient to support a finding that such negligence was a proximate cause of plaintiff's property damage and third party defendant's personal injuries. *Massengill v. J. E. Womble and Sons, Inc.,* 258 N.C. 181, 128 S.E. 2d 243 (1962). In fact, the evidence presented clearly reveals that the sole proximate cause of the third party defendant's injuries and plaintiff's property damage was the negligence of the third party defendant.

Plaintiff and third party defendant also contend the court erred in allowing defendant Harrold to amend the original answer in order to plead the family purpose doctrine and in making the driver of plaintiff's car a third party defendant. The trial court's order allowing the original defendants' motion for a directed verdict and our decision affirming the judgment directing a verdict for defendants make it unnecessary for us to discuss these assignments of error.

The judgment appealed from is

Affirmed.

Judges VAUGHN and BALEY concur.

STATE OF NORTH CAROLINA v. LAMONT TYRONE BYNUM

No. 737SC783

(Filed 12 December 1973)

1. **Criminal Law § 92— consolidation of co-defendants' trials proper**

   Trial court did not abuse its discretion in consolidating defendant's trial with the trial of a co-defendant. G.S. 15-152.

2. **Criminal Law § 89— corroboration testimony — slight discrepancies — testimony competent**

   Though the testimony of a police officer might have differed in a slight degree from the testimony of the two witnesses he was seeking to corroborate, the officer's testimony was not rendered incompetent since it substantially corroborated that of other witnesses.

3. **Criminal Law § 131— newly discovered evidence — new trial denied — no abuse of discretion**

   The trial court in an armed robbery case did not abuse its discretion in denying defendant's motion for a new trial for newly discovered evidence where that evidence consisted of a statement made subsequent to the judgment of the court by codefendant in open court proclaiming that he alone was guilty of the crime charged and that defendant was completely innocent of any wrongdoing.

APPEAL by defendant from *James, Judge,* 16 April 1973 Session of Superior Court held in EDGECOMBE County.

The defendant, Lamont Tyrone Bynum, was charged in a bill of indictment, proper in form, with the armed robbery of $16.00 from John Willey. The defendant Bynum's case was consolidated for trial, over Bynum's objection, with the trial of a co-defendant, Matthew Parker. Both defendants pleaded not guilty.

The material evidence offered by the State tended to show that on 29 March 1973 at about 11:30 p.m., the defendant and Parker attacked John Willey while the latter was in the bathroom at the bus station in Rocky Mount, North Carolina. Parker held a knife at Willey's throat until defendant Bynum removed Willey's wallet from the victim's left hip pocket. Upon completing the robbery, Parker and defendant fled; however, both were apprehended shortly after the incident.

The defendant Bynum offered evidence that on 29 March 1973, he and Parker went to the bus station and were in the bathroom for a brief period of time along with Willey and three other men. As defendant departed from the bathroom he

heard screams, became frightened, and fled from the bus station. Defendant denied any role in the robbery of Willey.

From a verdict of guilty as charged and the imposition of a prison sentence of not less than 18 nor more than 20 years, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General James Edward Magner, Jr., for the State.

Fountain and Goodwyn by George A. Goodwyn for defendant Lamont Tyrone Bynum.

HEDRICK, Judge.

[1] Defendant by his first assignment of error contends that the trial court erred in allowing the motion to consolidate defendant's trial with the trial of Matthew Parker. A motion for consolidation is addressed to the sound discretion of the trial judge; and since there is nothing in the record to suggest abuse of discretion in the ruling of the court upon this motion, this assignment of error is overruled. G.S. 15-152; *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386 (1967); *State v. Conrad,* 4 N.C. App. 50, 165 S.E. 2d 771 (1969).

[2] By assignments of error 2 and 4, defendant argues that the court erred in admitting the testimony of Officer Harper for the purpose of corroboration. Although the testimony of Officer Harper might have differed in a slight degree from the testimony of the two witnesses he was seeking to corroborate, "[w]here the testimony offered to corroborate a witness does so substantially, it is not rendered incompetent by the fact that there is some variation." *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960). Thus, this assignment of error is overruled.

[3] Next, defendant asserts that the court committed error when it failed to grant his motion for a new trial for newly discovered evidence. Subsequent to the judgment of the court, the defendant Parker made a statement in open court proclaiming that he alone was guilty of the crime charged, and declared that defendant Bynum was completely innocent of any wrongdoing. Thereafter, defendant Parker was brought to the judge's chambers and in the presence of his attorney and the trial judge, the defendant answered several questions asked by the trial judge, including the following:

"COURT: * * * Are you telling me now that what you said in that courtroom when you spoke up was not true and that you are now taking the position that you had throughout the trial that you had nothing to do with it?

DEFENDANT PARKER: Yes, sir.

COURT: Although you stated out there in the courtroom [after the judgment] that you did rob Mr. Willey?

DEFENDANT PARKER: Yes, sir.

COURT: And take his money. But that Bynum had no part of it?

DEFENDANT PARKER: It is just like it was when we were out there at first. Really, neither one of us had nothing to do with that robbery.

COURT: And the statement you made out there after sentence was imposed was made out of a desire to help Bynum?

DEFENDANT PARKER: Yes, it was."

A motion for a new trial for newly discovered evidence is addressed to the sound discretion of the trial court. *State v. Blalock,* 13 N.C. App. 711, 187 S.E. 2d 404 (1972). Since no abuse of discretion has been shown, we find this assignment of error to be without merit.

We find the defendant was afforded a fair trial free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JESSIE EARL MAY

No. 734SC667

(Filed 12 December 1973)

1. Narcotics § 4— manufacture of marijuana — sufficiency of evidence

In a prosecution for manufacturing marijuana, the trial court properly refused to grant defendant's motions for nonsuit where the

evidence tended to show that defendant worked for a third person who farmed, that defendant cultivated a cornfield for the third person, that law enforcement officers found marijuana growing in the field, and that defendant had previously told the Chief of Police that he had formerly worked for a man who had some marijuana in a cornfield.

2. **Narcotics § 4.5— manufacture of marijuana — instructions as to defendant's intent not required**

In a prosecution for manufacturing marijuana, the trial court did not err in failing to explain to the jury that in order to find defendant guilty it would be necessary to find that defendant manufactured marijuana with the intent to distribute same, since the words "with intent to distribute" found in G.S. 90-95(a)(1) relate to the word "possess" and not to the words "manufacture, distribute or dispense."

APPEAL by defendant from *Tillery, Judge,* 5 May 1973 Session of Superior Court held in JONES County.

Defendant and William Franklin Brimage (Brimage) were jointly charged in a bill of indictment with manufacturing, with intent to distribute, approximately 25 pounds of marijuana on 14 June 1972. They pleaded not guilty. A jury found Brimage not guilty but found defendant guilty, and from judgment imposing prison sentence of two years, defendant appealed.

Attorney General Robert Morgan by H. A. Cole, Jr., Assistant Attorney General, and C. Diederich Heidgerd, Associate Attorney, for the State.

Beaman, Kellum & Mills by James C. Mills for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the court to allow his motions for nonsuit.

Evidence presented by the State, briefly summarized, tended to show: On 9 June 1972, Deputy Sheriff Haddock saw defendant and Brimage plowing with tractors in a three acre field planted in corn. The field is in a rural section of Jones County, approximately one-quarter mile from the nearest public road and approximately 50 yards from a farm road. The field contained 60 rows of corn and was surrounded by woods and bushes. In the absence of defendant and Brimage, Haddock examined the field and found approximately 650 marijuana plants growing on the rows among the corn plants. The mari-

juana plants varied in height from 8 inches to approximately 36 inches and were growing on all rows except about 12 at one end of the field. Haddock had been in the vicinity of the field around the first of May (1972) at which time he saw Brimage discing the land. Haddock reported his discovery to other law enforcement officers and on 14 June 1972 they went to the field, pulled up the marijuana plants, which weighed 25 pounds, and took possession of them. On cross-examination Deputy Sheriff Provost, who was in the raiding party, testified that in some places in the field ragweed was quite thick but the ragweed had been cleaned away from the marijuana plants. Haddock testified that in plowing corn with a tractor, the operator sits about four feet above the ground and looks at the corn constantly, otherwise, he would cover the corn with dirt. S.B.I. Agent Phillips testified that some of the marijuana plants had grown taller than the corn.

Brimage and defendant testified as witnesses for themselves. Brimage's testimony is summarized in pertinent part as follows: In 1972 he "farmed" the field in question along with six other fields, planting a total of about 50 acres of corn. Defendant worked for him full-time during 1972. Around April 15-21, defendant planted corn in the three acre field and "I was right behind him with a weed sprayer." He and defendant plowed the field with tractors in May and again in June when they "laid it by." He had no knowledge of marijuana growing in the field and had never seen a marijuana plant prior to the seizure of those in question.

Defendant testified: He worked for Brimage in 1972 and assisted in planting the three acre field of corn in April and "cultivated" it with a tractor in May. He had no knowledge of marijuana growing in the field and had never seen a marijuana plant prior to the seizure of those in question.

On rebuttal, the State presented Trenton Chief of Police Maggie Small whose testimony is summarized thusly: She had been acquainted with defendant for some five to seven years prior to the trial. Some two or two and one-half years prior to June 1972, she had a casual conversation with defendant at a service station in Trenton. She and her husband were together at the time and defendant was complaining about some other man going off with his girl friend and the man did not have a driver's license. During the course of that conversation,

the subject of marijuana came up and defendant stated that he formerly worked for a man that had some marijuana in a cornfield and the man employed defendant to remove the weeds out of the corn. She asked defendant who the man was but defendant laughed and said he was not going to tell her. Defendant said that he knew what a marijuana plant was.

We hold that the trial court did not err in refusing to allow defendant's motion for nonsuit interposed at the conclusion of all the evidence.

[2] By his assignments of error 1 and 5, defendant contends the court erred in its failure to explain to the jury that in order to find defendant May guilty, it would be necessary to find that defendant manufactured marijuana *with the intent to distribute same*. Defendant argues that he was charged with violating G.S. 90-95 (a) (1) which makes manufacturing marijuana "with intent to distribute" a criminal offense. We reject this argument.

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." We hold that the words "with intent to distribute" relate to the word "possess" and not to the words "manufacture, distribute or dispense." See *State v. Elam*, 19 N.C. App. 451, 199 S.E. 2d 45 (1973). The averment in the indictment "with intent to distribute" is not necessary in charging the felony of manufacturing marijuana and is treated as surplusage. *State v. Stallings*, 267 N.C. 405, 148 S.E. 2d 252 (1966).

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

No error.

Judges CAMPBELL and VAUGHN concur.

KATIE H. WILLIAMS v. OLIVER HERRING, INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF SARA E. HERRING, DECEASED; THEODORE HERRING, INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF SARA E. HERRING, DECEASED; ELIZABETH T. HERRING, RETHA MAE SMITH; RUSSELL SMITH, CLARA PEARL LYNN; HERBERT LYNN; VELMA WRAY HOWARD; EDWARD HOWARD; LEWIS S. MILLER; TOMMY MILLER; NANCY D. MILLER; JULIAN D. MILLER; RACHEL A. MILLER; JOHN W. MILLER; DOROTHY C. MILLER; KAY MILLER MASON; A. A. MASON, JR.; JEWELL M. WHITE; IVEY J. WHITE; EDWARD MILLER; CAROL M. MILLER; PATRICIA M. HOWARD; RODNEY C. HOWARD; JACK C. MILLER; ROSE H. MILLER; JACKIE M. STROUD; H. DENNIS STROUD; ARTIE D. MILLER; DENNIS MILLER; RUTH S. MILLER; BOBBY HERRING; AND SHIRLEY HERRING

No. 734SC789

(Filed 12 December 1973)

Judgments § 37— partition proceeding — judgment affirmed on appeal — judgment as res judicata

Trial court's judgment requiring partition of lands held by tenants in common was *res judicata* in determining the parties' interests where that judgment was appealed and the case was considered on its merits by the Court of Appeals.

APPEAL by respondents Retha Mae Smith, Clara Pearl Lynn and Velma Wray Howard from *Cohoon, Judge,* 25 June 1973 Civil Session of Superior Court held in DUPLIN County.

This cause was instituted as a special proceeding for the partition of 11 tracts of land among tenants in common. In an amendment to their answer, appellants denied that their interest in the land was the interest alleged in the petition and amendments thereto. Thereupon, the Clerk of Superior Court entered an order transferring the cause to the civil issue docket.

On 21 December 1971, following a hearing, Webb, Judge, entered a judgment determining, among other things, that each of appellants owned one-seventh interest in the land; he ordered the cause transferred back to the Clerk for appointment of commissioners and division of the lands consistent with the judgment. Appellants (and certain other respondents) appealed from Judge Webb's judgment.

In an opinion filed 23 August 1972 and reported in 15 N.C. App. 642, 190 S.E. 2d 696 (1972), this court rejected the contentions of appellants and, with minor modification not affecting

the interests of the parties in the land, affirmed the Webb judgment. Further information with respect to the names and interests of the parties is set forth in the former opinion and no useful purpose would be served by a restatement here.

Following our former opinion, the cause was remanded to the Clerk of Superior Court, commissioners were appointed, and on 10 April 1973 the commissioners filed their report in which they partitioned the land into seven equal shares, and allotted the same, as provided by the Webb judgment. Appellants filed exceptions to the report on the ground that each of them is entitled to more than a one-seventh interest in the land. The Clerk overruled the exceptions and confirmed the report of commissioners.

Appellants appealed from the Clerk's order of confirmation. The cause came on for hearing before Judge Cohoon who, after making appropriate findings of fact, concluded that the judgment of the Court of Appeals is *res judicata* as to the interests of appellants and that each of the appellants owns a one-seventh interest in the land. He ordered that the report of commissioners be confirmed. Appellants appealed to this court.

Barnes & Braswell by Henson P. Barnes for respondent appellants.

Kornegay & Bruce by George R. Kornegay, Jr.; Chambliss, Paderick & Warrick by Benjamin R. Warrick; Turner and Harrison by Fred W. Harrison; and, Vance B. Gavin for petitioner and respondent appellees.

BRITT, Judge.

Appellants contend that each of them owns more than one-seventh interest in the lands and that the judgment of Judge Webb, affirmed by this court, is not *res judicata* in determining their interests. We reject this argument and hold that the judgment is *res judicata.*

In *Masters v. Dunstan,* 256 N.C. 520, 523-524, 124 S.E. 2d 574, 576 (1962), in an opinion by Justice Clifton L. Moore, we find:

> " 'It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties

> and privies, in all other actions involving the same matter.' *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157. '... (W)hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.' *Humphrey v. Faison,* 247 N.C. 127, 100 S.E. 2d 524, citing and quoting *Armfield v. Moore,* 44 N.C. 157."

See also *Morris v. Perkins,* 6 N.C. App. 562, 170 S.E. 2d 642 (1969).

Appellants argue that the former appeal was from an interlocutory order; that the order was not appealable, therefore, the judgment of Judge Webb was not *res judicata.* In support of their argument, they cite *Hyman v. Edwards,* 217 N.C. 342, 7 S.E. 2d 700 (1940). We think there is an obvious distinction between the cases.

In *Hyman,* the petition asked for a sale of the land for partition. One of the respondents filed answer alleging that the land was capable of actual partition and asked for that relief. Following a hearing, the Clerk ordered an actual partition and appointed commissioners. Petitioners appealed and the judge affirmed the Clerk's order. Petitioners thereupon appealed to the Supreme Court and respondents filed a motion to dismiss the appeal. The Supreme Court did not consider the case on the merits but allowed the motion to dismiss the appeal on the ground that petitioners had appealed from an interlocutory order.

In this cause, there was no motion to dismiss the former appeal and this court proceeded to pass upon the merits of the case. Therefore, as to the parties to this cause, the Webb judgment is conclusive "of rights, questions and facts in issue" at that time. The interests of the respective parties, including appellants, in the land was the principal issue at the time of the Webb judgment and the appeal to this court therefrom.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. WILLIAM MACKIE LOWE

No. 7319SC785

(Filed 12 December 1973)

Burglary and Unlawful Breakings § 5— accomplice testimony — sufficiency of evidence

In a prosecution for breaking and entering and larceny, the trial court properly submitted the case to the jury where the evidence, consisting of the testimony of an accomplice and other witnesses, tended to show that defendant and an accomplice planned the crime, the accomplice broke into her grandmother's home and called defendant, defendant came to the house and pried open the victim's safe, defendant left to obtain a car, and when he returned, the accomplice took the money and a stereo out to the car and they drove off.

ON *certiorari* to review trial before *Wood, Judge,* 16 April 1973 Session of Superior Court held in CABARRUS County.

Defendant, William Mackie Lowe, was charged in a valid bill of indictment with felonious breaking and entering and felonious larceny of $400.00 and a stereo record player from the home of Mrs. Myrtle Wills in Kannapolis on 29 April 1972. He entered a plea of not guilty to both charges but was convicted by a jury. From a judgment imposing a prison sentence of ten years for felonious breaking and entering and not less than five nor more than ten years for felonious larceny to begin at the expiration of the breaking and entering sentence, the defendant filed notice of appeal. This Court subsequently granted petition for certiorari to perfect appeal.

Attorney General Morgan, by Assistant Attorney General William F. Briley, for the State.

Larry E. Harris for defendant appellant.

BALEY, Judge.

Defendant has assigned as error the failure of the trial court to grant his motion for nonsuit. It is clear that there is substantial evidence to justify submission of this case to the jury and to support its verdict.

The State's evidence included the testimony of Mrs. Teresa Tilley, the granddaughter of Mrs. Myrtle Wills, who testified

that she participated with defendant in the theft on 29 April 1972. She stated that she was unmarried at that time and had been dating defendant. Defendant told her that she would have to "come up with some money" to pay a bill he owed, and she said that her grandmother kept some money in the bathroom. Defendant then told her to help him steal the money or he would kill her. She went to her grandmother's house and entered by using a rock to break the glass in the front door. She telephoned defendant, and he came to the house, pried open the safe in the bathroom where Mrs. Wills kept her money, and emptied the money into some paper bags. Defendant then left to get a car, and when he returned Teresa Tilley took the bags of money and the stereo out to the car and they drove off. They went to a building owned by Rich Tilley, where they counted the money and placed it in two cookie cans, and then they resumed driving. After they had driven for some time they were stopped by police officers and arrested.

Defendant contends that Mrs. Tilley's testimony was incompetent since she was an accomplice in the crime, but this contention is without merit. The testimony of an accomplice is sufficient to sustain a conviction even when unsupported by other evidence. *State v. McNair,* 272 N.C. 130, 157 S.E. 2d 660; *State v. Terrell,* 256 N.C. 232, 123 S.E. 2d 469; *State v. Kendrick,* 9 N.C. App. 688, 177 S.E. 2d 345. Here, however, there was a great deal of evidence in addition to that of Mrs. Tilley. Mrs. J. W. Givens, a neighbor of Mrs. Wills, testified that she saw Teresa Tilley using a rock to break into Mrs. Wills' front door. She saw defendant going into the house and then coming out and returning with a car, and she saw Mrs. Tilley coming out of the house and getting into the car with her arms full. H. E. Tucker, a Kannapolis policeman, testified that he stopped defendant and Teresa Tilley and found a stereo and two cans full of money in their car. Mrs. Wills stated that when she came home from work during the morning of 29 April 1972, she found that her front door had been broken, her stereo was missing, and her safe had been broken open and the money removed.

Motion for nonsuit is properly denied when there is substantial evidence tending to prove the essential elements of the crime with which defendant is charged. *State v. Evans,* 279 N.C. 447, 183 S.E. 2d 540; *State v. Allred,* 279 N.C. 398, 183 S.E. 2d 553; *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755.

Defendant has received a fair trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

FLOYD EDSEL TAYLOR v. NANCY JEROME TAYLOR

No. 7328DC662

(Filed 12 December 1973)

Infants § 8— custody proceeding — jurisdiction in another state — dismissal in N. C. proper

In a child custody proceeding the trial court did not abuse its discretion in dismissing plaintiff's action under G.S. 50-13.5(c)(5) where the trial court found that an Illinois court had assumed jurisdiction over the matter and that the best interests of the children would be served by having the matter disposed of in Illinois.

APPEAL from *Styles, Judge,* 18 May 1973 Session of BUNCOMBE County District Court.

Plaintiff and defendant in this action are husband and wife, and prior to 2 September 1972, they lived with their four minor children in Lake County, Illinois. On 2 September 1972, plaintiff moved to Buncombe County, North Carolina, with the four minor children.

Prior to his departure from Illinois, plaintiff commenced an action in the Illinois Circuit Court seeking divorce from defendant and custody of the four minor children. The complaint was filed on 17 July 1972, and summons was returned showing service on defendant on 24 July 1972. Defendant filed her answer on 16 August 1972, wherein she counterclaimed for divorce and custody of the children.

Subsequent to plaintiff's departure from Illinois, defendant moved that the court award her temporary exclusive possession of the Illinois home, temporary alimony and attorneys fees, that the court order plaintiff to return the children to Illinois, and that the plaintiff be restrained from interfering with defendant.

On 12 September 1972, the Illinois Circuit Court entered an order granting the relief sought by defendant's motion. The order of Judge Kaufman recited "THIS COURT TO RETAIN JURISDICTION FOR COMPLIANCE OF THIS ORDER."

On 14 September 1972, plaintiff instituted an action for custody by filing a complaint in Buncombe County District Court, North Carolina. Judge Allen awarded temporary custody to plaintiff.

Defendant filed answer on 24 October 1972, praying that the court relinquish jurisdiction of the matter to the Circuit Court of the Nineteenth Judicial District of Lake County, Illinois.

When this cause was tried, Judge Styles received into evidence court records of the Illinois proceedings. The court thereupon made the following findings of fact:

> "1. That this Court has jurisdiction over the parties to this action and to the minor children born of the marriage between the parties; and that this action is one for the custody of such minor children;
>
> 2. That the Circuit Court of the Nineteenth Judicial District, Lake County, Illinois, has assumed jurisdiction to determine the matters involved in this action;
>
> 3. That the best interests of the children, to wit: JEROME C. TAYLOR, JEFFERSON J. TAYLOR, JAMES M. TAYLOR and JASON H. TAYLOR and the parties hereto, to wit: FLOYD E. TAYLOR and NANCY J. TAYLOR would be served by having the matter disposed of in that jurisdiction, to wit: the Circuit Court of the Nineteenth Judicial District, Lake County, Illinois."

The court, pursuant to G.S. 50-13.5(c) (5) refused to exercise jurisdiction and dismissed the action. From the dismissal of the action, plaintiff appeals.

Roberts and Cogburn, by Max O. Cogburn, for plaintiff appellant.

Adams, Hendon and Carson, P.A., by James Gary Rowe, for defendant appellee.

MORRIS, Judge.

Plaintiff's sole assignment of error is to the District Court's refusal to exercise jurisdiction and its entering of the order to dismiss the action. We hold that the District Court did not err.

G.S. 50-13.5(c)(5) reads as follows:

"(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody.

> (5) If at any time a court of this State having jurisdiction of an action or proceeding for the custody of a minor child finds as a fact that a court in another state has assumed jurisdiction to determine the matter, and that the best interests of the child and the parties would be served by having the matter disposed of in that jurisdiction, the court of this State may, in its discretion, refuse to exercise jurisdiction, and dismiss the action or proceeding or may retain jurisdiction and enter such orders from time to time as the interest of the child may require."

Plaintiff's contention is that the above statute is not satisfied by a finding that the courts of another state have assumed jurisdiction; rather, he contends, the court of the other state must in fact have had jurisdiction. This contention is untenable.

The language of G.S. 50-13.5(c)(5) is unequivocal. The court did in fact find that the Illinois Court assumed jurisdiction and that the best interest of the children would be served by having the matter disposed of in Illinois. These findings were supported by competent evidence, i.e., the records of the proceeding in the Illinois Circuit Court. Therefore, we hold that the District Court did not abuse its discretion in dismissing the action under G.S. 50-13.5(c)(5).

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. J. D. DAVIS

No. 7326SC635

(Filed 12 December 1973)

Narcotics § 4— possession of heroin found in bathroom

The State's evidence was sufficient for the jury in a prosecution for possession of heroin where it tended to show that heroin was found hidden under a toilet seat cover in a bathroom at the back of defendant's house, that defendant and three others were in the living room when the officers were admitted to the house, and that before entering the house officers saw a man hurriedly removing something from a front room of the house and carrying it toward the back.

APPEAL from *Snepp, Judge,* 16 April 1973 Session of MECKLENBURG County Superior Court.

Defendant was indicted for possession of heroin in contravention of G.S. 90-95(a)(3). Defendant pled not guilty, was found guilty by the jury, and sentenced by the court to two years imprisonment.

The evidence presented by the State showed that police officers, pursuant to a valid search warrant, proceeded to the residence of J. D. Davis and were admitted by Davis, who admitted it was his house. There were four people—including Davis—sitting in the living room.

The officers then searched the premises, which consisted of a den, two bedrooms and one and one-half baths. In the half bath connected to the rear bedroom, on top of the toilet lid, underneath the toilet seat cover, the officers discovered six glassine bags containing a white powdery substance identified by the Crime Lab as heroin. Davis's son and daughter-in-law occupied the back bedroom and used the adjoining bathroom. J. D. Davis used the main bathroom which was located across from the den.

At the close of all the evidence, defendant moved for judgment as of nonsuit, and the motion was denied.

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

Charles V. Bell for defendant appellant.

MORRIS, Judge.

Defendant's sole assignment of error is to the trial court's denial of his motion for judgment as of nonsuit, made at the close of all the evidence. It is his contention that the evidence was insufficient to go to the jury inasmuch as there was no evidence of a "state of awareness" on his part for the presence of the heroin in this bathroom.

In the leading case of *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972), the Supreme Court held that an accused has possession of a controlled substance within the meaning of the law "when he has both the power and intent to control its disposition or use." *Id.* at 12, 187 S.E. 2d at 714. The requirements of power and intent necessarily imply that a defendant must be aware of the presence of an illegal drug if he is to be convicted of possessing it. But here there was ample evidence to show that defendant was aware of the presence of the heroin. It was found hidden under a toilet seat cover in a bathroom at the back of his house. Before entering the house, police officers saw a man hurriedly removing something from a front room of the house and carrying it toward the back.

> "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. *Also,* the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.' (Citations omitted.)" (Emphasis added.) *Id.* at 12-13, 187 S.E. 2d at 714.

In *State v. Summers*, 15 N.C. App. 282, 189 S.E. 2d 807 (1972), this Court held that the State's evidence was sufficient to go to the jury. Defendant shared a house with one other person, and at the time of the arrival of the police, 15 to 20 people were visiting defendant and listening to the stereo. Marijuana was found in a stove in the backyard "practically up against the house."

While the rule established in *State v. Harvey, supra,* does not compel submission of the case to the jury in every instance

in which controlled substances are found on the premises of an accused, the facts of this case are sufficient.

No error.

Judges VAUGHN and BALEY concur.

STATE OF NORTH CAROLINA v. WILLIAM T. HARDIN

No. 7326SC588

(Filed 12 December 1973)

Constitutional Law § 30— two year delay between offense and trial — no denial of speedy trial

Where the prosecuting witness was hospitalized for two years as a result of wounds inflicted by defendant and, in order to testify, the witness was brought to court in an ambulance only two days after his release from the hospital, the delay between the commission of the offense and defendant's trial was not arbitrary or negligent on the part of the State; hence, defendant was not denied his right to a speedy trial.

APPEAL from *Chess, Special Judge,* 19 March 1973 Criminal Session of MECKLENBURG Superior Court.

On 12 December 1972, defendant was charged in a warrant with assault with a deadly weapon with intent to kill in violation of G.S. 14-32(a). The assault was alleged to have occurred on 23 February 1971.

Defendant waived preliminary hearing and was bound over for trial in Superior Court on 5 March 1973, where he moved to dismiss the bill of indictment on the ground that his right to a speedy trial had been violated. The motion was denied, and the State presented the following evidence:

Clarence T. Hardin, father of the defendant, testified that on 23 February 1971 he heard defendant William T. Hardin arguing with his wife, the mother of defendant. Clarence Hardin picked up a scrub hoe and approached the room where defendant and Mrs. Hardin were arguing. When defendant saw Clarence Hardin, he knocked the hoe out of his hand and cut him on the top of the shoulder with a knife. After Clarence Hardin fell to the floor, he was unable to get up, and he was taken to Charlotte Memorial Hospital in an ambulance.

Clarence Hardin remained in Memorial Hospital for a month, in Charlotte Rehabilitation Hospital for two months, and was transferred to the Community Hospital where he remained until he was released on 3 March 1973, two days before the trial. On the date of the trial, Clarence Hardin was unable to walk. He was brought to the courthouse in an ambulance and he testified from a stretcher.

Defendant's motion to dismiss was renewed and denied. Defendant offered no evidence.

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

Lacy W. Blue for defendant appellant.

MORRIS, Judge.

Defendant's sole assignment of error is to the trial court's overruling the motion to dismiss the indictment for lack of a speedy trial without making any findings of fact and conclusions of law.

In North Carolina, there is no statute of limitations barring the prosecution of a felony. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969); *State v. Burnett,* 184 N.C. 783, 115 S.E. 57 (1922). G.S. 15-10 merely provides that under certain circumstances the State must release from custody a defendant who has not been speedily tried. *State v. Johnson, supra.* "The constitutional guarantee of a speedy trial, therefore, imposes the only limitation upon purposeful and oppressive delays between the date of a felonious offense and the commencement of the prosecution." *State v. Johnson, supra,* at 272.

The decisions of the Supreme Court of this State make it clear that the constitutional right to speedy trial is violated only when the delay is an *undue* delay, negligently or arbitrarily delayed by the State, or oppressive delay. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Johnson, supra.*

> "The accused has the burden of showing that the delay was due to the State's wilfulness or neglect. Unavoidable delays and delays caused or requested by defendant do not violate his right to a speedy trial. Further, a defendant may waive his right to a speedy trial by failing to demand or to make some effort to obtain a speedier trial. *State v.*

Ball, 277 N.C. 714, 178 S.E. 2d 377; *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Lowry and State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870. The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274." *State v. Spencer, supra,* at 124.

The reason for the delay in the prosecution in the present case is clear from the record. The prosecuting witness was hospitalized for a period of two years as a result of wounds inflicted by defendant. In order to testify, the witness was brought to court in an ambulance only two days after his release from the hospital, and his testimony was taken while he was on a stretcher. We can see no manner in which the delay in this case can be termed arbitrary or negligent on the part of the State. We hold that under the circumstances defendant was not denied his constitutional right to a speedy trial.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM SANDEROUS KENNON

No. 738SC583

(Filed 12 December 1973)

Arrest and Bail § 3— warrantless arrest — reasonable grounds to believe felony committed, escape imminent

Where officers observed defendant at 11:00 p.m. carrying a fishing tackle box with the lid open and brimming with apparently new oil filters and an innertube, the officers were suspicious and they approached defendant who blurted out that he had been forced to break into a place and take some merchandise, the officers warned defendant of his rights, placed him in a patrol car, but asked him no questions, the officers observed a matchbook with the name of a service station printed on it in the tackle box, they proceeded to the station where they saw a broken window, blood, a T-shirt and a hat, defendant had a cut on his arm, and defendant stated that the hat was his, officers had reasonable grounds to believe that defendant had committed a felony and would evade arrest if not taken into immediate custody, and evidence seized upon defendant's arrest was properly admitted, though the arrest was made without a warrant.

APPEAL by defendant from *Martin (Perry), Judge,* at the 22 January 1973 Session of WAYNE Superior Court.

This is a criminal action in which the defendant William Sanderous Kennon was tried on an indictment charging breaking and entering, larceny and receiving stolen goods. The defendant pled not guilty but was found guilty of breaking and entering and larceny and was sentenced to not less than seven nor more than ten years in the State's Prison.

Attorney General Robert Morgan by Assistant Attorney General James L. Blackburn for the State.

Strickland and Rouse by David M. Rouse for defendant appellant.

CAMPBELL, Judge.

Defendant's sole assignment of error is the denial by the trial court of his motion to suppress evidence gained as a result of an illegal arrest. In the case at bar, at approximately 11:00 p.m. on June 4, 1972, police officers observed the defendant carrying a fishing tackle box with the lid open and brimming with oil filters and an innertube, all of which appeared to be new. The officers were suspicious and approached the defendant who immediately blurted out that he was looking for a police officer, that he had been forced by two men with a gun to break into a place and that they had made him take part of the merchandise. The officers testified that the defendant had the odor of an intoxicating beverage on his breath but that he did not stagger, his speech was not slurred and that he did not appear to be drunk. The officers fully advised the defendant of his constitutional rights and placed him in the patrol car but did not ask him any questions.

When the tackle box was placed in the car, the lid fell open and the officers obsesrved a book of matches with "Richard Best Texaco" on it. The officers then proceeded with the defendant to Richard Best's Texaco Station where they saw a broken window in one of the bays, some blood on the window, and, beneath the window, a T-shirt and a hat. The defendant stated the hat was his even though the officers asked him no questions about it. The officers observed an unbandaged two-inch cut on defendant's arm. The bleeding had stopped and was dry. The defendant was then turned over to Lt. Forehand, a detective, who had been called to the scene. The goods and tackle box were then identified by Mr. Richard Best, who had arrived at the scene, as being his property which had been in the station.

The statute covering arrest without a warrant for a crime not committed in the presence of the officer is G.S. 15-41 which reads:

> "A peace officer may without warrant arrest a person:
>
> * * *
>
> (2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

On the issue of whether the officers had reasonable grounds to believe that the defendant had committed a felony, the evidence was more than ample.

In determining whether the officers had reasonable grounds to believe that the defendant would evade arrest if not taken into immediate custody, we necessarily must take into consideration the nature of the felony, the hour of the day or night, the nature of the neighborhood where the arrest was made, the number of suspects, the number of officers available for assistance, and the likely consequences of the officers' failure to act promptly. Considering the evidence in light of the aforementioned factors, we find no unlawful arrest and no error in the trial court's denial of the motion to suppress.

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. DONALD WINFIELD CLARK AND MICHAEL CONNER

No. 733SC718

(Filed 12 December 1973)

1. Criminal Law § 5— defense of insanity — jury instruction not required

Though defendant presented medical reports to the effect that he had an aggressive personality, that he had been abusive to his family and that his condition had been diagnosed as schizophrenia, chronic undifferentiated, the trial court properly refused to instruct on insanity where there was no evidence that defendant lacked the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation.

2. Criminal Law § 6— defense of intoxication — necessity for instruction

Where the evidence tended to show that defendant's breath smelled of alcohol, but his speech was not slurred, he did not stagger, and he appeared to be in full possession of his faculties and knew what he was doing, the trial court was not required to instruct the jury on the defense of intoxication.

APPEAL by defendant Clark from *Rouse, Judge,* at the 16 April 1973 Session of CARTERET Superior Court.

There were criminal actions against two defendants in which both were charged with felonious breaking or entering. The cases were consolidated for trial. As to defendant Michael Conner, the trial court declared a mistrial but proceeded as to Clark.

On the evening of 25 January 1973, the cottage of J. M. Robinson was occupied on "stake-out" by Officer Morris of the Emerald Isle City Police, accompanied by one Dennis Day. While so occupied, the defendant broke in and was apprehended inside the cottage at the top of the stairs leading to a tower on the roof of the cottage.

Immediately upon his apprehension, defendant Clark told Officer Morris that he was a mental patient, a drug addict and a veteran. Later defendant Clark was taken to jail and then to Carteret General Hospital because defendant Clark said that he needed a "fix."

The defendant was examined and then returned to the Carteret County Jail. From a verdict of guilty and a sentence of not less than nine nor more than ten years, the defendant Clark appealed.

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

Hamilton & Bailey by Glenn B. Bailey for defendant appellant.

CAMPBELL, Judge.

[1] The defendant assigns as error the refusal of the trial court to charge on insanity and intoxication. The defendant presented medical reports to the effect that he had an aggressive personality, had been abusive to his family, and that his condition had been diagnosed as schizophrenia, chronic undifferen-

tiated. However, there is not one shred of evidence that the defendant lacked the capacity to distinguish between right and wrong at the time of and in respect of the matter under investigation. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969), *sentence modified,* 403 U.S. 948, 91 S.C. 2283, 29 L.Ed. 2d 859 (1971).

[2] The defendant also produced testimony that he had been drinking heavily on the day of his arrest and that he had taken various drugs on the two previous days. However, there was no testimony that the defendant was deranged. The defendant's testimony concerning all events up to the time of his entry into the house is quite clear. Deputy Morris, Mr. Day and Chief of Police Knight all testified that they smelled alcohol on defendant's breath but that his speech was not slurred; he did not stagger; and he appeared to be in full possession of his faculties and knew what he was doing. The trial court is not required to instruct the jury on the defense of intoxication where there was no evidence that defendant's mental processes were deranged by intoxication. *State v. McLain,* 10 N.C. App. 146, 177 S.E. 2d 742 (1970); *State v. Bailey,* 4 N.C. App. 407, 167 S.E. 2d 24 (1969); *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971), *sentence modified,* 408 U.S. 939, 92 S.C. 2875, 33 L.Ed. 2d 762 (1972); *State v. Cureton,* 218 N.C. 491, 11 S.E. 2d 469 (1940).

We have reviewed defendant's other assignments of error and find them without merit.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. KENNETH EARL WEBB

No. 734SC819

(Filed 12 December 1973)

Rape § 6— submission of assault with intent to rape

In this rape prosecution, the trial court properly submitted an issue of defendant's guilt of assault with intent to commit rape where the prosecutrix testified the completed acts of sexual intercourse occurred only after defendant assaulted her and that she submitted

against her will because she was afraid for her life, and defendant admitted the assault but testified that the subsequent sexual intercourse was with consent; moreover, had there been error in the submission of such issue, it was favorable to defendant and he has no standing to challenge a verdict of guilty of assault with intent to commit rape.

ON *Certiorari* to review judgment of *Copeland, Judge,* entered at the 25 September 1972 Session of Superior Court held in ONSLOW County.

Defendant was indicted for rape and pled not guilty. The jury found him guilty of assault with intent to commit rape. From judgment on the verdict imposing a prison sentence, defendant gave notice of appeal. The Court of Appeals subsequently granted his petition for certiorari to perfect the appeal.

Attorney General Robert Morgan by Associate Attorney William A. Raney, Jr. for the State.

Ellis, Hooper, Warlick, Waters & Morgan by William J. Morgan for defendant.

PARKER, Judge.

The sole question presented is whether the trial judge erred in submitting to the jury as a possible verdict defendant's guilt of assault with intent to commit rape. Appellant contends that the State's evidence, if fully believed, established rape, while his evidence, if fully believed, showed at most only a simple assault, and that therefore it was error under the evidence in this case for the trial court to instruct the jury concerning assault with intent to commit rape. We do not agree.

The only witnesses testifying to the crucial events were the prosecutrix and the defendant. Both testified to completed acts of sexual intercourse. The prosecutrix testified these occurred only after defendant assaulted her and that she submitted against her will and because she was afraid for her life. Defendant admitted the assault but testified that the subsequent sexual intercourse was with consent. Under this evidence the jury could find defendant not guilty of rape but guilty of assault with intent to commit rape. *State v. Green,* 246 N.C. 717, 100 S.E. 2d 52. The offense of assault with intent to commit rape is complete if defendant assaults the prosecutrix with intent to force her to engage in sexual intercourse against her will and

notwithstanding any resistance she may make, although she thereafter consents. There was no error in submitting the lesser included offense.

Moreover, had there been error, it would have been favorable to the defendant and he is without standing to challenge the verdict. *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297.

In defendant's trial and the judgment appealed from we find

No error.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. CHARLES W. HULTMAN, STEVE LANNING AND DELBERT C. MARTIN

No. 734SC591

(Filed 12 December 1973)

Narcotics § 4— possession of LSD delivered to friend for safekeeping

The State's evidence was sufficient for the jury in a prosecution of three defendants for felonious possession of LSD where it tended to show that defendants asked the State's witness to hold some "stuff" for them, each defendant gave the witness a bottle containing green and yellow capsules, the bottles contained 294 capsules, and the capsules contained LSD, it not being necessary that the State show that defendants had possession, either actual or constructive, when they were arrested.

APPEAL by defendants from *Cohoon, Judge,* 19 February 1973 Session of Superior Court held in ONSLOW County.

The defendants were charged with felonious possession of a controlled substance, to wit: 294 capsules of LSD. They pled not guilty. The State presented the testimony of Richard C. Duff, who testified in substance as follows: He knew the defendants, as they were in the same company at Camp Lejeune. On 5 January 1973 the three defendants, riding in defendant Lanning's car, approached him at a phone booth near the trailer court where he lived. Defendant Lanning got out of the car and asked him if he would hold some "stuff" for them. Duff accompanied the defendants to his trailer, where each of the three defendants gave him a bottle containing green and yellow capsules. The

defendants told Duff that they had heard there was to be a raid on their trailer that night and that they would come back for the bottles in a couple of days. After the defendants left, Duff called the Sheriff's Department. When Deputy Sheriff Paul Buchanan arrived, Duff gave him the three bottles, which Duff had not opened.

Deputy Sheriff Buchanan testified in substance as follows: On receiving the three bottles from Duff, he opened each bottle separately and counted the capsules. There was a total of 294 capsules. At the Sheriff's office he field-tested one capsule from each bottle and the test was positive for LSD. He later took the three bottles to the SBI laboratory in Raleigh, where he delivered them to P. T. Williamson for analysis. The defendants stipulated that P. T. Williamson was an expert specializing in the analysis and identification of drugs, including LSD, and that if present he would testify that he analyzed five capsules from each bottle and found that they contained LSD.

The defendants did not offer evidence. They were each found guilty by the jury, and from judgments imposing prison sentences, appealed.

Attorney General Robert Morgan by Assistant Attorney General Charles A. Lloyd and Associate Attorney John M. Silverstein for the State.

Edward G. Bailey for defendant appellants.

PARKER, Judge.

Appellants' sole assignment of error is directed to the denial of their motion for nonsuit made at the close of the State's evidence. The State's evidence was ample to require submission of the case to the jury as to each defendant. Cases cited in appellants' brief dealing with constructive possession are not apposite. There was ample evidence that each defendant had actual possession of LSD at the time they brought the bottles to Duff and delivered them to him for safekeeping. It was not necessary, as appellants' counsel apparently contends, that the State show that defendants had possession, either actual or constructive, when they were subsequently arrested. There was no error in denying their motion for nonsuit. We find

No error.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. THOMAS JEROME PEARSON

No. 734SC630

(Filed 12 December 1973)

1. **Criminal Law § 138— punishment within limits discretionary**

Imposition of punishment within limits authorized by statute is within the discretion of the trial judge and is not reviewable on appeal.

2. **Homicide § 28— first degree murder — failure to instruct on defense of home — no error**

In a first degree murder case the trial court did not err in failing to instruct the jury on defendant's right to protect his home where the evidence tended to show that the fatal stabbing occurred in the residence of a third person.

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

By indictment, proper in form, defendant was charged with first-degree murder. Upon arraignment, the solicitor announced that defendant would be tried for second-degree murder. Defendant pled not guilty. The jury found defendant guilty of manslaughter. From judgment sentencing defendant to prison for not less than 18 nor more than 20 years, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Archie W. Anders for the State.

Mercer & Thigpen by Grady Mercer for defendant appellant.

PARKER, Judge.

[1] Appellant first assigns error to the sentence imposed, but states no reason and cites no authority to show the sentence invalid. Imposition of punishment within limits authorized by statute is within the discretion of the trial judge and is not reviewable on appeal. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Fleming,* 202 N.C. 512, 163 S.E. 453. The sentence here imposed was within the limits authorized by G.S. 14-18. Appellant's first assignment of error is without merit.

[2] Appellant assigns error to the court's failure "to charge the jury that the defendant had a right to protect his place

of residence, his home." However, such a charge would not have been warranted under the evidence in this case. All of the evidence set forth in the record is that the fatal stabbing occurred in the residence of one Carrie Moore, and there is no evidence that defendant acted in defense of his own premises.

We have carefully examined the entire record and find therein no prejudicial error. The indictment on which defendant was charged and tried was proper in form. He was represented at his trial by counsel who was privately employed by his friends, with his approval and consent, to represent him. There was ample competent evidence to support the jury's verdict. Two eyewitnesses for the State testified to the fatal stabbing and to the events leading up thereto; defendant testified that he stabbed, but only in self-defense. In a charge free from prejudicial error the able trial judge fully and correctly declared and explained the law arising on the evidence given in the case. In defendant's trial and in the judgment appealed from, we find

No error.

Judges HEDRICK and BALEY concur.

BARBARA H. HINSON v. WILLIAM W. JEFFERSON AND WIFE, ANNE C. JEFFERSON, AND MAE W. JEFFERSON

No. 733DC787

(Filed 12 December 1973)

1. **Rules of Civil Procedure § 56— contract for sale of land — summary judgment properly denied**

In plaintiff's action to rescind a contract for the sale of land the trial court properly denied plaintiff's motion for summary judgment where any cause of action alleged by her related to 19 October 1971, the date of the deed from defendants to plaintiff, but the affidavits and other material presented by plaintiff on her motion for summary judgment related to the condition of the land and county rules and regulations subsequent to 15 February 1972.

2. **Cancellation and Rescission of Instruments § 10; Rules of Civil Procedure § 56— rescission of contract for sale of land — summary judgment against moving party inappropriate**

Though summary judgment may be rendered against the moving party, it was not appropriate in this case where defendants sold plain-

tiff a lot of land with its use restricted to a single family residence, plaintiff discovered that the land could not be used for residential purposes inasmuch as a wastes disposal system could not be installed in accordance with State and county laws, and plaintiff sought to rescind the contract.

APPEAL by plaintiff from *Wheeler, District Judge,* 29 August 1973 Session of District Court held in PITT County.

In her complaint, filed 6 March 1973, plaintiff alleges in pertinent part the following: By deed dated 19 October 1971 defendants conveyed to plaintiff a 200 ft. by 300 ft. lot of land located in Farmville Township, Pitt County. The deed contains covenants limiting the use of the land to a single family residence costing not less than $25,000, based on costs prevailing in Pitt County as of 1 October 1971. Thereafter, plaintiff determined that the lot could not be used for residential purposes inasmuch as "a wastes disposal system could not be installed in accordance with the laws of the State of North Carolina and the ordinances of the County of Pitt." Because the lot could not be used for residential purposes, plaintiff elected to rescind the contract and demanded that defendants refund the $3,500 purchase price, together with $453 spent by plaintiff, on the lot. Defendants refused to comply with plaintiff's demand.

On 10 May 1972, plaintiff moved for summary judgment. Following a hearing, the trial court entered judgment denying plaintiff's motion, awarding summary judgment in favor of defendants, and dismissing the action with prejudice. Plaintiff appealed.

Everett & Cheatham by C. W. Everett for plaintiff appellant.

Gaylord and Singleton by Mickey A. Herrin for defendant appellees.

BRITT, Judge.

Two questions are presented: (1) Did the court err in denying plaintiff's motion for summary judgment? (2) Did the court err in entering summary judgment in favor of defendants and dismissing the action? We answer the first question in the negative and the second in the affirmative.

[1] (1). 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. G.S. 1A-1, Rule 56. *Lee v. Shor,* 10 N.C. App. 231, 178 S.E. 2d 101 (1970). The burden is on the moving party to establish the lack of a triable issue of fact. *Robinson v. McMahan,* 11 N.C. App. 275, 181 S.E. 2d 147 (1971). In considering a motion for summary judgment, the court must look at the record in the light most favorable to the party opposing the motion. *Blackmon v. Valley Decorating Co.,* 11 N.C. App. 137, 180 S.E. 2d 396 (1971).

Any cause of action alleged by plaintiff related to 19 October 1971, the date of the deed from defendants to plaintiff. The affidavits and other materials presented by plaintiff on her motion for summary judgment tended to show the condition of the lot, and rules and regulations pertaining to septic tanks and other sewage disposal facilities in Pitt County, subsequent to 15 February 1972. For example, the affidavit of W. M. Pate, Sanitarian Supervisor of the Pitt County Health Department, refers to a certification of 27 December 1972, and attached to the affidavit is a letter from Pate to plaintiff referring to "findings in March 1972." Plaintiff's Exhibit "B," REGULATIONS GOVERNING SEWAGE DISPOSAL IN PITT COUNTY, disclose that the regulations were adopted on 1 March 1972. The affidavit of Roy R. Beck relates to "an inventory and evaluation" of the lot as of 16 February 1972.

For failure to carry her burden to establish the lack of a triable issue of fact, plaintiff was not entitled to summary judgment.

[2] (2). Since defendants did not file a motion for summary judgment, the cause was heard solely on plaintiff's motion. While G.S. 1A-1, Rule 56(c) provides that "[s]ummary judgment, when appropriate, may be rendered against the moving party," we think it was not appropriate in this case.

For the reasons stated, the judgment dismissing this action is

Reversed.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. ROGER WILLIAM PARKS, JR.

No. 736SC606

(Filed 12 December 1973)

1. **Criminal Law § 18— misdemeanor — jurisdiction of superior court**

The superior court has no jurisdiction to try an accused for a misdemeanor upon a warrant of the district court unless he is first tried and convicted for such misdemeanor in the district court and appeals to the superior court from the sentence imposed in the district court.

2. **Criminal Law § 157— necessary parts of record omitted — appeal dismissed**

Since the record on appeal failed to show jurisdiction of these misdemeanor cases in the superior court and did not contain the warrants upon which defendant was tried and the judgment from which the appeal was taken, the appeal is dismissed.

APPEAL by defendant from *Lanier, Judge,* 19 April 1973 Session of Superior Court held in HERTFORD County.

The record filed in this court indicates that the defendant was tried in the Superior Court on warrants charging him with the misdemeanors of operating a motor vehicle on the public highway while he was under the influence of intoxicating liquor and with the possession of non-taxpaid liquor. The record shows that the defendant, represented by counsel, pleaded not guilty and was found guilty by the jury of both charges. The record indicates further that the court consolidated the two cases for judgment and imposed a jail sentence of twelve months suspended on the condition that defendant surrender his operator's license, not operate a motor vehicle in the State of North Carolina for a period of twelve months and pay a fine of $150.00 and costs.

Attorney General Robert Morgan and Associate Attorney William A. Raney, Jr., for the State.

Cherry, Cherry and Flythe by Thomas L. Cherry for defendant appellant.

HEDRICK, Judge.

[1] The record filed in this court does not contain the warrants upon which the defendant was tried or the judgment from which the appeal was taken. There is nothing in the record to

disclose how the superior court obtained jurisdiction of these cases. The superior court has no jurisdiction to try an accused for a misdemeanor upon a warrant of the district court unless he is first tried and convicted for such misdemeanor in the district court and appeals to the superior court from the sentence imposed in the district court. *State v. Harold,* 14 N.C. App. 172, 187 S.E. 2d 195 (1972); *State v. Marshall,* 11 N.C. App. 200, 180 S.E. 2d 464 (1972); *State v. Byrd,* 4 N.C. App. 672, 167 S.E. 2d 522 (1969).

[2] The Court of Appeals will take notice *ex mero motu* of the failure of the record to show jurisdiction in the court entering the judgment appealed from. It is the duty of defendant appellant to see that the record on appeal is properly made up and transmitted to the Court of Appeals. *State v. Marshall, supra; State v. Byrd, supra.* For failure of the record to show jurisdiction in the superior court and to contain the warrants upon which defendant was tried and the judgment from which the appeal is taken, the appeal will be dismissed. *State v. Marshall, supra; State v. Banks,* 241 N.C. 572, 86 S.E. 2d 76 (1955); Rules 19(a) and 48, Rules of Practice in the North Carolina Court of Appeals.

Nevertheless, we have carefully reviewed the record which is before us and find no error which would entitle defendant to a new trial.

Appeal dismissed.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. DENNIS JUAN

No. 734SC745

(Filed 12 December 1973)

Narcotics § 4— possession of LSD found in refrigerator

The State's evidence was sufficient for the jury in a prosecution for felonious possession of LSD where it tended to show that defendant and another were present when officers found 3,214 hits of blotter acid (LSD in dots on pieces of paper) in the refrigerator of a trailer leased by defendant and that defendant had been living in the trailer for six months or more.

APPEAL by defendant from *Cohoon, Judge,* at the 10 April 1973 Session of ONSLOW Superior Court.

The defendant was charged with the felonious possession of Lysergic Acid Diethylamide commonly known as L.S.D. The defendant entered a plea of not guilty but was found guilty and sentenced to be confined in the State Prison and assigned to do labor under the supervision of the North Carolina Department of Corrections for a term of five years. From the verdict and judgment of the court, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Robert R. Reilly for the State.

Edward G. Bailey for the defendant appellant.

CAMPBELL, Judge.

The defendant's only assignment of error is the trial court's denial of his motion for judgment as of nonsuit. The evidence in the case is plenary. Officers, allegedly on an informant's tip, approached the defendant's mobile home and found the defendant and one David Collins packing defendant's car and decided that if they were going to do anything they would have to do it then. The officers identified themselves and asked if they could search the defendant's trailer and car. The defendant consented. The officers found a bag of marijuana on the kitchen table, a half coconut shell of marijuana in the back bedroom and 3,214 hits of blotter acid (L.S.D. in dots on pieces of paper) in the refrigerator. There was evidence that the defendant Juan was the lessee of the trailer in question and had been living there for six months or more.

In considering the sufficiency of the evidence to withstand a defendant's motion for judgment as of nonsuit, all the evidence must be considered in the light most favorable to the State. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971). The evidence was ample.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. MURLE EDWARD HINTON

No. 738SC777

(Filed 12 December 1973)

APPEAL by defendant from *James, Judge,* 9 July 1973 Session of Superior Court held in WAYNE County.

Defendant was tried upon two bills of indictment, consolidated for purpose of trial and this appeal, each charging the felony of breaking and entering, and the felony of larceny after breaking and entering. One bill of indictment charged the breaking and entering into the home of Mr. and Mrs. David R. Best, and the larceny of a quantity of personal property therefrom on 24 May 1973. The other bill of indictment charged the breaking and entering of the home of Mr. and Mrs. Billy R. Howell, and the larceny of a quantity of personal property therefrom on 24 May 1973.

The State's evidence tended to show the following: The homes of Mr. and Mrs. Best and Mr. and Mrs. Howell are in a rural community about two miles west of Goldsboro. During the morning of 24 May 1973, Mr. and Mrs. Best and Mr. and Mrs. Howell were not at home; during the time they were away, their homes were broken into. During the morning of 24 May 1973 defendant was seen walking along the street about three blocks from the Best home. At the time he had a duffle bag over his shoulder and a portable television set in his hand. He was observed as he placed these items behind a pile of limbs in a field near the edge of the road. Defendant continued down the street and was later observed working on his car which was stopped on the edge of the street. Defendant took a suitcase from the trunk of his car and threw it into an adjoining field. A deputy sheriff was called to the scene, and he investigated the contents of the suitcase and the duffle bag.

The portable television set and the items contained in the duffle bag were property taken from the home of Mr. and Mrs. Howell. The items contained in the suitcase were property taken from the home of Mr. and Mrs. Best.

Defendant offered no evidence.

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

George R. Britt, for the defendant.

BROCK, Chief Judge.

The trial court had jurisdiction of the person of the defendant and of the subject matter. The indictments were proper in form and defendant was represented by counsel at all critical stages of the proceedings. Defendant was clearly identified by several persons who observed his conduct on the day in question. The personal property of which he had possession before undertaking to hide it was clearly identified as having been taken from the homes of Mr. and Mrs. Best and Mr. and Mrs. Howell without their knowledge or consent. The evidence was sufficient to support a verdict of guilty. The case was presented to the jury upon applicable principles of law. The jury verdict was unambiguous and the sentences imposed are well within the maximum authorized.

Counsel has perfected this appeal at the insistence of defendant, although counsel candidly states he is unable to find error. At counsel's request, we have reviewed the record for possible prejudicial error and find none.

No error.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. THOMAS ODELL CARSON

No. 7328SC782

(Filed 12 December 1973)

ON *certiorari* to review trial before *Harry C. Martin, Judge,* 27 November 1972 Session of Superior Court held in BUNCOMBE County.

Defendant was charged in three bills of indictment with assault with intent to kill inflicting serious injury, armed robbery and kidnapping. The cases were consolidated for trial. Defendant pleaded not guilty to all charges.

The State's evidence tended to show that the defendant and another man entered a grocery store on Biltmore Avenue in the city of Asheville about 7:30 p.m. on 30 July 1972, threatened the employee, Goldie Dotson, with a sawed-off shotgun,

and took $386.41 from Mrs. Dotson and the grocery store. On the outside of the store as they were leaving, they met Roy Lee Burrill and forced him at gunpoint to accompany them in his truck. Burrill testified that defendant was holding the gun, put it in his ribs, and ordered him into the truck. After Burrill got inside the truck, defendant opened the door and shot him through the left leg below the kneecap. Both men got in the truck with Burrill with the other person driving and defendant sitting in the front to the right of Burrill. They proceeded at a high rate of speed up Biltmore Avenue to the junction with Victoria Road where they collided with an iron post and wrecked the truck. Defendant and the other man ran, leaving the injured Burrill in the truck. Defendant was discovered by police shortly thereafter and arrested after a chase into the woods. He was identified by Mrs. Dotson about an hour after the robbery. Mrs. Dotson, Mr. Burrill, and other witnesses identified defendant at the trial.

The defendant testified in his own behalf that he had himself been robbed by the other man who was unknown to him and had been forced to participate in the robbery and the kidnapping of Burrill and that the other man shot Burrill.

The jury found defendant guilty of armed robbery, kidnapping, and assault with a deadly weapon inflicting serious injury. From judgment based thereon, the defendant filed notice of appeal. This Court subsequently granted petition for certiorari to perfect the appeal.

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

William E. Anderson for defendant appellant

BALEY, Judge.

Both counsel for the defendant and for the State have examined the exceptions contained in the record and are unable to find any prejudicial error.

We have also given careful examination to the record and conclude that defendant had a fair trial. The charges against him were properly consolidated for trial as the acts constituting the offenses were connected as a continuing transaction. *See* G.S. 15-152. The State's evidence was strong and convincing and amply sufficient to support the guilty verdicts. The charge

of the court was impartial and comprehensive. Sentences imposed upon conviction were within statutory limits.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. MARK CARVIN OLDS

No. 733SC761

(Filed 12 December 1973)

ON appeal from *Tillery, Judge,* at the 18 June 1973 Session of PITT Superior Court.

The defendant, Mark Carvin Olds, was tried at the November 1971 Session of the Superior Court of Pitt County, North Carolina, and convicted of involuntary manslaughter. A sentence of six to eight years was suspended and defendant placed on probation for five years under the usual conditions of probation and the special condition that he pay a fine of One Thousand Dollars. At the June 1973 Session of the Pitt County Superior Court before the Honorable L. Bradford Tillery, after due and proper notice to the defendant, his probation officer reported that the defendant had violated the terms of his probation in the following manner: (a) had been convicted of driving without an operator's license; (b) had been convicted in New York of possession of a dangerous weapon; (c) had paid only Seventy Dollars towards his fine and costs; and (d) had changed his place of residence without securing written consent of the probation officer. The court found those violations and entered into effect the suspended sentence of not less than six nor more than eight years. From such sentence the defendant in open court gave notice of appeal.

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

Owens, Browning & Haigwood by Mark W. Owens, Jr., for defendant appellant.

CAMPBELL, Judge.

This case only presents the face of the record for our review. We have carefully reviewed the record and find no error.

No error.

Chief Judge BROCK and Judge PARKER concur.

JEAN JONES v. WILLARD JONES

No. 738DC598

(Filed 12 December 1973)

APPEAL by defendant from *Nowell, Chief District Judge,* at the 20 December 1972 Session of WAYNE County District Court.

From judgment rendered therein, the defendant appealed.

Dees, Dees, Smith, Powell & Jarrett by William L. Powell, Jr., for plaintiff appellee.

Barnes & Braswell, P.A., by Henson P. Barnes for defendant appellant.

CAMPBELL, Judge.

After the filing and docketing of the record in this case, no briefs were filed, and accordingly, this Court, *ex mero motu,* dismisses the appeal.

Judges BRITT and VAUGHN concur.

GASTON-LINCOLN TRANSIT, INC. v. MARYLAND CASUALTY COMPANY

No. 7327SC715

(Filed 19 December 1973)

1. **Insurance § 2; Principal and Agent § 5— insurance agent — apparent authority to bind insurer**

Although an insurer may have instructed its agencies that certain risks were to be submitted to the insurer prior to binding by the agency, an agency had apparent authority to bind the insurer to coverage of insured's buses in a renewal policy and to waive provisions of a rider limiting coverage of the buses where insured's negotiations in prior years had been with the agency and insured had no knowledge that the agency did not have authority to bind the insurer.

2. **Insurance § 10— renewal policy — provision not contained in previous policies — notice to insured**

The trial court did not err in reforming a renewal insurance contract covering the insured's buses by deleting therefrom an endorsement limiting coverage of the buses to a specified radius from their principal place of garaging where the limitation was not contained in prior contracts and was added by the insurer to the renewal contract without notice to the insured.

3. **Insurance § 10— renewal policy — change in coverage — notice to insured**

An insured has a right to expect that the coverage of a renewal insurance policy will be substantially the same as that afforded by the prior policy absent notice to the contrary; if the insurer without notice inserts an endorsement varying the original coverage, the renewal contract may be reformed to conform with the terms of the prior policy and recovery may be had in that same action by the insured under the renewal contract as reformed.

4. **Insurance § 10— reformation of policy — extension of coverage — additional premiums**

In an action in which the trial court reformed a renewal insurance contract by deleting an endorsement limiting coverage of insured's buses to a specified radius from their principal place of garaging, the insurer was not entitled to an additional premium for the expanded coverage where the insurer, through its agent, was aware of the scope of insured's bus operations and the course of dealing between the parties was directed at coverage of the entire bus operation at the rates agreed upon.

APPEAL from *McLean, Judge,* 7 May 1973 Session of GASTON Superior Court.

Plaintiff is a bus company with is principal office in Gastonia, North Carolina. Its buses were insured from 1966 to

1971 by defendant, a Maryland corporation doing business in North Carolina through its authorized agent the George A. Jenkins Agency, Inc., of Gastonia. The present action was instituted to reform the insurance contract covering the buses to delete therefrom an endorsement limiting coverage of insured buses to a specified radius of their principal place of garaging.

The plaintiff owned a 1956 GMC bus which was included in the coverage afforded by the policy issued by defendant. On 5 July 1971, this bus, while in Louisville, Kentucky, burned without fault on the part of the plaintiff. Defendant concedes that the bus was included in the coverage of the policy, that it burned through no fault of the plaintiff, and that it was damaged in the amount of $10,000.

The dispute between plaintiff and defendant concerns an endorsement allegedly attached to the policy limiting the coverage of some buses to a radius of 50 miles and others to a radius of 150 miles from their principal place of garaging. Louisville, Kentucky, is more than 150 miles from Gastonia.

The evidence presented by the parties tended to show the following:

The parties had begun their relation as an insurer and insured in 1964, and since 1966 defendant has issued through the George A. Jenkins Agency, Inc., renewal policies. The term of each policy coincided with the calendar year, and plaintiff introduced the following numbered policies into evidence:

2-3662696 (31 December 1967 — 31 December 1968)
2-3785758 (31 December 1968 — 31 December 1969)
2-3895407 (31 December 1969 — 31 December 1970)
2-3953208 (31 December 1970 — 31 December 1971)

Each policy stated on its face that it was a renewal of the policy for the preceding year.

Following the burning of the bus, William Ray Rhyne, Jr., —Vice President and Controller of plaintiff—notified George A. Jenkins, Jr., of the fire. An appraisal of the damage was made within 48 hours, and Mr. Rhyne was informed by Mr. Jenkins that defendant denied the claim and would not pay it because of a rider imposing a mileage limitation on the use of the buses. Rhyne thereupon examined the policy in effect—2-3953208—and saw the rider for the first time.

Rhyne further testified that he first became Controller of plaintiff in November, 1966, and shortly thereafter he had occasion to examine in detail the policy effective 31 December 1966—31 December 1967. There was no limitation regarding mileage in that policy. In each succeeding year, Rhyne met with Jenkins regarding the renewal of the insurance policies, and while they discussed the bus schedules for the coming year, they did not "go over" the policies.

Defendant contends that the rider—entitled Auto 1145—was inserted into policy 2-3895407 when it was initially issued. There is in fact no evidence as to whether the rider was in the policy as issued or inserted later. There is likewise no evidence that plaintiff was ever notified by defendant of the insertion of the rider with its territorial limitation.

The trial court sitting without a jury made, *inter alia,* the following findings of fact:

"10. That defendant, not its agent in Gastonia, inserted in renewal policy 2-3895407 which covered the period of December 31, 1969, through December 31, 1970, an endorsement entitled 'Auto 1145'. That the renewal policy numbered 2-3953208 covering the period of plaintiff's loss contained an identical endorsement entitled 'Auto 1145.'

* * *

14. That the George A. Jenkins Agency, Inc., had not at any time given to plaintiff any notice or information as to the insertion of said 'Auto 1145' endorsement into the renewal policy nor did the defendant itself give any written or verbal notice of the insertion of said endorsement into said policy at any time prior to the loss sustained by plaintiff.

* * *

19. That defendant deliberately and intentionally inserted its endorsement 'Auto 1145' in its renewal policy in the year preceding the policy period in which plaintiff's loss occurred without giving any notice thereof to plaintiff or to its agent, the George A. Jenkins Agency, Inc., and neither defendant nor its said agent ever gave any notice to plaintiff of the attaching of said endorsement to said renewal policies.

20. That defendant's agent, George A. Jenkins, and the George A. Jenkins Agency knew that the plaintiff was en-

gaged in the operation of a charter bus business and that it regularly transported passengers in the operation of its charter business for many miles beyond 150 miles of Gastonia, North Carolina. That, in fact, defendant's agent, George A. Jenkins, had been a party to charter trips to Raleigh, North Carolina, on several occasions and knew that the distance between Gastonia and Raleigh exceeded 150 miles.

* * *

25. That the defendant's conduct in inserting endorsement 'Auto 1145' in the renewal policies in which said endorsement appears constitutes inequitable conduct on defendant's part, and the defendant had a duty to notify plaintiff of any alteration or change of coverage in any renewal policy at the time of its issuance.

26. That the defendant's agents were fully informed as to the nature of the business of the plaintiff and the territorial scope of its operations of its buses and unjustly altered the renewal policies notwithstanding said knowledge and information.

27. Plaintiff had a right under the circumstances shown by the evidence in this action to assume that the defendant would renew the policies of insurance here in question on the same terms as in the original policy and that the renewals would provide the same coverage as before.

28. That by inserting endorsement 'Auto 1145' in the renewal policy without notice to plaintiff the defendant materially changed the insurance coverage purchased by plaintiff and plaintiff is entitled to have the renewal policies reformed to conform to the prior and original policy which did not contain said endorsement.

29. Defendant in this case, upon the expiration of the policy period in the original policy simply sent a renewal policy to plaintiff and the insured could not reasonably have been expected to read it over again and was entitled to assume that the terms and conditions set forth in said renewal policies remained the same as in the former policy and that the coverage had not been changed.

30. That defendant by its conduct and the conduct of its agents waived, and are estopped, to rely on the provisions

of endorsement 'Auto 1145' in its renewal policies relating to the territorial operation by plaintiff of its buses insured under said policies of insurance.

* * *

33. That defendant and its agents had a duty to speak and advise plaintiff of any change of coverage upon issuance of a renewal policy of insurance and did not do so. That by its silence the defendant practiced a fraud upon the plaintiff.

34. That plaintiff is entitled to have the renewal policies reformed to comply with the terms and coverage of the policy renewed and without any further assessment of premiums, the defendant has waived any right, if any it ever had, to demand payment of further premiums as a condition to reformation of said contract of insurance.

35. The endorsement of 'Auto 1145' was not in Plaintiff's Exhibit Number 3 (Renewal Policy No. 2-3785758) at the time of delivery of said policy to plaintiff by defendant and its agents, nor was it in said policy at the time it was introduced into evidence in the trial of this action. . . . "

The court thereupon concluded:

"3. That each of the policies of insurance offered in evidence during the trial of this action constituted a renewal of a policy issued to plaintiff and its affiliated companies for the preceding year and each of said policies was designated as a renewal in writing by defendant upon the face of each of said policies. That the terms of the two most recent policies offered into evidence did not legally change the terms of the policies being renewed and did not effectually limit the coverage provided to plaintiff by defendant's policies issued prior to the issuance of Policy No. 2-3895407.

4. That the oral contract between plaintiff and defendant was made solely to renew the policies in existence prior to the issuance of Policy No. 2-3895407 (covering the period of December 31, 1969-70) and there was no evidence of the introduction of any new terms in the two later renewal policies. Said agreements to renew said two later policies necessarily and as a matter of law implied a renewal by the defendant of the identical contract of insurance existing between plaintiff and defendant as set forth in Policy No.

2-3785758 (covering the period of December 31, 1967-68) and prior policies issued by defendant to plaintiff. That defendant had a duty to incorporate in the renewal policies the same insurance coverage as contained in the original policies.

* * *

7. That by its nondisclosure to plaintiff of the insertion of endorsement 'Auto 1145' into the renewal policies at its home office in Baltimore, Maryland, the defendant's conduct was inequitable, unjust and fraudulent.

8. That plaintiff is entitled to a reformation of the insurance policies issued by defendant subsequent to the policy period of December 31, 1968-1969, eliminating the variance between policies issued prior thereto and policies issued by defendant subsequent thereto in such manner as to eliminate from the two later renewal policies the provisions of endorsement 'Auto 1145'. That by reason of said reformation the insurance contract between plaintiff and defendant, as set forth in Policy No. 2-3785758, constitutes the contract under which the defendant's liability to plaintiff is governed and determined."

From the judgment for plaintiff, defendant appeals.

Basil L. Whitener and Anne M. Lamm for plaintiff appellee.

Jones, Hewson, and Woolard, by Harry C. Hewson, for defendant appellant.

MORRIS, Judge.

[1] Defendant first assigns error to the court's finding that the defendant by its conduct waived and is estopped to rely upon the provisions of the endorsement "Auto 1145." Its first basis for this assignment is its contention that the Jenkins Agency was a limited agency as opposed to an unlimited agency. Specifically, it relies on the portion of its answer to plaintiff's interrogatory excluded by the court, but read into the record. According to this answer, defendant instructed its agencies that any inter-urban buses or frequent trips greater than 150 miles represented greater than normal risks and as such they were to be submitted to defendant for approval prior to binding by the agent. Thus, contends defendant, since the Jen-

kins Agency had no authority to bind the defendant to this risk, it had no authority to waive the provision.

We cannot sustain this contention. "Although an agent be authorized to act in a limited capacity, yet if he has apparent authority to represent the company in relation to fixing rates of premiums, and does so, the company is bound thereby, unless the assured has knowledge of the agent's limited powers." Joyce, 2d, Insurance, § 551; *Perkins v. Washington Insurance Co.*, 4 Cow. 645 (N.Y. 1825). There was evidence that Rhyne and Jenkins met annually and discussed the bus schedules and market value of the buses. "Where a principal objects to the act of his agent, as unauthorized, the question is, not what power did he intend to give his agent, but what power the third person who dealt with the agent, and who insists on his acts as valid, had a right to infer that he possessed, from his own acts and those of his principal." *Perkins v. Washington Insurance Co., supra,* at 645. There is no evidence that Rhyne—or anyone associted with plaintiff—knew that the Jenkins Agency had no authority to bind defendant in regard to rates. All of plaintiff's prior insurance negotiations had been with the Jenkins Agency, not with the defendant itself. Thus, plaintiff was justified in the belief that the Agency could bind the defendant, and defendant cannot now deny the authority of the Agency to bind defendant or to waive the provisions of the rider.

[2] Defendant's second assignment of error is to the court's reforming policies 2-3895407 and 2-3953208 by deleting "Auto 1145" on the ground it was not contained in the preceding policy, and therefore plaintiff had no notice thereof. We do not agree.

There appears to be no definitive case in North Carolina on the reformation of renewal contracts of insurance wherein the insurer has inserted a rider without notification. However, the overwhelming weight of authority in the United States is diametrically opposed to defendant's position.

> "Generally, an insured in renewing his policy may rely upon the assumption that the renewal will be upon the same terms and conditions as the earlier policy, and therefore he is not bound by a reduction in the renewal policy where the change was not called to his attention at the time of the renewal. The usual remedy of the insured who, after sustaining a loss, discovers that he is not covered under his renewal policy because of some restriction or warranty not

in the earlier policy, or because of a reduction in coverage from the earlier policy, is to seek reformation of the renewal policy and, often in the same action, a recovery thereon as reformed, for the basic theory behind the rule which holds the insurer bound by the greater coverage in the earlier policy is that if an insurance company knows that the renewal policy differs and does not inform the insured, it is guilty of fraud or unequitable conduct, or that if it does not know, it is because of a mistake, and in either event the insured, who has relied on the assumption that he is receiving a policy based on the same terms and conditions as the earlier one, is entitled to recover as though there had not been a change in the coverage in the renewal policy.

As is the rule with contracts generally, the mere failure of an insured to read the policy does not necessarily prevent his seeking reformation thereon and all the more so when there is involved a renewal of a policy wherein the insurer has reduced the coverage without notice to the insured, for the insured has a right to rely on the assumption that the renewal policy will contain the same terms and conditions as the earlier policy." Annot., 91 A.L.R. 2d 546, 549 (1963).

"By the renewal of a policy, except where there is a special agreement for different terms, the original policy is continued under the original stipulations, and the only change is in the time of its expiration, it certainly being in harmony with the reasonable intent of the parties that where an insurer agrees to renew a policy, the insured should have a right to expect that the new protection will be in substance the same as that afforded by the former contract and upon the same conditions. This is especially true, not only where the insured specifically requests the insurer to issue a policy like the previous one, but also where it is understood that the two policies are to be the same, as well as where the original policy expressly so provides, and the agreement to renew is made shortly before the expiration of the original policy, and the renewal premium is paid, or agreed to be paid." 17 Couch 2d, Insurance, § 68:60.

[3] Although—as we have noted—there is no definitive North Carolina case on the specific point of law in question, the above line of authority was approved by the Supreme Court, per

Justice Sharp in *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962). We, therefore, hold that in the renewal of an insurance contract, absent notice to the contrary, the insured has a right to expect that the coverage of the new policy will be substantially the same as that afforded by its predecessor. If, absent notice to the contrary, the insurer inserts an endorsement varying the original coverage, the renewal contract may be reformed to conform with the terms of the prior policy. Recovery may be had in that same action by the insured under the renewal contract as reformed.

[4] Defendant's final assignment of error is to the trial court's failure to require an additional premium which would be due for the expanded coverage. Inasmuch as this assignment of error is based upon defendant's exception to the court's finding that defendant by its conduct has waived the right to demand further premium, it is without merit. Where jury trial is waived, the court's findings of fact are conclusive if supported by competent evidence and judgment will be affirmed on appeal. *Nichols v. Insurance Co.*, 12 N.C. App. 116, 182 S.E. 2d 585 (1971). There is ample evidence in the record that defendant through its agent, the George A. Jenkins Agency, Inc., was aware of the scope of plaintiff's bus operations. There is also competent evidence that the course of dealings between the parties was directed at coverage of the entire bus operation at the rates agreed upon. Defendant cannot now be awarded additional premiums.

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JOE BRYANT AND STATE OF NORTH CAROLINA v. RAYMOND MITCHELL FLOYD

No. 7226SC592

(Filed 19 December 1973)

Obscenity — constitutionality of statute — motion pictures

The statute proscribing the dissemination of obscenity in a public place, G.S. 14-190.1, is not unconstitutional on its face and is not unconstitutional as applied to defendants who exhibited motion pictures

containing stark portrayals of sex acts without a suggested theme or purpose other than to portray the acts in the most blatant manner.

Judge PARKER dissenting.

THESE defendants originally brought their cases before this Court by appeals from *Friday, Judge,* 6 March 1972 Session of Superior Court held in MECKLENBURG County.

Defendants were charged in warrants with intentionally disseminating obscenity in a public place. They were found guilty in District Court, appealed, and were granted a trial *de novo* in Superior Court. The cases were consolidated for trial before a jury which returned a verdict of guilty as to both defendants. They again appealed. On 22 November 1972, this Court filed its opinion finding no prejudicial error in the trial. *State v. Bryant* and *State v. Floyd,* 16 N.C. App. 456, 192 S.E. 2d 693.

Defendants then attempted to appeal and simultaneously petitioned the Supreme Court of North Carolina for a writ of certiorari. The appeal was dismissed, and the petition, denied. Defendants then petitioned the Supreme Court of the United States for a writ of certiorari. The latter petition was allowed. The Supreme Court of the United States vacated the judgment of this Court, and remanded the case to this Court for further consideration by us in light of *Miller v. California,* 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct 2607 (1973), and companion obscenity cases decided by the Supreme Court of the United States in June 1973. The case was reargued in this Court on 18 September 1973.

Attorney General Morgan and Associate Attorney Wall, for the State.

Smith, Carrington, Patterson, Follin and Curtis, by Michael K. Curtis and J. David James, for defendant-appellants.

BROCK, Chief Judge.

The question for determination upon this reconsideration is the constitutionality of G.S. 14-190.1, as applied to the defendants in light of *Miller v. California,* 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607 (1973).

Defendants argue that G.S. 14-190.1 is unconstitutionally vague and is in violation of the First and Fourteenth Amend-

ments to the United States Constitution. Defendants contend the statute is unconstitutional because it fails to incorporate the newly evolved standards for the determination of whether materials are obscene, as set forth by the Court in *Miller, supra.* In *Miller,* the Court states the constitutional test for obscenity is whether:

> "(a)'[T]he average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest (citations omitted),
>
> (b) [T]he work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
>
> (c) [T]he work, taken as a whole, lacks serious literary artistic, political, or scientific value."

The Supreme Court, holding that state statutes designed to regulate obscene material must be carefully limited, said in *Miller,* " . . . we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." However, the Supreme Court in *Miller, supra,* footnote 6, after citing examples of state laws directed at depiction of defined physical conduct, went on to say, "We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate."

The statute under which the defendants were indicted proscribes the selling, delivering, and providing, or an offer or agreement to sell, deliver or provide " . . . any obscene writing, picture, record or other representation or embodiment of the obscene; . . ." On its face, this statutory terminology does not contain the specifics suggested by *Miller.* The difference between the *Miller* standards and the old standard as set out in *Memoirs v. Massachusetts,* 383 U.S. 413, 16 L.Ed. 2d 1, 86 S.Ct. 975, is that *Miller* requires that the conduct be specifically defined by the statute. This requirement may be met, however, according to *Miller,* by authoritative judicial construction.

At no point did the Supreme Court indicate that *Miller's* clarification and modification of *Memoirs* was the result of *Memoirs* having permitted unconstitutional infringement on

efforts to distribute pornography. Rather, the Supreme Court was dissatisfied with *Memoirs* because it imposed greater burdens on the regulation of such materials than was demanded by the Constitution. " . . . [T]he *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was '*utterly* without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof." *Miller v. California, supra.*

We are not convinced from the remand of the obscenity cases by the Supreme Court, without more, that the Supreme Court, in the interest of *strengthening* powers to regulate pornography, elected to eliminate constitutionally-valid law that would otherwise be available in prosecuting pending obscenity cases.

This Court, therefore, is faced with the obligation, in light of the *Miller* remands and in view of its duty to assure protection of First and Fourteenth Amendment rights, to assure that the defendants will not be convicted under earlier standards if those standards are more restrictive of pornography than those in *Miller*. We therefore make, as we are required to do, an independent judgment on the facts of this case as to whether the materials in this case are constitutionally protected. *Jacobellis v. Ohio,* 378 U.S. 184, 12 L.Ed. 2d 793, 84 S.Ct. 1676. In our review, we shall consider both the *Miller* and *Memoirs* definitions of obscenity. If the film is not obscene under *both* of these standards the charges must be dismissed.

We invoke this dual standard test upon the premise that the Supreme Court, by vacating and remanding the entire group of obscenity cases, indicated that defendants in pending prosecutions were entitled to the benefit, if any, of the new standards. We note that *Miller,* itself, was not reversed, but vacated and remanded for further proceedings.

In making our independent judgment in accordance with *Jacobellis,* we have reviewed the motion pictures in question and have applied both *Miller* and *Memoirs* standards. In our earlier opinion filed in this case the facts were reviewed as follows:

> "In the case before us it was stipulated that the films 'showed acts of sexual intercourse and oral sexual acts by and between human males and human females in a state

> of undress.' The films identified as State's Exhibits 2, 3, 4 and 5 introduced into evidence in this case depicted sexual activity in what is customarily thought of as the normal manner by the insertion of the human penis into the vagina of the human female. In addition, they depicted sexual activity by oral stimulation of the penis with the mouth of a nude female, and also sexual activity by the stimulation of the vulva and clitoris with the lips and tongue of a nude male. There were depictions of simultaneous acts of fellatio and cunnilingus between a nude male and a nude female. There were also depictions where the act of cunnilingus was performed by one nude male with a nude female while another nude female was engaged simultaneously with the same nude male in the act of fellatio. These depictions were not all simulated and little, if anything, was left to the imagination. The sole emphasis of these films is the revealing of the sexual activity of the moment. They have no plot, no real motive, and no objectives other than to appeal to the prurient interest in sex."

The four films in this case are stark portrayals of sex acts without a suggested theme or purpose other than to portray the acts in the most blatant manner. They exhibit a morbid interest in nudity and portray sex acts far beyond customary limits of candor in description or representation of such matters.

Patently offensive "hard core" portrayals of sexual conduct such as described above, are proscribed by our statute regulating dissemination of obscene materials in a public place. Neither the defendants nor the general public need any further definition by statute to know that the four films in this case are obscene and are not entitled to the dignity of constitutional protection.

In the trial of these defendants the State carried the burden of proof under the *Memoirs* standards. That was a heavier burden than is required under the newer *Miller* standards. In our independent judgment of the four films we conclude that they are obscene when tested by both the *Miller* and *Memoirs* standards. This dual procedure protects defendants from a retroactive application of *Miller* standards which might ease the burden of the State. At the same time it grants to defendants the application of *Miller* standards which might place a heavier burden upon the State. In this opinion we concur in the rationale

of *State v. Watkins*, ____ S.C. ____, (Filed 26 November 1973) (S.Ct. of S. C. Opinion No. 19727); *Redlich v. Capri Cinema*, ____ N.Y. Sup Ct App Div ____, (Filed 27 November 1973), 42 U.S.L.W. 2297; and *United States v. Thevis*, 484 F. 2d 1149 (5th Cir., 12 September 1973), 42 U.S.L.W. 2182.

We hold therefore that G.S. 14-190.1 is not unconstitutional on its face, and is not unconstitutional as applied in this case.

We abide by our earlier disposition.

No error.

Judge VAUGHN concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

The United States Supreme Court has directed us to give further consideration to this case in the light of *Miller v. California* and its companion cases. *Miller* announced new guidelines for determining whether material may be considered obscene and therefore beyond First Amendment protection. In certain respects these new guidelines appear to be less rigorous than those which they replaced and to that extent *Miller* has eased the prosecution's burden. The majority opinion in *Miller*, however, went further than merely announcing new guidelines. Insofar as pertinent to the case now before us, the importance of *Miller* is the requirement which it makes that a criminal statute dealing with obscenity to be constitutionally valid must be specific. Chief Justice Burger's opinion, while regarding as categorically settled that obscene material is unprotected by the First Amendment, expressly acknowledged "the inherent dangers of undertaking to regulate any form of expression" and recognized that "State statutes designed to regulate obscene materials must be carefully limited." The opinion then contains the following:

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.*" (Emphasis added.)

Our statute, G.S. 14-190.1, contains no such specific definitions nor has it yet been authoritatively construed so as to supply them. The statute became effective on 1 July 1971. Defendants in the present case are charged with having violated it by acts which allegedly occurred on 10 September 1971. To now construe the statute so as to supply the specific definitions which *Miller* requires and which the statute obviously lacks, requires the exercise of judicial legislating to a degree which in my opinion is beyond the power of the courts to perform. The Legislature alone has the power to amend our statute so as to give it the specificity which *Miller* requires for its validity. Even when adopted such amendments may not be applied *ex post facto* to defendants in the present case. I vote to vacate the judgments.

SHIRLEY KAY G. WARD v. DOLPHUS FRANKLIN WENTZ, JR.

No. 7326SC314

(Filed 19 December 1973)

1. Damages §§ 3, 13— connection between accident and necessity for medical treatment — reasonableness of medical expenses — competency of evidence

In an action for damages for personal injuries sustained by plaintiff when her vehicle was struck by defendant's vehicle, the trial court did not err in excluding plaintiff's evidence concerning certain medical expenses incurred by her subsequent to the accident (1) where plaintiff's evidence that the medical attention she received was reasonably necessary for proper treatment of her injuries consisted only of plaintiff's assertion that medical expenses incurred by her were "definitely related to the accident," and (2) where plaintiff presented no evidence as to the reasonableness of the expenses incurred other than to offer evidence of the amounts charged.

2. Appeal and Error § 49— failure of record to show excluded evidence — no prejudice

Exclusion of a medical witness's testimony cannot be held prejudicial where the record fails to show what the testimony would have been.

3. Damages §§ 3, 13— personal injury — competency of medical testimony

In an action for damages for personal injuries sustained by plaintiff in an automobile accident four years earlier, the trial court did not err in excluding evidence as to an examining physician's prognosis where the prognosis was based entirely upon what plaintiff had told him during her visit with him on the day before the trial, nor did the court err in sustaining defendant's objection to a hypothetical question

which called for the doctor's opinion as to whether plaintiff would have any permanent partial disability.

APPEAL by plaintiff from *Snepp, Judge,* 4 December 1972 Schedule "B" Civil Session of Superior Court held in MECKLENBURG County.

In this civil action commenced 28 December 1971 plaintiff seeks damages for personal injuries received 11 January 1969 when the car she was driving was struck in the rear by defendant's vehicle while plaintiff's car was stopped at a red traffic light. Defendant stipulated liability, and the case was submitted to the jury on the single issue of damages.

Plaintiff testified that the collision threw her forward, causing her head to strike the window on the left-hand side and her neck and chest to strike the steering wheel. She was examined at the hospital emergency room, where x-rays showed no fractures and she was diagnosed as having an acute cervical sprain and a contusion on her right chest. Medicine was prescribed, she was referred to an orthopedic surgeon for further checking, and she was released without hospitalization. Other evidence offered by plaintiff as to her injuries, her loss of earnings, and her medical expenses, will be referred to in the opinion.

Defendant offered no evidence. The jury answered the damage issue in the amount of $2,500.00. From judgment on the verdict, plaintiff appealed.

Wayne M. Brendle and John D. Warren for plaintiff appellant.

Sanders, Walker & London by James E. Walker and Robert G. McClure, Jr., for defendant appellee.

PARKER, Judge.

Plaintiff assigns error to rulings of the trial court excluding evidence concerning certain medical expenses incurred by her in the State of Florida. Plaintiff testified that at the time of the accident, which occurred on 11 January 1969, she lived in Charlotte, N. C., and that in October 1969 she moved to Florida, where she resided until 28 February 1972, when she came back to Charlotte to live. Evidence was admitted as to medical expenses incurred by plaintiff and treatment prescribed for her

while she remained in Charlotte during the period immediately following the accident. In this connection Dr. Charles F. Heinig, the orthopedic surgeon consulted by plaintiff, testified that he examined plaintiff on 13 and 23 January 1969 and found no bone injury and "no evidence of any black or blueness or swelling." Dr. Heinig diagnosed her injury as a "mild cervical sprain" for which he prescribed an analgesic and muscle relaxant. He reassured plaintiff that she would not have any permanent disability and suggested that she return to work. Dr. Heinig did not see plaintiff after 23 January 1969. Dr. David E. Graham, a general practitioner, testified that he saw plaintiff on several occasions between 28 January and 7 February 1969, during which time he treated her for acute bronchitis as well as for her injuries. For the latter, in addition to medicine, he prescribed a cervical collar to help the muscles relax and to speed up recovery. On cross-examination Dr. Graham testified he felt that plaintiff was exaggerating her complaints but was not sure of it. After 7 February 1969, Dr. Graham did not again see plaintiff until 4 December 1972, Monday of the week in which the trial occurred. Dr. Heinig and Dr. Graham were the only two doctors to testify at the trial. By stipulation of counsel a written report signed by Dr. J. M. Petty, a neurologist, was put in the record and read to the jury. In this report, which was dated 26 March 1969, Dr. Petty stated that he examined plaintiff in his office on 12 February 1969, that he thought "it is likely this girl has sustained a soft tissue injury of the flexation extension variety to the muscles of her neck," that he had placed her on darvontran as needed for pain and seconal to take for sleep, and that it was his feeling that she would probably continue to improve and he "would doubt very seriously that she would have any permanent deficit because of this."

Evidence of plaintiff's medical expenses incurred during the period immediately following the accident, including the charges made by Drs. Heinig, Graham and Petty, was admitted before the jury, and defendant did not challenge these expenses either as being unreasonable in amount or as not having been reasonably incurred for treatment of the injuries plaintiff received in the accident. The rulings to which plaintiff excepts and now assigns error relate to her efforts to introduce evidence of certain doctor bills and other expenses incurred by her after she moved to Florida in October 1969. After sustaining defendant's objections to this evidence, plaintiff testified for the record and in the absence of the jury, as follows:

> "While I was in Florida, I did incur medical expenses for injuries sustained in the accident. The first doctor that I saw was Dr. Hilliard, and he charged $50.00 and $62.00, that $112.00; the next doctor was Dr. Jackson and Dr. Annis, which together was $299.00, they are in the Watson Clinic. The next was Lakeland General Hospital for x-rays $65.00. The next was the physical therapist who charged $12.00 and $10.00, that's $22.00. Dr. Smith charged $12.00 for x-rays. Lee Memorial Hospital bill was $32.00. I bought prescription drugs while I was in Florida and paid approximately $80.00 for those. I did not have any other medical expenses that I recall while I was in Florida."

Still in the absence of the jury, plaintiff testified she had paid some of these bills but did not know which ones. When her counsel asked:

> Question: "Are these bills all related to the complaints which you say you have from the accident or to some other treatment for some other ailment?"
>
> Plaintiff answered: "They are definitely related to the accident."

[1] We find no error in the trial court's rulings excluding the evidence offered by plaintiff concerning her Florida medical expenses. Defendant, having stipulated negligence, was liable to plaintiff for all damages to her naturally and proximately resulting from his negligent act. Included, of course, was the reasonable cost of such medical treatment received by her as was made reasonably necessary by his fault. The burden remained on plaintiff, however, to show both that the medical attention she received was reasonably necessary for proper treatment of her injuries and that the charges made were reasonable in amount. As to her Florida expenses she has shown neither. There is no competent medical evidence to relate the necessity for such treatment as she may have received in Florida to the injuries she received in the 11 January 1969 accident; the mere assertion by plaintiff, who was a layman, that they were "definitely related to the accident" was not competent for that purpose. This Court has held it error to admit such evidence under similar circumstances. *Graves v. Harrington,* 6 N.C. App. 717, 171 S.E. 2d 218. Further, it has been widely held that in a personal injury action evidence of the amount charged for accrued medical, hospital, or nursing expenses is not in

itself evidence of the reasonableness of such expenses. Annotation, 12 A.L.R. 3d 1347, § 3. Here, there was no other evidence to show the reasonableness of the Florida charges. Plaintiff's first assignment of error directed to rulings excluding her evidence as to those charges is overruled.

[2] On direct examination of Dr. Graham, plaintiff's counsel asked if he had an opinion as to whether the acute bronchitis for which he treated plaintiff in February 1969 "could or might have been connected with the injuries she received in the accident." The court sustained defendant's objections to this and to other questions by which plaintiff's counsel sought to develop some connection between his client's bronchitis and the accident. Plaintiff now assigns error to these rulings. However, what the witness's answers would have been does not appear in the record and the exclusion of testimony cannot be held prejudicial when the record fails to show what the answer of the witness would have been. *Gibbs v. Light Co.*, 268 N.C. 186, 150 S.E. 2d 207.

[3] Plaintiff's counsel asked Dr. Graham for his prognosis based upon an examination he made of plaintiff on 4 December 1972, the day before the trial. The court sustained defendant's objection to this question. Had the witness been permitted to answer, he would have testified "[t]hat her existing condition as of today will be permanent." Under the circumstances of this case plaintiff suffered no prejudicial error by the exclusion of this testimony. All of the evidence shows that Dr. Graham had last treated plaintiff for her injuries on 7 February 1969, nearly four years before her trial. There was no evidence that she had received any medical treatment whatever or had consulted any doctor with reference to her injuries from the time she returned to live in Charlotte at the end of February 1972 up until the time of her trial. Her visit to Dr. Graham on 4 December 1972 was obviously made, not to obtain treatment, but to obtain evidence for use at the trial. With reference to that visit, Dr. Graham testified:

> "The last time I saw her was on December 4, 1972. At that time, she said she had intermittent episodes of headaches and some intermittent episodes of pain in the shoulder and neck. I made an examination of her at that time. My examination was negative. I could not find any objective evidence. My definition is that 'objective' is some-

> thing that you can more or less demonstrate or see and 'subjective' is an opinion, more or less, it cannot be substantiated. I very much rely on subjective as well as objective findings in my examination to make a diagnosis. When I saw her in December, the opinion I am now ready to give is based against a background of clinical experience and also what she told me back some time before. I don't know whether she has been cured, whether she has reached a complete recovery from those things I treated her for a couple or three years ago or not, except for what she tells me."

In view of this testimony we find no prejudicial error in the court's excluding the evidence as to Dr. Graham's prognosis, based, as it was, entirely upon what plaintiff had told him during her visit with him on the day before the trial. Similarly, we find no prejudicial error in the court's sustaining defendant's objection to a hypothetical question which plaintiff's counsel asked of Dr. Graham. The question, which called for the witness's opinion as to whether plaintiff would have "any permanent partial disability" as a result of her injuries, was based, among other matters, upon an assumed finding by the jury that on 4 December 1972 plaintiff had *informed* the doctor that she still had pain in the neck, not that she actually still had such pain. Under the questions as phrased the doctor was ready to express as his opinion that plaintiff did have "some permanent partial disability." In forming such opinion the doctor obviously assumed the truthfulness of plaintiff in informing him that she still suffered pain, an assumption which the jury might have been unwilling to make. It is a rare personal injury case indeed in which the injured party does not claim at the time of trial still to have some residual pain from the accident. The jury might well have disbelieved plaintiff's claim in this regard but still been impressed by the doctor's opinion as to the permanency of her condition, not realizing that it was based upon an assumption which was contrary to their own finding. Under these circumstances we hold that defendant's objection to the hypothetical question was properly sustained.

Since plaintiff offered no competent evidence from which the jury might find that she suffered any permanent injuries, the court properly instructed them not to consider any damages for permanent injuries. We also find no error in other portions of the charge to which exception was taken.

We have considered plaintiff's remaining assignments of error and find no error sufficiently prejudicial to warrant a new trial. On this appeal we find

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE HOLLAND AND EDDIE LEE BURRIS

No. 7327SC705

(Filed 19 December 1973)

1. **Criminal Law § 66— in-court identification of defendants — observation at crime scene as basis**

Evidence in an armed robbery case that the witnesses had over ten minutes to observe defendants at the crime scene was sufficient to support the trial court's finding that in-court identifications of defendants were based on such observation and not tainted by any pretrial procedure.

2. **Criminal Law § 97— additional evidence offered by State — no prejudicial error**

The trial court in an armed robbery case did not abuse its discretion in allowing the State to put on additional evidence relating to a pistol after it had closed its case where, after the evidence was in, the court instructed the jury to disregard it, strike it from their minds, and not consider it during their deliberations, the State rested, defendants were asked if they had further evidence, and defendants answered in the negative.

3. **Criminal Law §§ 92, 113— cases consolidated for trial — separate issues submitted to jury**

Trial court's instruction in the trial of two defendants for armed robbery was proper where the court carefully charged the jury that an issue would be submitted as to each defendant, that, though the cases against defendants were consolidated, there were still two separate cases, that the jury could find both defendants guilty, or both not guilty, or one guilty and the other not guilty.

4. **Criminal Law § 168— robbery of one man alleged — charge on robbery of two men — no prejudicial error**

Defendants in an armed robbery case were not prejudiced by the court's reference in its charge to two men as having been robbed, though the indictment charged armed robbery of only one of the men, since the uncontradicted evidence was that both men were robbed.

5. **Robbery § 3— armed robbery prosecution — evidence of defendant's ability to post bond — admissibility**

Where there was evidence of one defendant's unsteady employment during the time preceding the alleged robbery and there was evidence that over $600 was taken in the robbery, the solicitor's question as to defendant's ability to post bond was relevant, and the solicitor's statement that he thought the question was "proper to show that [defendant] had that three hundred dollars in possession" was not prejudicial to defendant.

6. **Criminal Law § 126— polling the jury — possible error cured**

Any error in the jury polling procedure in defendants' trial for armed robbery was cured when all the jurors assented to the verdict.

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

Evidence was sufficient to uphold the jury's verdict of guilty of armed robbery where the evidence tended to show that the two defendants entered a store together, one defendant pulled a gun, the defendants emptied the cash register and took money from a store employee, and defendants were seen leaving the store together.

APPEAL by defendants from *Friday, Judge,* 12 March 1973 Session, Superior Court, GASTON County.

Defendants were charged, in indictments proper in form, with armed robbery. From judgment entered on the jury verdict of guilty as charged, each defendant appealed.

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

Childers and Fowler, by Henry L. Fowler, Jr., for defendant Willie Holland, appellant.

Harris and Bumgardner, by Tim L. Harris and Don H. Bumgardner, for defendant Eddie Lee Burris, appellant.

MORRIS, Judge.

Although in some instances assignments of error are not identical, and an assignment may not be applicable to both defendants, for the most part, their contentions are the same. We will first treat the assignments of error applying to both. If deemed necessary, we will discuss exceptions and assignments of error which apply only to one defendant.

[1] Both defendants contend that identification evidence should not have been admitted. They asked for a voir dire after the evidence for the State was in. The court announced that although

it recognized this was a highly irregular procedure and not approved by it, the voir dire examination would be allowed. After the examination, the court found as facts that the evidence showed that the prosecuting witnesses had had over ten minutes to observe the defendants; that this was ample opportunity to observe the defendants; that the in-court identification "did not result from any out-of-court confrontation or pre-trial identification or proceedings or conducive to mistaken identity. The court does not find that any pre-trial procedure was so unpermissive as suggested as to give rise to have substance (sic)." The evidence before the court, both from the State's evidence and the evidence on voir dire, was more than sufficient to support the court's findings. Upon its findings the court concluded that it would "allow this evidence to remain before the jury." In this we find no error.

Both defendants contend that the court erred in allowing the State, in its cross-examination of defendant Holland, to examine him with respect to a pistol which had not been identified and was displayed to the jury. The pistol had been found in defendant Burris's car. Both defendants moved for a mistrial and excepted to the court's allowing the State to put on additional evidence relating to the gun after it had closed its case. This is also the subject of an assignment of error for each defendant.

The evidence from both prosecuting witnesses was that Burris and Holland came in the store; Burris asked whether the gas pumps were working; that when Burris was told they were working, Holland pulled a twenty-two caliber nickel plated pistol and said: "This is a holdup." The solicitor had the pistol marked for identification, and the witness was unable, or refused, to identify it. It was not, therefore, introduced into evidence. We fail to see where defendants have been prejudiced.

[2] With respect to the court's allowing the State to put on additional evidence relating to the gun after it had closed its case, "[i]t is discretionary with the trial court to permit the introduction of additional evidence after both parties have rested and arguments have been made to the jury, but the opposing party must be given an opportunity to offer additional evidence in rebuttal. (Citations omitted.)" *State v. Anderson*, 281 N.C. 261, 266, 188 S.E. 2d 336 (1972). In this case, after the evidence was in, the court instructed the jury to disregard it, strike

it from their minds, and not consider it during their deliberations. The State rested and defendants were asked if they had any further evidence. Both answered in the negative. We see no abuse of discretion, the defendants have shown none, and this assignment of error is overruled.

In connection with the cross-examination of defendant Holland concerning the pistol, defendant Burris contends that the court engaged in an exchange of derogatory remarks with counsel for defendant Holland. We find nothing in the record indicating the court made any derogatory remarks. The court did tell counsel at one point to sit down. This, the court had every right, in fact obligation, to do.

[3] Both defendants contend that the court erred in its charge in that by its charge it intertwined the guilt or innocence of the two defendants in such a manner that it required that they must both be acquitted jointly or found guilty jointly. This assignment of error is without merit. The court carefully instructed the jury that an issue would be submitted as to each defendant; that though the actions were consolidated, there were still two separate actions. The court further said "Now, the court instructs you that you may find both defendants guilty or you may find both defendants not guilty, or one of the defendants guilty and the other not guilty as you find the truth to be, you being the jury in this action." Conceding that at one point in the charge the court did use language which could, standing alone, be construed as defendants contend; nevertheless, in his final instruction he again told them there would be two issues—one as to the guilt or innocence of Holland and one as to the guilt or innocence of Burris. Read contextually, as it must be, we see no possible way for the jury to be confused or misled on this point.

Defendants both contend that the court erred in allowing witness Williams to testify with respect to the arrest of Burris without restricting the jury's consideration of this evidence to defendant Burris. This assignment of error cannot be sustained because the court, after Williams's evidence, instructed the jury not to consider any of it in their deliberation and ordered it stricken from the record.

[4] Both defendants also urge that reversible error occurred when, in his charge to the jury, the court referred to Bridges along with Stroupe as having been robbed. It is true that the

indictment charged armed robbery of only Stroupe. However, all the evidence was to the effect that Stroupe and Bridges were in the store at the time. Stroupe owned the store, and Bridges worked for him. The uncontradicted evidence was that defendants took all the money from the cash register and some $12 from Bridges. We cannot perceive how this inadvertence could possibly have prejudiced either defendant.

[5] We now discuss defendant Holland's assignments of error which are separate and distinct from defendant Burris. One of his contentions is that the court committed prejudicial error in allowing the State to question the defendant Holland about whether he had enough money to get out of jail by posting a bond. Because of this, counsel for Holland twice moved for a mistrial—once at the time the question was asked and again by motion out of the presence of the jury. There was evidence with respect to defendant Holland's unsteady employment for the time preceding the alleged robbery. There was also evidence that over $600 was taken in the robbery. We think the question relevant. Certainly defendant Holland would have every opportunity to explain it on redirect examination. Additionally, the witness never answered the question. It appears that counsel's real objection is to the statement of the solicitor. Before the court had an opportunity to rule on defendant's objection and motion for mistrial, counsel for defendant said: "I think it's a ridiculous and improper question." Whereupon the solicitor stated: "Your Honor, I think it's proper to show that he had that three hundred dollars in possession." Defendant moved for a mistrial again, and the motion was overruled. He did not move that the statement be stricken from the record or that the court instruct the jury not to consider it. See *State v. Gooding*, 196 N.C. 710, 146 S.E. 806 (1929). We see no prejudicial error in the court's refusal of the several motions for mistrial, and this assignment of error is overruled.

[6] Defendant Holland's seventh and last assignment of error is to the polling of the jury. Upon the coming in of the verdict, both defendants moved that the jury be polled. The record indicates that only 11 jurors were polled. However, after the polling was completed, the following took place:

> "Court: Would all the jurors please stand by? (All the jurors stand.)

Court: You have found the defendant, Willie Holland, guilty of armed robbery. This is your verdict so say you all? (Jurors answer in the affirmative.)"

The same procedure was followed with respect to defendant Burris. Whether there was actually a failure to poll the twelfth juror or whether there was simply an omission in the record is immaterial, because any defect was cured by the jurors *all* assenting to the verdict.

In the trial of defendant Holland we find no prejudicial error.

We now discuss the assignments of error of defendant Burris which are not related to defendant Holland.

[7] Defendant Burris's first assignment of error is to the failure of the court to grant his motions for nonsuit. We do not deem it necessary to go into the evidence in detail. Suffice it to say that there was plenary evidence to uphold the jury's verdict of guilty of armed robbery. There was evidence that defendants entered the store together, Holland pulled a gun, Burris stood to one side and asked whether the gas pumps were working. After Holland pulled the gun out, Burris pushed Bridges and told him to move over. After defendants got the money, Bridges and Stroupe were ordered to a room in the back of the store. Through a crack in the door both defendants were seen leaving the store, Holland leading and Burris following him. This assignment of error is overruled.

Defendant Burris, by his next assignment of error contends the court erroneously allowed the solicitor to ask, on cross-examination, whether defendant Burris had said on direct examination that he had been to his girl friend's house at a certain address. The witness had testified on direct that he had been to that address and that a girl lived there. Defendant further says that the court's comment "He's crossing" constitutes an opinion. We fail to see any prejudicial error in the question allowed nor are we able to determine how the court's statement could constitute an expression of opinion.

Defendant Burris's assignments of error Nos. 5, 7, 8, 9 and 10 all relate to the alleged erroneous admission of evidence. We have carefully examined each assignment of error and are of the opinion that prejudicial error is not present.

Assignments of error Nos. 6 and 20 are submitted without argument. These assignments are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

By assignment of error No. 19 defendant Burris contends that the court used the word "accomplice" in its charge in referring to Burris rather than "aider or abettor." It is true that this inadvertence occurred in one place. It is inconceivable that this could constitute reversible error in light of the charge as a whole.

By his remaining assignment of error defendant Burris contends that a verdict should have been directed at the end of all the evidence, or defendant Burris granted a new trial for that the cumulative effect of error committed by the court resulted in prejudice to defendant Burris. These contentions have been answered.

Both defendants had a fair trial. The instructions to the jury fairly and accurately stated the law applicable. The sentences are within the statutory limits.

No error as to both defendants.

Judges PARKER and VAUGHN concur.

REDEVELOPMENT COMMISSION OF HENDERSONVILLE v. MARGARET HENDRIX HYDER (WIDOW), CAROLYN R. HYDER (SINGLE), SARAH H. MARTIN & HUSBAND JAMES A. MARTIN; MARGARET FRANCES LONG & HUSBAND LEWIS O. LONG; JOHNNY P. HYDER (SINGLE), THOMAS S. HYDER & WIFE ELEANORE HYDER

No. 7329SC762

(Filed 19 December 1973)

1. **Attorney and Client § 7; Costs § 4— attorney fees as part of costs — statute**

When a statute provides for attorney fees to be awarded as a part of the costs to be paid by the governmental authority which is appropriating the property, it is not a contingent fee, but an amount equal to the actual reasonable value of the attorney's services.

2. **Attorney and Client § 7; Costs § 4— reasonable attorney fees — factors**

In fixing reasonable attorney fees to be taxed as part of the costs, the court should consider the kind of case, the value of the properties

in question, the complexity of the legal issues, the time and amount involved, fees customarily charged for similar services, the skill and experience of the attorney, the results obtained, and whether the fee is fixed or contingent.

3. **Attorney and Client § 7; Costs § 4— condemnation proceeding — reasonable attorney fees — use of contingent fee contract**

In this condemnation proceeding instituted by a redevelopment commission, the trial court erred in using contingent fee contracts between the landowners and their attorneys as the sole guide for determining reasonable counsel fees to be taxed as part of the costs to be paid by the redevelopment commission. G.S. 160-456(10)(h)(3).

APPEAL by petitioner from *Wood, Judge,* 28 May 1973 Session of Superior Court held in HENDERSON County.

This is a condemnation proceeding filed by the petitioner, Redevelopment Commission of Hendersonville, seeking to acquire lands of the respondents for redevelopment purposes. Commissioners were appointed by the Clerk of Superior Court of Henderson County to determine the value of the land to be taken. They filed their report on 29 July 1971 awarding compensation to the respondents of $32,000.00. This report was confirmed by the clerk, and respondents filed exceptions and notice of appeal to the superior court.

The case was tried before Judge B. T. Falls at the May, 1972, Term of the Superior Court of Henderson County upon the sole issue of the amount of just compensation to be awarded to respondents for the appropriation of their land and improvements. The attorney representing respondents in this trial was O. B. Crowell, Jr., of the firm of Crowell and Crowell, of Hendersonville. The jury returned a verdict of $61,750.00. Judge Falls, in his discretion, determined this amount to be excessive and entered an order setting aside the verdict and granting a new trial. There was no appeal from this order.

At the May, 1973, Term of the Superior Court of Henderson County with Judge William Z. Wood presiding, the case was again tried upon the single issue of just compensation. At this second trial respondents were represented by M. John DuBose, an attorney from Asheville, North Carolina, and their former attorney, O. B. Crowell, Jr., did not participate. The verdict returned by the jury in the second trial was $57,500.00. Prior to the entry of any judgment upon this verdict, Mr. Crowell filed a petition for an allowance of reasonable attorney

fees as provided by G.S. 160-456(10)(h)(3). The record does not disclose any hearing upon this petition but Judge Wood made the following findings of fact:

"The Court finds the following facts in the above entitled action:

"That this case was tried once before and at that time, Mr. O. B. Crowell, Jr., represented the respondents and that the Jury brought back in a verdict of $61,750.00, which verdict was set aside; that thereafter, Mr. Crowell was released without having been paid any Attorney fees by the respondents and that Mr. John DuBose was then employed by the respondents on a contract of 30% of the excess of $32,000.00, plus a retainer of $500.00; that Mr. Crowell was employed on a contract of 30% over the excess of $32,000.00; that the Court is of the opinion that one-third of the amount of the excess of $32,000.00 offered by the redevelopment Commission to the landowner prior to the employment of any Counsel, was a reasonable fee, plus interest:

"Therefore, the Court allows the following fees:

"$6,172.00 shall be paid to M. John DuBose in full settlement of his contract with the respondents, which the Court finds is fair and reasonable.

"$3,281.00 shall be paid to Crowell & Crowell in full settlement of their contract, which the Court finds as a fact that Crowell & Crowell rendered services as set forth in the Affidavit and that this sum is fair and reasonable.

"The Court finds that these Attorney fees are reasonable and are in keeping with that which is charged by the members of the North Carolina Bar Association in condemnation cases on a contingency basis, and notwithstanding any contingency fees, this amount is fair and reasonable.

"That the Court has never heard of a fee other than a contingent fee being charged in cases of this kind in the 21 years of law practice and that one-third of the excess recovered over what has been offered by the condemnor is a standard fee of Lawyers in North Carolina; that the exceptions to this standard fee are usually on the upper side, rather than on the lower side.

"The Court finds that the above fees, as allowed by this Court are, in all respects, fair, equitable and reasonable.

"This 24th day of May, 1973.

WILLIAM Z. WOOD
Judge Presiding"

The court entered judgment requiring petitioner to pay $57,500.00 with interest to respondents as compensation for the taking of their property. Based upon the findings of fact by the court, the judgment also awarded the attorneys for respondents the sum of $9,453.00 as attorney fees to be apportioned $6,170.00 to M. John DuBose and $3,281.00 to Crowell & Crowell, and the attorney fees were taxed as a part of the costs of the proceeding to be paid by the petitioner, Redevelopment Commission of Hendersonville. From that portion of the judgment relating to the attorney fees, petitioner has appealed to this Court.

W. Harley Stepp, Jr., and Edwin R. Groce for petitioner appellant.

Crowell and Crowell, by O. B. Crowell, Jr., and M. John DuBose for respondent appellees.

BALEY, Judge.

Petitioner, Redevelopment Commission of Hendersonville, takes the position that the attorney fees for property owners which were fixed by the court as a part of the costs in this case to be paid by the Commission are excessive and unreasonable. Petitioner contends that the findings of fact of the trial court are not supported by competent evidence and do not themselves justify the fees awarded.

In *Hicks v. Albertson,* 284 N.C. 236, 200 S.E. 2d 40, we have this succinct statement of the law with respect to the award of attorney fees:

> " 'The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding.' *In re King,* 281 N.C. 533, 540, 189 S.E. 2d 158. 'Except as so provided by statute, attorneys' fees are not allowable.' *Baxter v. Jones,* 283 N.C. 327, 330, 196 S.E. 2d 193."

The statutory authority upon which the allowance of attorney fees in this case is based is G.S. 160-456(10)(h)(3), which provides as follows:

> "[I]f the power of eminent domain shall be exercised under the provisions of this Article, the property owner or owners or persons having an interest in property shall be entitled to be represented by counsel of their own selection and their reasonable counsel fees fixed by the court, taxed as a part of the costs and paid by the petitioners."

[1] Eminent domain is the power of the sovereign to take private property for a public purpose on payment of just compensation. *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688. The statute conferring this power upon Urban Redevelopment Commissions provides that the Commission pay counsel fees for the property owner when it is necessary to condemn his property. Such a provision grants more freedom to the property owner to contest condemnation proceedings as it permits him to receive the award for his property, even after legal action, without having it reduced by the payment of attorney fees. It helps to equalize the bargaining power of the property owner and the commission and prevent insofar as possible any undue economic pressures. There must be some control over the amount of the fee, however, and this is found in the requirement that such counsel fees are to be fixed by the court and are to be reasonable in amount. When a statute provides for attorney fees to be awarded as a part of the costs to be paid by the governmental authority which is appropriating the property, it is not a contingent fee, but an amount equal to the actual reasonable value of the attorney's services. *Dumas v. King,* 157 F. 2d 463 (8th Cir. 1946); *Henlopen Hotel Corp. v. Aetna Ins. Co.,* 251 F. Supp. 189 (D. Del. 1966); *Morton County Bd. of Park Comm'rs v. Wetsch,* 136 N.W. 2d 158 (N.D. 1965); *Merchants' Fire Ins. Co. v. McAdams,* 88 Ark. 550, 115 S.W. 175 (1908).

[2] Reasonable counsel fees may be determined in part by the amount of the verdict obtained in the condemnation proceeding in the light of the proposals made to the property owner prior to his employment of an attorney. The results obtained by an attorney are a legitimate consideration in determining the amount of his fee. Under G.S. 160-456(10)(h)(3), however, there is no uncertainty about the payment of an attorney fee commensurate with the services performed. The use by the

court in this case of the contingent fee as the sole guide for a determination of reasonable counsel fees when there is no possibility that the attorney fee may go unpaid does not meet the statutory standard. There are numerous factors for consideration in fixing reasonable attorney fees—the kind of case, the value of the properties in question, the complexity of the legal issues, the time and amount involved, fees customarily charged for similar services, the skill and experience of the attorney, the results obtained, whether the fee is fixed or contingent, all afford guidance in reaching the amount of a reasonable fee. *See* Canon 12, N. C. Canons of Professional Ethics (effective until 31 December 1973) and Disciplinary Rule 2-106(B) of the North Carolina State Bar Code of Professional Responsibility (effective 1 January 1974); *Henlopen Hotel Corp. v. Aetna Ins. Co., supra; Morton County Bd. of Park Comm'rs v. Wetsch, supra;* Annot., 56 A.L.R. 2d 13, 20-50 (1957); Annot., 143 A.L.R. 672, 676-726 (1943).

[3] In this case both the attorney at the first trial, O. B. Crowell, Jr., and the attorney at the second trial, M. John DuBose, had contingent fee contracts with the property owners which were based upon the amount received for the property to be taken in excess of the offer made by the Commission. These fee contracts were binding upon the parties who executed them but not upon the court which, under the statute, fixes the fees to be taxed against a third party, the Redevelopment Commission. Whatever liability the property owners may have to their attorneys under their respective fee contracts may be determined in other actions. Here the court is concerned with an allowance of an attorney fee authorized by statute. From the facts found by the court it seems clear that in fixing the attorney fees undue emphasis was placed upon the contingent fee factor without regard for other considerations when, in reality, there was no contingency involved. It is proper under the statute to consider the results obtained as one of the elements for guidance in reaching the amount of the attorney fee, but, whether there was any recovery or not, counsel for the property owner was entitled to a reasonable fee, and it should not be set upon the basis of a contingency which did not exist. The element of risk in connection with the contingent fee justifies a much larger fee when the litigation is successfully terminated, but here there was no such risk, and the court failed to take this lack of risk into account.

The provision of the judgment of the trial court relating to the award of attorney fees is reversed, and the cause is remanded for a determination of reasonable counsel fees.

Reversed and remanded.

Chief Judge BROCK and Judge CAMPBELL concur.

WILLIAM RALPH LEWIS, EMPLOYEE-PLAINTIFF v. KENTUCKY CENTRAL LIFE INSURANCE COMPANY, EMPLOYER-DEFENDANT

— AND —

THE HOME INDEMNITY COMPANY, CARRIER-DEFENDANT

No. 7314IC471

(Filed 19 December 1973)

1. **Master and Servant § 96— workmen's compensation claim — Industrial Commission findings — conclusiveness on appeal**

   Specific findings of fact of the Industrial Commission which are supported by competent evidence are conclusive and binding on appeal. G.S. 97-86.

2. **Master and Servant § 55— workmen's compensation claim — activity for benefit of employer**

   Basically, whether a plaintiff's workmen's compensation claim is compensable turns upon whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose or that of a third person.

3. **Master and Servant § 61— workmen's compensation claim — act performed for third person — injury compensable**

   Where plaintifff, an insurance collector and salesman for defendant employer, was operating his vehicle in carrying out the duties of his job, observed a policyholder walking along the highway, stopped and determined that she needed gas, took her home, and returned to her vehicle with her husband after obtaining gas, started to enter his own vehicle, and was hit by a vehicle approaching from the rear, plaintiff's injury was sustained in an accident arising out of and in the course of his employment.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission filed 20 February 1973.

Plaintiff employee was injured on 1 March 1972 when he was struck by an automobile on 15-501 Bypass in Durham,

N. C. The parties are subject to the Workmen's Compensation Act and the only question presented by this appeal is whether plaintiff was injured by accident arising out of and in the course of his employment. After a hearing at which plaintiff presented, but defendants did not present, evidence, Commissioner Stephenson made findings of fact, conclusions of law, and entered an award in favor of plaintiff.

The facts pertinent to the question presented by this appeal, as found by Commissioner Stephenson, may be summarized as follows:

In September 1971 plaintiff began work as a debit insurance collector and salesman for defendant employer. He worked out of his home in Durham, N. C., since his employer had no place of business in Durham. He used his own car in his work and paid all of his own automobile expenses out of the weekly commissions paid him by his employer. In his work he collected premiums from his employer's policyholders on a weekly, semiweekly, or monthly basis, and at the same time solicited new business. He was initially employed on a $150.00 weekly drawing account, but was taken off this when his commissions equaled the draw. At the time of the accident, his weekly income was $175.00, said remuneration depending entirely on his collections and salary.

On the night of 29 February 1972 plaintiff went to the home of a Mr. and Mrs. John T. Morehead, policyholders who lived in the Damar Court housing development, for the purpose of collecting a premium. While there, he sold a policy of insurance to a brother-in-law of Mrs. Morehead, who was visiting the Moreheads. This brother-in-law did not have the money with him to pay the premium and told plaintiff he would leave money for the premium with either Mr. or Mrs. Morehead. On this visit plaintiff also discussed with a second brother-in-law the possibility of selling him some insurance but did not consummate that sale. Plaintiff knew the Moreheads only in connection with his work and had no social connection with them.

On the following morning, 1 March 1972, plaintiff commenced work in his home by preparing his company report, which was due in the Raleigh regional office on the following day. After completing this report at approximately 10:30 a.m., plaintiff made calls on several policyholders, and then went to Damar Court to see a former policyholder who had made inquiry

as to whether her policy could be reinstated. After leaving Damar Court, plaintiff started toward the home of a policyholder who wanted claim forms to be filled out. Remembering that he had no claim forms in his car, plaintiff started toward his home to secure them, for that purpose driving north on 15-501 Bypass, which was the most direct route from Damar Court to his home. While so doing, plaintiff observed Mrs. Morehead about one hundred feet away from her vehicle, walking on the shoulder of the road. She had run out of gas and, having no money with her, had started walking to her home, which was about three-fourths of a mile away, to tell her husband. Plaintiff recognized her as one of his policyholders and at the first crossover got into the southbound lane of travel and went to Mrs. Morehead, asking what her problem was. He then carried her to her home, secured her husband, and he and Mr. Morehead then returned to the Morehead vehicle after obtaining gasoline from a service station in the area. Plaintiff stopped his car on the shoulder of the road behind the Morehead vehicle, obtained the gasoline from the trunk of his car, and gave it to Morehead, who told him that he could start the car all right and that plaintiff was free to leave. Morehead offered to pay plaintiff for his aid, but plaintiff refused to accept any money. As plaintiff started to enter his own car, a vehicle approached from the rear out of control and struck plaintiff, knocking him partially under the Morehead vehicle and causing the personal injuries for which compensation is being claimed in this proceeding.

Finding of Fact No. 8 made by Commissioner Stephenson is as follows:

> "8. At the time plaintiff stopped to aid Mrs. Morehead on March 1, 1972, he had reasonable grounds to believe that to help her would be beneficial to his employer's interests, was incidental to his employment, and would advance his employer's work. Plaintiff's injury by accident on the occasion complained of arose out of and in the course of his employment."

On these findings of fact Commissioner Stephenson concluded as a matter of law that plaintiff sustained an injury by accident arising out of and in the course of his employment, and on this conclusion entered an award in plaintiff's favor. On appeal, the Full Commission adopted as its own the findings of

fact, conclusions of law, and the award of Commissioner Stephenson. From this order of the Full Commission, defendants appealed.

Bryant, Lipton, Bryant & Battle by Alfred S. Bryant for plaintiff appellee.

Hedrick, McKnight, Parham, Helms, Warley & Kellam by Philip R. Hedrick for defendant appellants.

PARKER, Judge.

[1] The specific findings of fact of the Industrial Commission are supported by competent evidence. They are, therefore, conclusive and binding on this appeal. G.S. 97-86; *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439.

> "When the specific, crucial findings of fact are made, and the Commission thereupon finds that plaintiff was injured by accident arising out of and in the course of his employment, we consider such specific findings of fact, together with every reasonable inference that may be drawn therefrom, in plaintiff's favor in determining whether there is a factual basis for such ultimate finding." *Guest v. Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E. 2d 596, 599.

Thus, the question presented by this appeal is whether the specific findings of fact, when considered together with such reasonable inferences in plaintiff's favor as may be drawn therefrom, support the ultimate finding and conclusion that plaintiff's injury was sustained by accident arising out of and in the course of his employment. We hold that they do.

[2, 3] "Basically, whether plaintiff's claim is compensable turns upon whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose or that of a third person." *Guest v. Iron & Metal Co., supra.* Under the specific facts established by the findings in this case, we think it apparent that plaintiff acted, not merely to an appreciable extent, but even to a substantial extent, for the benefit of his employer. As a debit insurance collector and salesman plaintiff was engaged in a highly competitive and intensely personalized calling. Proper performance of his duties required that he maintain continual communications with the policyholders who lived in his assigned territory. He delivered policies and attendant forms,

collected premiums at short-term intervals, solicited additional sales, and his regular duties required constant personal contacts with existing and prospective customers. Normally his was the only, and almost always was the most constant, human contact between his employer and its policyholders. To a very great degree their concept of the insurance company, plaintiff's employer, directly reflected their concept of him. To the extent they respected and admired him, they respected and admired his employer. In a real sense, he was the insurance company as far as they were concerned, and any action on his part which built goodwill for him at the same time fostered goodwill for his employer. Goodwill is widely recognized as valuable to any business; it is particularly so to an insurance company.

Any actions of an employee which reasonably tend to build the goodwill of his employer have at least some connection with his employment, and the suggestion has been made that this furnishes at least some rational basis for considering such actions as "arising out of" the employment. Note, Workmen's Compensation—Employer's Goodwill, 33 N. C. Law Review 637. We need not in this case, however, rest our decision upon so broad a basis. The helpful actions in which plaintiff here was engaged at the time of the accident had a more direct and immediate connection with the duties of his employment than merely tending to build a general public goodwill for his employer. Here, plaintiff's actions reasonably tended not only to retain for his employer the business of two existing policyholders, but also tended to promote consummation of specific new business for which negotiations had already begun. Obtaining this specific new business, as well as retaining in effect specific existing policies, was directly dependent upon the goodwill of the very persons whom plaintiff was engaged in assisting at the time of the accident which caused his injuries. Under these circumstances we find the Commission's conclusion that the accident arose out of and in the course of plaintiff's employment fully supported by the specific findings of fact, which are, in turn, fully supported by competent evidence in the record. The order and award appealed from is

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. TOMMY FARRELL DAVIS

No. 7319SC815

(Filed 19 December 1973)

1. **Automobiles § 125; Indictment and Warrant § 17— crime scene — driving after license revoked — no variance in allegation and proof**

In a prosecution for drunken driving, operating a vehicle 80 mph in a 60 mph zone, and operating a vehicle without a license there was no fatal variance between the allegations and the proof where the warrant charged that the offenses occurred in Randolph County and the evidence indicated that they took place within a mile of the town of Asheboro, since the court could take notice that the scene of the crime was in Randolph County; nor was there a fatal variance where the warrant charged defendant with driving without a chauffeur's license rather than an operator's license, since a chauffeur's license is only a form of an operator's license, defendant was fully aware that his privilege to operate a motor vehicle had been revoked and so stipulated.

2. **Criminal Law § 117— charge on treatment of defendant's testimony — no error**

The trial court's instruction that the jury might take into account defendant's interest in the outcome of the case in determining whether to believe his testimony in whole or in part and that such evidence of the defendant as they believed should be treated the same as any other believable evidence was proper.

APPEAL by defendant from *Seay, Judge,* 4 June 1973 Session, RANDOLPH County Superior Court.

The defendant was tried under two separate warrants. In the first warrant the defendant was charged with operating a motor vehicle on a public highway without a license. The second warrant under which the defendant was tried contained two counts. The first charged the defendant with operating a motor vehicle on a public highway while under the influence of intoxicating liquor. The second count charged the defendant with operating a motor vehicle on a public highway at a speed of 80 miles per hour in a 60 mile-per-hour zone. In the district court the defendant was found guilty; and from a sentence of 90 days imprisonment, he appealed to the superior court. In the superior court he was found guilty of all three charges and was sentenced to a term of six months with a recommendation of work release. It was from this sentence that the defendant appealed.

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

Seawell, Pollock, Fullenwider, Van Camp & Robbins, P.A., by P. Wayne Robbins for defendant appellant.

CAMPBELL, Judge.

The evidence on behalf of the State was to the effect that on 3 September 1972, in the early morning hours, State Highway Patrolman McAllister observed a 1967 blue Chevrolet automobile traveling west on U. S. Highway No. 64. The patrol car got behind the Chevrolet and by means of the blue light flashing on top of the patrol car caused the 1967 Chevrolet to pull to the north shoulder of U. S. Highway No. 64 and come to a stop. As the patrolman stopped the patrol car, he was at an angle to the Chevrolet so that he could see through the window into the Chevrolet automobile. He observed two people in the Chevrolet; and at this time, the driver and the passenger in the Chevrolet, exchanged positions without getting out of the Chevrolet. The patrolman observed a small man get out from under the steering wheel of the Chevrolet and a heavy-set person got under the steering wheel and immediately took off from the shoulder of the road. The patrolman pursued with the blue light on and the siren on. The Chevrolet attained speeds of 80 miles per hour, and the speed limit in that area was 60 miles per hour for automobiles. This pursuit lasted for one-half mile when the Chevrolet appeared to slow down. The patrolman began also to slow down; and at this time, the driver of the Chevrolet went to the north shoulder of the highway and then spun the car around and took off in an easterly direction on U. S. Highway No. 64. The patrolman again tried to stop the Chevrolet automobile, but it avoided the patrol car and continued in an easterly direction until it went over a 30-foot embankment. This occurred about 3:30 a.m. at a point about five-tenths of a mile from the Town of Asheboro. The patrolman from the top of the embankment could hear people running through the woods from the Chevrolet car. The patrolman radioed for assistance, and Deputy Sheriff Larry Allen and several patrol cars came to the assistance of Patrolman McAllister. Some fifteen minutes later, the defendant was brought out of the woods by Deputy Sheriff Larry Allen. At that time the defendant was placed under arrest for driving under the influence of an intoxicating beverage. Patrolman McAllister asked the defendant for his operator's license,

and he did not have one. It was stipulated by counsel for the defendant that the defendant had no operator's license but was eligible to get it back. Patrolman McAllister identified the defendant as the heavy-set person whom he had seen driving the Chevrolet automobile.

The defendant introduced evidence to the effect that he was not driving the automobile; that he was the owner of the Chevrolet automobile but was in the backseat drunk and asleep; that a friend, Harvey Trogdon, was doing the driving and that he, Davis, did not know what had happened until after the car had wrecked. The defendant also introduced as a witness Harvey Trogdon, who stated that he had been driving the automobile on the occasion in question and that he did not remember stopping on the highway and that a car was passing when the next thing that he knew was the car he was driving went over the embankment.

[1] The defendant assigns as error the denial of his motion for nonsuit at the close of the State's evidence for that there was a fatal variance between the allegations and the proof. The defendant says that there was no proof that the occurrence was in Randolph County, whereas, the warrants so recited. There is no merit in this exception for that the Court will take judicial notice that U. S. Highway No. 64 five-tenths of a mile from Asheboro is in Randolph County. Asheboro is the County Seat of Randolph County. The defendant further contends a fatal variance in the warrant with regard to lack of an operator's license for that the warrant said, "chauffeur's" license rather than operator's license. There is no merit in this exception for that a "chauffeur's" license is only a form of an operator's license. The defendant was fully aware that his privilege to operate a motor vehicle had been revoked and it was so stipulated.

The defendant further assigns as error the charge of the court to the effect that U. S. Highway No. 64 was a public road in Randolph County at a point five-tenths of a mile from Asheboro. As previously stated, the Court could take judicial notice of this fact. As said in *State v. Vick,* 213 N.C. 235, 195 S.E. 779 (1938):

> "There are many facts of which the court may take judicial notice, and they should take notice of whatever is, or ought to be, generally known within the limits of their

jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind. . . ."

[2] The defendant further assigns as an error the court's instruction to the jury to the effect:

> "Now, the defendant has testified in his own behalf, and you may find that he or some of the other witnesses are interested in the outcome of the trial, and in deciding whether or not to believe such witnesses, you may take the interest that they have into account. If after doing so, you believe his testimony in whole or in part, you treat it, what you believe, the same as any other believable evidence."

This, or a similar admonition, has been approved too many times by the Court to require further discussion. The defendant, in support of this exception, refers to the case of *State v. Ownby,* 146 N.C. 677, 61 S.E. 630 (1908). The *Ownby* case is not in point and is readily distinguishable.

We have considered the other exceptions taken by the defendant and find them without merit.

This case presented a clear question as to the identity of the driver of the Chevrolet automobile involved. The evidence in this regard was conflicting and presented a jury question. The jury accepted the evidence on behalf of the State. We find no prejudicial error in the trial.

No error.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. JAMES CASTLE THOMAS

No. 7318SC764

(Filed 19 December 1973)

1. **Narcotics § 4— possession — *heroin residue in bottle cap***

Evidence tending to show that defendant had possession of a bottle cap containing a heroin residue was sufficient to support defendant's conviction of possession of heroin in violation of G.S. 90-95(a)(3) since the statute makes it unlawful for any person to possess heroin without regard to the amount involved.

2. **Narcotics § 3— possession — usable quantity**

The trial court in a prosecution for possession of heroin did not err in refusing to permit defense counsel to question an SBI chemist as to "what is a usable quantity of heroin" and in refusing to instruct the jury that they must find defendant not guilty if they found he "merely possessed useless traces or residue of narcotics."

3. **Narcotics § 3— possession — exhibiting defendant's arms to jury**

In a prosecution for possession of heroin wherein defendant denied on cross-examination that he had "track marks" on his arms, the trial court did not err in requiring defendant, at the solicitor's request, to take off his jacket and exhibit his arms to the jury since the presence of such marks on defendant's arms was relevant to show his knowledge of and familiarity with the drug he was charged with possessing.

4. **Narcotics § 3— exhibiting defendant's arms to jury second time**

In this posecution for possession of heroin, requirement that defendant exhibit his arms to the jury a second time, while disapproved, did not constitute prejudicial error.

5. **Narcotics § 3— no prejudice from mere question**

In prosecution for possession of heroin, no prejudice resulted from the mere fact that defendant was asked whether he had been shot "over dope," no answer to the question being shown in the record.

APPEAL by defendant from *Lupton, Judge,* 12 February 1973 Criminal Session of Superior Court held in GUILFORD County.

Defendant was charged by indictment, proper in form, with felonious possession of heroin, a violation of G.S. 90-95 (a) (3). He pled not guilty. The State's evidence in substance showed: On the evening of 31 October 1972 two Greensboro Police Officers were on a stakeout watching for a certain automobile for which they held a search warrant. They observed the suspect car come to a stop near the curb and saw defendant walk up to it and engage in conversation with someone in the car. As the officers closed in, defendant stepped back from the car and, taking his left hand out of his pocket, dropped a bottle cap onto the ground. The officers retrieved the bottle cap, which was later delivered to the SBI laboratory in Raleigh. An SBI chemist testified that the residue in the bottle cap contained the substance heroin. On cross-examination the chemist testified that he would estimate the weight of the residue in the bottle cap at "a few milligrams," and that while he did not quantitate the residue, "only a small part of it was heroin."

The jury returned a verdict of guilty, and judgment was imposed sentencing defendant to prison for the term of two years with directions that he be given treatment for drug addiction. From this judgment, defendant appealed.

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

Frye, Johnson & Barbee by Walter T. Johnson, Jr., for defendant appellant.

PARKER, Judge.

[1] Appellant contends that he was entitled to nonsuit on the grounds that the State's evidence disclosed that he possessed at most only a tiny amount of the substance heroin and that possession of such a small quantity should not be considered an offense under G.S. 90-95(a) (3). That statute, however, makes it unlawful for any person to possess "a controlled substance included in any schedule" of the North Carolina Controlled Substances Act without regard to the amount involved. It may be, as defendant contends, that possession of a mere trace of a controlled substance is not in itself one of the evils sought to be suppressed by the Controlled Substances Act. Nevertheless, to interpret the statute as defendant here contends would require that we amend it, a legislative rather than a judicial function. We find no error in denial of defendant's motion for nonsuit.

[2] What we have said above also disposes of appellant's assignments of error directed to the trial court's actions in sustaining the solicitor's objection when defendant's counsel sought to question the SBI chemist as to "[w]hat is a usable quantity of heroin" and in refusing to instruct the jury that they must find defendant not guilty if they found he "merely possessed useless traces or residue of narcotics." The North Carolina Controlled Substances Act as now written simply does not limit its strictures to possession of "usable" or any other specific quantities of the forbidden substances.

[3] During cross-examination of the defendant the solicitor asked, without objection, if he did not have "track marks" on his arms. This the defendant denied. At the solicitor's request and over defendant's objection, the court then required defendant to take off his jacket and exhibit his arms to the jury. In

this we find no error. The presence of such marks on defendant's arms was relevant to show his knowledge of and familiarity with the type of drug which he was charged with possessing in this case. Possession of a bottle cap containing a residue as described in the evidence in this case by a person unfamiliar with the uses of heroin might well be consistent with innocent possession because of lack of knowledge by the possessor of the contraband nature of the article possessed. Possession of such an article by one sophisticated in the use of drugs is quite another matter. Evidence of the marks on defendant's arms was admissible as being relevant to show his prior knowledge. 1 Stansbury's N. C. Evidence, Brandis Revision, § 92. The evidence being relevant, the court committed no error in requiring defendant to show his arms to the jury. *State v. Sanders,* 280 N.C. 67, 185 S.E. 2d 137; *Neely v. United States,* 2 F. 2d 849 (4th Cir. 1924).

[4] Appellant complains because the court, at the solicitor's urging and over defendant's objection, required him to exhibit his arms to the jury a second time. While we do not approve of this procedure, we do not find it so prejudicial as to warrant requiring a new trial in this case.

[5] Defendant, explaining the marks on his arms, testified he had been fed intravenously while hospitalized as result of having been shot by a friend during the course of an argument over money he owed. Whereupon the solicitor asked: "Didn't he shoot you over dope?" Defendant's counsel objected to the question, and while the record shows no ruling on the objection, neither does it show that any answer was given. Without passing upon the propriety of the question on this appeal, we do hold that no prejudicial error has been made to appear from the mere fact that it was asked.

We have carefully reviewed all of appellant's remaining assignments of error and find them without merit. In defendant's trial we find no prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES DANIEL FULCHER

No. 7317SC660

(Filed 19 December 1973)

1. **Homicide § 20— color slides — illustration of medical testimony**

The trial court in a homicide case did not err in the admission of seven color slides for the purpose of illustrating testimony of the medical examiner.

2. **Criminal Law § 34— guilt of another crime — admissibility**

In this homicide case in which the State's evidence tended to show that the victim was beaten to death with a hammer, the court did not err in the admission of evidence that defendant had been convicted for beating deceased with a hammer on another occasion.

3. **Homicide § 20— admissibility of hammer found at crime scene**

Although a hammer found at the scene of a homicide was not specifically identified as the murder weapon, the hammer was properly admitted in evidence in defendant's murder trial where the evidence showed that the victim had been brutally beaten, that there were circular bruise marks over the victim's body, and that defendant had previously beaten the victim with a hammer.

APPEAL by defendant from *Kivett, Judge,* at the 26 March 1973 Session of ROCKINGHAM Superior Court.

This is a criminal action involving an indictment for first-degree murder wherein the State elected to proceed on second-degree murder or a lesser included offense.

The State's evidence showed that on the night of March 28, 1972, the defendant entered the home of the deceased, his girl friend, Ruby Allen Slayton, and found Donnie Caudle who had been with the deceased and others all day. They had been drinking heavily and the deceased was apparently passed out on the bed at the time. The defendant told Caudle, "Don't worry about nothing, sit down, I have caught her with men before." The defendant then sat down at the table and began drinking. Caudle left, leaving the defendant and Ruby Slayton alone.

The next morning the defendant called his foreman, saying he would not come to work that day because of a toothache. The defendant drew out all of his savings that morning and left town. That afternoon, March 29, 1972, the estranged husband of deceased came to the house and found the deceased's

body. She had been brutally beaten. A hammer was found on the refrigerator near the body. There was evidence that two months previously the defendant had beaten the deceased with a hammer. There were uniform circular bruise marks approximately one-half inch in area over the deceased's body. The defendant moved to Baltimore, Maryland, under the name of John Brown. In Baltimore the defendant, on several occasions, told one Terry Hand and Hand's wife and mother that he had killed someone and was wanted for murder. On one occasion the defendant told the Hand family he had killed a man with a whiskey bottle.

In June of 1972 Officer Belluse of the Baltimore Police, who was investigating an assault case, came to the Hand home. The officer was outside calling headquarters when Mr. and Mrs. Hand told Officer Belluse that the defendant had told them he had killed a man. The officer went back inside to talk to Fulcher, and the defendant gave the officer a false name, date of birth, and social security number. The officer went back outside to call in, and the defendant fled out the back door. He was apprehended two doors away under some clothes in a closet. From a verdict of guilty of voluntary manslaughter and a sentence of twenty years, the defendant appealed.

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

Gwyn, Gwyn & Morgan by Melzer A. Morgan, Jr., for the defendant appellant.

CAMPBELL, Judge.

[1] The defendant complains that it was error to admit seven color slides used by the medical examiner to explain and illustrate his testimony. Defendant asserts they were too grotesque, inflammatory and repetitious. We are aware of the decisions in *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1968) and *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). However, we feel that this case is controlled by the general rule that the mere fact that the photographs may be gory, gruesome, revolting or horrible, does not prevent their use by a witness to illustrate his testimony. *State v. Sallie,* 13 N.C. App. 499, 186 S.E. 2d 667 (1972), *cert. denied,* 281 N.C. 316, 188 S.E. 2d 900 (1972); *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967);

State v. Gardner, 228 N.C. 567, 46 S.E. 2d 824 (1948); "Admissibility of Photograph of Corpse in Prosecution for Homicide or Civil Action for Causing Death," 73 A.L.R. 2d 769 (1960).

[2] The defendant next assigns as error the admission into evidence of his conviction for the prior beating of the deceased with a hammer after the defendant had caught the deceased with another man. The defendant asserts that this evidence is inadmissible as tending only to show the identity of the accused. The defendant concedes that this evidence of prior crime would be admissible to show *quo animo,* intent, design, guilty knowledge, or scienter, or to make out the *res gestae,* or to exhibit a chain of circumstantial evidence in respect to the matter on trial, when such crimes are so connected with the offense charged as to throw light on one or more of these questions. Cases discussing this concept are *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972) and *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). We agree with these cases and hold that the evidence was properly admitted.

[3] The defendant next assigns as error the admission into evidence of the hammer found on the scene for that there is no relevant connection between the hammer, the accused, and the decedent. It is true that there was no evidence specifically identifying the hammer as the murder weapon. However, the hammer was found at the scene; there were circular bruise marks over the body of the deceased, and the defendant had previously beaten the deceased with a hammer. The hammer was clearly a part of the chain of circumstances tending to show appellant's guilt. See Stansbury's North Carolina Evidence, Brandis Revision, § 118, p. 356, N. 10, 11 and 12 (1973).

Finally, the defendant assigns as error the denial of his motion for judgment as of nonsuit. Taking the evidence in the light most favorable to the State, we find it to be sufficient.

The charge to the jury is not in the record; and accordingly, we presume it was adequate, full and correct.

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

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES KENNETH BRANDON

No. 7317SC748

(Filed 19 December 1973)

1. **Criminal Law § 75— voluntary statement — admissibility**

In a prosecution for driving under the influence, defendant's statement made after he agreed to take a breathalyzer test that, "What I have been taking won't show up anyway," was voluntary and not the result of any interrogation.

2. **Criminal Law § 88— cross-examination — limitation proper**

The trial court did not erroneously and prejudicially restrict defendant's right of cross-examination by sustaining the solicitor's objection to a question where the witness had previously testified that he did not know the answer to that question and where the record shows that he would have given the same testimony again if allowed to answer.

3. **Constitutional Law § 33; Criminal Law § 102— solicitor's jury argument — no comment on defendant's failure to testify**

Statements by the solicitor in his argument to the jury that he did not know what defendant "had been taking. It is not in evidence." and that "We have many facts and circumstances not contradicted so that we don't need the result of that test from the breathalyzer" did not constitute impermissible comments on defendant's failure to testify.

APPEAL by defendant from *Kivett, Judge,* June 1973 Criminal Session of Superior Court held in SURRY County.

Defendant was charged with driving an automobile upon a public highway while under the influence of intoxicating liquor. He pled not guilty. The State's evidence tended to show that at about 9:40 p.m. on 27 January 1973, Officers Shumate and Hall, in a patrol car on Highway 268, observed a vehicle drive by at high speed. The officers, alerted by the speed of the vehicle, followed for two miles on Highway 268, estimating the vehicle's speed at 70 miles per hour as it weaved back and forth across the center line, before stopping it. The defendant was found to be the driver and sole occupant of the car. Staggering and smelling of alcohol, he was arrested and taken to the county jail, where a breathalyzer test indicated a blood alcohol count of .10 percent. The defendant offered no evidence. Upon verdict of guilty, judgment was entered imposing sentence of four months imprisonment.

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

Franklin Smith and Fredrick Johnson for defendant appellant.

PARKER, Judge.

[1] Defendant contends error in the failure of the trial court to strike Officer Hall's testimony that defendant, after agreeing to take a breathalyzer test, said, "What I have been taking won't show up anyway." Defendant, noting that the testimony of the two officers was in conflict as to whether defendant was warned of his rights before or after making this statement, argues that defendant's statement was an impermissible product of custodial interrogation and that *Miranda* applies. The record discloses, however, that when Officer Shumate asked defendant, after stopping him on the highway, if he wanted to take a breathalyzer test, defendant replied that he did and then gratuitously volunteered the comment above quoted. This and other evidence amply supports the trial court's determination upon voir dire that the defendant's statement "was freely and voluntarily and understandingly given without any attempt on the part of the officer to interrogate him," and was volunteered "and not in response to any interrogation." Under the circumstances of this case, the rules of *Miranda* have no application. This holding also disposes of defendant's contentions that admission of defendant's statement necessitated a mistrial and that the solicitor should not have referred to it during the State's closing argument to the jury.

[2] Defendant contends that the trial court erroneously and prejudicially restricted his right of cross-examination. This contention is without merit. During cross-examination of Officer Shumate, defendant's counsel asked, "Doesn't he [referring to the defendant] normally walk in a sort of loose nonchalant manner?" The court sustained the solicitor's objection to this question. In this we find no error, since the witness had previously testified that he did not know how defendant normally walked. In any event the defendant could have suffered no prejudice from the court's ruling, since the record shows that, had the solicitor's objection been overruled, the witness would have answered, "I don't know because I don't know him personally and don't know how he walks." If defendant was at-

tempting to explain his staggering on the night of the arrest as being chronic rather than alcohol-induced, clearly the excluded testimony would have been of no service.

Appellant's further contention that he suffered prejudicial error because he was not permitted to place the witness's answer in the record until after completion of the trial is also without merit. No sound reason has been advanced as to how the excluded testimony, had it been disclosed to defense counsel while the witness was still on the stand, could possibly have aided counsel in developing by further cross-examination any matter beneficial to the defense.

[3] Finally, defendant contends that the solicitor, in his argument to the jury, impermissibly commented on the defendant's failure to testify. Upon careful review of the solicitor's argument, however, we do not find either the direct or indirect references to the accused's silence as were condemned in *State v. Waddell,* 11 N.C. App. 577, 181 S.E. 2d 737. It was entirely legitimate for the solicitor to argue, as he did in the present case, that he did not know what defendant "had been taking. It is not in evidence." And it was also legitimate for him to argue that the State did not have to rely on the breathalyzer in this case. His further statement to the jury, "We have many facts and circumstances not contradicted so that we don't need the result of that test from the breathalyzer," was not, in our opinion and in view of the circumstances of this case, prejudicial. *State v. Morrison,* 19 N.C. App. 573, 199 S.E. 2d 500. The statements to which defendant now excepts did not, in our opinion, unduly call attention to defendant's failure to testify.

In defendant's trial and in the judgment rendered we find

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. PERRY BYRUM

No. 7320SC803

(Filed 19 December 1973)

Criminal Law § 137— erroneous statement in judgment and commitment — correction — new trial not necessary

Where the indictment charges defendant with possession of heroin for the purpose of sale, the judgment and commitment states that defendant pleaded not guilty to possession with intent to distribute and was found guilty of that crime, and the record shows that defendant actually pleaded not guilty to possession of heroin and that the verdict was guilty of simple possession of heroin, the defendant is entitled to have the judgment and commitment corrected but is not entitled to a new trial since G.S. 90-95 authorizes the same punishment for possession of heroin and possession of heroin with intent to distribute, and the punishment of five years imposed by the trial judge did not exceed the statutory limit for either offense.

APPEAL by defendant from *Winner, Judge,* 7 May 1973 Session of Superior Court held in UNION County.

Defendant was tried upon a bill of indictment charging possession of heroin for the purpose of sale, a violation of G.S. 90-95. Defendant pleaded not guilty to the charge of possession of heroin.

The State's evidence tended to show the following: On 13 July 1972, defendant was riding as a passenger in a taxicab just outside of Monroe, North Carolina. B. M. Lea, Special Agent with the North Carolina State Bureau of Investigation (S.B.I.), assigned to Union County for the purpose of drug investigation, stopped the taxicab in which defendant was a passenger. Before the vehicle had stopped, Lea observed a passenger throwing an object out of the right rear window of the taxicab. Lea retrieved the object, a plastic vial containing 24 aluminum foil packets of a white powdery substance. Lea arrested defendant, charging him with possession of heroin with intent to distribute. Lea transported the seized substance to the S.B.I. Laboratory in Raleigh. An analysis showed the substance to be heroin.

The defendant produced a witness who testified as to the defendant's good character. Defendant testified on his own behalf that on 13 July 1972 defendant and one James Meadows were riding in a taxicab to Monroe; that the taxicab was "boxed-

in" by a Highway Patrol car and another vehicle, forcing the cab to yield to a blue light and siren; and that Lea advised defendant he was under arrest for possession of heroin. Defendant admitted sitting in the right rear passenger seat of the taxicab, but denied any knowledge of the vial or its contents, or having seen the vial thrown from the taxicab.

Robert C. Robinson, driver of the taxicab in question, testified that he picked up defendant and Meadows; that he was stopped by law enforcement agents; and that he did not observe either passenger tossing anything out of the vehicle.

Defendant moved for a directed verdict of not guilty; the motion was denied. A verdict of guilty of possession of heroin was returned by the jury.

Attorney General Morgan and Assistant Attorney General O'Connell for the State.

J. Tyrone Duncan for the defendant.

BROCK, Chief Judge.

Defendant's sole argument on appeal is that the trial judge erred in overruling defendant's motion for a directed verdict of acquittal on the grounds that there was no evidence adduced at trial tending to prove that the purported possession of the heroin by defendant was for the purpose of sale, as charged in the bill of indictment. Defendant contends the evidence presented is only sufficient to support a charge of possession of heroin, thus establishing a fatal variance between pleading and proof. Defendant contends that the crucial element "for purpose of sale," as set forth in the indictment, is lacking in the verdict returned; therefore, the verdict is insufficient to support the judgment.

The indictment in this case charges possession of heroin for the purpose of sale. The record, in showing the plea, judgment and verdict, reflects that defendant entered a plea of "not guilty to the charge of possession of heroin," and that the verdict was "guilty of possession of heroin." The judgment and commitment as signed by the trial judge states that defendant pleaded not guilty to possession of heroin "with intent to distribute" and that defendant was found guilty of possession of heroin "with intent to distribute."

G.S. 90-95 authorizes the same punishment for either possession of heroin, or possession of heroin with intent to distribute. The punishment of five years imposed by the trial judge here did not exceed the statutory limit as prescribed for either offense.

"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." 3 Strong, N. C. Index 2d, Criminal Law, § 167, p. 127.

We find no prejudicial error affecting a substantial right of defendant, entitling him to a new trial. It appears however that the judgment and commitment indicate that defendant was found guilty of possession of heroin with intent to distribute. It seems clear that the plea was only to the charge of possession and that the verdict was guilty of a charge of possession only. Although the authorized punishment is the same, we feel that the record should be conformed to reflect what actually transpired. We therefore remand the case to the Superior Court for a correction of the judgment to show that defendant pleaded not guilty to possession of heroin and that he was found guilty of possession of heroin. In order that the reference to intent to distribute may be stricken, the case is remanded for the purposes stated, but in the trial we find no error.

No error.

Judges MORRIS and CARSON concur.

STATE OF NORTH CAROLINA v. WILLIAM WOOD, DANIEL WARREN AND WILLARD RONALD WILDER

No. 7329SC685

(Filed 19 December 1973)

1. Burglary and Unlawful Breakings § 5— uncorroborated accomplice testimony — sufficiency of evidence

In a prosecution for felonious breaking or entering and possession of implements of housebreaking, evidence was sufficient to be submitted to the jury though it consisted only of the uncorroborated testimony of an accomplice that he and the three defendants broke into a pharmacy.

2. **Jury § 6— examination of prospective jurors — inquiry as to reasonable doubt — limitation proper**

The trial court did not err in refusing to allow defendants' counsel to ask prospective jurors if any one should "wind up and have more than one reasonable doubt, will you let that be known to the other members of the jury?" and "if you should have one single reasonable doubt would you vote to find the defendants not guilty?"

3. **Criminal Law §§ 95, 119— corroborating evidence — failure to request limiting instruction**

Defendants were not prejudiced where they objected to the admission of corroborating evidence but did not request the court to instruct the jury as to its limited use, the solicitor after defendants' objection stated that he offered the evidence for the purpose of corroboration of the witness and for no other purpose, and the court in its charge referred to the corroborative evidence and instructed the jury that it was not to be considered by them as evidence of the truth of statements made at an earlier time.

APPEAL by defendants from *Thornburg, Judge,* May 1973 Session Superior Court, RUTHERFORD County.

The three defendants were charged with felonious breaking or entering. Defendants Wood and Warren were also charged with possession, without lawful excuse, of implements of housebreaking. In addition, defendant Warren was charged with assault on a law enforcement officer with a deadly weapon while the officer was in the performance of his official duties. The jury found each defendant guilty as charged as to each offense. The court, on motion of defendant Warren, set aside the verdict of guilty of assault on a law enforcement officer. The defendants were represented at trial and are represented on appeal by privately retained counsel.

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

George R. Morrow and Carroll W. Walden, Jr., for defendant appellants.

MORRIS, Judge.

[1] By their first argument defendants contend that the court should have granted their motions for nonsuit based on the position that the evidence against the defendants came from an accomplice and was unsupported by other evidence. Defendants concede that the law of this State is as stated in *State v. McNair,* 272 N.C. 130, 157 S.E. 2d 660 (1967):

> " 'It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused.' *State v. Tilley,* 239 N.C. 245, 249, 79 S.E. 2d 473, 476, and cases cited; *State v. Saunders,* 245 N.C. 338, 342, 95 S.E. 2d 876, 879; *State v. Terrell,* 256 N.C. 232, 236, 123 S.E. 2d 469, 472." Id. at 132.

Applying the legal principle stated above, there was evidence which, when considered in the light most favorable to the State, is sufficient to show defendants were active participants in the crimes for which they were tried.

The owner of Cliffside Pharmacy had given a key to a deputy sheriff who entered the store on 10 June 1972 at about 11 o'clock p.m. At approximately 2:30 someone broke and entered the store. The deputy sheriff fired in the direction of that person or those persons. Return shots were fired. Burglary tools were found in the area. William Shaw testified that he knew the three defendants and had participated with them in breaking and entering Cliffside Pharmacy. He gave all the details of the incident and said he was the one who actually forced entry into the store and was the one who was shot in the leg by the deputy sheriff. The jury was properly instructed as suggested in *State v. McNair, supra.* This argument of defendants is without merit.

[2] On voir dire examination of the petit jury by defendants' counsel, he attempted to ask of the jurors whether if any one should "wind up and have more than one reasonable doubt, will you let that be known to the other members of the jury?" The State objected, and the court sustained the objection. He attempted then to ask "Ladies and Gentlemen of the Jury, if you should have one single reasonable doubt would you vote to find the defendants not guilty?" The court again sustained the State's objection. This, defendants contend, constituted prejudicial error. By statute and case law, any party to an action, whether civil or criminal, is entitled to inquire into the fitness and competency of any prospective juror. G.S. 9-15. *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969). Nevertheless, the trial court has broad discretion in the voir dire selection of jurors, *State v. Cameron,* 17 N.C. App. 229, 193 S.E. 2d 485

(1972), and the exercise of the party's right to examine prospective jurors should be carefully supervised by the trial court. *Karpf v. Adams* and *Runyon v. Adams,* 237 N.C. 106, 74 S.E. 2d 325 (1953). We perceive no abuse of discretion in the court's sustaining the objections of the State. The jury was fully and adequately instructed as to reasonable doubt.

[3] Defendants next urge that corroborating evidence was admitted without the court's instructing the jury as to its limited use. Defendants did object to the evidence but did not request a limiting instruction. Bobbitt, C.J., said in *State v. Sawyer,* 283 N.C. 289, 297, 196 S.E. 2d 250 (1973):

> "The general admission of evidence competent for a restricted purpose will not be held reversible error in the absence of a request at the time that its admission be restricted." Quoting 7 Strong, N. C. Index 2d, Trial, § 17.

Additionally, the solicitor after defendants' objection stated: "I offer this for the purpose of corroborating the witness Shaw, if it so does and for no other purpose." The court also in its charge referred to the corroborative evidence and carefully instructed the jury that it was not to be considered by them as evidence of the truth of statements made at an earlier time. We cannot conceive how defendants could possibly have suffered prejudice.

Finally, defendants argue that the court erred in instructing the jury upon the law with respect to assault with a firearm upon a law enforcement officer in the performance of his duties. Assuming *arguendo* that this was error, the charge was specifically limited to defendant Warren and the verdict of guilty of that offense was set aside. Again, no prejudice has been shown.

Defendants have had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and BALEY concur.

DALTON BARBOUR v. LEWPAGE CORPORATION, T/A PAGE HOUSE RESTAURANT AND WILLIAM H. PAGE

No. 732SC180

(Filed 19 December 1973)

Malicious Prosecution § 10; Witnesses § 6— character — collateral issue — specific acts

In a civil action for malicious prosecution based on a charge that plaintiff embezzled funds from a restaurant which he managed, the trial court committed prejudicial error in the admission of testimony by the restaurant hostess that the individual defendant had asked her to visit motels and meet men since the individual defendant's character was not directly at issue and could not be proved by specific acts of bad conduct.

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

Civil action for malicious prosecution. In early March 1971 and for some time prior thereto plaintiff was an employee of the defendant corporation, serving as manager of its Page House Restaurant in Washington, N. C. As such he worked under the general supervision of the individual defendant (Page), who was president of the corporate defendant. On Tuesday morning, 2 March 1971, plaintiff failed to report for work. Page, on finding that plaintiff and certain cash receipts from the restaurant business were missing, signed a criminal complaint charging plaintiff with the felony of embezzling $500.00 belonging to the corporate defendant. The parties stipulated that in so doing he acted as agent of his codefendant and within the scope of his employment. Plaintiff was arrested on this charge, and after a preliminary hearing the District Judge entered a finding of probable cause against him. Subsequently, the grand jury returned a bill of indictment "Not a true bill," and plaintiff was released on 16 August 1971. Thereafter plaintiff instituted this action seeking recovery of compensatory and punitive damages.

The jury found that Page had sworn out the warrant maliciously and without probable cause, and awarded plaintiff $10,000.00 in compensatory damages. From judgment entered on the verdict against both defendants, defendants appealed.

Frazier T. Woolard for plaintiff appellee.

McMullen, Knott & Carter by W. B. Carter, Jr. for defendant appellants.

PARKER, Judge.

The evidence was such as to require a jury determination as to whether there was want of probable cause, and defendants' motions for directed verdict were properly denied. However, for errors in admissions of certain evidence there must be a new trial. We need refer only to one. At the close of defendants' evidence plaintiff recalled one of his witnesses, Mrs. Ruth Dixon. Mrs. Dixon had previously testified that she had been employed at the Page House Restaurant as hostess and cashier during the time plaintiff was manager. On redirect examination plaintiff's counsel asked her:

> Question: "Mrs. Dixon, has Bill Page [referring to the individual defendant] ever in any manner asked you for yourself or anybody else to visit motels and meet men?"

The court overruled defendants' timely objection, and the witness answered, "Yes, sir."

Appellants' contention that in admission of this testimony they suffered prejudicial error must be sustained. There was simply no excuse for such a question. The answer elicited was totally irrelevant to any issue properly raised at the trial. Defendant Page's character was not directly at issue, and "[w]here a person's character is only collaterally in issue, to allow it to be proved by specific acts of good or bad conduct would consume an unreasonable amount of time, distract the jury's attention from the real issues in the case, lead to acrimonious disputes, and unfairly surprise the opponent, who may be presumed to be ready to defend his own general reputation or that of his witnesses, but not to meet specific charges against either without notice." 1 Stansbury, N. C. Evidence, Brandis Revision, § 111. Nor can there be much question as to the prejudicial impact of the testimony in this case; the witness's unequivocally affirmative response came at the close of plaintiff's rebuttal evidence and was immediately underlined when defendants' counsel was forced to recall defendant Page to the stand to deny the accusation. No portion of the upcoming jury charge served to nullify this testimony, which remained fresh in the jurors' minds as they retired for deliberation.

While we hold that the admission of this evidence was error prejudicial to the defendants, had this been the only error at the trial it might not be considered sufficiently prejudicial

to warrant requiring a new trial. There were, however, other errors in the admission of evidence such that the cumulative effect, in our opinion, resulted in denying defendants a fair trial before the jury. However, we do not discuss appellants' other assignments of error, as the questions presented may not arise upon retrial.

New trial.

Judges CAMPBELL and VAUGHN concur.

LEE ROY CABE v. JOHNNIE LOU CABE

No. 7322DC514

(Filed 19 December 1973)

Divorce and Alimony § 18— failure to show dependency of spouse — award of alimony pendente lite error

Where defendant wife offered evidence that she had an income of $300, plus, per month and that she had expenses of a home payment, automobile insurance and property taxes of $116.90 per month, she failed to show that she was a dependent spouse or to show that she did not have sufficient means whereon to subsist during the action and to defray its necessary expenses; therefore, the trial court erred in awarding defendant wife alimony *pendente lite* and counsel fees.

APPEAL by plaintiff from *Cornelius, District Judge,* 29 December 1972 Session of District Court held in DAVIDSON County.

Plaintiff-husband, Lee Roy Cabe, seeks an absolute divorce on the grounds of one year's separation. Defendant-wife, Johnnie Lou Cabe, filed an answer and counterclaim alleging grounds for alimony without divorce in bar of husband's action.

On 29 December 1972 a hearing was held on defendant's motion in the cause for alimony pendente lite and counsel fees. Defendant offered evidence of her employment, partial payments made by defendant on accrued debts and assessments, and assets either owned or in sole possession of the defendant.

The trial court found facts and concluded as a matter of law that defendant-wife is a dependent spouse within the meaning of G.S. 50-16.1(3); that plaintiff-husband is a supporting spouse within the meaning of G.S. 50-16.1(4); that defendant has met the requirements of G.S. 50-16.3 and is entitled to an

award of alimony pendente lite; and that defendant is entitled to an award of counsel fees pendente lite.

The trial court ordered plaintiff to pay the defendant monthly the sum of $101.90 for maintenance and support, to pay the 1972 Davidson County taxes and assessments on the real and personal property of the defendant, and all subsequent real and personal property taxes, and to maintain in effect an automobile liability insurance policy on defendant's 1962 Ford. Plaintiff was also ordered to pay to the attorneys for defendant counsel fees in the amount of $250.00.

Wilson and Biesecker, by Joe E. Biesecker, for plaintiff-appellant.

Klass and Beeker, by Ned A. Beeker, for defendant-appellee.

BROCK, Chief Judge.

G.S. 50-16.3 establishes the requirements for an award of alimony pendente lite. In the first place the applicant must be a dependent spouse. Once it is established that the applicant is a dependent spouse it must appear that such spouse: (1) prima facie, is entitled to the relief demanded in the action (i.e., absolute divorce, divorce from bed and board, annulment, or alimony without divorce); and (2) does not have sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

Conceding, without deciding, that defendant in this case has established, prima facie, the grounds upon which she bottoms her action for alimony without divorce, she has failed to offer evidence to show that she is a dependent spouse or to show that she does not have sufficient means whereon to subsist during this action and to defray its necessary expenses.

The evidence offered upon the hearing shows, and the judgment appealed from finds, the following with respect to the wife's finances:

> She has a net take home pay of $75.00 per week ($300.00, plus, per month).
>
> She has expenses, computed on a monthly basis, of home payment $101.90, auto insurance $6.50, and property taxes $8.50 (a total of $116.90 per month).

It seems obvious that she has other monthly expenses but the court is not permitted to speculate, as to the amount. The courts are not blind to the fact that day to day living is expensive, but each person's situation is different. Each case presents different circumstances and the burden is upon the applicant for alimony, or alimony pendente lite, to offer evidence to establish the need in each case.

Reversed and remanded.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. EUGENE CLANTON, JR.

No. 736SC595

(Filed 19 December 1973)

Assault and Battery § 15; Criminal Law § 114— defendant's admission of crime — instruction improper

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries, the trial court erred in instructing the jury that there was evidence that defendant admitted some of the facts related to the crime, since such instruction assumed a material fact which was not in evidence.

APPEAL by defendant from *Martin (Perry), Judge,* 26 March 1973 Session of Superior Court held in NORTHAMPTON County.

Defendant was charged in a bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injuries.

The State presented evidence which tended to show that on 1 October 1972 at approximately 1:30 a.m. defendant was preparing to leave the B & B Lounge in Jackson, North Carolina; that a group of young males had gathered around the defendant's vehicle, preventing his departure; that defendant got out of his car and engaged in an argument with a member of the group, R. C. Joyner, the prosecuting witness; that defendant shoved Joyner away twice, slapped him, and shot Joyner when he approached defendant a third time.

Defendant, relying upon the right of self-defense, testified in his own behalf that when he emerged from his vehicle to apologize and ask the boys to move, they began to wrap belts around their fists; that he was scared and had tucked a .25 caliber automatic pistol in his pants before emerging from the car; that defendant attempted to shoot over the head of Joyner in an attempt to "scare him off." Defendant then tossed away the weapon and awaited the arrival of the police.

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

Allsbrook, Benton, Knott, Allsbrook and Cranford, by Dwight L. Cranford, for the defendant.

BROCK, Chief Judge.

Defendant contends that the trial court committed prejudicial errors in its jury charge.

The State had introduced as evidence during the trial a voluntary statement made by the defendant to Deputy Sheriff Otis Wheeler. The statement was read into the record by Officer Wheeler as follows:

> "He said he got ready to leave and backed up the car and some boys walked behind my car, and I heard one of the boys say 'What are you going to do, run over me?' So I stopped and got out of my car and told the boys 'I am not going to run over them [sic]. Do you see this big car?' So all of the boys went around the car. One boy come [sic] up in front of the car and said 'You are not going to move the car.' I stepped out and went to the front part of my car and told the boy that I was going to move it, and if he did not move and get out of the way I would run over him. All of the time the boy started toward me, and I pushed him back and he came back to me again and I slapped him. Some more boys were standing around and I told him I was going to move my car and he said 'No, you are not.' At that time, I pulled my gun and shot him. He fell and I tossed the gun across the car."

Defendant specifically excepts to the portions of the jury charge which read as follows:

> "Now there has been some evidence in this case that the defendant, Eugene Clanton admitted some of the facts

related to the crime that he [sic] alleged to have committed. If you find that the defendant has admitted certain facts related to the crime then you should consider all of the circumstances under which his admission was made in determining whether or not it was a truthful statement made by him at a time prior to the time that he came to trial on this day."

The instruction that there was evidence that defendant admitted some of the facts related to the crime was an assumption by the judge of a material fact which was not in evidence. It constituted an expression of opinion that a fact had been proven. Error committed by the court in expressing an opinion on the facts is virtually impossible to cure. 3 Strong, N. C. Index 2d, Criminal Law, § 170, pp. 138-139.

The remaining assignments of error are not discussed because the questions probably will not arise on a new trial.

New trial.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. DONALD L. FLYNN

No. 734SC661

(Filed 19 December 1973)

Indictment and Warrant § 17; Municipal Corporations § 32— giving massage to member of opposite sex — fatal variance

In a prosecution of the manager of a massage parlor for allowing a female person to massage a male person in violation of a city ordinance which applied specifically to a "person holding a license under this article," nonsuit should have been allowed where the evidence showed that defendant was not a licensed operator on the date of the alleged crime.

APPEAL by defendant from *Braswell, Judge,* 12 March 1973 Session, ONSLOW County Superior Court.

Defendant was charged in a warrant with the violation of a town ordinance of Jacksonville, North Carolina, on 29 January 1973, in that he allowed a female person to massage a male

person in a massage parlor of which he was manager in violation of Chapter 15-17, Section 1-10 of the City Ordinance.

From a conviction and sentence in the district court, the defendant appealed to the superior court where he was again found guilty and sentenced to a term of thirty days in jail. It was from this judgment that the defendant appealed to this Court.

Attorney General Robert Morgan by Assistant Attorney General Russell G. Walker, Jr., and Associate Attorney Charles J. Murray, for the State.

Smith, Carrington, Patterson, Follin & Curtis by J. David James and Michael K. Curtis for defendant appellant.

CAMPBELL, Judge.

The evidence on behalf of the State was ample to show that on the evening of 29 January 1973, a police officer of Jacksonville entered the Oriental Massage Parlor and there arrested a female employee who had just completed giving a massage to a male customer. The officer then went next door to a bookstore where he arrested the defendant. The defendant was the manager of the massage parlor and was such on 29 January 1973.

The warrant specifically charged the defendant with violating Section 1-10 of the ordinance. The pertinent part of the ordinance reads as follows:

> "Section 1-10. *Treatment of Persons of Opposite Sex.*
>
> (a) *Restricted.* It shall be unlawful for any person holding a license under this article to treat a person of the opposite sex, except upon the signed order of a licensed physician, osteopath, chiropractor, or registered physical therapist, which order shall be dated and shall specifically state the number of treatments, not to exceed ten (10). . . ."

It is to be noted that this provision of the ordinance, the violation of which the defendant was charged with, specifically applies to a "person holding a license under this article." This provision was alluded to in the charge of the judge where he stated "[t]hat according to a section of the ordinance it shall be unlawful for any person holding a license under this article

to treat a person of the opposite sex." The female operator, who was arrested on this occasion, namely, Barbara S. Bailey, testified on behalf of the State; and among other things, she stated: "On January 29, 1973, we did not have a license from the City of Jacksonville to operate a massage parlor."

The evidence on behalf of the State therefore discloses that the defendant was not a licensed operator as required by Section 1-10 of the ordinance. The defendant was not charged with a violation of Section 1-13 of the ordinance, which section made it a misdemeanor for any person to operate a massage parlor without a license. The evidence on behalf of the State disclosed a violation of Section 1-13 but does not disclose a violation of Section 1-10.

It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged. The allegation and proof must correspond. *State v. White,* 3 N.C. App. 31, 164 S.E. 2d 36 (1968).

There was a fatal variance between the charge contained in the warrant and the evidence. The motion of the defendant for a nonsuit should have been sustained.

Reversed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. J. C. ROBINSON

No. 7327SC820

(Filed 19 December 1973)

Criminal Law § 91— denial of continuance to obtain witnesses

The trial court did not abuse its discretion in the denial of defendant's motion for a continuance to obtain witnesses where defendant's attorney informed the court that he did not know the names of the witnesses, their whereabouts or the substance of their testimony.

APPEAL by defendant from *Martin (Robert M.), Special Judge,* at the 13 August 1973 Criminal Session, CLEVELAND County Superior Court.

The defendant was tried on a bill of indictment, proper in form, charging a felonious escape from the North Carolina Department of Corrections, Subsidiary Unit No. 4635, located in Cleveland County, North Carolina, where the defendant had been serving a sentence for a previous felony.

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

Hamrick & Hobbs by L. L. Hobbs for defendant appellant.

CAMPBELL, Judge.

The evidence on behalf of the State discloses that on Sunday, 15 July 1973, the defendant was serving a sentence in the North Carolina Department of Corrections, Subsidiary Unit No. 4635, located in Cleveland County. The sentence was from five to ten years imposed at the 27 October 1971 Session of the Superior Court of Guilford County for the felony of conspiracy to commit false pretense. About 2:30 p.m., during visiting hours, the defendant escaped and was later apprehended about 10:00 p.m. the same day at a point some two miles away.

On 25 July 1973, counsel was appointed for the defendant and conferred with the defendant. It was determined that the defendant would submit a plea of guilty to the charge. The case was calendared for trial on 21 August 1973, and some 10 or 15 minutes before the case was called for trial, the defendant advised his counsel that he desired to have the case continued to be heard before another judge. In order to accomplish this, the defendant told his attorney that he would enter a plea of not guilty and that he would seek a continuance on the ground that he desired some witnesses whose names he did not know and whose whereabouts he did not know, and neither was he able to inform his attorney as to what testimony he would elicit from them. The attorney did request a continuance, and frankly advised the court that he did not know the names of the witnesses or their whereabouts or the substance of their testimony. The motion for a continuance was denied. The granting of a continuance was within the discretion of the trial judge, and no abuse of that discretion appears in this record.

The appeal presents the face of the record for review. We have reviewed the record, and we find

No error.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. JOE CAMPBELL

No. 735SC822

(Filed 19 December 1973)

Criminal Law § 86— prior convictions — examination of defendant

The solicitor was properly allowed to cross-examine defendant about specific prior convictions without first inquiring as to whether there had been any prior convictions.

APPEAL from *Rouse, Judge,* 21 May 1973 Session of Superior Court held in NEW HANOVER County.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. He entered a plea of not guilty. The jury returned a verdict of guilty of the lesser charge of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to a term of five years imprisonment. From this judgment, he has appealed.

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

Herbert P. Scott for defendant appellant.

BALEY, Judge.

Defendant testified in his own behalf and was cross-examined about prior criminal convictions. He complains in his only assignment of error that the State did not first inquire about whether there were any convictions before proceeding to examine him about the specific convictions—all of which he admitted.

For purposes of impeachment a defendant in a criminal case who takes the stand as a witness in his own behalf may be cross-examined with respect to prior conviction of crime. *State v. Miller,* 281 N.C. 70, 189 S.E. 2d 618; *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534, *cert. denied,* 400 U.S. 946; 1 Stansbury, N. C. Evidence (Brandis rev.), § 112.

While defendant may no longer be asked if he has been *indicted* or *arrested* for a specific offense, *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174, "the decision in *Williams* did not change the rule that for purposes of impeachment a witness may be asked whether he has *committed* specific criminal acts or

been guilty of specified reprehensible conduct." *State v. Gainey,* 280 N.C. 366, 373, 185 S.E. 2d 874, 879; *accord,* 1 Stansbury, *supra,* § 111.

Control of the cross-examination was within the discretion of the trial court, and we find no abuse of discretion.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. LAWRENCE F. HENSON

No. 738SC719

(Filed 19 December 1973)

Criminal Law § 114— corroboration of prosecutrix — expression of opinion in charge

In this prosecution for assault with intent to commit rape, the trial judge expressed an opinion on the evidence when he stated in the charge that three witnesses had corroborated the testimony of the prosecutrix since the question of whether the testimony of a witness corroborates that of another witness is a question of fact for the jury.

APPEAL by defendant from *Martin (Perry), Judge,* 21 May 1973 Session of Superior Court held in WAYNE County.

Defendant was charged in a bill of indictment, proper in form, with the felony of assault with intent to rape. He was found guilty as charged and sentenced to an active term of imprisonment.

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

Turner and Harrison, by Fred W. Harrison, for the defendant.

BROCK, Chief Judge.

The State's evidence was sufficient to support a verdict of guilty as charged.

During the course of the trial judge's instructions to the jury he stated the following:

"Evidence has been received by the State corroborating or tending to show that at an earlier time the prosecuting witness made a statement consistent with her testimony at this trial.

"The court recalls in particular that two friends of hers that she talked to corroborated her testimony in the manner in which I have described and that a deputy sheriff likewise corroborated her testimony by testifying that she told them substantially the same thing at an earlier time when she was not under oath. However, that is for you to determine in your review of the evidence and recollection of all the evidence."

Defendant assigns the foregoing as error in that the trial court expressed an opinion to the jury upon the evidence. This assignment of error is sustained. The error of the positive statement by the trial judge that three witnesses had corroborated the testimony of the prosecuting witness was not cured by the later general statement that it was for the jury to determine. The question of whether the testimony of a witness corroborates that of another witness is a question of fact for the jury. *State v. Byrd*, 10 N.C. App. 56, 177 S.E. 2d 738.

The remaining assignments of error are not discussed because the questions probably will not arise on a new trial.

New trial.

Judges PARKER and VAUGHN concur.

HAZEL BRIDGES CHEWNING v. JASPER C. CHEWNING

No. 7320SC670

(Filed 27 December 1973)

1. Courts § 21— accident in South Carolina — what law governs

The substantive rights and liabilities of the parties are to be determined by the laws of South Carolina in a wife's action against the husband to recover damages for personal injuries sustained by her when the husband's truck, which she was driving, overturned in South Carolina, notwithstanding the only negligence alleged in plaintiff's complaint was defendant husband's failure to warn her of the defective condition of a tire and that negligence first occurred in this State.

2. **Automobiles § 92— automobile guest statute — wife who was driving vehicle**

The mere facts that plaintiff was the wife of defendant and that she was the driver of her husband's vehicle at the time the accident occurred did not preclude her from being his "guest without payment" within the meaning of the South Carolina Automobile Guest Statute.

3. **Automobiles § 92— automobile guest statute — burden of proof**

The occupant of a vehicle who claims that an automobile guest statute is not applicable has the burden of proving that his status was not that of a guest.

4. **Automobiles § 92— wife as guest**

Plaintiff wife was her husband's "guest" while accompanying him in a truck to South Carolina to buy produce for his store where the evidence showed that the truck belonged to the husband and was used by him in his business, in which she had no ownership interest, that she accompanied him only rarely while he used the truck for business purposes, and that she accepted his invitation to accompany him solely for purposes of sociability and companionship.

5. **Automobiles § 92— applicability of guest statute — proof required**

Where the South Carolina Automobile Guest Statute applied, plaintiff could not prevail upon a mere showing of simple negligence but had to show that the accident which caused her injury was either intentional on the part of defendant or that it was caused by his heedless and reckless disregard of the rights of others.

6. **Automobiles § 92; Negligence § 7— automobile guest statute — wanton negligence — operation of vehicle with slick tire**

Evidence that defendant continued operation of his vehicle after he knew one of his tires was slick was insufficient to support a verdict that defendant was guilty of wanton misconduct such as to evince a reckless indifference to the safety of others.

APPEAL by plaintiff from *McConnell, Judge,* 26 February 1973 Civil Session of Superior Court held in ANSON County.

This is a civil action in which plaintiff-wife seeks to recover damages from defendant-husband for personal injuries sustained by her on 17 June 1968 when her husband's pickup truck, which she was driving, overturned in a single car accident on South Carolina Highway #145. The parties are and were at the time of the accident married to each other and reside together as husband and wife in Anson County, North Carolina, in which County plaintiff instituted this action on 10 September 1970. In her original complaint plaintiff alleged that defendant was the owner of the truck, that on and prior to the date of the accident the right rear tire on the truck was "slick, bald, defective and in a dangerous state of disrepair," that defendant knew

of the defective condition of the tire but failed to warn the plaintiff, that defendant requested her to drive the truck and that she agreed to do so without knowing about the defective condition of the tire, and that the right rear tire blew out and caused plaintiff to lose control of the truck so that it overturned and caused her injuries. By amendment to the complaint, which the court allowed plaintiff to file on 26 February 1973, plaintiff alleged that defendant, after having knowledge of, or after by exercise of ordinary care he should have had knowledge of, the defective condition of the tire, did "wilfully and wantonly and in reckless disregard of the rights and safety of others" fail "to replace said defective tire and continued to operate his said motor vehicle on the public highways of South Carolina in said defective condition in violation of the Statutes of South Carolina in such cases made and provided."

Defendant filed answer in which he denied knowledge of any defective condition of the tire, denied that the tire was in fact defective, and, among other defenses, alleged contributory negligence on the part of the plaintiff in failing to inspect the tires after having opportunity to do so and in operating the vehicle after she had the same information as was available to defendant as to any defects in the tire.

At the trial before judge and jury, plaintiff testified in substance to the following:

At the time of the accident she was thirty-eight years old. She and her husband had been married since 1950 and have two children. Her husband owned and operated a produce and grocery store near Lilesville, N. C., and they lived in the back of it. She owned no interest in the business, but she got her "living." She attends her housework and when her husband asks her to help in the store, she does, but he does not pay her any salary nor does she share in any profits of the business. As part of his business, her husband owns a one-half ton pickup truck. He goes to produce markets and she "just occasionally" goes with him. On 17 June 1968 her husband invited her to accompany him to the Columbia, S. C., produce market. Until that date she had not been on a trip with her husband previously during that year. On that day they arrived at the market about 10:30 a.m., and while her husband was loading produce in the truck, she went to a restaurant to get sandwiches for both of them. When she returned, the truck was loaded and the load was covered with a canvas. After the accident her husband told her

he had on the truck 100 watermelons which weighed "about 15 and 20 pounds each," 100 cantaloupes, "that he figured weighed about 3 pounds each" a sack of potatoes, which weighed 50 pounds and a hamper of peas "that generally weighed 20-25 pounds." Prior to the accident her husband did not tell her about the condition of the tire on the truck.

On the return trip at about Camden, S. C., her husband advised her he did not feel too good, pulled off on the roadside, and asked her to drive. She slid over on the seat, and her husband got out and went around the truck and got in on the passenger side. He instructed her to drive "somewhere between forty and fifty." She drove 25 miles to the intersection of U. S. Highway #1 and S. C. Highway #145, and then proceeded north on Highway #145 some fifteen miles. The weather was "real nice and hot," "the temperature was probably 85° or somewhere in that neighborhood," and S. C. Highway #145 along which they were traveling was tar and gravel, hilly in places, and level in other places. When she reached a point a few miles south of Chesterfield, S. C., and while she was driving "around thirty-five and not over forty," and going down a little hill, "all at once it sounded like dynamite exploded and the truck immediately went to her left" and she was unable to hold it. Her husband reached over and took hold of the steering wheel and pulled it back toward the right, and as the truck started to the right, he let go of the steering wheel. The truck went down the shoulder some fifteen or twenty feet, started coming back onto the highway to its left again, and then started turning over, which it did "some three or four times." As a result, plaintiff was injured, was unable to move, and had to be taken out of the truck by the ambulance drivers.

At the scene of the accident and after her husband had gotten out of the truck and walked around it, he came back and told plaintiff that the right rear tire had blown out and caused the accident. She had never had occasion to examine the tires on the pickup. Prior to the accident defendant never told her he had a slick tire on his truck. After the accident he told her that it was slick, a recap, that it should not have been on the truck to begin with, that he should have changed the tire and was intending to do so on the next day, but that he had been busy with farming and hauling peaches and produce and just had not had time to have it changed.

Robert Pickett, a seventeen-year-old boy who occasionally worked part time in the store, testified that he was with the defendant some three weeks prior to the accident when they noticed the tire and "at that time Mr. Chewning stated that the tire needed changing because the rubber was kind of slick."

Herbert Short, operator of Wadesboro Tire Service, testified that he had originally sold defendant the tire, plaintiff's Exhibit #11, identified as being the right rear tire on the truck at the time of the accident, and had recapped it once. Over defendant's objection, this witness was held by the court to be qualified to testify as an expert to give an opinion as to the reason for tire failures. He testified that in his opinion the tire had blown out because it was slick, that a slick tire would run hotter than a tire with a regular tread, that heat builds up pressure in a tire, and that the tire blew out "because it was possibly overloaded."

Defendant, testifying as a witness for the plaintiff, testified in substance as follows: On 17 June 1968 the right rear tire on his truck "was in bad shape but he did not discover that it was in as bad shape as it was until after it blowed out." About a month before the accident, when the truck was jacked up at a service station for an oil change, he looked under it and "noticed that the right rear tire was worn down right bad," and he intended to replace the tire upon seeing the condition it was in. The tire had been on the truck since June 1966, and had been recapped in 1967. He did not remember ever mentioning to his wife before the accident that the right rear tire on the truck was worn out. On 17 June 1968 "he knew that the right rear tire of the truck was worn badly, but he did not realize how bad." He used the truck in his business and many times drove to the Columbia, S. C., produce market. On 17 June 1968 he invited his wife to go with him. That was the first and only time that Mrs. Chewning went with him to the produce market that year. She went with him last year one time. At the time of the accident he had less produce on the truck than he normally had.

Defendant's testimony as to the events leading up to the accident and as to the accident itself was substantially the same as that given by his wife. Defendant was also injured in the accident.

Evidence was also presented as to the nature and extent of plaintiff's injuries.

At the close of plaintiff's evidence, defendant moved for a directed verdict on the grounds that plaintiff's evidence failed to show actionable negligence on the part of the defendant and "even if there was a showing of actionable negligence, there was a clear and distinct showing for contributory negligence." The motion was granted, and from judgment dismissing her claim, plaintiff appealed.

C. Rouse Pusser, E. A. Hightower; and Taylor & McLendon by H. P. Taylor, Jr., for plaintiff appellant.

Leath, Bynum & Kitchin by Henry L. Kitchin for defendant eppellee.

PARKER, Judge.

[1] Plaintiff's right of action being transitory, the substantive rights and liabilities of the parties are to be determined in accordance with the laws of South Carolina, the *lex loci. Frisbee v. West,* 260 N.C. 269, 132 S.E. 2d 609; *Harper v. Harper,* 225 N.C. 260, 34 S.E. 2d 185; *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11; *Howard v. Howard,* 200 N.C. 574, 158 S.E. 101. The suggestion that North Carolina law should control, because the only negligence alleged in plaintiff's complaint was defendant's failure to warn her of the defective condition of the tire and this negligence first occurred in this State, is without merit. If defendant was guilty of negligent failure in that regard, the same negligence continued right up to the moment of the accident. Moreover, defendant could not become liable until the accident and resulting injury occurred, and it is well established "that in law the place of a wrong is in the State where the last event takes place which is necessary to render the actor liable for an alleged tort." *Farmer v. Ferris,* 260 N.C. 619, 627, 133 S.E. 2d 492, 498; see Annotation, Conflict of Laws—Place of Tort, 77 A.L.R. 2d 1266, and Restatement, Conflict of Laws 2d, § 146. Accordingly, we look to the laws of South Carolina for determination of the substantive rights and liabilities of the parties in this case.

The first question presented is whether the South Carolina Automobile Guest Statute is applicable under the circumstances of this case. That statute, § 46-801, South Carolina Code of 1962, in pertinent part reads as follows:

> "§ 46-801. *Liability for injury to guests in car.*—No person transported by an owner or operator of a motor

vehicle as his guest without payment for such transportation shall have a cause of action for damages against such motor vehicle or its owner or operator for injury, death or loss in case of an accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard of the rights of others."

Looking to the laws of South Carolina, we find this statute applicable in the present case.

[2-4] South Carolina, like our own State, recognizes the right of a wife to maintain a tort action against her husband to recover damages for her personal injuries caused by his actionable negligence. *Pardue v. Pardue,* 167 S.C. 129, 166 S.E. 101; *Oshiek v. Oshiek,* 244 S.C. 249, 136 S.E. 2d 303 (recognizing rule). The Automobile Guest Statute has been held applicable by the South Carolina Supreme Court in cases brought by a wife against her husband to recover for injuries received by her while riding in his automobile, thereby tacitly recognizing that a wife, no less than a stranger, may under appropriate circumstances occupy the legal status of "guest" within the meaning of the statute. *Guyton v. Guyton,* 244 S.C. 357, 137 S.E. 2d 273; *Jackson v. Jackson,* 234 S.C. 291, 108 S.E. 2d 86; and see Annotation, 2 A.L.R. 2d 932. While we have found no decision of the South Carolina Supreme Court dealing with the factual situation in which the guest assists in driving the vehicle, at least one court, applying South Carolina law, has held that the mere fact that the plaintiff assisted with the driving would be insufficient to change the status of the plaintiff from that of "guest" within the meaning of the statute. *Kaufmann v. Huss,* 59 N.J. Super. 64, 157 A. 2d 338. This holding is in accord with substantial authority from other jurisdictions having similar statutes, particularly where the circumstances surrounding the parties indicate that the considerations inducing the offer of transportation to the occupant were primarily those of hospitality or sociability. 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 479; Annotation, 39 A.L.R. 3d 1083, Automobiles—Guest Statute—Noncash Payment, § 9(c), p. 1109. It is true that the case now before us presents an unusual factual situation in that plaintiff was driving at the moment the accident occurred, but we see no logical reason why this fact should change her status as a person who was being furnished transportation by the owner of the vehicle "as his guest without

payment for such transportation" within the meaning of the statute, if the other circumstances were such as to indicate that she held that status. Thus, on the basis of the foregoing authorities it is our opinion that under applicable South Carolina law the mere facts that plaintiff was the wife of defendant and that she was the driver of her husband's vehicle at the time the accident occurred did not preclude her from being his "guest without payment" within the meaning of the South Carolina Automobile Guest Statute. The question remains as to whether, under all of the circumstances disclosed by the evidence in this case, she did occupy that status. In this connection, while we find no controlling South Carolina decision on the matter, "it appears to be a well-accepted principle that the occupant of the vehicle who claims that the guest statute is not applicable has the burden of proving that his status was other than that of guest." Annotation, 24 A.L.R. 3d 1400, 1402; *accord, Frisbee v. West, supra.* In the present case we find no evidence to indicate that plaintiff occupied any status other than that of a "guest without payment." Indeed, all of the evidence indicates she was her husband's guest within the meaning of the statute when the accident occurred. The vehicle belonged to him and was used by him in his business, in which she had no ownership interest. Only rarely did she accompany him while he used the vehicle for business purposes. Both plaintiff and defendant testified that on the occasion in question defendant "invited" plaintiff to accompany him, an expression ordinarily used to connote a courtesy extended by a host to a guest, and all of the evidence indicates that she accepted the invitation solely for purposes of sociability and companionship. There being no evidence to indicate otherwise, under the circumstances of this case plaintiff must be considered as having been defendant's "guest" at the time of the accident in which she was injured.

[5] Finding, as we do, that the South Carolina Automobile Guest Statute applies in this case, plaintiff may not prevail upon a mere showing of simple negligence. She must show that the accident which caused her injury was either intentional on the part of defendant, as to which there was clearly no evidence, or that it was "caused by his heedlessness or his reckless disregard of the rights of others." Whether, under the substantive law of South Carolina, the evidence was sufficient to require its submission to the jury is determinable in accordance with the procedural law of this jurisdiction. *Kirby v. Fulbright,* 262 N.C. 144, 136 S.E. 2d 652. Accordingly, we apply our well-established

rule (which apparently is also the rule applied in South Carolina, *Guyton v. Guyton, supra)* that the evidence must be considered in the light most favorable to the plaintiff. When all of the evidence in this case is so considered, we find it insufficient to warrant submitting to the jury an issue as to whether the accident was caused by her husband's "heedlessness or his reckless disregard of the rights of others," as those words have been interpreted by the South Carolina Supreme Court.

In applying the statute the phrase "caused by his heedlessness *or* his reckless disregard of the rights of others" must be construed to read "caused by his heedless *and* reckless disregard of the rights of others." *Fulghum v. Bleakley,* 177 S.C. 286, 181 S.E. 30. Action or conduct in reckless disregard of the rights of others constitutes wanton misconduct, evincing a reckless indifference to consequences to the life, limb, health, or property rights of another. *Fulghum v. Bleakley, supra.*

[6] Viewing the evidence in the light most favorable to the plaintiff, we find that while it might be sufficient to warrant a jury finding defendant guilty of simple negligence in continuing to operate his vehicle when he knew one of the tires was "kind of slick" and was "worn down right bad," the evidence was not sufficient to support a verdict that defendant was guilty of any wanton misconduct such as to evince a reckless indifference to the safety of others. *Saxon v. Saxon,* 231 S.C. 378, 98 S.E. 2d 803, cited and relied on by both parties, in our view supports the defendant's position rather than that of the plaintiff. That case, as this one, involved an accident which occurred when a weak truck tire blew out. In *Saxon,* however, in addition to the condition of the tire, there was evidence that defendant drove his truck with a shifting cargo on a very hot day—98 degrees—at a high rate of speed, and in disregard of warnings of his guest. The court held such evidence sufficient for submission to the jury upon the issue of defendant's heedlessness and recklessness, in so doing laying stress upon the excessive speed with which defendant drove "especially under the circumstances of his weak tire and his shifting load." Nothing in the opinion suggests that the court would find evidence of heedlessness and recklessness sufficient in a case such as is now before us where the only evidence of any negligence on the part of defendant is that he continued operation of his vehicle after he knew one of his tires was slick.

We find defendant's motion for a directed verdict was properly allowed, and the judgment dismissing plaintiff's action is

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES PERRY POTTER

No. 738SC618

(Filed 27 December 1973)

1. **Criminal Law § 29— mental capacity to stand trial**

In determining a defendant's capacity to stand trial, the test is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed.

2. **Criminal Law § 5— insanity as defense — knowledge of right and wrong**

The test of insanity as a defense to an alleged criminal offense is the capacity of the defendant to distinguish between right and wrong at the time of and in respect of the matter under investigation.

3. **Criminal Law §§ 5, 29— mental capacity to stand trial — defense of insanity — sufficiency of evidence**

The trial court in an armed robbery case did not err in finding defendant competent to stand trial and in failing to grant his motion for nonsuit on the ground of insanity where there was competent and substantial evidence from an expert psychiatrist who treated defendant subsequent to his arrest and from eyewitnesses to the crime that defendant knew the difference between right and wrong at the time of the robbery and that he was competent to stand trial.

4. **Criminal Law § 43— photographs — admissibility for illustration**

The trial court in an armed robbery prosecution did not err in allowing into evidence five photographs shown by officers to eyewitnesses of the robbery, one of which the witnesses had identified as a photograph of defendant, since a witness may use a photograph to illustrate his testimony and make it more intelligible to the court and jury.

5. **Criminal Law § 90— *cross-examination of own witness***

The trial court did not err in failing to permit defendant to cross-examine a defense witness who gave testimony that was damaging

to defendant where defendant never requested permission to cross-examine.

6. Criminal Law § 112— burden of proof — instruction proper

There is no set formula that must be used in charging on the burden of proof, but the instructions given in this case properly indicated to the jury that the State must prove defendant guilty beyond a reasonable doubt.

7. Criminal Law § 116— instruction on defendant's failure to testify

When defendant does not request an instruction on his failure to testify, it is better for the court not to give any charge on this subject, but the giving of an unrequested instruction does not constitute error if it correctly states the law.

8. Robbery § 5— armed robbery — felonious intent — instruction required

Though the court in every armed robbery case must instruct the jury on felonious intent, the judge is not required to use the specific words "felonious intent"; he is only required to give a correct description of the state of mind necessary for the crime.

9. Robbery § 5— armed robbery — sufficiency of instruction on felonious intent

Trial court's instruction in an armed robbery case that in order to convict defendant they must find that, at the time he took the property of his victims, he "intended to deprive them of its use permanently . . . [and] knew that he was not entitled to take the property" was an accurate description of the "felonious intent" element of armed robbery.

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

Defendant was charged in separate bills of indictment with the armed robbery of Dallas Mike Hall and Jack Horrell on 29 December 1972 while they were working at the Convenient Food Market in Goldsboro. He was arrested in January 1973 and petitioned on 5 February 1973 to be admitted to Cherry Hospital for psychiatric evaluation. The Superior Court granted his petition, and on February 6 he was taken to Cherry Hospital, where he remained until March 27. Shortly after his release, his case was called for trial in the Superior Court of Wayne County. The court held a hearing on the question of his competency to stand trial. At this hearing the only witness was Dr. Eugene V. Maynard, the Regional Director of Forensic Psychiatry at Cherry Hospital, who testified that in his opinion defendant was competent to stand trial. The court found defendant competent and ordered the trial to proceed.

Dallas M. Hall and Jack Horrell were the chief witnesses for the State. They testified that on the night of 29 December 1972, defendant came into the Convenient Food Market and asked for a job. Hall told him that the store did not need any help, and defendant then pulled out a gun and demanded all the money in the cash registers. Hall and Horrell gave him the money from separate registers—which amounted to $265.00. Both Hall and Horrell identified defendant during their testimony as the man who had robbed them.

Among the other witnesses for the State was R. A. Stocks, a Goldsboro policeman who took part in the investigation of the robbery. He testified that he had shown a group of five photographs to Hall and Horrell and they had correctly identified one as a photograph of defendant. The five photographs were admitted into evidence and shown to the members of the jury.

Defendant's father and adoptive sister testified for him, stating that he had been insane at the time of the robbery. Dr. Maynard was also called as a witness for defendant, but testified that in his opinion defendant did know right from wrong at the time of the robbery.

The jury found defendant guilty in each case of armed robbery, and he was sentenced to consecutive prison terms of 20 to 25 years. He has appealed to this Court.

Attorney General Morgan, by Associate Attorney Norman L. Sloan, for the State.

J. Thomas Brown, Jr., for defendant appellant.

BALEY, Judge.

Defendant asserts as a defense that he was insane at the time of the commission of the crimes charged in the bills of indictment and at the time of trial. He contends that the trial court erred in finding him competent to stand trial, and that it again erred in failing to grant his motion for nonsuit on the ground of insanity.

[1, 2] Incapacity to stand trial and insanity as a defense to a criminal prosecution are two different concepts. Whether a defendant is competent to stand trial depends on his mental condition at the time of trial. " 'In determining a defendant's capacity

to stand trial, the test is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed.' " *State v. Jones,* 278 N.C. 259, 266, 179 S.E. 2d 433, 438; *State v. Propst,* 274 N.C. 62, 70, 161 S.E. 2d 560, 566; *accord, State v. Lewis,* 11 N.C. App. 226, 181 S.E. 2d 163, *cert. denied,* 279 N.C. 350, 182 S.E. 2d 583. Whether a defendant can be held responsible for his illegal act depends on his mental condition at the time the act was committed. "In this state, the test of insanity as a defense to an alleged criminal offense is the capacity of the defendant to distinguish between right and wrong at the time of and in respect of the matter under investigation." *State v. Atkinson,* 275 N.C. 288, 313-14, 167 S.E. 2d 241, 256; *accord, State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516; *State v. Spence,* 271 N. C. 23, 155 S.E. 2d 802, *aff'd mem.,* 392 U.S. 649.

[3] Dr. Eugene V. Maynard, an expert psychiatrist who treated defendant at Cherry Hospital, testified about defendant's mental condition at the hearing on his competency to stand trial, and again during the trial as a witness for defendant. He stated that in his opinion defendant had known the difference between right and wrong at the time of the robbery on 29 December 1972; that when defendant was admitted to Cherry Hospital on February 6, he was suffering from paranoid schizophrenia, a psychotic condition, possibly brought on by the shock of being arrested and jailed; that a drug known as Haldol had been prescribed for defendant at Cherry Hospital; that the drug had brought about a remission in defendant's psychotic condition; and that defendant was now competent to stand trial. In addition to the testimony of Dr. Maynard, Dallas M. Hall and Jack Horrell, the two eyewitnesses to the crime, testified that defendant did not appear to be insane at the time of the robbery. This testimony clearly constitutes competent and substantial evidence in support of the trial court's finding that defendant was competent for trial and its denial of defendant's motion for nonsuit. The court did not err in either of these rulings.

[4] Defendant objects to several of the court's rulings on the admission and exclusion of evidence. First, he contends that the court should not have admitted into evidence the five photographs shown to Hall and Horrell, one of which they identified as a photograph of defendant. This contention is without merit.

"A witness may use a . . . photograph . . . to illustrate his testimony and make it more intelligible to the court and jury." 1 Stansbury, N. C. Evidence (Brandis rev.), § 34, at 93-94; *accord, State v. Johnson,* 280 N.C. 281, 185 S.E. 2d 698; *State v. Preston,* 9 N.C. App. 71, 175 S.E. 2d 705.

[5] Defendant also argues that the court erred in failing to permit him to cross-examine Dr. Maynard, who was called as a defense witness but gave testimony that was damaging to defendant. The trial judge may in his discretion allow a party to cross-examine his own witness, *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473; *State v. Vicks,* 223 N.C. 384, 26 S.E. 2d 873, but only upon request. Here defendant never requested permission to cross-examine Dr. Maynard. In any event the opinion of Dr. Maynard and the information and study of defendant upon which it was based were all in the record of his testimony on direct examination.

[6] Several of defendant's exceptions relate to the court's charge to the jury. One of these has to do with the instructions on the burden of proof. There is no set formula that must be used in charging on the burden of proof, and the instructions given in this case clearly indicated to the jury that the State must prove defendant guilty beyond a reasonable doubt and were entirely proper. *State v. Glatly,* 230 N.C. 177, 52 S.E. 2d 277; *State v. Ray,* 209 N.C. 772, 184 S.E. 836.

[7] The court instructed the jury accurately on defendant's failure to testify. *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733; *State v. Artis,* 9 N.C. App. 46, 175 S.E. 2d 301. When the defendant does not request an instruction on his failure to testify, it is better for the court not to give any charge on this subject; but the giving of an unrequested instruction does not constitute error, if it correctly states the law. *See State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115, *cert. denied,* 404 U.S. 1023.

Defendant contends that the trial judge summarized Dr. Maynard's testimony too briefly. However, the court's discussion of the evidence given by Dr. Maynard takes up 1½ pages of the record and mentions the most important parts of his testimony. It is not necessary and indeed it would be impossible for the judge to restate everything a witness has said. The court must of necessity give the witness's testimony in a shortened, summarized form. *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829.

[8, 9] Defendant asserts that the court failed to instruct the jury on "felonious intent," one of the elements of the crime of armed robbery. "An essential element in robbery cases 'is a "felonious taking," *i.e.*, a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker.' " *State v. Mundy,* 265 N.C. 528, 530, 144 S.E. 2d 572, 574. In every armed robbery case the court must instruct the jury on this element of the crime. *Id.* But the judge does not have to use the specific words "felonious intent"; he is only required to give a correct description of the state of mind necessary for the crime. *State v. Spratt,* 265 N.C. 524, 144 S.E. 2d 569. In this case the court instructed the jury that in order to convict defendant, they must find that at the time he took the property of Dallas M. Hall and Jack Horrell, he "intended to deprive them of its use permanently . . . [and] knew that he was not entitled to take the property." This is an accurate description of the "felonious intent" necessary for armed robbery, and it meets the requirements of the *Mundy* and *Spratt* cases.

The court properly instructed the jury on the issue of insanity. *State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188.

Defendant has received a fair trial free from any prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. DELMAR GROVER MATTHEWS AND JERRY WASHINGTON COLLINS

No. 7317SC826

(Filed 27 December 1973)

1. Robbery § 4— common law robbery — sufficiency of evidence

Evidence in a common law robbery case was sufficient to be submitted to the jury where it tended to show that defendant, who knew his victim, and a companion took the victim a short distance from his home to discuss a matter with him, defendant engaged the victim in conversation while the companion approached him from the rear, the companion hit the victim with a pipe several times, defendant choked

him and stomped on him, and when the victim recovered consciousness later the defendant, his codefendant and the victim's billfold were gone.

2. **Criminal Law §§ 92, 95— joint trial — admissibility of codefendant's confession — no error**

A confession made by a codefendant in defendant's presence while they were both in the same jail cell was admissible where the cases against defendant and his codefendant for common law robbery of the same man were consolidated for trial, though the declarant did not testify, and the rule of *Bruton v. U. S.*, 391 U.S. 123, did not apply to require exclusion of the confession; furthermore, any incrimination of defendant by the codefendant's statement was of insignificant probative value in relation to the mass of competent and admitted evidence against defendant.

APPEAL by both defendants from *Kivett, Judge,* 18 June 1973 Session, SURRY County Superior Court.

Each defendant was charged under a proper bill of indictment with common law robbery. Without objection, the two cases were consolidated for trial. Each defendant entered a plea of not guilty, was found guilty of common law robbery, received a sentence of 10 years in the State's Prison, and noted an appeal.

The evidence on behalf of the State tended to show that Gene Heath, a tobacco farmer in Surry County, was in the habit of carrying large sums of money with him at all times; and this was known to the defendant Matthews. Matthews was a lifelong friend of Heath and had frequently associated with him; had worked for Heath; had been a drinking companion of Heath; and on frequent occasions Heath and Matthews had visited each other; and on occasions Heath had loaned money to Matthews, which Matthews had always paid back. On 4 December 1972, Heath had gone off with an older brother and another friend, and they had been on a drinking spree. During the course of the spree, the three of them had visited various places. About 5:00 p.m. in 5 December 1972, the spree terminated with the older brother bringing Heath back home. As they arrived home, the two defendants were leaving the home of Heath. The older brother left and Heath went over to speak to the two defendants. Heath did not know the defendant Collins, but Matthews introduced them and then invited Heath to have a beer with them. Heath told them that he had been on a spree and felt sick and did not want anthing else to drink. Thereupon, Matthews told Heath that he had a matter that he would like to

discuss with him; and thereupon, the two defendants and Heath got in the automobile driven by the defendant Collins and proceeded a short distance away from the home to a tobacco barn. On arriving at the tobacco barn, Matthews and Heath got out of the automobile and went around the side of the barn, leaving Collins in the automobile. Matthews inquired of Heath as to how his farming operations were progressing. Heath told him; and they were engaged in just a casual conversation with Heath waiting to ascertain what it was Matthews wanted to discuss with him, when Heath heard footsteps behind him and turned just in time to see the defendant Collins with an iron pipe in his hand coming down on the back of Heath's head. Heath was knocked to the ground but not unconscious; and as he started to rise, he was struck again by Collins and then Matthews grabbed him by the throat and then proceeded to stomp Heath while Collins struck him the third time in the back of the head. Heath was rendered unconscious; and when he regained consciousness some fifteen or twenty minutes later, both defendants were gone, together with a billfold from Heath's pocket containing $1,388.00. Heath returned to his home where his wife and daughter took him to Pilot Mountain for medical attention. Before receiving medical attention, however, Heath insisted on stopping by the Police Department and reported the robbery.

Police officers found, at the tobacco barn in question, blood, a piece of pipe some eighteen to twenty inches in length and about three-quarters of an inch in diameter, and a torn pants pocket which had been the pocket in which Heath carried his billfold.

It was about 6:15 p.m. on Tuesday, 5 December 1972, when Heath reported the robbery to the police officers in the police station in Pilot Mountain. Shortly before 8:00 p.m. on the same evening, the defendants were seen in the automobile in which they had been traveling earlier at the Heath home. Collins was still driving the vehicle, and Matthews was in it. They were both placed under arrest, Collins for driving under the influence of an intoxicating liquor, and Matthews for being publicly drunk. Pursuant to these charges, they were both locked up in the same cell in the Pilot Mountain Jail. About 9:30 p.m., Police Officer Stanley went to the cell and proceeded to read to Collins the warrant charging him with robbery. While he was reading the warrant, Collins interrupted to say, "I wish that I had killed the God damn son of a bitch now." Matthews

was in the cell at the time and said nothing understood by Stanley.

When Police Officer Stanley testified to the statement made to him by Collins in the jail cell, the trial judge immediately advised the jury as follows:

> "Now Ladies and Gentlemen, I instruct you that with respect to that statement, that first of all, you have to to determine whether you believe that it was made. If you conclude that it was made, then I instruct you that you may consider it only insofar as it may refer to the defendant Collins, you may not in any way, and I specifically instruct you, don't consider it in any way with respect to the defendant Matthews. It refers solely to Collins and it it would be highly improper for you to consider it in any way against the defendant Matthews."

The defendant Collins did not go on the witness stand, but the defendant Matthews did go up on the witness stand. Matthews testified that he was in the cell with Collins when the warrants were read to both him and Collins. He stated that Officer Manuel read the warrant to him and that another officer read the warrant to Collins. He stated that when the other officer read the warrant to Collins, that Collins stated, "Red, now you know if I had done robbed or rolled anybody or hit them with an iron pipe or anything like that, you know that I would have killed the man, I would have killed the man if I had done something like that." Again, on cross-examination, the defendant Matthews testified:

> "I did not hear Collins say words to the effect of I wish that I had killed the son of a bitch. Collins said to Mr. Manuel, when he read the warrants to him, he said, 'Red, you know if I would have done something like that, rolled a man for his money and hit him,' says, 'I would have killed him.' "

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

Fred E. Lewis III for defendant appellant, Delmar Grover Matthews.

Charles H. Randleman for defendant appellant, Jerry Washington Collins.

CAMPBELL, Judge.

We will treat the two appeals separately.

COLLINS' APPEAL

This appeal presents only the record for review. We have carefully examined the record, including the bill of indictment, plea and the judgment; and we find no prejudicial error appearing therein.

MATTHEWS' APPEAL

[1] There was plenary evidence when considered in the light most favorable to the State to take the case to the jury. There was no error in denying the defendant Matthews' motion for nonsuit.

The defendant Matthews assigns as error the denial of his motion for a severance and mistrial on account of the incriminating statement made by the codefendant Collins.

[2] The defendant relies upon the rule laid down in *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968) and *Roberts v. Russell,* 392 U.S. 293, 20 L.Ed. 2d 1100, 88 S.Ct. 1921 (1968), *reh. denied,* 393 U.S. 899, 21 L.Ed. 2d 191, 89 S.Ct. 73 (1968). We do not think the *Bruton* rule is controlling in the instant case. The statement objected to in the instant case was made in the presence of the defendant Matthews when they were both in the same cell and with each other. *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128 (1959). In *State v. Fox,* 274 N.C. 277, 291, 163 S.E. 2d 492, 502 (1968), the North Carolina Supreme Court, in discussing the *Bruton* rule, stated:

> " . . . The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra),* and (2) that the declarant will not take the stand. . . . "

In the instant case the declarant Collins did not take the stand; but since under the rule of *State v. Bryant* the confession was admissible, the *Bruton* rule does not apply. Furthermore, any incrimination of Matthews by the statement attributed to Collins was of insignificant probative value in relation to the mass

of competent and admitted evidence against Matthews. *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972).

The charge to the jury was unexcepted to and not in the record. It is therefore presumed to be adequate, fair and non-prejudicial.

In the trial of Matthews we find no prejudicial error.

Collins no error.

Matthews no error.

Judges HEDRICK and BALEY concur.

TOWN OF MOUNT OLIVE v. HUBERT PRICE

No. 738SC652

(Filed 27 December 1973)

1. **Municipal Corporations § 30— zoning ordinance — presumption of validity**

   A zoning ordinance is presumed valid and the burden is on the party alleging invalidity to prove that the ordinance is unreasonable and arbitrary.

2. **Appeal and Error § 42— evidence omitted — presumption as to findings**

   When the evidence is not in the record it is presumed that the court's findings are supported by competent evidence and they are conclusive on appeal.

3. **Municipal Corporations § 30— zoning ordinance — necessity for recordation**

   It was not necessary for a municipal zoning ordinance adopted prior to 1 January 1972 to be recorded in the office of the register of deeds in the county in order to become effective. G.S. 160A-2; G.S. 160A-364.

APPEAL by defendant from *Martin (Perry), Judge,* at the 7 May 1973 Civil Session of WAYNE Superior Court.

This is a civil action for the enforcement of the mobile home provisions of the Zoning Ordinances of the Town of Mount Olive. On 29 January 1973, Judge Perry Martin entered an order that defendant was in violation of the ordinance by moving a

mobile home onto his property at 314 North Church Street in the Town of Mount Olive. Judge Martin continued the ruling on the injunction until the matter could be heard on the merits. On 30 April 1973 defendant filed a motion for summary judgment which motion was denied. The hearing on the merits was held before Judge Perry Martin on 7 May 1973. However, there is no record of the plaintiff's evidence. The appellant assigns this omission to the fact that a court reporter was only present to take the testimony of Mrs. Price, the defendant's wife. The judgment of the trial court reads as follows:

> "THIS CAUSE coming on to be heard and being heard before his Honor Perry Martin, Judge presiding over the Courts of the Eighth Judicial District, at the May 7, 1973 Civil Term of the General Court of Justice, Superior Court Division for Wayne County, and the Court after hearing the evidence makes the following findings of fact and conclusions of law:
>
> 1. That the above entitled action was filed by the plaintiff, Town of Mount Olive, on the 15th day of January, 1973, against the defendant, Hubert Price, for violation of Chapter O, Article 2 of the Zoning Ordinances of the Town of Mount Olive and amendments thereto.
>
> 2. That an Answer was duly filed and sworn to by the defendant on the 29th day of January, 1973.
>
> 3. That the plaintiff was in Court and represented by its attorney, Mr. George R. Kornegay, Jr., of Mount Olive, North Carolina.
>
> 4. That the defendant and his wife were present in Court and represented by their attorney, Mr. Douglas P. Connor, of Mount Olive, North Carolina.
>
> 5. That neither the plaintiff nor the defendant made a request for jury trial.
>
> 6. That this matter originally came on for hearing on a Motion for a Temporary Restraining Order before his Honor Perry Martin, Judge presiding over the Courts of the Eighth Judicial District at 2:00 o'clock p.m. on the 29th day of January, 1973, and on that date, the Court after hearing the evidence of the plaintiff and the defendant entered an Order that the mobile home of the defendant

placed on the lot at 314 North Church Street by the defendant was in violation of the Zoning Ordinances and amendments of the Town of Mount Olive; that the defendant had made electrical, water and sewer hookups to said mobile home without first obtaining authority from the Town of Mount Olive and in violation of the Ordinances of the Town of Mount Olive; and the Court continued the issuance of an injunction until the above matter could be heard on its merits at the March 5, 1973 term of Superior Court of Wayne County.

7. That at the March 5, 1973 term of Superior Court of Wayne County, the attorney for the defendant advised the Court that he had to be in Federal Court at that time and the matter was therefore continued.

8. That the matter was set preemptorily [sic] for a hearing of all Motions on the 30th day of April, 1973, and was set preemptorily [sic] for trial on its merits on the 7th day of May, 1973.

9. That the matter came on for hearing on a Motion on the 30th day of April, 1973, after a Motion had been filed for Summary Judgment by the defendant; and at that time the Court after hearing the evidence denied the defendant's Motion for Summary Judgment.

10. That the matter came on for hearing on the merits on the 7th day of May, 1973.

11. That the plaintiff introduced a certified copy of Chapter O, Article 2 (known as the Zoning Ordinance), and all amendments thereto.

12. That it had been previously stipulated that (Exhibit A) attached to the Complaint was a true and exact copy of the Ordinance and amendments thereto as they appear in the Ordinance book of the Town of Mount Olive.

13. That the Court after hearing all the evidence of the plaintiff and the defendant finds as a fact that the defendant has placed said mobile home on his lot at 314 North Church Street within the city limits of the Town of Mount Olive, North Carolina, in violation of Chapter O, Article 2 of the Zoning Ordinance of the Town of Mount Olive.

14. That the defendant has made electrical, water and sewer hookups to said mobile home without first obtaining proper authority from the Town of Mount Olive and in violation of the Ordinances of the Town of Mount Olive.

15. That the plaintiff will be seriously and irreparably damaged if the defendant is allowed to keep said mobile home on the lot at 314 North Church Street in the Town of Mount Olive.

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

1. That the defendant, Hubert Price, has moved a mobile home on to his lot at 314 North Church Street in the Town of Mount Olive on or about the 30th day of September, 1972, in violation of the Zoning Ordinances and amendments of the Town of Mount Olive.

2. That the plaintiff's Motion and application for a permanent injunction against the defendant for moving said mobile home on to his lot at 314 North Church Street and using it for a residence be and the same is hereby allowed and the defendant is hereby restrained and permanently enjoined from keeping said mobile home on his lot at 314 North Church Street in the Town of Mount Olive, North Carolina, and from using said mobile home as a residence.

3. That the defendant shall move said mobile home from the lot at 314 North Church Street in the Town of Mount Olive, North Carolina, prior to the 1st day of July, 1973.

4. That the costs of this action be taxed to the defendant.

This the 7th day of May, 1973.

s/ PERRY MARTIN
Judge Presiding"

From said Judgment, the defendant appealed.

Kornegay & Bruce by George R. Kornegay, Jr., for the plaintiff appellee.

Douglas P. Connor for the defendant appellant.

CAMPBELL, Judge.

[1-3] The defendant has appealed on the grounds that there was no evidence to support the finding by the trial court on 29 January 1973 and 7 May 1973 that the defendant was in violation of a zoning ordinance. The gist of his argument is that there was no violation of the ordinance because there was no valid zoning ordinance at the time in question. However, a zoning ordinance is presumed to be valid and the burden is on the party alleging invalidity to prove that the ordinance is unreasonable and arbitrary. *Orange County v. Heath,* 278 N.C. 688, 180 S.E. 2d 810 (1971) ; *Gastonia v. Parrish,* 271 N.C. 527, 157 S.E. 2d 154 (1967). The evidence before Judge Martin when he entered the order of 29 January 1973 and when he entered the judgment of 7 May 1973, other than the testimony of Mrs. Price, which does not invalidate the ordinance, is not in the record. When the evidence is not in the record it is presumed that the court's findings are supported by competent evidence, and the same are conclusive on this appeal. *Cobb v. Cobb,* 10 N.C. App. 739, 179 S.E. 2d 870 (1971) ; *In Re Sale of Land of Warrick,* 1 N.C. App. 387, 161 S.E. 2d 630 (1968). Mrs. Price testified that she went to the Wayne County Courthouse but could find no record of any mobile home ordinance for the Town of Mount Olive in the Office of the Register of Deeds. Defendant asserts that G.S. 160A-364 is controlling. This statute states that no city ordinance shall become effective until recorded in the Office of the Register of Deeds of each county in which any property directly affected thereby is located. However, the ordinance in question was adopted June 7, 1971. G.S. 160A-364 did not go into effect until December 31, 1971. G.S. 160A-2, Effect Upon Prior Law reads:

> "The enactment of this chapter shall not require the readoption of any city ordinance enacted pursuant to laws that were in effect before January 1, 1972, and are restated or revised herein."

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

ROBERT LEE WOOD, JR., BY HIS GUARDIAN AD LITEM, ROBERT LEE WOOD, SR. v. B. WALTON BROWN, ADMINISTRATOR OF THE ESTATE OF ARCHIE MERRELL CREEF, JR., DECEASED

No. 7319SC20

(Filed 27 December 1973)

1. **Automobiles § 45; Evidence § 51— automobile collision — intoxication of driver — admissibility of blood test results**

In an action by a passenger against the estate of the deceased driver to recover for injuries sustained in an automobile accident, the trial court did not err in allowing into evidence the results of a blood alcohol analysis performed upon a blood sample extracted from the deceased driver's corpse, since that evidence was relevant with respect to defendant's claim that plaintiff was contributorily negligent in riding with the driver after plaintiff knew or should have known of the driver's intoxicated condition, and there was evidence that the blood sample was taken within three hours of the accident, the blood was in fact taken from the body of the driver, and the sample was sealed and delivered to an SBI chemist who was an expert in the field.

2. **Automobiles §§ 90, 129— presumption as to intoxication — instruction in civil action — error**

In an action to recover for personal injuries sustained in an automobile accident where the intoxication of the driver was at issue, the trial court erred in instructing the jury as to the rebuttable presumption created by G.S. 20-139.1 that a person with .10 percent or more by weight of alcohol in his blood is under the influence of intoxicating liquor.

APPEAL by plaintiff from *McConnell, Judge,* May 1972 Session of Superior Court held in RANDOLPH County.

Civil action by a passenger against estate of the deceased driver to recover for personal injuries sustained by the passenger in an automobile accident in which the driver was killed and the passenger injured. Plaintiff alleged that the accident occurred when the driver, driving his vehicle at night on a two-lane blacktop road at a high and dangerous rate of speed in excess of 100 miles per hour, attempted to pass other vehicles around a curve and lost control of his car, which skidded off of the highway and struck a utility pole. Defendant answered that prior to and at the time of the accident the driver was intoxicated, that the plaintiff had been with the driver a considerable period of time prior to the accident and had been with him at the time he purchased and consumed alcoholic beverages, and that after plaintiff knew or by exercise of due care should have

known of the driver's intoxicated condition he had an opportunity to get out of the vehicle but failed to do so. Defendant pled this conduct of plaintiff as contributory negligence.

The jury answered issues of negligence and contributory negligence in the affirmative. From judgment on the verdict dismissing the action, plaintiff appealed.

Ottway Burton for plaintiff appellant.

Smith & Casper by Archie L. Smith for defendant appellee.

PARKER, Judge.

[1] Appellant assigns error in the admission into evidence, over timely objection, of the results of a blood alcohol analysis performed upon the blood sample extracted from the deceased driver's corpse. This evidence was properly admitted. "It is well settled in this jurisdiction that the effect of alcohol in the bloodstream as shown by proper chemical tests is competent evidence on the question of intoxication." *Robinson v. Insurance Co.*, 255 N.C. 669, 122 S.E. 2d 801. Admissibility, however, is conditioned upon "a showing of compliance with conditions as to relevancy in point of time, tracing and identification of specimen, accuracy of analysis, and qualification of the witness as an expert in the field." *Robinson v. Insurance Co., supra.* In the case at bar, the results of the blood alcohol analysis were supported by adequate foundation. According to uncontradicted evidence, the wreck occurred at approximately 8:45 p.m. on 10 May 1969. Creef, the driver, was rushed by ambulance to Randolph Hospital in Asheboro, N. C., where, after treatment in the emergency room, he expired at 10:05 p.m. Creef's body was then taken to the Ridge-McDowell Funeral Home in Asheboro where Mr. Bob Ridge, owner of the funeral home, at the request of a highway patrolman, extracted a blood sample from the deceased's heart "somewhere in the neighborhood of 10:30, 11:00, 11:30 prior to midnight," when the cadaver was placed on the preparation table in the embalming room. The blood sample was then sealed and sent to SBI chemist Glenn Glesne for analysis. Appellant, while admitting that the mortician testified that he "did not . . . insert any extraneous materials into the body prior to the removal of the blood" contends that "proper evidence was sought to be introduced showing injections of over 500 cc substances by the staff at the hospital, in an attempt to save [Creef's] life." Appellant's intimation that the excluded hos-

pital records would have revealed injections which might have raised Creef's blood alcohol content is feckless, as the record indicates not only that these records, in fact, were admitted into evidence but also that the suspect substance was but a sucrose solution, dextran, used in severe shock cases. Appellant's suggestion that the "almost three hours" which elapsed between wreck and sample extraction somehow invalidates the test results is also without merit as there was competent, uncontradicted expert testimony to the contrary. Nor are we impressed with appellant's contention that the mortician lacked the skill needed to perform the relatively simple task of extracting the blood sample. Finally, defendant's argument that the result of a blood alcohol analysis was irrelevant to the issues at trial overlooks qualified expert opinion that the .21 percent reading indicated intoxication at the time of the accident. *Osborne v. Ice Co.*, 249 N.C. 387, 106 S.E. 2d 573; *McNeil v. Williams*, 16 N.C. App. 322, 191 S.E. 2d 916.

Appellant's contention that the court committed error in submitting an issue as to contributory negligence is also without merit. There was ample evidence from which the jury could find that plaintiff voluntarily continued to ride in the vehicle after having reasonable opportunity to leave it and after he knew or in exercise of due care for his own safety should have known that the driver was under the influence of an intoxicant.

[2] However, for error in a portion of the court's instructions to the jury there must be a new trial. Plaintiff testified that the driver was not at any time under the influence of any intoxicating liquor and that the accident occurred only because the driver, after having previously driven in a safe manner, suddenly drove his car at a high rate of speed and continued to do so over plaintiff's protest. Defendant's contention, on the contrary, was that the driver was under the influence of intoxicants and that plaintiff knew this but nevertheless continued to ride with him. Thus, we have here the somewhat unusual situation of the plaintiff-passenger contending that the driver was sober, while the defendant, representing the deceased driver, contends he was intoxicated. After reciting the contentions of the parties, the court instructed the jury as to the rebuttable presumption created by our statute, G.S. 20-139.1, arising from the fact that a person has .10 percent or more by weight of alcohol in his blood. By the express language of the statute, however, it applies "[i]n any criminal action" arising out of acts alleged

to have been committed by a person driving a vehicle while under the influence of intoxicating liquor. By no sound exercise of statutory construction can we take such specific language to authorize the application of the statutory presumption in civil actions. This holding is in accord with the great weight of authority from other jurisdictions. Annotation, 16 A.L.R. 3d 748, § 9, p. 757; *contra, Interstate Life & Ins. Co. v. Whitlock,* 112 Ga. App. 212, 144 S.E. 2d 532.

Appellee suggests that the erroneous instruction resulted in no prejudice to appellant because "there was other ample evidence from which the jury could find that the deceased driver on this occasion was under the influence of an intoxicating beverage at the time of the accident and that plaintiff was or should have been aware thereof." Our review of the record, however, indicates that appellee minimizes the importance of the presumption and exaggerates the strength of the evidence on this point. It was plaintiff's major contention that his injuries resulted from Creef's sudden, unexpected, and unexplained speeding in excess of 100 miles per hour moments before the accident, while defendant at once sought to explain Creef's behavior and to establish plaintiff's contributory negligence through Creef's prolonged and visible intoxication. Thus, the factual issue of Creef's intoxication was of critical importance to the outcome of the lawsuit, and, given the evidence before the jurors, we are not able to say that the erroneous instruction as to G.S. 20-139.1 did not assist the jury in deciding this issue against the plaintiff. Plaintiff is entitled to a

New trial.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN LEWIS WILLIAMS

No. 7321SC733

(Filed 27 December 1973)

1. Criminal Law § 42; Narcotics § 3— identification of heroin — chain of possession

The State sufficiently connected heroin identified at trial by an SBI chemist with white powder purchased by an undercover agent from defendant for the heroin to be admitted in evidence where the

State's evidence tended to show that the substance purchased from defendant was locked in the trunk of the agent's car overnight and taken by him the next morning to a district SBI office where a preliminary test for heroin was conducted, the substance was then placed in a manila envelope and sealed with identifying marks on the envelope, the envelope was returned to the locked trunk of the agent's car and remained there for two days, the agent delivered the envelope and its contents to an SBI chemist in Raleigh, and the chemist delivered them to another SBI chemist who analyzed the substance and identified it at the trial as heroin.

2. **Criminal Law § 114; Narcotics § 4.5— sale of heroin — instructions — analysis of substance sold**

In a prosecution for selling heroin, the trial judge did not assume that a substance tested by a chemist and presented in evidence was the same substance sold by defendant when he charged the jury that the State had offered evidence which "tends to show" that defendant sold a substance that was later analyzed by an SBI chemist as containing heroin.

APPEAL by defendant from *Collier, Judge,* 9 April 1973 Session of Superior Court held in FORSYTH County.

Defendant was indicted for selling heroin to C. E. Douglas on 10 March 1972 at Winston-Salem. He entered a plea of not guilty and was tried before a jury.

The State's evidence consisted of the testimony of the undercover agent, C. E. Douglas, who made the purchase from defendant and the testimony of Charles H. McDonald, the chemist employed by the State Bureau of Investigation who made the chemical analysis and determined that the substance delivered to him by Douglas was heroin.

Defendant offered no evidence.

The jury returned a verdict of guilty and defendant was sentenced to five years imprisonment. From this judgment, he appeals.

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

White and Crumpler, by Fred G. Crumpler, Jr., Michael J. Lewis and Melvin F. Wright, Jr., for defendant appellant.

BALEY, Judge.

[1] The principal contention of the defendant is that the State has failed to connect the heroin which was identified at the trial

by the State chemist with the white powder purchased from him by the undercover agent, Douglas, and that its admission into evidence is error.

Before any articles are admitted into evidence, they must be properly identified. *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (penknife); *State v. Eagle,* 233 N.C. 218, 63 S.E. 2d 170 (bottle of whiskey). "To justify their admission, a proper foundation must be laid, and such articles must be identified as the articles they are purported to be, and shown to be connected with the crime or with accused. . . . " 22A C.J.S., Criminal Law, § 709, p. 949.

In its most favorable light the State's evidence in this case showed the purchase of "almost a spoon of heroin" from the defendant on 10 March 1972 at Winston-Salem. The substance purchased was put in the locked trunk of the agent's car overnight and taken by him the next morning to the district office of the State Bureau of Investigation at Greensboro where a preliminary test for heroin was conducted. The substance was then placed in a manila envelope and sealed with identifying marks on the envelope indicating the case file number, date, time, and initials of agent Douglas, and returned to the locked trunk of the car. The car remained at the Douglas residence for two days and on 13 March Douglas carried the envelope and its contents to Raleigh and delivered them to Thomas H. McSwain, a chemist for the State Bureau of Investigation. It was stipulated that McSwain delivered them to another SBI chemist, Charles H. McDonald, on 14 March. McDonald testified that he made the chemical analysis and that the substance delivered to him was heroin, and he identified it at the trial. While there was some vagueness and confusion in the testimony of agent Douglas, the State's evidence was sufficient as a whole to show a connected tracing of the heroin and to identify it properly for admission into evidence.

[2] Defendant excepts to the following portion of the charge of the court: "The State has offered evidence which tends to show that on March tenth, 1972, the defendant, John L. Williams, sold a substance to Curtis Douglas for a hundred and twenty-five dollars and when that substance was later analyzed by the chemist from the SBI lab in Raleigh, it was determined to contain heroin." Presumably defendant contends that the charge assumes that the substance tested by the chemist and presented in evidence was the same substance sold by defendant.

We do not so interpret it. The court was giving the contentions of the State. The instruction plainly stated that the State's evidence "tends to show" and left it for the jury to determine what the evidence actually did show. There was ample evidence to support this statement of the State's contentions.

The charge when taken in full context properly instructs the jury to consider all the evidence and places the burden upon the State to prove beyond a reasonable doubt that the defendant distributed the heroin.

The verdict of the jury is fully supported by the evidence. Defendant has shown no prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. STEVEN DORUS RUDISILL

No. 7321SC766

(Filed 27 December 1973)

Searches and Seizures § 4— search under warrant — failure to knock and demand admittance

Although officers failed to knock and demand admittance to defendant's apartment before entering it, their search of the apartment pursuant to a warrant was legal where they entered the apartment through an open door, an officer immediately notified the guest who had opened the door that they were "Police officers with a search warrant," and the officer repeated that announcement to the other occupants of the apartment as he came upon them.

APPEAL by defendant from *Lanier, Judge,* 11 June 1973 Criminal Session FORSYTH Superior Court.

In separate bills of indictment, proper in form, defendant was charged with the felonies of possession of the controlled substance marijuana with the intent to distribute and possession of the controlled substance cocaine. Defendant entered pleas of not guilty, was found guilty of possession of cocaine and possession of marijuana, a misdemeanor. From judgment imposing prison term of not less than three nor more than four years, defendant appeals.

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

Renn Drum (Drum and Liner of counsel) for defendant appellant.

BRITT, Judge.

Defendant's sole assignment of error concerns the admission into evidence of the products of a search of an apartment at 130-A Park Circle, Winston-Salem, pursuant to a search warrant. Defendant contends the evidence should have been suppressed as a product of an illegal search in that the officers conducting the search failed to knock and announce their purpose before conducting the search. After *voir dire* to inquire into the legality of the search, the court found that the search warrant was valid and none of defendant's constitutional rights were violated. The evidence in support of this finding shows:

E. P. Oldham (Oldham), a member of the Forsyth County Sheriff's Department, obtained a search warrant in the evening of 11 December 1972 directing a search of 130-A Park Circle, Winston-Salem. At about 8:30 p.m., as Oldham and other officers approached the address, Louis Harley Lucas, III, (Lucas) was coming out of, or about to come out of, the door at the bottom of a flight of stairs leading directly to the apartment above. As Lucas opened the door, Oldham stepped in without knocking and said to Lucas, "Police officers with search warrant." Lucas was detained at the foot of the stairs and advised to remain quiet as Oldham went up the stairs to the apartment proper. At the top landing was an open door, through which he stepped, with pistol drawn, into a den area, announcing, "I'm a police officer with a search warrant." Immediately in front of him on a small table was a loose green vegetable material and rolling papers, which Oldham confiscated. In the room were defendant, who was placed under arrest pursuant to an arrest warrant that had been issued in another case, and three others. After securing those in the room, Oldham advised defendant that he had a search warrant, read the warrant to defendant, and conducted a further search of the premises.

G.S. 15-44 provides: "If a felony or other infamous crime has been committed, or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner,

constable, or police officer, *admittance having been demanded and denied,* to break open the door and enter the house and arrest the person against whom there shall be ground of belief." [Emphasis added.] This appears to be the rule whether the process is a search or an arrest warrant. See *State v. Covington,* 273 N.C. 690, 161 S.E. 2d 140 (1968), citing *State v. Mooring,* 115 N.C. 709, 20 S.E. 182 (1894).

The first question presented here is whether the open door obviated the demand for admittance by first knocking. We think it did. This court in *State v. Shue,* 16 N.C. App. 696, 701, 193 S.E. 2d 481, 484 (1972) has said, "The requirement that a police officer, armed with an arrest warrant or search warrant must demand and be denied admittance before making forcible entry, serves to identify his official status and to protect both the officer and the occupant. *State v. Covington, supra.*" In this instance in which the door was opened and the officer stepped in immediately making announcement to the person opening the door, to require the officer to knock at the open door would require a vain act. The procedure used in this case fulfilled the functional requirements of the rule, i.e., it served to notify the occupants that the entry was of an official nature and not an invasion of protected privacy, and to protect the officer from being treated as a trespasser.

Was then the announcement by Oldham sufficient? We hold that it was. As was held by the United States Supreme Court in *Miller v. United States,* 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed. 2d 1332 (1958), in a case decided under federal law, the burden of making an express announcement is slight. It must fill the functional requirements as stated above and his announcement did.

Was the announcement to the guest, rather than the actual owner, a fulfillment of the rule? In *State v. Heckstall,* 268 N.C. 208, 209, 150 S.E. 2d 213, 215 (1966), we find: "It was the duty of the officers to disclose their authority to the owner, or to the person in charge, before beginning the search in order that they might escape treatment as trespassers." In this case the searching officer made the announcement to the person at the door and repeated it to the other occupants as soon as he came upon them. This fills the requirement that such notice be given as will identify the officer to protect the occupants and the officer.

We conclude that the finding of the trial court after *voir dire* was correct and the evidence admissible.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. GAIL LORRAINE YOUNG

No. 7321SC760

(Filed 27 December 1973)

1. **Criminal Law § 128— question by solicitor — failure to declare mistrial**

The trial court in a prosecution for possession of heroin did not err in failing to declare a mistrial when the solicitor asked defendant whether a codefendant "came home when the police were searching there and found 12 packs of heroin under your house" on another occasion.

2. **Narcotics § 4— possession of heroin — minute amount**

The possession of even a minute amount of heroin constitutes a violation of G.S. 90-95(a)(3).

3. **Narcotics § 4.5— possession of heroin — instructions**

The trial court adequately instructed the jury as to what constitutes possession or constructive possession of heroin.

APPEAL by defendant from *Lanier, Judge,* 11 June 1973 Criminal Session of FORSYTH Superior Court.

Defendant was charged in a bill of indictment, in proper form, with the felonious possession of heroin. She entered a plea of not guilty, the jury returned a verdict of guilty, and from judgment imposing a sentence of not less than two nor more than three years, she appeals.

Attorney General Robert Morgan, by Assistant Attorney General Ann Reed, for the State.

W. Warren Sparrow for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error a question propounded by the district attorney to defendant while testifying in her own behalf. The district attorney was inquiring about a codefendant who had been living with defendant when he asked,

"And she [the codefendant] came home when the police were searching there and found 12 packs of heroin under your house?" Defense counsel objected and moved for a mistrial. The court sustained the objection but denied the motion for mistrial.

Defendant contends that the court at least should have instructed the jury to disregard the question, but, more properly, should have declared a mistrial. We find no rule by which the judge is required to tell the jury to disregard a question, certainly in the absence of a request to so instruct the jury and there was no request here. A motion for mistrial in cases less than capital is addressed to the trial judge's sound discretion and his rulings thereon are not reviewable on appeal in the absence of a showing of a gross abuse of discretion. *State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599 (1966); *State v. Williams,* 7 N.C. App. 51, 171 S.E. 2d 39 (1969). Defendant here has failed to show any abuse of discretion on the part of the court which would warrant a new trial and this assignment is overruled.

[2] On her second assignment of error defendant contends that since the amount of heroin actually found was so minute it did not amount to a violation of G.S. 90-95(a)(3) proscribing the use of such substances. We reject the contention. This section provides: " . . . [I]t shall be unlawful for any person: To possess a controlled substance included in any schedule of this Article." For purposes of this section, no limitation is set of the amount of the controlled substance which must be possessed in order to come within its prohibition. The offense is completed by the possession for any purpose other than those specifically authorized exceptions to the article. This assignment is also overruled.

[3] Defendant's final assignment of error is also without merit. Her contention on this assignment is that the court failed to adequately instruct the jury as to what constituted possession or constructive possession of the controlled substance heroin. A careful review of the charge shows it to be in accord with the instruction approved by this court in *State v. Romes,* 14 N.C. App. 602, 188 S.E. 2d 591, cert. denied, 281 N.C. 627.

No error.

Judges PARKER and VAUGHN concur.

T. A. LOVING COMPANY, PLAINTIFF v. JAMES F. LATHAM, BILL PRICE, M. GLENN PICKARD AND HUGH CUMMINGS III, INDIVIDUALLY AND TRADING AS HOLLY HILL REALTY, A PARTNERSHIP, AND THE WESTERN CORPORATION, ORIGINAL DEFENDANTS, AND AETNA CASUALTY AND SURETY COMPANY, ADDITIONAL DEFENDANT

No. 7315SC740

(Filed 9 January 1974)

1. **Contracts § 16— conditions precedent — insufficiency of evidence**

In a general contractor's action to recover the balance allegedly due for construction of a shopping center wherein the evidence showed that the original construction contract contained no guaranteed maximum construction price, that plaintiff executed a new contract with defendants containing a maximum cost figure in order for defendants to obtain a construction loan, and that defendants signed and delivered to plaintiff a letter in which defendants acknowledged that the maximum cost provision in the reexecuted contract was not binding upon plaintiff and agreed to hold plaintiff harmless if the final cost exceeded that amount, defendants' evidence was insufficient to require submission to the jury of an issue as to whether the letter signed by defendants was to become effective only upon conditions that plaintiff establish and maintain a cost control system which would enable plaintiff to have knowledge of the cost factors during all stages of construction and that plaintiff keep defendants currently informed of all cost data during all stages of construction, the evidence at most indicating no more than an understanding that plaintiff would maintain an accurate cost system and would keep defendants currently informed as the work progressed.

2. **Contracts § 4— reexecuted contract and letter — consideration for agreement in letter**

Where a letter was executed and delivered by defendants simultaneously with a reexecuted construction contract as a part of a single transaction and the letter and reexecuted contract together constituted a single agreement, plaintiff's execution of the reexecuted contract supplied ample consideration to defendants to make the obligations they assumed in the letter contractually binding upon them.

3. **Evidence § 32— parol evidence rule — letter intended as part of agreement**

The parol evidence rule did not render inadmissible a letter executed and delivered simultaneously with a reexecuted construction contract where it is clear the parties intended the letter to be an essential and integral part of their contract, notwithstanding the reexecuted contract was on a printed form containing an express merger clause.

4. **Contracts § 6— reexecuted contract to obtain loan — agreement that cost figure was not binding — failure to inform lender and surety — public policy**

Where the original contract for construction of a shopping center contained no guaranteed maximum construction price, and the general

contractor executed a new contract with the owners containing a maximum cost figure in order for the owners to obtain a construction loan, written agreement by the owners that the maximum cost provision in the reexecuted contract was not binding upon the contractor and that they would hold the contractor harmless if the final cost exceeded that amount was not void as against public policy by reason of the contractor's failure to disclose the existence of the agreement to the lender and to the surety on the contractor's performance bond.

APPEAL by original defendants from *Bailey, Judge,* 9 April 1973 Session of Superior Court held in ALAMANCE County.

This is a civil action in which plaintiff, a general contractor, seeks to recover $1,582,276.28 with interest from 25 September 1970, which plaintiff alleged was the balance owed to it by the original defendants by contract under which plaintiff constructed a large shopping center known as Holly Hill Mall on real property of defendants at Burlington, N. C. The individual original defendants and partnership will hereinafter be referred to simply as the defendants and the additional defendant will be referred to as Aetna. Defendants filed answer which contained a number of affirmative defenses constituting pleas in bar. A separate hearing was had on the Fourth and Fifth Defenses set out in the defendants' answer, and the present appeal is from judgments in favor of plaintiff on those defenses. The facts pertinent to the questions presented by this appeal are summarized as follows:

On 16 May 1968 plaintiff and defendants entered into a written contract for construction of the shopping center, under which plaintiff was to be paid its costs of construction plus a fixed fee of $350,000.00. This contract did not contain any guaranteed maximum construction price. On 16 May 1968 plaintiff and defendants also entered into another contract, collateral to the construction contract, which recites that defendants had obtained a commitment from Wachovia Bank and Trust Company (Wachovia) for a loan of $6,500,000.00 to finance construction of the center, that defendants anticipated such loan would be sufficient to cover the full costs of construction but that plaintiff and defendants were aware that the cost of the project might exceed that amount, and provides that in that event plaintiff would furnish to defendants funds or credit in the form of secondary financing in an amount not to exceed $250,000.00. Copies of these two contracts were delivered to Wachovia by defendants, who shortly thereafter advised plaintiff that Wachovia insisted upon a guaranteed maximum

contruction price. At that time the plans for the shopping center were not yet complete and plaintiff was not willing to give a guaranteed maximum price. However, at request of the defendants, the plaintiff did agree to write a letter to defendants guaranteeing that the construction cost would not exceed $5,500,000.00 (it being understood that $1,000,000.00 of the $6,500,000.00 Wachovia loan was needed for matters other than the construction costs), provided defendants on their part would agree in writing to hold plaintiff harmless if the final cost exceeded $5,500,000.00. In furtherance of this understanding, and on 26 June 1968, plaintiff did write such a letter to defendants, addressing the letter to defendant Latham who was acting in this matter for all of the original defendants, and forwarding this letter to defendants with a second letter, also dated 26 June 1968 and addressed to defendant Latham, containing the following:

> "Enclosed is a copy of the letter confirming our telephone conversation of June 25, 1968 regarding the guaranteed maximum price required by Wachovia Bank and Trust Company.
>
> "In accordance with our verbal agreement, we shall have a written agreement prepared for your signature which would take precedent over the mentioned letter should our final price exceed the $5,500,000.00 figure. Please be assured, however, that we feel this figure is adequate and that we are very optimistic about bringing the final cost in under the quoted maximum."

In a letter dated 11 July 1968 defendants wrote to plaintiff as follows:

> "In confirmation of our oral understanding with you, we acknowledge and agree (i) that your letter addressed to James F. Latham dated June 26, 1968 (copy of which is attached) was delivered without consideration at our request and solely for our benefit in order that financing of the subject project through Wachovia Bank & Trust Company could be obtained; (ii) that such letter was not intended to constitute, and does not constitute, an amendment to or modification of our contract with you dated May 16, 1968 for construction of the subject project; and (iii) that such letter does not represent a binding commitment by you to us. We also ratify and confirm each and every provision of said construction contract dated May 16,

> 1968 and acknowledge an obligation to compensate you for construction of the subject project in the amount and manner specified by the terms and provisions of such contract."

Thereafter, defendants received from Wachovia a construction loan commitment letter dated 9 August 1968 by which Wachovia agreed, on certain conditions, to make a loan to defendants in the amount of $6,500,000.00 to finance construction of the shopping center. This commitment limited the disbursements which could be made to plaintiff during course of the construction and expressly provided:

> "In any event, the $250,000.00 in addition to the normal 5% retainage will be withheld from disbursement since the general contractor has agreed to provide $250,000.00 in secondary financing if necessary. The contract amount must be shown on the contract and should not exceed $5,500,000.00."

By letter dated 15 August 1968 defendants wrote to plaintiff, enclosing copies of Wachovia's construction loan commitment and of Wachovia's long-term commitment, which were both dated 9 August 1968, pointing out to plaintiff that in order for these commitments to be effective it would be necessary for plaintiff to execute a new contract with defendants containing a maximum cost figure and that plaintiff agree to the other requirements set forth in Wachovia's loan commitment letters. At that time plans for the center were still incomplete.

On 19 August 1968 plaintiff and defendants signed a written contract, which they dated 16 May 1968, for construction by plaintiff of the shopping center at cost plus a fixed fee of $350,000.00. This reexecuted construction contract, unlike the first construction contract, contained a provision, Article 6.2, that "[t]he maximum cost to the owner, including the Cost of the Work and the Contractor's Fee, is guaranteed not to exceed the sum of Five Million Five Hundred Thousand and no/100 dollars ($5,500,000.00)." A copy of this document was attached to plaintiff's complaint as Exhibit A, and this instrument will be hereinafter referred to as the reexecuted construction contract or as Exhibit A. At the same time Exhibit A was signed, a letter addressed to plaintiff and dated 19 August 1968 was

signed and delivered by defendant Latham, acting for the Holly Hill Realty partnership, which letter contains the following:

> "In confirmation of our oral understanding with you, we acknowledge and agree (i) that as of this date our contract with you for construction of Holly Hill Mall dated May 16, 1968, has been re-executed in modified form (ii) that you re-executed and modified said contract without consideration at our request and solely for our benefit in order that financing of the subject project through Wachovia Bank and Trust Company could be obtained; (iii) that as re-executed and modified said contract provides in Article 6 for a maximum construction cost of $5,500,000; (iv) that the provision in the re-executed and modified contract with respect to maximum cost does not represent a binding commitment by you to us; and (v) that we will indemnify and hold you harmless from and against any loss on account of and by reason of said maximum construction cost provision."

This letter was subsequently signed by all of the individual defendants. A copy of this letter as signed by all defendants was attached to the complaint as Exhibit B and this letter will hereinafter be referred to as Exhibit B.

As required by Wachovia's construction loan commitment, plaintiff applied for and obtained from Aetna a dual-obligee performance bond, which was dated 19 August 1968, in which plaintiff is principal, Aetna is surety, and defendants and Wachovia are dual obligees. The amount of this bond was $5,500,000.00 and it was conditioned upon performance by plaintiff of all of its agreements under the construction contract.

Plaintiff completed construction of the shopping center in July 1970 at a cost exceeding the maximum specified in Exhibit A. This action was instituted on 14 January 1971. In its complaint plaintiff alleged that in connection with performance of the contract, Exhibit A as modified by Exhibit B, defendants incurred a total indebtedness to plaintiff in the sum of $7,105,351.00, that defendants had paid plaintiff $5,500,000.00 and were entitled to certain other credits and adjustments in the sum of $23,074.72, and that there remained an unpaid balance owed to plaintiff in the sum of $1,582,276.28 with interest from 25 September 1970. Defendants' answer set up a number of defenses and counterclaims, the Fourth and Fifth Defenses being in summary as follows:

Fourth Defense

While admitting that on 19 August 1968 they executed and delivered to plaintiff the letter attached to the complaint as Exhibit B, defendants alleged that Exhibit B was to become effective only upon certain specific conditions, among which were that plaintiff would establish a strict and effective fiscal control system for the project so complete as to enable plaintiff to keep defendants currently informed of all costs data, and that plaintiff would submit each month a detailed statement of such costs and would immediately notify defendant of any indication that $5,500,000.00 would not be sufficient to complete the project in order that defendants could make such design changes or take such other action as might be necessary to keep the construction cost within $5,500,000.00. Defendants alleged that these conditions were conditions precedent, that plaintiff failed to comply with them, and that therefore Exhibit B never became effective and the guaranteed price provision of Exhibit A remained in effect, unmodified.

Fifth Defense

For their Fifth Defense, defendants alleged (1) that there was no consideration to them for delivery of Exhibit B, and (2) that plaintiff did not disclose Exhibit B to Wachovia or to Aetna, which were thereby misled, and that by reason of such conduct Exhibit B is invalid and void as being in contravention of public policy.

Both plaintiff and defendants regarded the Fourth and Fifth Defenses as pleas in bar and asked that these defenses be tried first. Accordingly, the court ordered a separate trial of the matters raised by these two defenses. The parties filed a final pretrial order in which defendants stipulated that the following were the issues arising upon their Fourth Defense:

> "1. Did defendants execute and deliver to the plaintiff Exhibit 'B' on condition that the plaintiff establish and maintain a cost control system that would enable plaintiff to have knowledge of the cost factors during all stages of construction of Holly Hill Shopping Center, and that plaintiff keep defendants currently informed of all cost data during all stages of construction that would affect the cost of construction?
>
> "2. If so, did the plaintiff fail to perform these conditions?"

At the close of evidence offered by defendants, the court allowed plaintiff's motion for a directed verdict in its favor on the Fourth Defense and ordered that the first issue as above set fourth be answered "No."

In the final pretrial order neither party offered an issue of fact as to the Fifth Defense, and subsequently all parties, with concurrence of the court, agreed that all matters arising on the Fifth Defense were for determination by the court. At conclusion of the hearing the court entered an order on the Fifth Defense, making findings of fact, including findings that the letter dated 19 August 1968, Exhibit B of the complaint, had been executed and delivered by defendants simultaneously with the reexecuted construction contract, Exhibit A, "all as one act and as part of a single transaction," that Exhibit B was an integral part of the entire contract and with the reexecuted construction contract constituted a single indivisible agreement, that the simultaneous execution and contemporaneous delivery of the two documents was not intended to defraud and deceive Wachovia or Aetna and in fact did not defraud, deceive or mislead either of them, and that Exhibit B was not invalid and void as being in contravention of public policy. The court concluded and ruled as a matter of law that Exhibit B and the reexecuted construction contract "constitutes a valid contractual agreement between the parties thereto."

From the orders directing verdict in plaintiff's favor on the Fourth Defense and ruling in plaintiff's favor on the Fifth Defense, defendants appealed.

Poyner, Geraghty, Hartsfield & Townsend by John J. Geraghty and Lacy H. Reaves for plaintiff appellee.

Dalton & Long by W. R. Dalton, Jr.; and Latham, Pickard, Cooper & Ennis by T. D. Cooper, Jr., for defendant appellants.

PARKER, Judge.

Fourth Defense Appeal

[1] Defendants admit that they signed and delivered to plaintiff their letter dated 19 August 1968, Exhibit B. As their Fourth Defense against enforcement of the obligations expressly assumed in that letter, defendants allege that the letter was executed and delivered by them to become effective only upon certain specified conditions, which they now assert were condi-

tions precedent, that plaintiff failed to comply with these conditions, and that by reason thereof Exhibit B never became effective. The question presented by plaintiff's motion for a directed verdict on the first issue raised by the Fourth Defense is whether the evidence, considered in the light most favorable to defendants, was sufficient to require submission to the jury of an issue as to whether defendants did in fact execute and deliver the letter to become effective only on the conditions specified. We agree with the trial judge's conclusion that the evidence was not sufficient for that purpose.

Certainly nothing in the letter itself, which appears to have been carefully drawn, suggests that the parties understood and intended that it was to be operative only upon conditions. Nor do appellants here contend that any language appears in any of the other numerous documentary exhibits introduced at the trial which supports their position. Rather, they rely upon portions of defendant Latham's testimony concerning telephone conversations which he had with two officers of plaintiff corporation, D. C. Rouse and Banks McNairy. In particular, appellants point to the following portions of defendant Latham's testimony, which relate to telephone conversations which occurred in the latter part of June 1968:

> "I had conversations with Mr. Rouse and Mr. McNairy both concerning what is referred to in the letter [referring to plaintiff's letter to defendants dated 26 June 1968]. Those conversations took place during the preceding approximately week or ten days. As to what discussions we had, Wachovia wanted a guaranteed maximum price, and I so advised the plaintiff of the fact. The plans were not complete. T. A. Loving was not willing to give a guaranteed maximum price on the shopping center where all the plans were not completed. The bank would not disburse without the price. T. A. Loving was willing to give the letter that Mr. Rouse wrote [again referring to plaintiff's letter to defendants of 26 June 1968 regarding the guaranteed maximum price] if in return we were willing to give Loving a letter guaranteeing them that if the price went over the five and half million dollars, we borrowed from Wachovia, that we would reimburse Loving. We were willing to give Loving this letter on condition that Loving do two things; that they have a cost control system on the job that would let them know where the money was going, where it had

gone, what it was being used for, whether there was enough left to finish, and secondly, that they would let us know if anything happened that looked like it would make that cost go over the five and a half million dollars. I was in Winston-Salem on the 25th [of June 1968]. I met with Wachovia and called Mr. Rouse and told him that we had to have the letter and he said, 'All right, we will give you the letter, and you will have to give us a letter to protect us.'

"I said, 'Good, we will give you that letter in return we expect you to protect us.' I said that they would have to keep a tight control on the cost of Holly Hill, the things that had been discussed last month and above all, let us know if the costs get out of line and looks like it is going over. He said he would do that. He said, 'Yes, Jim, we will.'

"As to my having more than one conversation with members of the T. A. Loving Corporation concerning the cost control system and conditions relating to this letter, I had one the following day with Mr. McNairy, the 27th, the following day. I told him about the telephone conversation. We discussed the telephone call, and I told him that D. C. said he was sending the letter and we discussed the same thing then. Mr. McNairy, the Vice President of the corporation, told me the corporation would establish its control."

The foregoing testimony of defendant Latham all relates to conversations which occurred in June 1968. To tie this testimony in with Exhibit B, which defendants admit was executed and delivered on 19 August 1968, defendants point to the following portion of defendant Latham's testimony:

"As to the conversation I had later, I called Goldsboro on August 8th and again on August 15th, when I knew of the Wachovia commitment, those letters dated August 8th (sic). I do not remember which of the two telephone conversations it was, the 8th or the 15th, Mr. Rouse informed me that, 'we will need a new letter to protect us.' I said, 'Certainly, we will be glad to give you another letter, and remember you have to do the same thing, you promised us in the last letter in July.' and he said, 'We will,' and that was it."

Considering the foregoing testimony in the light most favorable to defendants, the evidence falls short of any showing that the parties understood that Exhibit B was signed and delivered by defendants to become effective only upon conditions. At most the testimony indicates no more than an understanding that plaintiff would maintain an accurate cost control system and would keep defendants currently informed as the work progressed. "Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise. . . ." Restatement of Law, Contracts, § 261, quoted in *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590. This rule of construction applies with particular force in the present case in which appellants attempt to construct a condition precedent not out of the contract documents themselves but from telephone conversations which occurred prior to the time Exhibit B was executed and most of which related to an earlier document which was superseded by Exhibit B.

We also find no merit in appellants' contention that other evidence, which they contend was erroneously excluded by the trial court, would have, either alone or in conjunction with the testimony above referred to, been sufficient to present a jury question on their Fourth Defense. A careful review of the record fails to disclose any excluded evidence which would lend substantial support to defendants' position.

Finally, we note that "the *ante litem motam* practical interpretation of the parties is a safe guide in the interpretation of contracts." *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906. In this connection the record shows that on 27 August 1969, approximately a year after Exhibit B was signed and almost a year and a half before this litigation was commenced, defendant Latham wrote a letter, introduced as Exhibit 40, to Banks McNairy, an officer of plaintiff, which contains the following sentence:

> "As we have indicated on earlier occasions, and because practically everything that is being done at Holly Hill is on a cost plus basis, we hope that the closest possible supervision will be given the labor of the subcontractor."

Again, on 5 September 1969 defendant Latham wrote a letter, introduced as Exhibit 41, to one of the architects for the project,

with copies to Rouse and McNairy, which contains the following:

> "Also, we want this office to have a copy of each week's payroll, not only of T. A. Loving, but also of each subcontractor on the job. Once each week we will want to go over these lists with a representative of your office. *I had thought that our previous request for this information was clear, but apparently there has been some misunderstanding. I am well aware that this can be considered an intrusion by the owners into an area the sole responsibility of the architect and the General Contractor. However, this is not a fixed fee contract, and our interest in the day to day operations is far greater than would otherwise be the case.*" (Emphasis added.)

The attitude expressed in these letters, written long before the present litigation commenced, seems hardly consistent with defendants' present position that the parties had agreed that defendants' obligations under Exhibit B were to become effective only upon compliance with the alleged conditions precedent.

We find no error in the trial court's granting plaintiff's motion for directed verdict on defendants' Fourth Defense.

Fifth Defense Appeal

[2] For their Fifth Defense defendants attempt a twofold attack upon Exhibit B. First, they allege that "there was no consideration to the defendants for the delivery by them to the plaintiff of Exhibit B." In this connection, however, the trial court found on plenary evidence that Exhibit B was executed by the defendants "simultaneously with the reexecuted Construction Contract, . . . and both documents were delivered to the plaintiff by the original defendant, James F. Latham, on behalf of said original defendants through the mail contemporaneously, all as one act and as part of a single transaction." From this the trial court concluded that Exhibit B "was an integral part of the entire contract between the parties and with the reexecuted Construction Contract, . . . constituted a single indivisible agreement." The record fully supports these findings and conclusion. It is readily apparent, therefore, that execution by plaintiff on 19 August 1968 of the reexecuted construction contract, Exhibit A, which the parties dated back to 16 May 1968, supplied ample consideration to defendants to make

the obligations they assumed in Exhibit B contractually binding upon them.

[3] We find without merit defendants' suggestion that Exhibit B was inadmissible, and therefore must be considered legally inoperative, under the so-called parol evidence rule. As has been many times pointed out, the misnamed parol evidence rule "is in reality not one of evidence but of substantive law." 2 Stansbury's N. C. Evidence, Brandis Revision, § 251. As suggested in that treatise, "[t]ranslated into the language of the substantive law, the parol evidence rule may be expressed thus: *Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing.*" Thus viewed, the question is presented here, as in all contract cases in which the rule is invoked, as to whether the parties assented to a particular writing as the complete and accurate "integration" of their contract. See 3 Corbin on Contracts, § 573. In this connection defendants contend that by Article 1 of the reexecuted contract, Exhibit A, the parties incorporated by reference another document, AIA Document A201, "General Conditions of the Contract for Construction," and that this document contains an express merger clause, the effect of which, so defendants argue, is to exclude Exhibit B from consideration as one of the contract documents. Both the reexecuted construction contract, Exhibit A, and the "General Conditions of the Contract for Construction" are on printed forms issued by the American Institute of Architects. While these documents are widely used in the construction industry, both for convenience and because they provide for many of the problems which practical experience has shown may be expected to arise in the course of a construction project, there is nevertheless no magic in the printed word. The problem remains, here as in other contract cases, of ascertaining the true intent and understanding of the parties.

Thus viewed, there can be no question in the present case but that the parties fully intended Exhibit B to be an essential and integral part of their contract. Defendants' own evidence is all to the effect that had defendants not executed Exhibit B, plaintiff would not have executed Exhibit A. Under these circumstances, to permit the standardized language in the printed forms, discovered long after the event by the keen eye of diligent defense counsel, to nullify the clearly understood and expressed intent of the contracting parties, would lead to a

patently unjust and absurd result which neither reason nor authority requires. Indeed, there is substantial authority to the contrary. "When several written contracts are separately and simultaneously executed, the fact that in one of them it is expressly stated that there are no such other contracts does not prevent their being proved and enforced, even though they contain promises and representations that would otherwise be excluded." 3 Corbin on Contracts, § 578, p. 407.

[4] The second attack made by defendants in their Fifth Defense upon the validity of Exhibit B is that it "is invalid and void for being in contravention of public policy." Certainly nothing in the document itself suggests any illegality. The recitations in the document are factually correct and the obligations to which defendants bound themselves are such as could be lawfully undertaken by honorable business men. Defendants do not contend otherwise. Their contention is that the failure of plaintiff to disclose the existence of Exhibit B to Wachovia and to Aetna renders it unenforceable as against defendants. We do not agree. As far as Wachovia is concerned, all of the evidence indicates that defendants, and not the plaintiff, maintained the most direct contacts and relationship. If there was a duty upon plaintiff to disclose Exhibit B to Wachovia, the same duty fell doubly upon defendants. Wachovia's rights are not being litigated in this action and its legal position can be in no way affected by any decision rendered herein. However, so far as the record in the present case reveals, the net result of the transactions disclosed was to place upon the lands on which, under its loan commitment, Wachovia was entitled to hold a first mortgage lien, a shopping center both substantially larger and considerably more expensive than was originally contemplated. It is difficult to see how such a result could have affected Wachovia's position adversely.

On motion of the defendants, Aetna was made an additional party defendant in this case, and Aetna has filed answer asserting its right to revoke its performance bond on the ground that the terms of the construction contract actually existing between plaintiff and defendants were substantially different from the terms of the contract which it was led to believe it was bonding. However that may be, and we emphasize that Aetna's rights are not being determined on this appeal, we point out that in any event the condition of the bond signed by Aetna as surety was such that it became void if plaintiff, as principal, well and

truly performed all of its undertakings under the construction contract. So far as everything in the present record suggests, plaintiff has long since completely performed under that contract.

Whatever effect failure to disclose Exhibit B may have had upon the rights of Wachovia and Aetna, under the present circumstances we perceive no sound reason why good public policy requires that that failure, in which defendants fully participated, should result in defendants being now relieved of their obligations to plaintiff under Exhibit B. We find no error in the trial court's order ruling in plaintiff's favor on defendants' Fifth Defense.

Both orders appealed from are

Affirmed.

Judges CAMPBELL and VAUGHN concur.

WALTER SANDERS, JR., ADMINISTRATOR OF THE ESTATE OF WAVON ATKINSON, DECEASED v. J. FELTON WILKERSON

No. 7311SC549

(Filed 9 January 1974)

1. **Easements § 2— profit a prendre — creation by grant — taking of sand and gravel — no license**

A *profit a prendre,* which is the right to enter upon the land of another and to take therefrom some part or product thereof, cannot be created orally but can only be created by grant; therefore, defendant who entered plaintiff's intestate's land to remove sand and gravel cannot rely on an oral agreement to take his actions from the realm of trespass and move them into the realm of consent, nor can defendant rely on having a license not revoked, since the right to enter land and take gravel is not the proper subject of a license.

2. **Trespass § 8— damages for removal of sand and gravel — good faith of trespasser — no deduction for costs incurred by trespasser**

In an action to recover damages resulting from defendant's allegedly wrongful removal of sand and gravel from the property of plaintiff's intestate where the trial court held that the written agreement between the parties providing for such removal was null and void, defendant was not entitled to reimbursement for costs incident to preparing the area for the taking of the sand and gravel, notwithstanding his honest belief that he had title to them.

3. **Trespass § 8— wrongful taking of sand and gravel — measure of damages**

Where defendant under a written agreement entered plaintiff's intestate's land and removed sand and gravel, but the agreement was subsequently held null and void, neither the trespass nor the conversion was intentional; therefore, the measure of damages was the value of the gravel as it lay on the land immediately after is severance from the realty, with no deduction for the value of the defendant's labor in effecting the severance.

4. **Trespass § 8— wrongful removal of sand and gravel — failure of court to award interest — no error**

Since interest is allowed only when expressly given by statute and there is no express provision made for actions of trover or trespass *de bonis asportatis,* in order to compel the wrongdoer to make full compensation to the injured party, the jury may, in their discretion and as damages, allow interest upon the value of the property from the time of its conversion or seizure, but there is no rule which gives interest as a matter of law and right; therefore, the trial court sitting without a jury acted within its discretion in failing to award plaintiff interest from the date of the wrongful taking of sand and gravel from his intestate's property.

Judge BALEY dissenting.

APPEAL by plaintiff and defendant from *Canaday, Judge,* 26 February 1973 Session of Superior Court held in JOHNSTON County.

This action was brought to recover damages resulting from defendant's allegedly wrongfully removing sand and gravel from the property of plaintiff's intestate.

Plaintiff's complaint alleged that defendant wished to remove sand and gravel from his land, the sand and gravel being necessary in the construction of certain oil bulk tanks in the immediate vicinity. Wavon Atkinson (Atkinson) advised defendant that there was a mortgage on the property. Defendant suggested that made no difference, but he would want a written agreement with respect to the exclusive right to dig on the 10-to-15-acre portion designated; that if any cropland was used an equal amount of land would be cleared by defendant. A written agreement was prepared by defendant. Atkinson alleged his signature was obtained by fraud; that the agreement purported to be an absolute conveyance in fee of Atkinson's property with defendant having right to dig for sand and gravel without limitation; that it failed to provide for royalties to Atkinson. Atkinson further alleged that since September 1966 defendant had, personally and through named other persons, entered on

his lands and removed large quantities of dirt, sand and gravel without accounting to Atkinson therefor; that dirt, sand and gravel had been removed from cropland and an equal amount had not been cleared. Atkinson alleged that the purported contract was without consideration and acquired fraudulently, was null and void and should be cancelled of record. He further alleged that because of "the continued trespassing upon his land by the defendant and the waste committed thereon," he was entitled to a restraining order, actual damages of at least $28,000, and punitive damages of at least $50,000.

Defendant answered, admitting Atkinson's ownership of the land, admitting the contract, denying it was obtained by fraud and without consideration, averring that the recorded contract was a valid agreement, denying any trespass or waste and entitlement to damages. As an affirmative defense, defendant pled estoppel. By way of counterclaim, he asked for $401 allegedly due him by Atkinson for sand and gravel sold by Atkinson from the lands.

By interrogatories answered by defendant it was established that defendant considered the agreement a mining lease and royalty agreement; that he did not consider himself obligated regularly to remove sand and gravel from the lands; that he contended he had paid Atkinson $4103.22; that approximately 45,000 yards of sand and gravel had been removed; that other people, naming them, had been upon Atkinson's land under authorization of defendant and removed sand and gravel and had paid defendant therefor; that Atkinson was to receive $0.10 per cubic yard for the material as it lay in the pit; that defendant had received a total of $8,667.53 for the sand and gravel removed from Atkinson's land.

Atkinson moved for summary judgment upon the ground that the written agreement was null and void and asking that the court declare the written agreement "to be null and void as a matter of law and that the court submit to the jury an issue as to the amount of damages, both actual and punitive, to which plaintiff is entitled." Judge Bailey entered an order finding that no consideration was given for the execution of the instrument, that it was vague and indefinite as to time of performance and as to the area involved. The order further provided that the agreement "is null and void, and that therefore plaintiff is entitled to the relief prayed for in his Motion for Summary Judgment." Judge Bailey ordered the agreement stricken from the

record. This Court affirmed Judge Bailey's order. *Atkinson v. Wilkerson,* 10 N.C. App. 643, 179 S.E. 2d 872 (1971). Thereafter, the plaintiff having died, Walter Sanders, Jr., as administrator of the estate of Wavon Atkinson, was substituted as party plaintiff.

After the opinion of this Court was certified to the Superior Court, plaintiff filed a motion for summary judgment for liquidated damages in the amount of $4,484.31 and for judgment in favor of plaintiff on defendant's counterclaim. In support of his motion, plaintiff urged that the written agreement had been held to be null and void; that in answer to interrogatories defendant had admitted the total sales of $8,667.53 and that he had paid Atkinson $4,183.22; that based upon defendant's admission, the value of plaintiff's land was reduced by at least $8,667.53 and defendant was entitled to a credit of $4,183.22; that since defendant's counterclaim was based on an agreement held to be null and void, plaintiff was entitled to judgment on the counterclaim.

Defendant answered the motion averring that even though the agreement was null and void, Atkinson understood its terms and consented over the period of time to the entry of defendant and his agents on Atkinson's lands; that defendant constructed a haul road over Atkinson's lands and had incurred other expenses by cutting a ditch, draining a pond, and cutting trees; that issues of fact remained for determination.

Defendant subsequently moved for judgment on the pleadings for that the complaint failed to state a claim upon which relief could be granted because no allegations therein established right to damages.

Plaintiff moved to amend the complaint to insert "per acre" after the words and figures $2,000 in alleging the value per acre of the land for sand and gravel purposes. This amendment was allowed.

The trial court, on 6 March 1973, entered an order in which he stated that the written agreement had been declared null and void on motion of defendant for summary judgment and the "only issue remaining in this action is the amount of damages that the plaintiff is entitled to recover of the defendant."

The court found the rule of damage to be as set forth in *Jones v. McBee,* 222 N.C. 152; awarded plaintiff damages in the

amount of $4,484.31 with interest from the date of the judgment until paid; denied defendant's motion for dismissal and for judgment on the pleadings; and allowed plaintiff's motion for summary judgment on defendant's counterclaim.

Both plaintiff and defendant appealed.

L. Austin Stevens for plaintiff appellant and plaintiff appellee.

James A. Wellons, Jr., and Wallace Ashley, Jr., for defendant appellant and defendant appellee.

MORRIS, Judge.

[1] Defendant argues in his brief that even though the written agreement was declared null and void, there was an oral agreement and plaintiff consented and agreed for defendant to go upon his lands and take the sand and gravel.

We said in *Builders Supplies Co. v. Gainey,* 14 N.C. App. 678, 681, 189 S.E. 2d 657 (1972):

> "While commercial gravel belongs to the mineral kingdom in that it is inorganic and formed by nature alone, it is not regarded as a mineral under the mining laws of North Carolina. *Lillington Stone Co. v. Maxwell,* 203 N.C. 151, 165 S.E. 351 (1932). (But see G.S. 74-49(6), effective 11 June 1971)."

This action arose from activities in 1966 through 1969, and the action was instituted in 1969. In *Builders Supplies Co. v. Gainey,* 282 N.C. 261, 192 S.E. 2d 449 (1972), Justice Lake defined a *profit a prendre* as "the right to enter upon the land of another and to take therefrom some part or product thereof." See also Webster, Real Estate Law in North Carolina, § 312. A *profit a prendre* can only be created by grant. It cannot be effectively created orally. *Council v. Sanderlin,* 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922); *Builders Supplies Co. v. Gainey, supra.* Defendant, therefore, cannot rely on an oral agreement to take his actions from the realm of trespass and move them into the realm of consent. Nor can defendant rely on having a license not revoked. See Thompson, Real Property, § 135. The right to enter land and take gravel is not the proper subject of a license. Thompson, *supra,* § 222.

Since defendant's counterclaim was based on the void contract, the court properly allowed plaintiff's motion for a directed verdict on the counterclaim.

[2] Defendant further urges that he is entitled to reimbursement for costs incident to preparing the area for the taking of the sand and gravel. We believe this argument is answered by the following statement of Justice Denny (later C.J.) in *Jones v. McBee,* 222 N.C. 152, 22 S.E. 2d 226 (1942):

> "This Court has held that where an action is brought to recover for damages for logs cut and removed by one in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value of the logs in the woods from which they were taken, together with the amount of injury incident to removal. However, notwithstanding the good faith of the party removing the logs, he may not be allowed compensation for converting the trees into personal property. *Wall v. Holloman,* 156 N.C., 275, 72 S.E., 369; *Gaskins v. Davis,* 115 N.C., 85, 20 S.E., 188."

[3] We come now to plaintiff's contention that the court erred in failing to allow interest from the time of the taking. Plaintiff relies on language in *Jones v. McBee, supra:*

> " 'Where neither the trespass nor the conversion is wilful or intentional, the measure of damages is the value of the mineral as it lay in the mine immediately after its severance from the realty, with no deduction for the value of the defendant's labor in effecting the severance. *The measure of damages for the conversion of ore by a purchaser from a trespasser has been held to be the value of the ore sold, together with a sum equal to legal interest thereon from the time of conversion, less the reasonable and proper cost of raising it from the mine after it was broken, and hauling from the mine to the purchaser's place of business.*' " (Emphasis added.) Id. at 154.

Apparently, plaintiff relies on that portion which is italicized. We agree that application of correct principles of law to the facts of this case results in denominating the actions of defendant as a conversion of the sand and gravel. The distinction between the italicized portion above and the case before us is that the conversion is not by a purchaser from a trespasser, but con-

version by the trespasser himself. We think the first sentence of the quoted portion is applicable in this case.

[4] In *Patapsco v. Magee*, 86 N.C. 350, 355-356 (1882), Justice Ruffin (later C.J.), speaking to the question of assessing interest in damage awards, said:

> "The rule in this state is, that interest, *as interest,* is allowed only when expressly given by statute, or by the express or implied agreement of the parties. *Devereux v. Burgwin,* 33 N.C., 490; *Lewis v. Rountree,* 79 N.C., 122. The only statute upon the subject is that contained in Rev. Code, ch. 31, sec. 90, which provides that all sums of money *due by contract of any kind whatsoever,* excepting such as may be due on penal bonds, shall bear interest, etc., but there is no provision made for actions of *trover* or trespass *de bonis asportatis.* In such cases, in order to compel the wrongdoer to make full compensation to the injured party, the jury may, in their discretion, and as damages, allow interest upon the value of the property from the time of its conversion or seizure, and it has been usual for them to do so. But there is no rule which gives it as a matter of law and right, and it was error, therefore, in his Honor to have thus added to the damages as assessed by the jury."

See also *Lance v. Butler,* 135 N.C. 419, 47 S.E. 488 (1904). Our research has disclosed nothing which would change the rule set out by Justice Ruffin.

We are aware of the decision in *Dean v. Mattox,* 250 N.C. 246, 108 S.E. 2d 541 (1959), but we do not think it changes the rule set out in *Patapsco v. Magee, supra.* In *Dean v. Mattox,* the jury returned a verdict of $2,250 damages, and the trial judge added in the judgment rendered "with interest from July 29, 1957," the date set by plaintiff in his complaint for the running of interest. Defendant had conveyed to plaintiff for $12,000 consideration certain timber on a designated tract of land. Plaintiff went on the land and cut timber and sold some to a lumber company. Plaintiff later learned that the land from which this timber was cut belonged to Duke Power. Plaintiff refunded the money and sued for $2,250, the alleged value of the timber he paid for but did not get. Justice Bobbitt (now C.J.), in discussing the defendant's contention that the court erred in adding interest to the jury's verdict, said:

> "Appellant cites no authority in support of his contention that the court erred in rendering judgment for $2,250.00

> *with interest from July 29, 1957.* Relevant to his general contention to this effect, it is noted that an action to recover for money had and received, under the doctrine of unjust enrichment, is an action on implied contract. Decisions in other jurisdictions differ as to whether, and if so as of what date, interest is allowable in such action. See 58 C.J.S., Money Received § 33(b), where the author states that 'the better view seems to be that whether interest shall be recovered must depend on the justice and equity of the case.'
>
> Without undertaking presently to adopt a rule of general application, we think the allowance of interest from July 29, 1957, the date plaintiff paid $2,250.00 to Rocky River Lumber Company, was proper under the circumstances of this case. The only reasonable conclusion to be drawn from the testimony of both plaintiff and defendant is that prior to July 29, 1957, defendant was fully advised that demand had been made on plaintiff for the $2,250.00 and that plaintiff was insisting that defendant provide the $2,250.00 to meet such demand." Id. at 251.

In the case before us, there was no jury verdict, because there was no trial. The court was entering judgment upon a motion for summary judgment. In his discretion, he could have awarded interest from the date of taking. He did not do so. Plaintiff has shown no abuse of discretion.

Affirmed.

Judge CAMPBELL concurs.

Judge BALEY dissents.

Judge BALEY dissenting.

In *Atkinson v. Wilkerson,* 10 N.C. App. 643, 179 S.E. 2d 872 (1971), this Court held the written agreement between the defendant and Atkinson for removal of sand and gravel from Atkinson's land to be invalid. The majority now holds that the oral agreement for removal of sand and gravel admitted by both parties is unenforceable, and defendant is liable to plaintiff for the full amount he received from the sale of the sand and gravel, leaving him no profit and no compensation for the time, labor,

and funds which he expended in removing and selling it. In my view, the applicable law does not require this inequitable result.

Both the defendant and Atkinson understood that the defendant had permission to be on the land and to remove sand and gravel; yet, because the written agreement was declared invalid, defendant is being treated as if he had stolen the sand and gravel. The record discloses that over a period of more than three years from 1966 to 1969 Atkinson had knowingly permitted the defendant to remove sand and gravel from his land and had received eleven separate payments for such materials in the total amount of $4,183.22. The entire sales price received by defendant for the materials removed was $8,667.53.

In my judgment the defendant in reality was not a trespasser but a licensee. Even though the agreement between defendant and Atkinson did not create a *profit a prendre,* it did create a license. A license can be created orally and is not subject to the statute of frauds. Restatement of Property, § 515 (1944); Webster, Real Estate Law in North Carolina, § 311; *see* Mordecai, Law Lectures 463-64, 835. When an attempt to create an easement or *profit a prendre* is ineffective because of defects in the written document or because there is no written document, a license is created. *Whitaker v. Cawthorne,* 14 N.C. 389 (defective writing); *Mertz v. J. M. Covington Corp.,* 470 P. 2d 532 (Alas. 1970) (no writing); *Towles v. Hodges,* 235 Miss. 258, 108 So. 2d 884 (1959) (no writing); 3 Powell, Real Property, § 429; Restatement of Property, § 514; Webster, *supra,* § 311. A license is defined as "a permission or waiver permitting the licensee to do acts upon the land which would otherwise be a trespass." Webster, *supra,* § 310. It differs from an easement or *profit a prendre* primarily in that it is freely revocable at the will of the licensor. *Hutchins v. Durham,* 118 N.C. 457, 24 S.E. 723; *R. R. v. R. R.,* 104 N.C. 658, 10 S.E. 659; 3 Powell, *supra,* § 428; Restatement of Property, § 519; Webster, *supra,* § 312. The difference is not significant in this case because the license was not revoked during the period involved.

Since defendant had a license from Atkinson allowing him to take sand and gravel from Atkinson's land, he was not a trespasser and did not wrongfully convert the materials to his use. After removing the sand and gravel, he sold it and paid Atkinson part of the proceeds as the oral contract between the parties required. Whether the $4,183.22 paid to Atkinson was as large

a payment as the contract required, and whether Atkinson's acceptance of the $4,183.22 estopped him to demand a larger sum, are issues as to which there may be conflict. They must be decided at trial rather than by summary judgment.

My vote is to remand for trial.

JOHN ALPAR v. WEYERHAEUSER COMPANY, INC. AND GEORGE P. FINGER AND D. N. JEFFERS

No. 732SC778

(Filed 9 January 1974)

1. **Rules of Civil Procedure § 8— pleading inconsistent defenses — necessity for election**

   To require a defendant who has pleaded inconsistent defenses to elect between them prior to trial would render meaningless Rule 8(e)(2) of the Rules of Civil Procedure; therefore, defendants in a libel and slander action could plead the defenses of privilege and non-utterance without being required to elect between them prior to trial.

2. **Libel and Slander § 14; Rules of Civil Procedure § 9— pleading defense of truth and/or mitigating circumstances**

   Rule 9(i)(2) of the Rules of Civil Procedure does not require defendant in a libel and slander action to reveal whether he intends to prove the defense of truth; rather, the rule allows the defendant to plead and prove truth and/or other mitigating circumstances.

3. **Trial § 57— trial without jury — incompetent evidence not considered**

   In a trial before the judge without a jury if incompetent evidence is admitted, the presumption arises that it was disregarded and did not influence the judge's findings.

4. **Appeal and Error § 57— trial court's findings binding on appeal**

   Trial judge's findings supported by competent evidence are binding on appeal.

5. **Libel and Slander §§ 2, 9— publication libelous per se — privilege**

   A publication is libelous *per se,* if when considered alone without innuendo, it tends to impeach one in his trade or profession; however, liability for such a defamatory statement can be avoided if the remark is afforded the protection of absolute or qualified privilege.

6. **Libel and Slander § 9— qualified privilege**

   A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, but the privilege may be lost by proof of actual malice on defendant's part or excessive publication by defendant.

7. **Libel and Slander § 10— libelous statement — qualified privilege**

Statement by defendant who was employed by corporate defendant as plaintiff's supervisor that plaintiff was clinically paranoid, though libelous *per se*, was qualifiedly privileged because the statement was made without malice in the corporate interest to five people who had a duty to perform with respect to plaintiff and his employment with the corporate defendant.

APPEAL by plaintiff from *Cowper, Judge*, 20 February 1973 Session of Superior Court held in BEAUFORT County.

This is a civil action instituted by the plaintiff, John Alpar, against the defendants George P. Finger, D. N. Jeffers, and Weyerhaeuser Co., Inc. (defendant corporation), in which the plaintiff alleges that he was slandered and libeled by the defendants. Plaintiff, an employee of the defendant corporation until he was fired in March of 1971, contends that the defendant Finger, plaintiff's immediate superior at Weyerhaeuser Co., Inc., slandered the plaintiff, and that those slanderous statements were attributable to the corporate defendant. Furthermore, plaintiff maintains that defendant Jeffers, another employee of the defendant corporation who supervised plaintiff and defendant Finger, published a libelous letter and also uttered a slanderous statement both of which were attributable to the defendant corporation. Finally, plaintiff asserts that he was also slandered by statements made by the defendant corporation.

The defendants filed an answer in which they denied making any slanderous or libelous statements but further stated that if such defamatory remarks were found to have been made by them, then such statements were true and they were privileged. By agreement of the parties, the case was heard by the presiding judge without a jury.

The plaintiff offered evidence which tended to show the following:

Plaintiff, an Hungarian immigrant, testified that he had lived in the United States since 1951, and that during this period he had held various positions in which he could utilize his training in forestry and horticulture. Plaintiff was employed in 1970 by defendant corporation for the purpose of installing a new tree nursery and putting it into operation, and he continued in this capacity until his dismissal in March of 1971. The alleged slanderous and libelous statements of defendants were made just prior to and at the time of the discharge of plaintiff. These

defamatory remarks included: (1) Three separate slanderous statements made by defendant Finger to Mrs. Mary Pruett, an office secretary of the defendant corporation, which described the plaintiff as "crazy" or "mentally ill"; (2) An interoffice communication received by plaintiff and five employees of Weyerhaeuser Co., Inc., from defendant Jeffers which advised that the plaintiff was clinically paranoid and further stated that the writer had discussed the case with a neighbor of his in Tacoma, Washington; (3) Slanderous statements made by the defendant corporation to certain guards who were allegedly hired to protect the property of defendant corporation from possible infliction of damage by plaintiff after the discharge of the latter.

After his dismissal from the defendant corporation, plaintiff made several attempts to secure employment in a similar capacity; but these efforts proved futile due to the lack of jobs in his particular specialty field.

Defendant offered the following evidence: Plaintiff's initial application for employment with the defendant corporation was rejected; however, after an emotional plea by the plaintiff, the application of plaintiff was reconsidered, and he was hired. Within a few months of his employment, the defendant corporation expressed dissatisfaction with plaintiff's performance as a result of plaintiff's inability to handle personnel problems, his inability to establish a line of authority among the employees he supervised, and the constant turnover of employees who worked under the guidance of the plaintiff.

Defendant Finger, plaintiff's immediate superior, testified that he never called plaintiff a "crazy Hungarian" or "crazy" and denied making the statement, "You are sick, you are mentally ill, I can prove it." Defendant Jeffers admitted discussing the Alpar case with his neighbor who was active in social and psychological work in Tacoma, Washington, but denied having ever mentioned plaintiff's name in the course of their conversation. The neighbor said, "It sounds like the man might have a problem with paranoia." Defendant Jeffers then prepared an interoffice memorandum, making six copies, none of which was intended to be received by plaintiff. In this memorandum the defendant Jeffers gave his opinion that the plaintiff Alpar was clinically paranoid. This document was intended to be seen only by members of the company, and Jeffers could not explain how

a copy happened to be mailed to the plaintiff in Washington, N. C., if in fact, a copy was mailed to the plaintiff at all.

Defendants also offered the testimony of Mrs. Mary Pruett, the office secretary, who stated that she had never heard defendant Finger or any other company official make a statement to the effect that plaintiff was mentally ill or crazy. She further testified that plaintiff was emotionally unstable, subject to fits of temper, and that she was personally afraid to be alone in his presence.

Upon completion of the presentation of the evidence, the trial judge made findings of fact and the following pertinent conclusions of law:

> "1. That the Defendant George P. Finger made no defamatory utterances with regard to the Plaintiff John Alpar."
>
> "2. That the Defendant George P. Finger did not slander the Plaintiff John Alpar."
>
> "3. That the letter dated March 8, 1971, written by the Defendant D. N. Jeffers contained certain statements which were defamatory in nature and libelous *per se* but that the Court does conclude as a matter of law that said letter was written without malice and was qualifiedly privileged in that all the persons to whom said letter was addressed and who in fact saw said letter had a genuine legal and corporate interest in and duty to perform concerning the Plaintiff John Alpar and his relations and employment with the Defendant Weyerhaeuser Company . . . . "
>
> "4. That the Defendant D. N. Jeffers did not slander the Plaintiff John Alpar in his conversation with his neighbor in view of finding of fact that he did not identify the Plaintiff John Alpar to his neighbor and further in view of the fact that his neighbor lived more than 3,000 miles from the Plaintiff John Alpar."
>
> "5. That neither Defendant Weyerhaeuser Company nor any agent of Weyerhaeuser Company has been shown to have defamed, slandered or libeled the Plaintiff John Alpar."
>
> "6. That the Plaintiff John Alpar by his own evidence and the testimony of his own witnesses has in no wise been

injured, harmed, or damaged in person, reputation, career or in any other respect by Defendant George P. Finger, Defendant D. N. Jeffers, or Defendant Weyerhaeuser Company, or by any agent of the Defendant Weyerhaeuser Company or by any of the Defendants individually or collectively in any respect whatsoever."

From an adverse judgment, the plaintiff appealed.

Wilkinson, Vosburgh & Thompson by John A. Wilkinson for plaintiff appellant.

Hutchins & Romanet by Andrew L. Romanet, Jr., and R. Wendell Hutchins for defendant appellees.

HEDRICK, Judge.

[1] By his first assignment of error plaintiff contends (a) that the trial court erred in failing to make the defendants elect between the defenses of privilege and nonutterance and (b) that the trial court also erred in failing to require the defendants to state, prior to the presentation of the evidence, whether they were relying upon truth as a defense or were abandoning that defense. Plaintiff in part (a) of this assignment of error does not dispute the fact that defendant can plead alternative, inconsistent defenses but rather he maintains that defendant make an election between the two defenses prior to trial. We cannot agree with this approach. G.S. 1A-1, Rule 8(e)(2), Rules of Civil Procedure, declares in part:

> "A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. * * * A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both . . . . "

If we were to accept the argument proffered by plaintiff, what possible significance would G.S. 1A-1, Rule 8(e)(2), Rules of Civil Procedure, have? Obviously, adherence to plaintiff's viewpoint would render Rule 8(e)(2) meaningless, as we would be placed in the incongruous position of saying that you can plead inconsistent defenses but you cannot prove the same.

[2] The second segment of plaintiff's first assignment of error is bottomed upon plaintiff's contention that the uncertainty as

to whether he would be confronted by the defense of truth forced him during the course of the entire trial, at great expense, to keep in court the head of the State Hospital from Madison, Indiana. Also, plaintiff claims that because of the inability to ascertain whether truth would be a defense, the trial judge allowed the evidence to wander almost endlessly in a maze. As in our discussion of the first portion of this assignment of error, we also find this argument to be without merit. This challenge requires that reference be made to G.S. 1A-1, Rule 9(i) (2), Rules of Civil Procedure, which reads as follows:

> "The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; *and whether he proves the justification or not, he may give in evidence the mitigating circumstances.*" (Emphasis added.)

Clearly, this statute does not require the defendant to reveal whether he intends to prove the defense of truth, and in fact, the latter portion of this Rule allows the defendant to plead and prove truth and/or other mitigating circumstances. For the reasons stated above this assignment of error is overruled.

[3, 4] Many of the 85 assignments of error discussed in the plaintiff's brief concern the admission or exclusion of evidence by the trial court. By agreement of the parties, this case was heard by the presiding judge without a jury, and "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 and immaterial testimony, but if incompetent evidence is admitted the presumption arises that it was disregarded and did not influence the judge's findings." 7 Strong, N. C. Index 2d, Trial, § 57, p. 377. Upon completion of the presentation of the evidence, the trial judge properly made findings of fact and conclusions of law. A careful review of the record does not affirmatively disclose that the trial judge's findings were influenced by the admission of any evidence which might possibly be termed incompetent and, furthermore, each of the facts found is supported by competent evidence and thus binding upon this court. *Mayo v. Casualty Co.,* 282 N.C. 346, 192 S.E. 2d 828 (1972); *Vaughn v. Tyson,* 14 N.C. App. 548, 188 S.E. 2d 614 (1972).

[5-7] Next, we must consider whether the facts found support the conclusions of law entered by the court. First, there are suf-

ficient findings of fact to support the conclusion that defendant Finger made no defamatory utterances with regard to plaintiff. Turning to the conclusion made concerning the letter sent from defendant Jeffers to plaintiff, we are of the opinion that the court was correct in determining the letter to be libelous *per se* but qualifiedly privileged. "The decisions in this jurisdiction, as well as others, clearly establish that a publication is libelous *per se*, or actionable *per se*, if when considered alone without innuendo: * * * (4) it tends to impeach one in his trade or profession." *Flake v. News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1937). Liability for such defamatory statements can be avoided if the remarks are afforded the protection of absolute or qualified privilege. The statement made by the defendant Jeffers, although found to be libelous *per se*, was qualifiedly privileged because the statement was made in the corporate interest. A recent N. C. Supreme Court decision, *Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E. 2d 410 (1971), quoted with approval the following passage from 50 Am. Jur. 2d, Libel and Slander, § 195 (1970): "A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest . . . . " See Also, Prosser, Law of Torts, § 115, pp. 789-790 (4th ed. 1971); Annot. 98 A.L.R. 1301 (1935). Although a qualified privilege may provide an affirmative defense against a defamation action, if the qualified privilege is found to be abused, then the privilege ceases to exist. The qualified privilege may be lost by proof of actual malice on defendant's part or excessive publication by the defendant. The trial judge properly concluded, based on the facts found, that the qualified privilege in this case was not waived by a showing of actual malice or excessive publication. Finally, we agree with the trial court's conclusions that the remarks made by the defendant Jeffers to his neighbor were not slanderous and also that defendant corporation has not been shown to have defamed, slandered, or libeled the plaintiff.

The judgment appealed from is

Affirmed.

Judges MORRIS and VAUGHN concur.

DOMESTIC ELECTRIC SERVICE, INC. v. THE CITY OF ROCKY MOUNT AND COKEY APARTMENTS, LTD.

No. 737SC806

(Filed 9 January 1974)

1. **Statutes § 5— construction of statutes**

In construing statutes the court should always give effect to the legislative intent; to determine the legislative intent, a court may consider the purpose of the statute and the evils it was designed to remedy, the effect of proposed interpretations of the statute, and the traditionally accepted rules of statutory construction.

2. **Electricity § 2; Utilities Commission § 4— assigned electric territory — new customers — applicability of statute to municipality**

G.S. 62-110.2(b)(8) applies to municipalities as well as to public utilities and electric membership corporations and prevents a municipality from providing electricity for new customers in a territory assigned by the Utilities Commission to an electric utility company.

3. **Electricity § 2; Utilities Commission § 4— electric service — new customers in area assigned to utility — authority of municipality to provide service — controlling statute**

Since G.S. 62-110.2 deals specifically with electric service and the assignment of customers to particular suppliers while G.S. 160A-312 is a broad general statute relating to all municipal "public enterprises," G.S. 62-110.2 controls in the determination of whether a municipality may provide electricity for new customers in an area outside the municipality which has been assigned by the Utilities Commission to an electric utility company.

Judge BRITT dissents.

APPEAL by plaintiff from *Lanier, Judge,* 14 August 1973 Session of Superior Court of NASH County.

Domestic Electric Service, Inc. (hereinafter referred to as Domestic) is a public utility company furnishing electric service to customers in designated areas of Nash, Edgecombe and Wilson Counties. Pursuant to G.S. 62-110.2(c) the Utilities Commission has assigned to it a territory southeast of Rocky Mount. Within that territory, at a point just southeast of the city limits of Rocky Mount, Cokey Apartments, Ltd. (hereinafter referred to as Cokey) has built a group of apartment buildings. In May 1973 Cokey submitted an application for electric service to the City of Rocky Mount (hereinafter referred to as City), which operates its own electric system. Domestic then filed suit against City and Cokey, seeking an injunction prohibiting City from furnishing electricity to Cokey. The case was heard in the Superior Court of Nash County, and the court gave judgment

for defendants, holding that Cokey was free to choose either Domestic or City as its electric supplier. Domestic appealed.

Battle, Winslow, Scott & Wiley, by Thomas L. Young, for plaintiff appellant.

Tally & Tally, by J. O. Tally, Jr., and Spruill, Trotter & Lane for defendant appellees.

BALEY, Judge.

The issue in this case is one of statutory construction. Domestic contends that under G.S. 62-110.2(b)(8) and (c)(1) it has the exclusive right to provide electricity for all new customers within its assigned territory. Defendants contend that Domestic's right is not exclusive; that G.S. 62-110.2 is inapplicable to municipalities; and that under G.S. 160A-312 City has the right to sell electricity to Cokey. G.S. 62-110.2(b)(8) and (c)(1) read as follows:

> "(b)(8) Every electric supplier shall have the right to serve all premises located wholly within the service area assigned to it pursuant to subsection (c) hereof.
>
> "(c)(1) In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign . . . to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities . . . . "

G.S. 160A-312 provides:

> "[A] city may extend and operate any public enterprise outside its corporate limits within reasonable limitations . . . . "

[1] In construing statutes the courts should always give effect to the legislative intent. *State v. Johnson,* 278 N.C. 126, 179 S.E. 2d 371; *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2; *Powell v. State Retirement System,* 3 N.C. App. 39, 164 S.E. 2d 80. To determine the legislative intent, a court may consider the purpose of a statute and the evils it was designed to remedy. *Puckett v. Sellars,* 235 N.C. 264, 69 S.E. 2d 497; *State v. Lovelace,* 228 N.C. 186, 45 S.E. 2d 48; *Shipyard, Inc. v. Highway Comm.,* 6 N.C. App. 649, 171 S.E. 2d 222, *cert. denied,* 276 N.C. 327. A court may also take into account the effect of proposed interpretations of the stat-

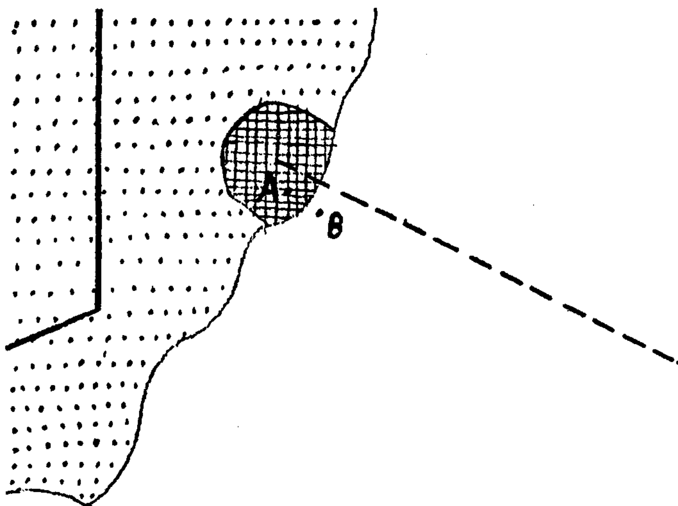
ute, since a contruction that leads to an anomalous or illogical result probably was not intended by the legislature. *See Town of Hudson v. City of Lenoir,* 279 N.C. 156, 181 S.E. 2d 443; *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765. Finally, a court may consider traditionally accepted rules of statutory construction, such as the rule that when a general and a special statute are in conflict, the special statute is controlling.

[2] The stated purpose of G.S. 62-110.2 is "to avoid unnecessary duplication of electric facilities." Before 1965, municipalities, public utilities and electric membership corporations were free to compete against each other for customers. In seeking to serve customers in the same geographical area, they built electric power lines that paralleled and crossed each other. To remedy this uneconomical duplication, in 1965 the General Assembly passed G.S. 62-110.2, applying to rural areas, and G.S. 160A-331 to -338, applying to municipalities. Both these statutes were part of the same act (Ch. 287, [1965] N.C. Sess. L. 328), and both sought to eliminate the wasteful duplication of power lines by assigning territories to specific suppliers of electricity. *See generally Utilities Comm. v. Electric Membership Corp.,* 276 N.C. 108, 171 S.E. 2d 406; *Utilities Comm. v. Electric Membership Corp.,* 3 N.C. App. 318, 164 S.E. 2d 895, *aff'd,* 275 N.C. 250, 166 S.E. 2d 663. Parallel electric lines are equally uneconomical regardless of who owns them; they do not cease to be wasteful and become beneficial merely because one line is operated by a municipality instead of a utility company or a co-operative. To interpret G.S. 62-110.2 as applying only to utilities and co-operatives, and not to municipalities, would undercut the purpose of the statute.

Further support for Domestic's position comes from an examination of the consequences that would result from a decision for defendants. Presumably, the primary purpose of a municipal electrical system is to serve customers within the boundaries of the municipality, while a utility company or co-operative is chiefly concerned with customers outside the city limits. Yet under defendants' interpretation of G.S. 62-110.2, an entirely contrary result is reached. G.S. 160A-332(a) provides for a 300-foot protected area around the lines of any utility company operating within a city. The city cannot serve any premises inside the city limits and wholly within 300 feet of the utility company's lines, unless the premises are also wholly or partially within 300 feet of the city's lines. But under defend-

ants' interpretation, the city may serve any premises outside the city limits. In other words, the city is more severely restricted within its own boundaries than outside its boundaries.

A diagram will clearly show how illogical this result is. In the diagram below, the dotted area is within the city limits of City C; the remainder of the diagram has been assigned to U Co., a public utility. The heavy black line represents one of City C's electric lines, while the dashed line represents an electric line of U Co. The crosshatched area represents U Co's protected area under G.S. 160A-332(a). Points A and B are newly constructed buildings needing electric service.



Under defendants' interpretation, City C can furnish electric service for Building B which is outside the city, but not to Building A which is within the city. If the city annexes Building B, it loses its right to provide electricity for the building. Almost certainly the General Assembly did not intend to bring about such an anomalous result.

[3] Domestic's proposed interpretation of the statute is consistent with generally accepted rules of statutory construction. It has often been held that when a general statute and a special or particular statute are in conflict, the special or particular statute is controlling. The special statute is viewed as an exception to the provisions of the general statute, since it is

presumed that the General Assembly did not intend to create a conflict. *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663; *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22; *Davis v. Granite Corporation*, 259 N.C. 672, 131 S.E. 2d 335. G.S. 62-110.2 deals specifically with electric service and the assignment of customers to particular suppliers, while G.S. 160A-312 is a broad general statute relating to all municipal "public enterprises," including bus lines, cable television systems and airports. G.S. 62-110.2, therefore, is the controlling statute in this case.

Defendants cite *Dale v. Morganton*, 270 N.C. 567, 155 S.E. 2d 136, and *Utilities Comm. v. Town of Pineville*, 17 N.C. App. 522, 195 S.E. 2d 76, *cert. denied*, 283 N.C. 394, 196 S.E. 2d 277, as holding that municipalities are outside the jurisdiction of the Utilities Commission. It is true that municipalities are not subject to comprehensive and detailed regulation by the Utilities Commission, as public utilities and co-operatives are, and the *Dale* and *Pineville* courts so held. But the General Assembly, which created the Utilities Commission and municipalities, certainly has power to subject one aspect of municipal utility operation—the extension of service to new customers—to Utilities Commission regulation. In adopting G.S. 62-110.2 and G.S. 160A-331 to -338 as parts of Ch. 287, [1965] N. C. Sess. L. 328, it clearly took this step. Thus the *Dale* and *Pineville* decisions, while unquestionably correct in their holding, do not apply to the present case.

Defendants also contend that the fact that G.S. 62-110.2 does not provide for assignment of territories to municipalities shows that the statute was drafted to exclude municipalities. This argument fails to take into account the fact that G.S. 62-110.2 was passed together with G.S. 160A-331 to -338, as part of the same act. Considered together, the two statutes cover the entire state and reflect the interests of municipalities, utility companies and co-operatives. They form a unified plan for eliminating duplication of electric facilities by assigning territories to particular suppliers. While it is true that G.S. 62-110.2 gives municipal electrical systems a minor role in rural areas, G.S. 160A-331 to -338 gives them a predominant position within the city limits. It would not appear logical that the legislature intended to give municipalities protection within the city limits (except for the 300 foot area adjacent to lines of an electric supplier already operating within the city) and then permit

municipalities to extend lines and compete in territory assigned to a utility or co-operative when the utilities and co-operatives are restricted from competing with each other within the assigned area. The clear purpose of the whole statute is to prevent wasteful duplication of competing facilities, and thereby serve the public interest.

In *Capital Electric Power Association v. City of Canton*, 274 So. 2d 665 (Miss. 1973), the Supreme Court of Mississippi reached a similar conclusion upon comparable facts. The City of Canton was seeking to serve a customer in territory assigned by the Public Service Commission to Capital Electric Power Association. The court held that notwithstanding the fact that the city was not subject to regulation by the Public Service Commission as to its own electric system, it could not invade territory assigned to a utility company by the Public Service Commission. The city was enjoined from extending electric service within the territory assigned to Capital and the exclusive right granted by the Public Service Commission for service within a designated territory was declared to be "a valuable right which may be protected by the courts." *Id.* at 670.

[2] It is our view that G.S. 62-110.2(b) (8) gives Domestic the exclusive right to provide electricity for all new customers in the territory assigned to it by the Utilities Commission. The decision of the trial court allowing Cokey to purchase electricity from City was erroneous and is reversed.

Reversed.

Judge PARKER concurs.

Judge BRITT dissents.

STATE OF NORTH CAROLINA v. PAUL HARRELL

No. 7316SC752

(Filed 9 January 1974)

1. Arson § 4— burning of store building — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for feloniously burning a store building where it tended to show that three weeks before the fire defendant offered money to another to

fix a switch box in defendant's store so that it would short out and cause a fire, that a fire in the store started in a cardboard box below the switch box, that defendant had certain debts and anticipated lawsuits, and that defendant was in the store less than 25 minutes before the fire was reported.

2. **Arson § 3; Criminal Law § 50— opinion testimony — point of origin of fire**

In a prosecution for felonious burning, the trial court did not err in permitting an experienced fireman and an SBI investigator to give opinion testimony as to the point of origin of the fire.

3. **Arson § 3— motive — financial obligations and pending lawsuits**

In a prosecution of defendant for feloniously burning his own store building, testimony concerning defendant's financial obligations and lawsuits pending against him was competent to show motive.

4. **Criminal Law § 34— burning of building — question as to burning of another building**

In a prosecution for the felonious burning of defendant's store building wherein defendant on cross-examination answered questions concerning fires that had occurred to a house and mill building which he owned, the trial court did not err in permitting the solicitor to ask defendant whether he had taken any tax advantage in burning the mill building.

5. **Criminal Law § 101— allowing bailiff to relay court's instruction — absence of prejudice**

When the bailiff informed the trial judge that he had been advised by the jury foreman that the jury was in disagreement, the judge's action in permitting the bailiff to relay an instruction to the jury to continue to deliberate to see if they could reach a verdict rather than giving such instruction to the jury in open court in the presence of defendant and his counsel, while disapproved, was not prejudicial to defendant where the evidence discloses that the bailiff did not exceed the judge's instructions and it does not appear that the jury was improperly influenced.

APPEAL by defendant from *McLelland, Judge,* 30 April 1973 Session of Superior Court held in ROBESON County.

Defendant was tried upon a bill of indictment charging him with the crimes of felonious burning and presenting a false insurance claim.

The State's evidence tended to show that on 4 September 1972 one James Rawls stopped in to see the defendant at defendant's music store in Lumberton, North Carolina. Rawls testified that defendant and he conversed about whether a switch box could be shorted out, thereby causing a fire. Rawls testified that defendant offered him $5,000 to fix the switch box in such

a fashion. Rawls declined the offer, and called the Lumberton Chief of Police that evening. The next day Rawls spoke with Assistant Police Chief H. C. Britt, relating to him the conversation he had with defendant the day before.

Assistant Chief Britt testified and confirmed that he had spoken to Rawls who told him of the conversation and gave him a diagram of the premises.

Two firemen for the City of Lumberton testified that they responded to a call at defendant's store at about 6:00 p.m. on 23 September 1972. Both men assisted in extinguishing the fire and testified that the wall in the store where the switch box was located was charred. Fireman Sam Byrd, Jr., testified that the remains of a cardboard box were against the wall where the switch box was located.

Fireman Byrd and Mr. C. J. Cole, an investigator for the State Bureau of Investigation, each testified that, in his opinion, the fire started in the cardboard box below the switch box.

Mr. Cole was allowed also to testify as to debts which defendant owed and lawsuits which defendant anticipated.

Merle Martin, an employee of defendant, who was living at defendant's home, testified that he left the store at 5:20 p.m. to take another employee home, and that at 5:35 p.m. when he passed by the store, defendant's car was still there. Martin testified that defendant did not arrive at home until approximately 5:40 p.m.

Defendant's evidence tended to impeach the credibility of the witness Rawls by enumerating prior convictions and presenting evidence that Rawls had a bad credit record.

Several witnesses testified that defendant was a person of good reputation.

Defendant testified in his own behalf that he did not offer Rawls money to burn his building.

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

Johnson, Hedgpeth, Biggs and Campbell, by John Wishart Campbell, for the defendant.

BROCK, Chief Judge.

[1] Defendant's first assignment of error is addressed to the failure of the trial court to grant defendant's motion to dismiss made at the close of all the evidence. Defendant contends the evidence offered by the State was insufficient to require submission to the jury of the case.

The State presented a logical sequence of events and testimony which tended to show motive on the part of defendant to burn the building, a discussion as to how the burning could be accomplished less than three weeks before the fire, an offer of money to Rawls to burn the store, and that defendant was present in the building less than 25 minutes before the fire was reported.

"Upon motion to nonsuit, the evidence must be considered in the light most favorable to the state, giving the state the benefit of every reasonable inference to be drawn therefrom, and nonsuit should be denied where there is sufficient evidence, direct, circumstantial, or both, from which the jury could find that the offense charged has been committed and that defendant committed it." 2 Strong, N. C. Index 2d Supp., Criminal Law, § 106, p. 302. This assignment of error is overruled.

Defendant next argues that the trial court erred in allowing certain opinion testimony by State's witnesses, and in allowing the use of photographs in conjunction with the testimony of one of the State's witnesses.

[2] Specifically, defendant contends that neither the witness Byrd, a fireman with 11½ years of fire fighting experience and a captain in charge of training, who had responded to the fire on the evening in question, nor the witness Cole, an employee of the State Bureau of Investigation whose specialty was the investigation of fires, having worked also as a fire investigator for the Insurance Commissioner and the Highway Patrol, should have been permitted to give opinion testimony.

" . . . [O]pinion is inadmissible whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts. If either of these conditions is absent, the evidence is admissible." Stansbury, North Carolina Evidence, Brandis Revision, § 124.

In this case, the trial judge properly ruled that due to the nature of fires, the average layman would be unable to deduce from the facts presented the point of origin of the fire. The opinion testimony elicited referred only to the point of origin of the fire, and did not present inferences or intimations as to how the fire started, when the fire started, or who started it.

As to the use of photographs by the witnesses to illustrate their testimony, the North Carolina rule is that photographs may be used to illustrate or explain the testimony of a witness.

This assignment of error is overruled.

[3] Defendant contends that the trial court committed prejudicial error in allowing the witness Cole to testify as to the financial obligations and pending lawsuits against the defendant. Defendant contends this testimony was irrelevant and immaterial to the issues at trial, merely serving to distract and inflame the jury.

"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. . . . Motive may be proved by declarations and other conduct of the person himself, or by evidence of facts which would naturally give rise to a relevant motive and from which such a motive may therefore reasonably be inferred." Stansbury, North Carolina Evidence, Brandis Revision, § 83.

This assignment of error is overruled.

[4] Defendant also contends that the trial court erred in permitting questions which disclosed a former reprehensible act of the defendant. During the course of cross-examination of the defendant, defendant answered questions concerning fires that had occurred to a house and mill building which he owned. The District Attorney then asked: "You bought it [the mill building]. Take any tax advantage in burning it?" The witness never admitted burning the building.

"It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. (Citations omitted.) Such questions relate to matters *within the knowledge of*

the witness, not to accusations of any kind made by others." *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174.

The scope of such questioning, however, is subject to the trial judge's discretion, and such questions must be asked in good faith. We find no evidence tending to show that the questioning was in bad faith, or that the trial judge abused his discretion. This assignment of error is overruled.

[5] Defendant contends that the trial court abused its discretion in denying defendant's motion to set the verdict aside and order a new trial. The motion was bottomed upon defendant's contention that the bailiff improperly communicated with the jury during its deliberations. Counsel for defendant has pursued this assignment of error with considerable fervor and tenacity. The following summary illustrates the events about which defendant complains.

Approximately fifty to sixty minutes after the jury began its deliberations in this case, its foreman knocked on the jury room door. The jury room door was approximately fifteen feet from the bench where the judge was seated and approximately fifteen feet from where the courtroom clerk was seated. The bailiff opened the jury room door to see if the jury was ready to return into open court. When the bailiff opened the door, the foreman advised him that the jury had a disagreement, and the bailiff understood the foreman to say that they stood 8 to 4. To prevent the jurors from saying anything further, the bailiff closed the door and reported to the presiding judge what had transpired. During this time another trial was in process. The presiding judge instructed the bailiff to return to the jury room and to inquire as to the reason for the knock on the door. The bailiff was again advised that the jury was in disagreement, but the jurors did not request to be allowed to return to the courtroom. The bailiff again reported to the presiding judge who instructed the bailiff to tell the jurors to consider the case longer and see if they could agree. The bailiff again went to the jury room door and told the jurors to deliberate further and try to reach a verdict. Thereafter, counsel for defendant went to where the bailiff was seated and asked the bailiff what had been said by and to the jury. The bailiff refused to tell him. The jury deliberated for approximately twenty minutes longer and returned into court with a verdict of guilty. The jurors were polled and each announced that the verdict of guilty was his verdict.

Defendant requested an opportunity to examine witnesses to develop the facts upon his motion to set aside the verdict and order a new trial. The trial judge, with fully sufficient patience, permitted and assisted defendant to offer all testimony defendant desired. The foregoing facts were brought out from examination of the bailiff, the courtroom clerk and the reporter.

We disapprove of the action of the trial judge in permitting the bailiff to relay the judge's instruction to the jury to continue to deliberate to see if they could reach a verdict. This is an instruction upon the duty of the jury which should have been given in open court by the judge in the presence of defendant and his counsel. Had the judge given his instruction in open court rather than relay it privately through the bailiff no suspicions would have been aroused concerning the sanctity of the jury verdict. Although we agree that the procedure followed in this case was sufficient to arouse defendant's concern, nevertheless, the evidence discloses that the bailiff did not exceed the instructions given to him by the judge, and it does not appear that the jury was improperly influenced by the conduct of which defendant complains. The trial judge assisted defendant in a plenary hearing to develop the facts. In our opinion, the facts do not support defendant's claim of prejudice. No abuse of discretion has been shown in denying defendant's motion to set aside the verdict.

No error.

Judges MORRIS and CARSON concur.

STATE OF NORTH CAROLINA v. PRESTON MAYNARD CARLISLE

No. 738SC709

(Filed 9 January 1974)

1. **Statutes § 4— constitutionality of statute — construction**

A statute is presumed to be constitutional and will not be declared unconstitutional by the courts unless the conclusion is so clear that there can be no reasonable doubt.

2. **Constitutional Law § 24; Jury § 1— habitual offender of traffic laws — no right to jury trial**

Since an action to revoke a driver's license is a civil action, jury trial is required in civil cases only for those actions which were

tried by jury in 1868, the date of the adoption of the N. C. Constitution, and driver's license revocation proceedings do not fall into this category, Chapter 20, Article 8 of the General Statutes providing for license revocation of habitual offenders is not void for failure to allow trial by jury.

3. **Automobiles § 2; *Constitutional* Law § 34— habitual offender of traffic laws — no double jeopardy**

In a proceeding to have defendant declared a habitual offender of the traffic laws and to bar him from operating a vehicle upon the highways of the State, defendant was not subjected to double jeopardy since the constitutional prohibition against double jeopardy applies only to criminal cases, a defendant is placed in double jeopardy when he is tried twice or punished twice for the same crime, and revocation of a driver's license is not a form of criminal punishment.

4. **Automobiles § 2; Constitutional Law § 24— revocation of driver's license of habitual offender — protection of constitutional rights**

Since the habitual offender statute relating to motor vehicle violations makes provision for proper notice of the proposed action under the statute, the information upon which it is based, an opportunity to employ counsel, to answer, to present evidence, and to be heard before a determination is made, and finally the right of appeal, there is nothing in the procedure under the statute which violates any constitutional rights of the person against whom the proceeding is brought.

5. **Automobiles § 1; Constitutional Law § 13— habitual offender of traffic laws — constitutionality of statute**

The habitual offender statute relating to motor vehicle violations represents a reasonable regulation of an individual right in the interest of the public good, and it is a valid constitutional exercise of the police power of the State.

APPEAL by the State from *Martin, Perry, Judge,* 4 June 1973 Session of Superior Court held in LENOIR County.

This is a proceeding instituted by the State pursuant to G.S. 20-223 to determine whether Preston Maynard Carlisle is an habitual offender of the traffic laws as defined in G.S. 20-221 and should be barred from operating a motor vehicle upon the highways of North Carolina.

Petition was filed by the solicitor on 2 April 1973 accompanied by an attached certified abstract of the driver's license record of Preston Maynard Carlisle as maintained in the North Carolina Department of Motor Vehicles. The superior court issued a show cause order directing respondent to appear for a hearing on 4 June 1973. The order, with the petition and abstract attached, was served upon respondent on 7 May 1973,

and answer was filed on 21 May 1973 asserting the unconstitutionality of the habitual offender statute.

At the hearing the State, over objection of respondent, was permitted to offer into evidence the petition, the certified abstract of the driver's license record of Preston Maynard Carlisle, and the show cause order. Respondent offered no evidence and moved to dismiss the proceeding on the ground that Article 8 of Chapter 20 of the General Statutes (G.S. 20-220 through 20-231) was unconstitutional. The court declared the statute to be unconstitutional and granted the motion to dismiss. From this judgment, the State appealed.

Attorney General Morgan, by Assistant Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for the State.

Sasser, Duke & Brown, by John E. Duke, for defendant appellee.

BALEY, Judge.

The question for decision upon this appeal is the constitutionality of Article 8 of Chapter 20 of the General Statutes of North Carolina (G.S. 20-220 through 20-231), which is applicable to habitual offenders of the motor vehicle laws. The trial court has interpreted this statute to be criminal in nature requiring all the safeguards to which a defendant charged with a criminal offense is entitled, including trial by jury, protection from double jeopardy, and compliance with the due process clause of the Fourteenth Amendment. We do not agree with this interpretation and hold the statute to be constitutional.

[1] It is fundamental that a statute is presumed to be constitutional and will not be declared unconstitutional by the courts unless the conclusion is so clear that there can be no reasonable doubt. *Mitchell v. Financing Authority,* 273 N.C. 137, 159 S.E. 2d 745; *Assurance Co. v. Gold, Comr. of Insurance,* 249 N.C. 461, 106 S.E. 2d 875; *State v. Anderson,* 3 N.C. App. 124, 164 S.E. 2d 48, *aff'd,* 275 N.C. 168, 166 S.E. 2d 49. In determining whether this statute is constitutional, it is important to consider the nature of a license to operate motor vehicles and the type of proceeding involved in the revocation of such license.

> "A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be

> deprived save in the manner and upon the conditions prescribed by statute."

In re Revocation of License of Wright, 228 N.C. 584, 589, 46 S.E. 2d 696, 699-700.

> " ' "The right of a citizen to travel upon the public highways is a common right, but the exercise of that right may be regulated or controlled in the interest of public safety under the police power of the State. The operation of a motor vehicle on such highways is not a natural right. It is a conditional privilege, which may be suspended or revoked under the police power. The license or permit to so operate is not a contract or property right in a constitutional sense." . . .'
>
> ". . . [I]t is well to keep in mind that the suspension or revocation of a driver's license is no part of the punishment for the violation or violations of traffic laws. It will be deemed that the court or courts in which the licensee was convicted, meted out the appropriate punishment under the facts and circumstances of each case. The purpose of the suspension or revocation of a driver's license is to protect the public and not to punish the licensee. However, the suspension or revocation of a driver's license should serve to impress such offender with the necessity for obedience to the traffic laws and regulations, not only for the safety of the public but for his own safety as well."

Honeycutt v. Scheidt, 254 N.C. 607, 609-10, 119 S.E. 2d 777, 780.

> "[T]he revocation of a license to operate a motor vehicle is not a part of, nor within the limits of punishment to be fixed by the court, wherein the offender is tried. . . .
>
> " '. . . Nor is it . . . an added punishment for the offense committed. It is civil and not criminal in its nature.' "

Harrell v. Scheidt, Comr. of Motor Vehicles, 243 N.C. 735, 739, 92 S.E. 2d 182, 185. *See also Atkinson v. Parsekian,* 37 N.J. 143, 179 A. 2d 732 (1962); *Commonwealth v. Funk,* 323 Pa. 390, 186 A. 65 (1936); *Parker v. State Highway Dep't,* 224 S.C. 263, 78 S.E. 2d 382 (1953); *Prichard v. Battle,* 178 Va. 455, 17 S.E. 2d 393 (1941).

[2] Since an action to revoke a driver's license is a civil action, jury trial is not necessary. Under the North Carolina Constitu-

tion every criminal defendant is entitled to a trial by jury. N. C. Const. art. I, § 24. But in civil cases, jury trial is required only for those actions which were tried by jury in 1868. N. C. Const. art. I, § 25; *Kaperonis v. Highway Commission*, 260 N.C. 587, 596, 133 S.E. 2d 464, 470; *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795. Driver's license revocation proceedings do not fall into this category. Therefore, the statute is not void for failure to allow trial by jury.

[3] Similarly, the constitutional prohibition against double jeopardy applies only to criminal cases. *See generally Benton v. Maryland*, 395 U.S. 784 (1969). A defendant is placed in double jeopardy when he is tried twice or punished twice for the same crime. *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569; *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838. Since the revocation of a driver's license is not a form of criminal punishment, it cannot constitute double jeopardy. *Atkinson v. Parsekian, supra; Commonwealth v. Funk, supra.*

Article 8 of Chapter 20 simply establishes a procedure in North Carolina under which the driver's licenses of habitual offenders of the motor vehicle laws may be revoked. It sets out a policy "to provide maximum safety for all persons who travel or otherwise use the public highways of this State; and [t]o deny the privilege of operating motor vehicles on such highways to persons who by their conduct and record have demonstrated their indifference to the safety and welfare of others and their disrespect for the laws of this State. . . ." G.S. 20-220. Section 20-221 enumerates in detail the type and number of convictions necessary to constitute an "habitual offender." When the record maintained by the Commissioner of Motor Vehicles appears to bring any person within the definition of an habitual offender, the Commissioner shall certify in the manner provided by G.S. 20-42(b) abstracts of the conviction record of such person to the superior court solicitor of the judicial district in which such person resides, and this abstract may be admitted into evidence to show that the person named therein was duly convicted of the offenses set out in the abstract. Upon receiving the abstract of the conviction record from the Commissioner, the solicitor shall file a petition in the appropriate judicial division requesting the court to determine whether the person named in the abstract is an habitual offender. When the petition is filed, the superior court judge shall enter an order directing the person named in the petition and abstract to

appear at the next criminal session of the court and "show cause why he should not be barred from operating a motor vehicle on the highways of this State." A copy of the petition, the show cause order, and the abstract of the conviction record shall be served upon the person named therein. G.S. 20-225 sets out the hearing procedure:

> "The matter shall be heard at the criminal session of the court by the judge without a jury. If such person denies that he was convicted of any offense shown in the abstract and necessary for a holding that he is an habitual offender, and if the court cannot, on the evidence available to it, determine the issue, the court may require of the Department of Motor Vehicles certified copies of such records respecting the matter as it may have in its possession. If, upon an examination of such records, the court is still unable to make such determination, it shall certify the decision of such issue to the court in which such conviction was reportedly made. The court to which such certification is made shall forthwith conduct a hearing to determine such issue and send a certified copy of its final order determining such issue to the court in which the petition was filed."

G.S. 20-226:

> "If the court finds that such person is not the same person named in the aforesaid abstract, or that he is not an habitual offender under this article, the proceeding shall be dismissed, but if the court finds that such person is the same person named in the abstract and that such person is an habitual offender, the court shall so find and by appropriate judgment shall direct that such person not operate a motor vehicle on the highways of the State of North Carolina and to surrender to the court all licenses or permits to operate a motor vehicle upon the highways of this State. The clerk of the court shall forthwith transmit a copy of such judgment together with any licenses or permits surrendered to the Department of Motor Vehicles."

G.S. 20-230:

> "An appeal may be taken from any final action or judgment entered under the provisions of this article in the same manner and form as appeals in civil actions."

[4] There is nothing in the procedure under Article 8 of Chapter 20 which violates any constitutional rights of the person against whom the proceeding is brought. Provision is made for proper notice of the proposed action under the statute, the information upon which it is based, an opportunity to employ counsel, to answer, present evidence, and to be heard before a determination is made, and finally the right of appeal. There is no provision for jury trial and no question of double jeopardy as the respondent is not being charged with a criminal offense. Habitual criminality is considered to be a status, not a crime. Respondent's guilt or innocence of specific offenses upon his record has already been determined. The only matter at issue is the fact of previous convictions. The existence of these convictions is of record in the courts where they were obtained. If there is a specific denial of the conviction of any previous offense, the court is instructed to determine this fact through appropriate procedure. The court must satisfy itself that respondent is the same person convicted of the previous offenses and that he is an habitual offender. In our view there are adequate safeguards in the statute to require proper identification and avoid any arbitrary or capricious judgment.

[5] The purpose of legislation of this type is to protect society from those who have demonstrated that their driving presents a hazard to life and property. The habitual offender statute relating to motor vehicle violations represents a reasonable regulation of an individual right in the interest of the public good. We hold that it is a valid constitutional exercise of the police power of the state.

The judgment of the trial court is reversed, and the cause remanded for hearing.

Reversed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DONALD WILLIS

No. 7326SC800

(Filed 9 January 1974)

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

   The trial court in an armed robbery case did not err in allowing an in-court identification of defendant by his victim where the identification was based on observation for five minutes at the well lighted crime scene and not on a pre-trial photographic identification.

2. **Criminal Law §§ 15, 91— change of venue — continuance — newspaper articles as basis — denial proper**

   The trial court in an armed robbery case did not err in refusing to grant defendant's motions for continuance and change of venue based on an article about defendant's trial appearing on page 3 of a city newspaper where, upon having the matter brought to its attention, the trial court on its own motion and without referring to the article or its contents excused all prospective jurors who had access to the newspaper.

APPEAL by defendant from *Grist, Judge,* 7 May 1973, Session of MECKLENBURG County Superior Court.

The defendants, Donald Willis and Timothy L. Morrison, were charged with armed robbery in separate bills of indictment. The cases were consolidated for trial. From a verdict of guilty as charged and active sentences pronounced thereon, the defendant Willis gave notice of appeal.

After entering the pleas and prior to the empaneling of the jury, the defendants moved the Court that a *voir dire* examination be held to determine if the in-court identification was tainted by pre-trial photographic identification having been done in an impermissively suggestive manner. This motion was allowed.

Tony Allen Gore testified that on 27 August 1972 at approximately 4:00 p.m. he was in his room in Myers Hall, a dormitory at Johnson C. Smith University. He was a counselor and had come to school early to assist the new students. Upon answering a knock on his door, he was confronted by two persons he assumed to be incoming freshmen who inquired if a Mr. Jones resided there. Gore told them this was not Jones' room and asked them several questions concerning how they liked school and other general matters. Both the room and the

hall were well lighted. The conversation lasted one or two minutes and the prosecuting witness had ample opportunity to observe their faces.

A few minutes later the two defendants returned and again inquired about Jones. Gore directed them to the information desk. The defendants walked in the room and engaged in some conversation. Still thinking they were freshmen, Gore continued to talk with them. Suddenly the defendant Willis pulled out a revolver, cocked it, pointed it at Gore, and ordered him not to move. Gore's hands and feet were bound and he was placed on his bed. Willis hit Gore in the mouth with his fist. He placed the gun to his head and threatened to kill him. He struck Gore in the head with the pistol.

The defendants proceeded to ransack the room, searching for money and other valuables. They took some money, clothes and rings. They left after threatening to return and kill Gore if he told the police. The room was well lighted, and the defendants spent five minutes there during the robbery. Gore observed them carefully during this time. He testified:

> I said to myself I'd better get a description of these guys. . . . I observed them. I saw that Morrison had a scar over his left eye. I made a specific effort after I had been hit in the head to look at him and get a description of him. I tried to approximate his weight according to my body and I observed Mr. Willis. . . . I looked him in the face in an effort to imprint his face in my mind and retain a description of him. . . .

The robbery was reported to the Charlotte Police. A week later Gore was shown a stack of approximately one hundred photographs. He recognized none. Subsequently he was shown a group of six photographs and immediately recognized one as being Willis. Later, he was shown a group of four photographs and immediately identified Morrison. Officer H. R. Thompson of the Charlotte Police Department testified that he had shown the photographs to Gore. Officer Thompson did nothing to indicate to Gore that any particular photograph was that of the defendants. He testified that Gore immediately identified the photographs.

At the conclusion of the *voir dire,* the Court made findings of fact and conclusions of law based on the hearing. It concluded

as a matter of law that the use of photographs was not impermissively suggestive and that the witness had ample opportunity to observe the two defendants. He found that the in-court identification was based on the observations made at the scene of the crime and ruled that the photographic identification and the in-court identification would be admitted.

Following the *voir dire* ruling the defendants brought to the Court's attention the fact that the *Charlotte News* had published the previous evening a story on page 3 of the paper relating to the facts elicited on the *voir dire.* Based upon this story, the defendants moved for a continuance and a change of venue. Twenty-five jurors were brought into the courtroom, and the Court inquired if any of them had read the May 7th *Charlotte News.* Four of them indicated in the affirmative and were excused by the Court. The Court then inquired if any of the others had access to the *Charlotte News* or discussed any of the stories in last night's paper with any body. There being none who had done so, selection of the jury commenced.

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

Peter H. Gerns for the defendant.

CARSON, Judge.

[1] The defendant assigns as error the allowing of the in-court identification of the defendants. The defendant contends the pre-trial showing of the photographs was so highly suggestive as to give rise to a substantial likelihood of irreparable misidentification. Prior to the ruling on the in-court identification, the trial court conducted a complete *voir dire* and made findings of fact and conclusions of law based on the evidence. It is well established in North Carolina that such findings of fact and conclusions based thereon 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 (1972); *State v. Pate,* 19 N.C. App. 701, 200 S.E. 2d 217 (1973). There is plenary evidence in the instant case to support such findings. Even if the pre-trial use of the photographs had been suggestive, the facts in this case would support an in-court identification. It is equally well established in this jurisdiction that an in-court identification may be made if the witness had ample opportunity to observe the defendant and the in-court identifica-

tion is based on the observations made at the time of the crime rather than the later use of the photographs. *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Neal,* 19 N.C. App. 426, 199 S.E. 2d 143 (1973). The facts in this case would support no other conclusion, and this assignment of error is without merit.

[2] The other assignment of error by the defendant is the Court's refusal to grant a continuance and change of venue because of the news article which appeared on page 3 of the *Charlotte News.* Such motions are addressed to the sound discretion of the trial court and will not be reviewed except when such discretion is abused. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457 (1968); *State v. Fountain,* 14 N.C. App. 82, 187 S.E. 2d 493 (1972). Here, there was no showing of any publicity prior to the article in question. It was short and factual and was on page 3 of the paper. When this matter was brought to the Court's attention, all prospective jurors who even had access to the newspaper were excused. Furthermore, the Court excused the jurors on its own motion and without referring to the article or its contents. It is difficult to perceive how the Court could have been any fairer to the defendants, or how any prejudice could have resulted from this procedure.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. GEORGE BRIGGS

No. 7317SC811

(Filed 9 January 1974)

1. **Homicide § 21— second degree murder — intentional shooting**

The State's evidence was sufficient for the jury in a second degree murder case where it tended to show that defendant intentionally fired a pistol at the victim and that the victim died as a proximate result thereof.

2. **Homicide § 24— presumptions — use of "intentionally killed"**

The trial court in a second degree murder case did not comment on the evidence in instructing the jury that the law raises two pre-

sumptions if the State proves beyond a reasonable doubt that defendant "intentionally killed" the victim.

3. **Criminal Law § 112— charge on reasonable doubt — ingenuity of counsel**

Trial court's instruction that a reasonable doubt is not a "doubt suggested by the ingenuity of counsel or your own ingenuity" was not erroneous.

4. **Criminal Law § 113— instruction that defendant gave conflicting testimony**

Defendant was not prejudiced by the court's instruction that defendant made conflicting statements on the witness stand, although it would have been better for the court to have recapitulated the evidence and left the question of conflicts to the jury.

5. **Homicide § 27— failure to instruct on involuntary manslaughter**

The trial court in a murder case did not err in failing to instruct on the lesser included offense of involuntary manslaughter where the uncontradicted testimony tended to show that the shooting of the victim was intentional.

6. **Homicide § 27— instructions on "heat of passion"**

There was ample evidence in this homicide case to support the court's instruction on "heat of passion."

ON *certiorari* to review a trial before *Kivett, Judge,* 19 March 1973 Session of CASWELL County Superior Court.

Defendant was charged in a valid bill of indictment with first-degree murder of James E. Foster, Jr. Defendant waived preliminary hearing and was tried in Superior Court.

The State's evidence tended to show that Deputy Sheriff Wagstaff, who investigated the shooting, arrived at the home of defendant's uncle, a Mr. Pullum, in response to a call. He observed defendant on the premises a few minutes after he arrived; and he asked him, "Were you here when all this happened?" Defendant's response was, "Oh, man, I did it." On the premises Deputy Wagstaff saw Mrs. Ossie Dean Slade's car with deceased's pickup truck parked directly behind it. The headlights of both vehicles were burning. The right front window of defendant's car was broken out, broken glass was on the inside of the car, and a broken bottle was on the seat. Deputy Sheriff Willis confirmed the testimony of Deputy Wagstaff.

Dr. Page Hudson, Chief Medical Examiner for the State, testified that he examined the body of the deceased and found four gunshot wounds. One was a superficial puncture wound in the left eyebrow, and the other three were entrance-type

gunshot wounds. One was in the back side of the left forearm, one was in the rear of the left shoulder, and one was in the left side of the chest. All of the entrance wounds were made with .32-caliber bullets. It was Dr. Hudson's opinion that the cause of death was internal hemorrhaging from the gunshot wound in the left side of the chest.

Dr. Thomas Webster testified that on the night of the shooting, he was at the home of his parents, directly across the road from the Pullum home. He saw two vehicles turn into the driveway adjacent to the Pullum home. Shortly thereafter, he heard two or three shots fired, and, after a brief pause, he heard two or three more.

Gay Ganoway testified that she lived two or three hundred yards from the Pullum residence, and, on the night of the shooting, defendant came to her house and asked to use the phone. She overheard defendant say he had killed someone. Defendant left, and when he returned to use the phone again, Gay Ganoway overheard him ask someone if he could "come back to the house" and "was he dead."

At the close of State's evidence, defendant's motion for nonsuit was denied.

Defendant thereupon took the stand, and his testimony was as follows. On the night of the shooting he was parked with Ossie Dean Slade in her car near an abandoned laundromat. The deceased, James Foster, drove into the area and spotted the car. He backed up in his pickup truck, and defendant and Mrs. Slade left with Mrs. Slade driving. Foster followed the car through town about three times, driving "right on the bumper." Mrs. Slade told defendant that Foster wanted to see her, but that she "didn't want to be bothered with him." After driving through town the third time, Mrs. Slade got on Highway 86 and drove to the Pullum residence where she pulled into the driveway with Foster right behind her. Foster got out of his truck with three or four bottles in his hand, came to the passenger side where defendant was seated, beat the glass out of the window, and forced his upper body inside the car. Defendant reached in the glove compartment, pulled out a pistol, and shot Foster about three times. After the third shot, Foster raised up and said he was going to kill defendant and headed back to his truck.

At the close of his evidence, defendant renewed his motion for nonsuit, and it was again denied. Defendant was found guilty by the jury of second-degree murder. From the entry and signing of judgment, defendant appeals.

Attorney General Morgan, by Deputy Attorney General White and Assistant Attorney General Byrd, for the State.

Ronald M. Price and Price, Osborne, Johnson and Blackwell, by D. Floyd Osborne, for petitioners.

MORRIS, Judge.

Defendant first assigns error to the denial of his motions for judgment as of nonsuit at the close of the State's evidence and at the close of his evidence. The denial of these motions presents the question of the sufficiency of the evidence on the entire record to go to the jury. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971) ; *State v. Stevens,* 9 N.C. App. 665, 177 S.E. 2d 339 (1970). We, therefore, will consider the sufficiency of the evidence on the entire record.

[1] The test for the sufficiency of the evidence to withstand the motion for nonsuit is well established. If the evidence, considered in the light most favorable to the State, giving the State the benefit of all inferences and resolving all inconsistencies in favor of the State, tends to establish guilt, then the denial of the motion for nonsuit is proper. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971). The evidence in the case *sub judice* tends to establish that defendant intentionally fired the pistol at deceased and that deceased died as a proximate result thereof. The intentional use of a deadly weapon which proximately results in death gives rise to the presumption that the killing was malicious. *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971). This inference is sufficient to take the State's case to the jury, since an intentional killing with malice is murder in the second degree. *Id.* The motion for nonsuit was properly denied.

[2] Defendant next contends that the court's instructions to the jury constitute a comment on the evidence in contravention of G.S. 1-180. We do not agree. The court did not err in the use of the term "intentionally killed." The portion of the charge excepted to is as follows:

> "I charge that for you to find the defendant guilty of second degree murder, the State must prove two things beyond

a reasonable doubt. First, that the defendant intentionally and without justification or excuse and with malice, shot James E. Foster, Jr., with a deadly weapon. Malice is not only hatred, ill will or spite, as it is ordinarily understood. To be sure that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another, which proximately results in his death without just cause, excuse or justification. . . .

If the State proves beyond a reasonable doubt that the defendant intentionally killed James E. Foster, Jr., with a deadly weapon, or intentionally inflicted a wound upon James E. Foster, Jr., with a deadly weapon, that proximately caused his death, the law raises two presumptions. First, that the killing was unlawful and second, that it was done with malice; then nothing else appearing, the defendant would be guilty of murder in the second degree."

These instructions fairly and accurately define the law of second-degree murder. *State v. Duboise, supra.* Defendant would have us apply *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971), to hold that the term "intentionally killed" in the above-quoted portion of the charge violated G.S. 1-180. Such is not the holding of *Rummage.* The Supreme Court in *Rummage* held that the *frequent* and *interchangeable* use of the terms "intentional killing" and "intentional shooting" constituted error in a *manslaughter* instruction inasmuch as it pointed to a finding of malice. The portion of the charge excepted to is in an instruction on second-degree murder, and in no manner can it be deemed prejudicial.

[3] There is no error in the following instruction on reasonable doubt to which defendant excepts:

"It is not a vain, imaginary or fanciful or mere possible doubt, because everything related to human affairs is open to some possible or imaginary doubt, nor is it a doubt suggested by the ingenuity of counsel or your own ingenuity, not legitimately warranted by the evidence."

The Supreme Court approved this language in *State v. Hammonds,* 241 N.C. 226, 232, 85 S.E. 2d 133 (1954), quoting *State v. Steele,* 190 N.C. 506, 130 S.E. 308 (1925).

" 'We suggest, in addition to the definitions heretofore approved, for its practical terms, the following: "A reason-

able doubt, as that term is employed in the administration of criminal law, is an honest, substantial misgiving, generated by the insufficiency of the proof; an insufficiency which fails to convince your judgment and conscience, and satisfy your reason as to the guilt of the accused." It is not "a doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the testimony, or one born of mericful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him or those connected with him." *Jackson, J.* in *U. S. v. Harper,* 33 Fed. 471.' "

[4] Defendant has failed to show prejudice in the court's instruction to the effect that defendant made a conflicting statement on the witness stand. There were in fact conflicting statements as to that particular in defendant's testimony. This defendant concedes. While it would have been better for the court to have recapitulated the evidence and left the question of conflicts to the jury, we do not consider this error sufficiently prejudicial to warrant a new trial.

[5] Defendant further assigns error to the failure of the court to instruct on the lesser included offense of involuntary manslaughter. There is no merit to this assignment of error inasmuch as the uncontradicted testimony tends to show that the shooting was intentional.

"Involuntary manslaughter is the unintentional killing of a human being without malice, premeditation or deliberation, which results from the performance of an unlawful act not amounting to a felony, or not naturally dangerous to human life; or from the performance of a lawful act in a culpably negligent way; or from the culpable omission to perform some legal duty. *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485; *State v. Satterfield,* 198 N.C. 682, 153 S.E. 155." *State v. Rummage, supra,* at 55.

Where there is no evidence that a homicide was caused by culpable negligence of defendant or by a misadventure, there is no duty on the part of the trial court to instruct on involuntary manslaughter. *State v. Lawson,* 6 N.C. App. 1, 169 S.E. 2d 265 (1969).

[6] Defendant's final assignment of error is to the court's instructing the jury on "heat of passion," since, he contends,

there was no evidence that deceased was killed in the heat of passion. It is true that an instruction on "heat of passion" is inappropriate when not supported by the evidence. *State v. Rummage, supra.* In the case *sub judice* there is ample evidence from which the jury could infer that deceased was killed in the heat of passion.

No error.

Chief Judge BROCK and Judge CARSON concur.

FRANKLIN LEWIS ROBUCK v. JENNIE G. ROBUCK

No. 7328DC780

(Filed 9 January 1974)

Divorce and Alimony §§ 14, 16— property settlement — effect on defense of adultery and claim for alimony

A property settlement agreement signed by the parties did not bar the wife from asserting the defense of adultery to the husband's action for divorce and did not by virtue of G.S. 50-16.6(b) bar the wife's cross-action for alimony.

APPEAL by defendant from *Allen, Judge,* 8 March 1973 Session of District Court held in BUNCOMBE County.

On 11 September 1972, plaintiff brought an action against defendant for absolute divorce on the grounds they had lived separate and apart since 1 August 1970.

On 11 November 1972, defendant filed her responsive pleadings. By way of defense to the action for divorce, defendant answered and alleged that plaintiff and defendant had lived together until 11 January 1971, when plaintiff maliciously turned her out of their home; that plaintiff had offered such indignities to her person as to render her condition intolerable and life burdensome; that plaintiff before and after turning defendant out of the home had committed adultery and that he was the father of an illegitimate child born to his alleged companion in adultery. As a cross action against plaintiff, defendant sought an award for support and maintenance and counsel fees and pleaded the above in support of her claim.

On 12 December 1972 plaintiff moved for summary judgment against defendant on her cross action. The motion came on for hearing on 8 March 1973. The motion was considered on the evidence consisting of an agreement that parties had signed on 1 March 1971 and defendant's affidavit. The agreement is as follows:

> "THIS AGREEMENT, Made and entered into this 1st day of March, 1971, by and between JENNIE G. ROBUCK, hereinafter referred to as Party of the First Part, and F. L. ROBUCK, hereinafter referred to as Party of the Second Part;
>
> WITNESSETH:
>
> WHEREAS, the parties hereto are husband and wife and have encountered serious marital difficulties by reason of which the Party of the First Part is contemplating the filing an Original Complaint for Divorce against the Party of the Second Part; and,
>
> WHEREAS, the parties hereto are desirous of amicably settling their respective property rights and have entered into various agreements relating to same, which said agreements the parties desire to and by these presents do hereby express in writing.
>
> NOW, THEREFORE, in consideration of the premises, the mutual advantages accruing from the execution of this Agreement, the promises and covenants contained herein and for other good and valuable considerations, the adequacy of which and the receipt of which is expressly acknowledged by each of the parties hereto, the parties agree as follows:
>
> 1. The Party of the First Part is to receive the sum of One Hundred Thousand Dollars ($100,000.00) cash by no later than two (2) years from the date of the execution of this Agreement, such sum, as aforementioned, to be paid from the sale of lots which were accumulated by the parties during the tenure of their marriage and which were accumulated partly through the efforts and labors of the Party of the First Part. The said sum of One Hundred Thousand Dollars ($100,000.00) is to be paid in the manner and form consistent with the terms and provisions of that certain Deed of Trust executed by the parties, a

copy of which is attached hereto, marked Exhibit A, incorporated herein by reference and made a part hereof. It is further expressly agreed between the parties that the aforesaid sum of One Hundred Thousand Dollars ($100,000.00) is not and shall not be construed to be payments of alimony but instead is expressly recognized and admitted by the parties to be the share of the Party of the First Part in an equitable distribution of the properties accumulated by the parties during the tenure of their marriage.

2. The Party of the Second Part shall pay to the Party of the First Part as alimony the sum of One Hundred Twenty-Five Dollars ($125.00) per week, which said payments shall begin immediately following the execution of this Agreement and shall further continue for a period of one (1) full year following the payment in full of the sum of One Hundred Thousand Dollars ($100,000.00) as aforementioned.

3. The Party of the First Part shall receive a fee simple, fully, finally and forever, in and to the real property located at 4 Pinehurst Circle, Arden, North Carolina, and the Party of the Second Part agrees to execute any and all instruments as may be required to vest in the Party of the First Part a fee simple, fully, finally and forever, in and to said property. The Party of the First Part shall make the mortgage payments on the aforesaid real property promptly as same become due.

4. The Party of the First Part shall receive as and for her own, sole and separate use the trailer which is located at Skyland, North Carolina, and which is presently being used to house the fabric business of the Party of the First Part, which said business is known as Quality Interiors. The Party of the Second Part shall discharge and pay in full the indebtedness on said trailer.

5. The Party of the First Part is to receive as and for her own, sole and separate use that certain 1971 225 Buick Electra automobile, and the Party of the Second Part shall pay and discharge in full any and all indebtedness on said automobile. The Party of the Second Part further shall do any and all things necessary to convey to the Party of the First Part a certificate of title to said automobile free and clear of any and all liens and/or encumbrances of any and all kinds.

6. The Party of the Second Part shall be required to pay those premiums on a medical and hospital insurance policy to be acquired by the Party of the First Part whose benefits shall not be less than those benefits afforded by Blue Cross, Blue Shield and major medical.

7. The Party of the First Part for and during that period of time until the aforesaid sum of One Hundred Thousand Dollars ($100,000.00) shall have been paid in full shall continue to have the unrestricted use of the following credit cards charges against which made by the Party of the First Part shall be paid by the Party of the Second Part, and the Party of the Second Part, during said period as aforementioned, shall not cause in any way any of the aforesaid credit cards to be cancelled:

(a) Telephone credit card number
884-53-80-1870

(b) Gulf credit card
Land, Sea and Air

(c) Bankamericard

(d) Humble Travel Club card

(e) Shell credit card

(f) Master Charge

(g) Mobil credit card

(h) Avis Rent-a-Car

(i) Phillips 66

(j) Esso

As pertains to charges which may be made by the Party of the First Part against any and all of the aforesaid cards, the Party of the First Part agrees not to make unreasonable charges.

8. The Party of the First Part agrees upon the payment in full to her of the sum of One Hundred Thousand Dollars ($100,000.00) as aforementioned to deliver to the Party of the Second Part, without the necessity of any demand, all of the aforementioned credit cards and to make

no further charges under same which would be the obligation of the Party of the Second Part to pay.

9. The Party of the First Part admits and agrees that following the payments in full to her of the sum of One Hundred Thousand Dollars ($100,000.00) as aforementioned and the performance of the covenants and promises contained herein by the Party of the Second Part that she will have no further interest in the businesses or properties owned by the Party of the Second Part directly or indirectly.

10. This Agreement constitutes the entire understanding and agreement between the parties and may be modified only by writing executed by the parties subject, however, to the approval of any Court of competent jurisdiction in which the Party of the First Part should cause her Complaint for Divorce to be filed.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written."

Defendant's affidavit, in summary, tends to show the following: The parties had placed their real estate in a corporation owned by her husband. She would sign any paper her husband requested her to sign because she trusted him. After plaintiff became involved with the other woman, defendant discovered that large sums of money had been withdrawn from the business. Counsel advised her the only way she could stop the money from going out was to seek a divorce. She advised counsel that she did not want a divorce. Counsel later recommended that she make a "quiet property settlement." She did not know her husband's net worth at the time the papers were signed, and the settlement was not based thereon. The Court made findings of fact including the following:

"3. That Plaintiff and Defendant separated from each other on March 1, 1971, and have since remained separate and apart, and have been so separated for more than one year;

4. That on March 1, 1971, the Plaintiff and Defendant entered into a valid Alimony and Property Settlement Agreement in contemplation of divorce, in Memphis, Tennessee;

5. That pursuant to the provisions of said Alimony and Property Settlement Agreement, the Plaintiff conveyed to the Defendant certain real estate; paid her $100,000.00; paid for and conveyed to the Defendant a Buick automobile; granted to the Defendant the use of certain credit cards and complied with the provisions of said Alimony and Property Settlement Agreement;

6. That pursuant to said Alimony and Property Settlement Agreement, the Defendant accepted the benefits from said Alimony and Property Settlement Agreement; . . . "
Based on these findings the Court concluded:

"1. That the Defendant is now barred from recovery of Alimony by virtue of the provisions of General Statutes 50-16.6(b).

2. The Defendant is now barred for asserting the defense of adultery."

The Court then allowed plaintiff's motion for summary judgment in favor of plaintiff on defendant's claim for alimony and ordered that defendant's defense of adultery be stricken from her responsive pleadings.

Defendant appealed.

Robert S. Swain for plaintiff appellee.

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

VAUGHN, Judge.

We see nothing in the agreement of the parties signed 1 March 1971 which, as a matter of law, bars defendant's right to defend the action brought against her and to assert her cross action. G.S. 50-16.6(b), on which the Court relied, provides: "(b) Alimony, alimony pendente lite, and counsel fees may be barred by an *express provision* of a valid *separation agreement* so long as the agreement is performed." (Emphasis added.) The agreement in question contains no such provision, express or implied. Moreover, on its face, it does not appear to be a "separation agreement" for there is no agreement to separate or to live separately and apart. The recital that party of the first part is contemplating the filing of a complaint for divorce does not specify the grounds. Indeed, the basis for the contem-

plated divorce action may well have been the very grounds she now seeks to assert by way of her defense and cross action. Defendant agreed to accept alimony for the time stated but did not agree to relinquish her right to additional alimony or any other right arising out of the marriage except "she will have no further interest in the businesses or properties owned by the Party of the Second Part." The agreement appears to be a property settlement and not a separation agreement which, under appropriate circumstances, might be used as a defense against the matters raised in defendant's responsive pleading.

Reversed.

Judges CAMPBELL and HEDRICK concur.

CITY OF BREVARD, A MUNICIPAL CORPORATION, AND L. C. CASE, BUILDING INSPECTOR OF THE CITY OF BREVARD v. JOHN F. RITTER, FRANKIE M. WAGONER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF LEWIS MOORE, LOIS ROBINSON, FERRELL MOORE, EUNA ANN CANTRELL AND CHARLES MORGAN COMPANY, A CORPORATION

No. 7329SC387

(Filed 9 January 1974)

Contempt of Court § 6; Municipal Corporations § 30; Trial § 6— enlargement of airport facilities — order to remove construction — stipulations showing violation

Where defendants purchased a private airport located in an area zoned for residential use, began construction on an addition to the airport facilities, were permanently restrained from constructing a pilot lounge and clubhouse and auxiliary hangar or extending or enlarging the airport facilities, and were required to remove that portion of construction already completed within 90 days, stipulations by defendants that the portion of the construction was not removed but was altered so as to include bedrooms, a kitchen and bathrooms were sufficient to show that defendants failed to comply with the order of the trial court to remove the offending structure which constituted an extension of the nonconforming use.

APPEAL by plaintiffs from an order of *Ervin, Judge*, entered 31 December 1972 out of term and out of district.

Prior to December 1971, defendant Ritter secured an option to purchase land upon which was located a private airport con-

sisting of a grass or dirt runway approximately 1,000 feet to 2,000 feet long, along with improvements consisting of 3 open hangars and one 12 x 15 metal storage building. One gas tank and one gas pump were purchased from a previous tenant for $600.00. Since 1965, the property, which lies within a one-mile radius of the City of Brevard, has been zoned R-2, Medium Density Residential. Although he purchased the improvements located on the airport premises in December 1971, defendant did not actually buy the land until January 1972.

On 4 August 1971, defendant requested the City of Brevard to rezone the property from R-2, Residential to F-1, Flood Plain. On 18 October 1971, the Board of Aldermen, pursuant to the recommendation of the Brevard Planning and Zoning Board, denied defendant's request. Defendant did not appeal that decision.

In December 1971, before purchasing the property, defendant began construction of a new building on the premises which would include approximately 3,000 square feet. It was intended to be used as a pilot clubhouse and designed to include facilities such as restrooms, chairs, tables and refreshment vending machines and an auxiliary hanger. The projected dimension of the clubhouse was 20 x 42 feet, and that of the auxiliary hangar, 51 x 34 feet, an area sufficient for storing one aircraft. Defendant said the new facilities would be used in conjunction with a flying club he intended to organize.

By the end of December 1971, the clubhouse building foundation and concrete base were completed as were the erection of studs around the perimeter of the building and the positioning of a metal beam support located across the front of said building.

The metal storage building already located on the premises as of December 1971 measured 12 x 15 feet and served as the airport office and headquarters. As such, it contained a desk, a phone, a snack machine and aircraft navigational radio equipment as well as oil, pilot supplies and tie-down equipment.

On 5 January 1972, plaintiff secured a temporary restraining order prohibiting defendant from continuing to construct a clubhouse. The order was secured on the grounds that the building would not be used for a purpose compatible with Sections 50 and 51 of the Brevard Zoning Ordinance and that the construction constituted an impermissible expansion and extension of a prior nonconforming use in violation of Section 70 of the

ordinance. As a result of a hearing on 17 January 1972 before Judge Falls, the restraining order was continued until a final adjudication on the merits. On 21 February 1972, a hearing before Judge Falls was held upon plaintiff's application for a permanent injunction. The Court made the following findings and conclusions, among others:

> "Finding of Fact 19 — 'That in December of 1971 the defendant, John F. Ritter, began constructing a new building located upon said premises which was to contain approximately 3,000 square feet, the intended use thereof being a pilot lounge or clubhouse and auxiliary hangar to be used in conjunction with the other facilities located at said airport, and that said building was completely new construction and not connected in any way to any of the existing structures located upon said premises, and said construction could in no way be considered as the repair, rebuilding or alteration of an existing structure, nor could such structure constitute a replacement of any existing structure.'
>
> "Conclusions of Law — '1. That the building presently under construction by the defendant, John F. Ritter, with the assistance of the Charles Morgan Company, is in violation of Sections 50, 51 and 70 of the Brevard Zoning Ordinance, and such construction is unlawful and should be restrained.
>
> "2. That the construction of a pilot lounge or clubhouse and auxiliary hangar constitutes an enlargement and extension of the nonconforming use in violation of Section 70 of the Brevard Zoning Ordinance, since no such structure now exists and such construction does not constitute the repair or remodeling of any existing structure.
>
> "3. That the defendant, John F. Ritter, should be enjoined from continuing with the construction or building of the pilot lounge or clubhouse and auxiliary hangar located upon the airport premises, and said defendant should be required to remove the portion or portions of said building which are already completed.' "

Following the findings of fact and conclusions of law, the Court decreed, in part:

> "That the defendant, John F. Ritter, and the defendant, Charles Morgan Company, be and they are hereby perma-

nently enjoined and restrained from constructing the pilot lounge and clubhouse and auxiliary hangar or extending or enlarging the airport facilities and said defendant, John F. Ritter, is herein and hereby directed to remove that portion of construction of said pilot lounge or club and auxiliary hangar already completed within 90 days from the date of this judgment."

This Court affirmed Judge Falls' order in a decision reported in *City of Brevard v. Ritter*, 14 N.C. App. 207, 188 S.E. 2d 41. That decision was certified on 8 May 1972.

No work was done on building from January until June 1972. On 22 May 1972, defendant notified plaintiff he was proceeding to convert the partially completed structure into a two-bedroom, single family residence which would be compatible with existing zoning regulations. Prior to giving the above notice, defendant again applied to the Board of Aldermen for F-1 rezoning. No action was taken on the application before construction was recommenced.

Plaintiffs filed a motion in the cause alleging, among other things, that defendant had continued construction after Judge Falls' order of 21 February 1972 and had failed to remove the new construction existing as of the date all as was required by that order. Judge W. E. Anglin signed an order on 26 September 1972 in which Ritter was directed to appear and show cause why he should not be held in contempt. The parties submitted stipulations of facts on 15 December 1972. The case was considered by Judge Ervin on the record in the case and argument of counsel.

Among the stipulations were the following:

"6. . . . . — 'That in December of 1971 the defendant, John F. Ritter, began constructing a new building located upon said premises which was to contain approximately 3,000 square feet, the intended use thereof being a pilot lounge or clubhouse and auxiliary hangar to be used in conjunction with the other facilities located at said airport, and that said building was completely new construction and not connected in any way to any of the existing structures located upon said premises, and said construction could in no way be considered as the repair, rebuilding or alteration of an existing structure, nor could such structure constitute a replacement of any existing structure.'

* * *

"9. *That the defendant, John F. Ritter, has not removed that portion of the construction of his building as it existed on February 23, 1972.* (Emphasis added.)

"10. That the construction of said *building was continued by the defendant,* John F. Ritter, commencing during the month of June 1972; that the defendant Ritter at said time made certain alterations to the existing construction by building two bedrooms, a kitchen, and by making certain alterations to the bathroom areas as shown on defendant's Exhibit 1, attached hereto. (Emphasis added.)

"11. That the defendant, John F. Ritter, and his family have spent the night in said building on occasions when they were in Brevard, North Carolina.

'That on or about October 11, 1972, when the attorneys for the parties made an inspection of the structure, the same had various furnishings located therein including various tables, chairs, lamps, TV set, a bed, a day bed, stove, refrigerator, telephone, all located at various places within the living-dining room, kitchen, bedrooms and baths.'

* * *

"13. That on or by the 11th day of September 1972, with the exception of the finishing of the rectangular space marked as 'Recreation' on Exhibit C (51 feet by 34 feet) (and marked garage and hobby shop, plus bedroom and closet and powder room, as shown on defendant's Exhibit 1), the defendant, John F. Ritter, had substantially completed the building which he was then constructing and the sides thereof had been painted and Exhibit F attached hereto is a fair and accurate representation of said building as it appeared on the 11th day of September 1972."

On 31 December 1972, Judge Ervin signed an order which denied plaintiff's motion in the cause and contained, in pertinent part, the following:

* * *

"And after consideration of the court's file, and the facts stipulated between the parties, and after hearing argument of counsel as to the facts and the law, it appeared to the court and the court finds that the plaintiff has failed to carry the burden of proving that the defendant, John F.

Ritter, has violated the provisions of the judgment of the Honorable B. T. Falls dated February 23, 1972, nor the subsequent opinion of the Court of Appeals of North Carolina, and the plaintiff has failed to prove that the structure completed by the defendant is in violation of the court order."

Morris, Golding, Blue & Phillips by James N. Golding for plaintiff appellants.

Van Winkle, Buck, Wall, Starnes and Hyde, P.A. by O. E. Starnes, Jr., and Roy W. Davis, Jr., for defendant appellee.

VAUGHN, Judge.

Subsequently affirmed by this Court, the order of Judge Falls, required, among other things, defendants to "remove that portion of construction . . . already completed" within 90 days. Defendants were permanently restrained "from constructing the pilot lounge and clubhouse and auxiliary hangar or extending or enlarging the airport facilities." It appears to us that when Judge Falls uses the words "pilot lounge and clubhouse and auxiliary hangar" he was simply adopting the language of the parties to describe the *offending structures* which then and now constitute an extension of the nonconforming use. The stipulations are sufficient to show that defendants have failed to comply with the order, despite the fact that they may have changed the name of the offending structures.

The question of compliance or noncompliance with the explicit letter and intent of the order as entered was the essential question presented for resolution at the hearing. The order of 31 December 1972 is reversed and vacated and the cause is remanded for proceedings to assure compliance with the order of Judge Falls entered 23 February 1972.

Reversed and vacated.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES WESLEY BLUE

No. 738SC689

(Filed 9 January 1974)

1. **Criminal Law § 75— statements to police — admissibility**

Statements made by defendant to a police officer were properly admitted in evidence after the court conducted a *voir dire,* made findings of fact and concluded that defendant's constitutional rights had not been violated; furthermore, defendant was not prejudiced by admission of the statements since they were exculpatory.

2. **Criminal Law § 80— right to inspect officer's notes — statute**

G.S. 15-155.4 does not give defense counsel the right to inspect notes discovered in the pocket of a law officer during the trial.

3. **Constitutional Law § 31; Criminal Law § 80— notes in officer's pocket — no right of inspection by defendant**

Where defense counsel discovered the existence of notes in the shirt pocket of a deputy sheriff during his cross-examination of the deputy, and the deputy did not use the notes during his testimony, motion by defense counsel that he be allowed to inspect the notes was properly denied by the court on the ground that the notes were the work product of the police.

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

This is a criminal action in which the defendant, James Wesley Blue, was charged in a bill of indictment, proper in form, with the first degree murder of Sadie Marie Highsmith. Upon arraignment, the defendant pleaded not guilty to the crime charged.

The State offered evidence which tended to show the following: On 6 October 1972 defendant and a friend, Dock Wilkerson, were working on the farm of J. W. Bryant near Grantham, North Carolina. At approximately 6:00 p.m. defendant and Wilkerson departed from work in Wilkerson's automobile and made brief stops in Dudley and Goldsboro prior to driving to defendant's home. They arrived at defendant's home at approximately 7:30 p.m., and Wilkerson testified as to the following events:

> "When we got to his house I saw a person I knew as Sadie there. I don't know her last name. I had known her because we had all barned tobacco together, Sadie, James, and me.

> I saw Sadie when she came to the front door of James Blue's house."
>
> * * *
>
> "She was standing right in the doorway. There were lights on in the house behind her but none in front of her. When I saw her she was standing with the light behind her and none in front of her but I could tell what color dress she was wearing."

Wilkerson did not get out of his car at defendant's home and left as soon as defendant got out of the vehicle.

At about 10:00 p.m. on the same day, Deputy Sheriff Coley of the Wayne County Sheriff's Department received a telephone call from defendant and was instructed by defendant to drive to a designated point on Highway 13 South, near Grantham. Upon arriving at this site, the deputy sheriff observed defendant standing beside the road, and defendant stated that he had just arrived home and found Sadie Highsmith in a puddle of blood. Deputy Sheriff Coley testified as follows:

> "He took us in the house and in the back room where we found the deceased. The deceased was a black female dressed only in socks. The other portions of her body were bare. She was lying on the floor face up. I observed the wounds on her face, head, arms and legs. At the time we observed her I have an opinion that she was dead."

Further investigation revealed a bloody axe head five feet from where the deceased was lying, a bedroom spattered with blood, a wash basin which had blood stains on it, and blood on defendant's hands, under his fingernails, and behind his right ear.

Mark Bryant and Crow Best, both of whom worked with defendant on the farm of J. W. Bryant, testified as to separate statements made to them by defendant. Bryant testified that:

> "On Wednesday before the 6th of October, 1972, we were out there talking and James Blue he said that his wife had made him mad about spending his money or something like that and he said that she wouldn't do it anymore because he would chop her up with the axe and kill her."

Best talked with defendant two days later and during the course of their conversation defendant said that:

> "Sadie wouldn't spend any more of his money or he would kill her. Before she would he would kill her and cut her up with the axe."

The State also offered the testimony of Dr. Louis Lefer, a medical doctor working with the Office of the Chief Medical Examiner of North Carolina, who testified that in his opinion the cause of death was loss of blood due to the wounds on the body and that in his opinion the time of death was between 6:00 p.m. and 12:00 p.m. on 6 October 1972.

The jury found defendant guilty of second degree murder and from a judgment imposing a prison sentence of twenty to twenty-five years, defendant appealed.

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

Herbert B. Hulse and George F. Taylor for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of his motions for judgment as of nonsuit. These motions were properly denied as there was plenary, competent evidence to submit the case to the jury and to support the verdict rendered.

[1] Defendant's next two assignments of error raise the question of whether certain statements made by the defendant were properly admitted into evidence. The first of these statements was made on 6 October 1972 by the defendant to Deputy Sheriff Coley shortly after the latter had arrived to conduct his investigation. Officer Coley testified as follows:

> "Mr. James Wesley Blue stated that he arrived home and found his wife in a puddle of blood and at that time I asked Mr. Blue had he touched anything or moved her or in any way at all and he said no, he had not."

The second statement introduced in evidence was made by the defendant the next day at the sheriff's office and consisted of the following:

> "[W]hen I got home, Dock put me out in front of my house. [Sadie was standing in the door.] I got my beer and went on into the house. Me and Sadie sit down and dranked the two beers and talked awhile. * * * When I changed clothes I got out and walked across the field to a neighbor's house. When I arrived at the neighbor's house there wasn't anyone at home so I turned round and came back to my house. When I came into the house I found Sadie in the back bedroom cut up wih blood all over her. I then went out to the barn and called the sheriff's office."

The State offered evidence of these statements on two separate occasions and each time prior to admission of such statements, the trial court, following the practice approved by a long line of decisions, conducted a *voir dire* into the circumstances surrounding the making of these statements. *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). At the completion of each *voir dire* the court made findings of fact and concluded that the defendant's constitutional rights had not been violated. We deem that this procedure sufficiently insured that defendant's statements were voluntarily, understandingly, and freely made. Furthermore, it is worthy of note that the statements introduced were of an exculpatory nature as opposed to inculpatory; thus, the defendant could not possibly have suffered any prejudice by their admission. These assignments of error are not sustained.

[2, 3] Next, defendant contends that the trial court erred in not allowing him to inspect certain notes which were located in the shirt pocket of Deputy Sheriff Davis and which were discovered for the first time by defendant's counsel upon his cross-examination of Deputy Sheriff Davis. These notes had not been used by the witness to refresh his memory. The trial judge, terming the notes the work product of the police, refused the defendant's counsel's motion requesting that he be allowed to inspect the notes. Although there is no common law right to discovery in criminal actions, *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334, cert. denied 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884 (1964), G.S. 15-155.4 provides for pretrial investigation in criminal cases in certain limited circumstances. The statute provides that the defense counsel, by showing good cause and adhering to the established time limitations, can inspect specific

exhibits and examine expert witnesses. Clearly, the notes sought by defendant do not fall within either of these latter categories; therefore, resolution of this question is not controlled by G.S. 15-155.4, *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973). Rather, we believe this case is similar to *State v. Davis, supra,* in that both cases involve the attempted discovery of certain information held by law enforcement officials.

Admittedly, the *Davis* case was concerned with a pretrial investigation and involved a more widespread request for information; however, we think that the court's denial of the defendant's motion because it concerned the work product of police is germane to the present case. The court in *Davis* further emphasized the importance of the sanctity of police investigation by including within its opinion the following quote from *Moore v. Illinois,* 408 U.S. 786, 33 L.Ed. 2d 706, 92 S.Ct. 2562 (1972):

> "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."

Furthermore, defendant has failed to show how, if at all, he was prejudiced by the failure of the trial court to order the notes in question to be turned over to him. We find this assignment of error to be without merit.

The defendant has brought forward several other assignments of error which we have carefully reviewed and find to be without merit.

No error.

Judges MORRIS and BALEY concur.

STATE OF NORTH CAROLINA v. RANDY KING

No. 7319SC813

(Filed 9 January 1974)

1. Obstructing Justice— obstructing police officer — variance

There was no variance between allegation and proof where the warrant charged defendant with obstructing an officer while the officer was attempting to arrest defendant and the evidence showed

that defendant obstructed the officer both when defendant's companion was arrested and when an attempt was made to arrest defendant.

2. **Arrest and Bail § 6— resisting unlawful arrest — firing of shotgun — unreasonable force**

Defendant's firing of a shotgun at an officer did not constitute reasonable force in resisting an unlawful arrest without a warrant for a misdemeanor not committed in the officer's presence.

APPEAL by defendant from *Seay, Judge,* 4 June 1973 session of RANDOLPH County Superior Court. The defendant, Randy King, was charged in a bill of indictment with the felony of assault on a law enforcement officer with a firearm and in a warrant with obstructing a public officer in the performance of his duties. The latter had been appealed from district court, and the two were consolidated for trial. The verdict was guilty of obstructing a public officer and guilty of assault with a deadly weapon, a lesser included offense of the felony charged. From a judgment imposing an active sentence, the defendant gave notice of appeal.

Patrolman D. W. Carter testified that he noticed a vehicle driving in an erratic manner at 7:45 on the evening of 10 June 1972. After stopping the vehicle and observing the driver, E. P. Burrows, Jr. (Burrows), Officer Carter placed Burrows under arrest for driving while under the influence of alcohol. The defendant Randy King (King) was a passenger in the Burrows automobile. While Officer Carter was preparing to search Burrows, King got out of the car and told Officer Carter he wasn't going to arrest anybody. Having been told to go back to his car, King said he was going to get a gun and blow Officer Carter's head off. At this time Officer Carter radioed for assistance.

King went to Burrows' car and returned carrying a 4½ foot slab of wood which he started swinging. Officer Carter informed King that he was going to place him under arrest for interfering with an officer. King continued to advance swinging the slab of wood. Officer Carter sprayed King with Mace to stop him. King backed up and then started forward again swinging the slab of wood. Officer Carter used the Mace again, and King fell back. King started to advance once more when some members of King's family drove up and tried to calm him down. King escaped by running into the woods nearby.

Officer Skelton arrived at the scene in response to the radio call for assistance. He was briefed on the events including

the threat to blow Officer Carter's head off. Officer Carter drove off to take Burrows to jail, and Officer Skelton stayed with the Burrows car awaiting the wrecker. Shortly afterward, Officer Skelton saw the defendant in the woods about 50 feet away with a shotgun in his hands. Officer Skelton got his shotgun from the patrol car, and the defendant ran into the woods. The defendant's father came and offered to "go down there and get that boy." Officer Skelton ducked down beside a power pole, and a shotgun blast went off, striking the pole just above the Officer's head. He returned the fire and heard someone run away through the woods. The defendant's father brought him to jail the following morning.

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

Bell, Ogburn and Redding by John N. Ogburn, Jr., for the defendant.

CARSON, Judge.

[1] Defendant's first assignment of error relates to whether there is a fatal variance between the allegations of the warrant for interfering and the proof adduced. The warrant charges the defendant with obstructing an officer while the officer was discharging a duty of his office—making an arrest of the defendant. The defendant claims the violation, if any, occurred while the officer was attempting to arrest Burrows and hence a fatal variance. The defendant cites *State v. Allen,* 14 N.C. App. 485, 188 S.E. 2d 568 (1972), in support of his contention.

In the Allen case the officer had arrested Bruce Allen for driving under the influence. Some fifteen minutes after Bruce Allen had been placed in the patrol car, the officer had an argument with Walter Allen, a passenger in the vehicle. Bruce Allen got out of the car and struck the officer during the argument. He was charged with obstructing an officer while the officer was in the performance of his duties: to wit, arresting *Bruce* Allen. In reversing, this Court held that nonsuit should have been granted to Bruce Allen because of the fatal variance between the allegations and proof. Bruce Allen had peacefully submitted to the arrest some fifteen minutes earlier and obstructed only when the officer was attemping to arrest Walter Allen.

The facts in the instant case are clearly distinguishable from the Allen case. Officer Carter had not completed his arrest of Burrows when King started obstructing the officer. Furthermore, King continued to resist violently after being told that Officer Carter was going to arrest him also. He continued to advance on Officer Carter swinging the slab of wood in such a manner that Mace had to be used three times. It is clear that King obstructed Officer Carter both when the arrest of Burrows was made and also when the attempt to arrest King was made.

[2] Defendant next contends that Officer Skelton had no authority to arrest without a warrant for a misdemeanor not committed in the officer's presence and that the defendant could use reasonable force to resist the unlawful arrest. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Jefferies,* 17 N.C. App. 195, 193 S.E. 2d 388 (1972). While the defendant's statement of the principle of law is correct, the application to the facts here is incorrect. Firing a shotgun at the officer under the existing circumstances was clearly unreasonable and excessive force. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954); 1 Strong, N. C. Index, Arrest and Bail, § 6 p. 278.

The defendant's remaining assignments of error pertain to the judge's charge. Considering the charge in its entirety, we feel that the trial court correctly and properly charged the jury as required. He instructed the jury on the elements of each offense as well as the lesser included offenses as appropriate. *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971). He correctly refused to charge on lesser included offenses which were not supported by the evidence. *State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Curtis,* 18 N.C. App. 116, 196 S.E. 2d 278 (1973). The proper instructions as to the quantum of proof were given as were other necessary instructions. *State v. Billinger,* 9 N.C. App. 573, 176 S.E. 2d 901 (1970). Viewed contextually and in its entirety, the trial court correctly charged the jury as required. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970).

No error.

Chief Judge BROCK and Judge MORRIS concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. J. R. HELDERMAN AND WIFE, WILLIE H. HELDERMAN

No. 7329SC659

(Filed 9 January 1974)

1. **Eminent Domain § 7— selection of jury — change of counsel for trial — no prejudice**

Though the attorney for plaintiff during the jury selection process which took place two days before trial was not the attorney for plaintiff at trial, plaintiff has shown no prejudice since the jury was selected with the consent of counsel for plaintiff, and the court was not informed that plaintiff's counsel at the jury selection would not be trial counsel.

2. **Eminent Domain § 6— evidence of value of land taken — cumulative errors prejudicial**

In an eminent domain action where the issue of just compensation was submitted to the jury, error of the trial court in allowing evidence as to the landowner's opinion that his property had constantly increased in value since his purchase, evidence as to price of sales of comparable land, and evidence as to the asking price of landowners in order to determine the market value of the property, together with other errors, was prejudicial to plaintiff and prevented it from getting a fair trial.

Judge VAUGHN dissents.

APPEAL by plaintiff from *McLean, Judge,* 12 March 1973 Session, Superior Court, HENDERSON County.

This eminent domain action was brought to acquire fee simple title to right-of-way across certain described lands of defendants. On 14 March 1973, a consent order was entered determining all issues except the issue of damages. The parties could not agree upon the issue of just compensation, and this issue was submitted to a jury, after trial, which answered the issue in the amount of $47,500. Upon filing its complaint, plaintiff had deposited its voucher in the amount of $3100 with the Clerk of Superior Court, this being the sum estimated by plaintiff to be just compensation for the taking. From the judgment entered on the jury verdict, plaintiff appealed bringing forward 17 assignments of error based on 79 exceptions.

Attorney General Morgan, by Deputy Attorney General White and Assistant Attorney General Hamlin, for plaintiff appellant.

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

MORRIS, Judge.

[1] Plaintiff's first assignment of error is directed to the action of the trial court in having a jury selected to try the issue of damages at a time when trial counsel for plaintiff was not in attendance at court. The record shows the court announced:

> "Mr. Jim Richmond, Raleigh, North Carolina, appearing for the State Highway Commission on Monday, 12 March, 1973.
>
> Mr. Monroe Redden, Hendersonville, North Carolina, appearing for the defendants on Monday, 12 March, 1973.
>
> THE COURT: Why couldn't you gentlemen pass on a jury here this morning in your case and then let them go and come back Wednesday morning, and the other jury would not have to come back?
>
> *By agreement of counsel the jury is selected.*
>
> Jurors chosen, sworn and empaneled.
>
> It appearing to the undersigned, Judge Presiding, that this action is for the condemnation of the right of way by the State Highway Commission and that the trial of this case will likely take two days. IT IS NOW, THEREFORE, ORDERED that a thirteenth and fourteenth juror be empaneled.
>
> Thirteenth and fourteenth jurors are duly chosen and sworn, and the jury is reempanelled." (Emphasis added.)

On Wednesday of the same week the case was called for trial. The court advised the jurors that when they were selected, Mr. Richmond was present and appearing for the State but that he was not present for the purpose of trial, Mr. Hill and Mr. Hamlin being the attorneys for the State for the purpose of trial. The court then inquired of the jury whether any prejudice would arise in their minds by reason of the change of counsel. No negative response was received, and he directed the attorneys to proceed to trial.

Whereupon, Mr. Hamlin, counsel for the State, handed a map to the jury and put one on the board. At that point, he requested a hearing out of the presence of the jury. His request was granted, and Mr. Hill moved that the State be allowed to pick another jury since neither he nor Mr. Hamlin had been

present when the jury was selected. The court then dictated the following into the record:

> "THE COURT: Let the record show that on Monday it appeared to the presiding Judge that the only jury trial for the week was the case of *State Highway Commission v. J. R. Helderman, and wife;* that the Court inquired of counsel at that time if there was any objection to the selection of the jury to try this case, at which time counsel for the State Highway Commission and counsel for the defendant stated to the Court that there was no objection to the selection of the jury at that time, and the Court desiring to select a jury in order that the other jurors might go home and the State would not be required to pay for any further attendance for them during the Court.
>
> In view of the foregoing the Court denies the motion of the plaintiff, petitioner."

From the record, it is abundantly clear that the procedure of which plaintiff complains was done with the consent of counsel for plaintiff. We agree that it is certainly a better practice for the trial counsel to participate in the selection of the jury. However, here no prejudice has been shown. The record reveals no valid reason for Mr. Richmond's failure to demur to the procedure suggested by the court, nor does the record indicate that the court was told that Mr. Richmond would not be trial counsel. This assignment of error is overruled.

While it may be that any one of the additional errors assigned by plaintiff might not be sufficiently prejudicial to warrant a new trial, we are of the opinion that cumulatively they are sufficiently prejudicial to entitle plaintiff to a new trial.

[2] We do not deem it necessary to go into each assignment of error in detail. A few examples of the errors in evidence will suffice. Defendant was allowed to testify, over objection, that his property had constantly increased in value since he purchased it. He had previously been allowed to testify, over objection, that he *thought* he knew and was acquainted with the fair market value of real estate in the vicinity. He testified he bought the property seven or eight years ago, was in the oil business in Albemarle where he lived, owned no other property in Henderson County, and there were no buildings on the property, and that he had never lived in Henderson County. There is nothing in the testimony of plaintiff which would indicate

any basis for his knowledge of fair market value of property in the vicinity nor whether his property had constantly increased in value since his purchase.

During defendants' evidence, the court, after hearing evidence out of the presence of the jury, determined that he would not allow price of sales of comparable land to be put in evidence although the witness could testify as to descriptions of the land allegedly the subject of a comparable sale. Immediately after this ruling, defendants' witness was testifying about a comparable sale. Counsel for defendants asked what the land sold for. Plaintiff's counsel objected. The objection was sustained. In spite of the court's ruling, the witness answered $45,000. The court allowed plaintiff's motion to strike and instructed the jury not to consider it. In view of the verdict of $47,500, it is difficult to assume the jury failed to consider this evidence put before them after an objection had been sustained and in response to a question counsel had been told not to ask.

The same witness was allowed, over objection, to testify as to the asking price of landowners "in order to determine the market value of this property." In *Canton v. Harriss*, 177 N.C. 10, 12, 97 S.E. 748 (1918), Justice Hoke said:

> "An unaccepted offer of this kind may be influenced by so many considerations entirely foreign to such an issue, and may put the opposing party at such disadvantage, affording him, as it does, no fair opportunity to either anticipate or combat it, that its reception as evidence has been very generally disapproved by the authorities on the subject. (Citations omitted.)"

It is true that the witness did not testify as to specific asking prices, but he did testify that he investigated asking prices and took into consideration all that he learned. He came up with a figure of $66,850 as damages.

The property abutted U. S. 64 and defendant had testified that prior to the taking he planned to build a service station and car wash thereon. The same witness testifying for defendants was allowed, over objection, to testify that U. S. 64 "is the most heavily traveled road in Henderson County." Absolutely no foundation had been laid for that evidence. The witness had previously testified that he, in determining his valuation of $66,850, had considered the traffic but did not take a traffic count.

During defendants' cross-examination of plaintiff's witnesses, questions were asked, over objection, with respect to sales prices of property about which no one had testified. The witness, in one instance, was not allowed to explain his answer, the court, upon his request to do so, saying: "You talk to your lawyers after you get through."

Although the court properly gave the measure of damages, his last instruction on damages was:

> "*As the court has heretofore instructed,* Members of the Jury, the measure of damages is the difference between the fair market value of the property immediately before the taking and the fair market value of the remainder of the tract after the taking, *which shall include the value of the property taken plus damages to the adjoining property.*" (Emphasis added.)

We think the examples set out are sufficient to show that the cumulative effect of these, and other errors, was prejudicial to plaintiff and prevented it from getting a fair trial. For that reason, we are of the opinion that plaintiff is entitled to a

New trial.

Judge BALEY concurs.

Judge VAUGHN dissents.

STATE OF NORTH CAROLINA v. MOSES TEEL

No. 737SC807

(Filed 9 January 1974)

1. Criminal Law § 122— inability of jury to agree — additional instructions proper

Trial court's supplemental instruction requesting further deliberation after the jury had announced its failure to agree was not coercive where the judge repeatedly cautioned the jurors not to surrender a conscientious opinion one might have about the case, suggested to the jury that if they failed to reach a verdict, the case would have to be tried again, and urged the jury to try to reach a verdict.

2. Larceny §§ 9, 10— larceny of property with value greater than $200 — failure to instruct on value — verdict of guilty — misdemeanor larceny — sentence

In a prosecution for felonious breaking and entering and larceny of tobacco worth $3400 where there was no finding of guilty of the breaking and entering, a verdict of guilty of felonious larceny or of guilty of misdemeanor larceny was permissible under appropriate instructions; however, since the jury in this case was not instructed as to its duty to fix the value of the property in question, the verdict must be considered as a verdict of guilty of misdemeanor larceny, and judgment of imprisonment for a period of not less than three nor more than five years imposed upon defendant is greater than the maximum allowed for a misdemeanor and is vacated.

APPEAL by defendant from *Brewer, Judge,* 21 May 1973 Session of Superior Court held in WILSON County. Argued in the Court of Appeals on 14 November 1973.

Defendant was charged in a bill of indictment, sufficient in form, with (1) the felony of breaking and entering, and (2) the felony of larceny of property after such breaking and entering and of a value of $3,400.00.

The State's evidence tended to show the following: On 5 May 1972 a tobacco packhouse belonging to one Adrian Bass, was broken into and 22 sheets of tobacco belonging to Adrian Bass were stolen. The value of the tobacco so stolen was $3,400.00. On 7 November 1972 defendant sold some of the stolen tobacco in Danville, Virginia.

Defendant's evidence tended to show that he was elsewhere at the time of the alleged breaking and entering and at the time of the sale of the tobacco in Virginia.

The jury found defendant not guilty of the felonious breaking and entering, but guilty of the felonious larceny. Defendant was sentenced to a term of three to five years imprisonment, which sentence was suspended upon stated conditions. Defendant appealed.

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

Charles L. Becton for the defendant.

BROCK, Chief Judge.

[1] Defendant assigns as error that the trial judge coerced the jury into finding defendant guilty of larceny.

The record discloses that the jury deliberated from 4:35 p.m. until 6:00 p.m. on one afternoon and from 9:05 a.m. until 10:10 a.m. the next morning. The jury came into open court and its foreman announced that it had agreed upon a verdict as to one count in the indictment but stood eleven to one as to the other count. The trial judge instructed the jury as follows:

> "Members of the Jury, the Court gives you the following instructions. Listen very carefully to what I have to say.
>
> "I don't want any member of the Jury to surrender any conscientious opinion that he or she has about these cases, but you know the reason we select a jury and let twelve jurors discuss the case, is so that each member of the jury can express his or her opinion and also consider the opinion of the fellow jurors. It is very rare that all twelve would have the same opinion to begin with. We want the benefit of your combined judgment. And, it may be that you have an idea that you want the other members of the Jury to consider. Maybe some of the others have ideas that you ought to consider. In the final analysis, members of the Jury, we are seeking to determine the truth of the matter.
>
> "So far as I know, you members of the Jury have all of the information or all of the evidence available in this case. If we should have a failure of agreement now, it would mean that the case would have to be tried over again, which would mean added expense, and in the final analysis some twelve jurors are going to have to decide this case. And, inasmuch as you members of the Jury have all of the evidence any other twelve jurors would have, I am hoping that you can determine it, but as I stated at the outset, I do not ask and would not permit a single one of you, members of the Jury, to participate in a verdict that did not reflect your conscientious opinion. I don't ask or want you to do that. I want you to consider the views of the members of the Jury.
>
> "I might say there is no reason to hurry in this case. So, at this time, members of the Jury, I will let you resume your deliberations and see if you can reach a verdict in this case. You may retire.
>
> "May I say, if you determine that you cannot resolve your differences, let us know."

The record discloses that the jury thereafter deliberated from 10:48 a.m. to 11:03 a.m. before returning its verdict of not guilty on the breaking and entering count and guilty on the larceny count.

The charge to which defendant objects must not be read in detached portions. When viewed as a whole, it is clear that the trial judge repeatedly cautioned the jurors not to surrender a conscientious opinion one might have about the case. Defendant argues, however, that it was improper for the court to suggest that if this jury failed to reach a verdict, the case would necessarily have to be tried again. Defendant contends that a mistrial is not always followed by a retrial and, therefore, the suggestion that the case would have to be tried again was untrue and misleading.

The statement that in event of failure of agreement by the jury the case would have to be tried over again, while not accurate in the sense of a retrial being an absolute necessity, was accurate as a generality. Considering the supplemental charge as a whole, it was merely an expression of hope that the jury would decide the case if it could do so without any juror abandoning a sincere and conscientious belief. The supplemental charge, considered contextually, could not reasonably have a coercive effect.

U. S. v. Harris, 391 F. 2d 348, relied upon by defendant, is clearly distinguishable. In *Harris* the trial judge, in giving supplemental instruction to the jurors, advised them that a previous jury had failed to agree.

While we urge that trial judges must be extremely careful in the manner of requesting further deliberation after the jury has announced its failure to agree, we hold that the supplemental instructions given in this case were not coercive. This assignment of error is overruled.

[2] Defendant assigns as error the acceptance by the trial judge of a verdict of guilty of felonious larceny after a verdict of not guilty of breaking and entering.

The following is stated in *State v. Holloway,* 265 N.C. 581, 144 S.E. 2d 634: "It is noted that the verdict of not guilty as to the first count [felonious breaking and entering] establishes that defendant did not commit the alleged larceny pursuant to an unlawful and felonious breaking and entering and therefore

G.S. 14-72, as amended, does not apply." Absent a finding of guilty of the breaking and entering, a verdict of guilty of larceny of property of a value of more than $200.00 (a felony), or of guilty of larceny of property of a value of $200.00 or less (a misdemeanor), was permissible under appropriate instructions. In this case, however, the jury was not instructed as to its duty to fix the value of the property in question. Therefore, as was done in *State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380, the verdict in this case must be considered as a verdict of guilty of larceny of property of a value of $200.00 or less (a misdemeanor).

The judgment of imprisonment for a period of not less than three nor more than five years entered in this case is greater than the maximum allowed for a misdemeanor. The judgment is vacated and this cause is remanded to the Superior Court for pronouncement of judgment herein as upon a verdict of guilty of misdemeanor larceny.

Error and remanded.

Judges CAMPBELL and PARKER concur.

HARLEY McCRAY SIMMONS v. ED NORMAN WILLIAMS, JR. AND HAROLD BURNETT FERGUS

No. 735DC779

(Filed 9 January 1974)

1. **Automobiles § 53— driving on wrong side of highway**

In an action to recover for personal injuries received when plaintiff was struck by defendants' truck, plaintiff's evidence was sufficient to go to the jury on the issue of defendant driver's negligence where it tended to show that the driver had crossed a double yellow line and was traveling in the left lane of the street when the accident occurred.

2. **Negligence § 35— directed verdict for contributory negligence**

A verdict may be directed on the basis of contributory negligence only when the plaintiff's evidence so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference or conclusion can be drawn therefrom.

3. **Automobiles § 83— driving on wrong side of road — contributory negligence of pedestrian**

Plaintiff's evidence did not disclose that he was contributorily negligent as a matter of law when he was struck by defendants'

truck, but presented a jury question as to that issue, where it tended to show that plaintiff, a sanitation worker, crossed the street and picked up a garbage can and two plastic bags full of trash, that he stepped out into the street a foot or two and then stopped and stood still, that he was struck by defendants' truck while standing still a foot or two from the curb with the garbage can and plastic bags in his arms, that defendants' truck was traveling southward in the north-bound lane when it struck plaintiff, and that there was no crosswalk at the point where plaintiff was struck.

APPEAL by plaintiff from *Barefoot, Judge,* April 1973 Session of District Court held in NEW HANOVER County.

This is an action to recover damages for personal injuries. The plaintiff alleges he was hit by a truck owned by Harold Burnett Fergus and operated by Ed Norman Williams, Jr. The accident occurred on 12 October 1971 on Front Street in the city of Wilmington.

In his complaint plaintiff charges the defendant Williams, among other things, with negligence in operating his truck to the left of the center line of Front Street at excessive speed and without keeping proper lookout. Defendants denied all allegations of negligence, but defendant Fergus admitted in his answer that he owned the truck and that Williams was his agent and employee acting in the course of his employment.

At the conclusion of plaintiff's evidence, the court granted defendant's motion for directed verdict.

Plaintiff appealed.

Crossley & Johnson, by Robert White Johnson, for plaintiff appellant.

Smith & Spivey, by James K. Larrick, for defendant appellees.

BALEY, Judge.

The sole question to be decided in this case is whether the trial court erred in directing a verdict for defendants.

[1] It is clear that plaintiff has presented sufficient evidence to go to the jury on the issue of defendants' negligence. He testified that defendant Williams had crossed a double yellow line and was traveling in the left lane of the street when the accident occurred. He was struck by the left front fender of the

Williams truck. G.S. 20-146 provides that, except in certain specified situations, motor vehicles must be driven on the right side of the roadway. "When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidence makes out a prima facie case of actionable negligence." *Lassiter v. Williams,* 272 N.C. 473, 475, 158 S.E. 2d 593, 595; *Anderson v. Webb,* 267 N.C. 745, 749, 148 S.E. 2d 846, 849; *Smith v. Kilburn,* 13 N.C. App. 449, 456, 186 S.E. 2d 214, 219, *cert. denied,* 281 N.C. 155, 187 S.E. 2d 586. Defendant, of course, may rebut the inference arising from such evidence by showing that he was on the wrong side of the road from a cause other than his own negligence. *Anderson v. Webb, supra.*

[2, 3] As to contributory negligence of the plaintiff as a matter of law, a verdict may be directed on the basis of contributory negligence "only when the plaintiff's evidence . . . so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference or conclusion can be drawn therefrom." *Anderson v. Carter,* 272 N.C. 426, 429, 158 S.E. 2d 607, 609; *accord, Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47; *Miller v. Enzor,* 17 N.C. App. 510, 195 S.E. 2d 86, *cert denied,* 283 N.C. 393, 196 S.E. 2d 276. In determining whether a directed verdict should be granted, the evidence must be viewed in the light most favorable to plaintiff. *Bowen v. Gardner, supra; Homes, Inc. v. Bryson,* 273 N.C. 84, 159 S.E. 2d 329. Contradictions and inconsistencies in plaintiff's evidence must be resolved in his favor. *Bowen v. Gardner, supra; Waycaster v. Sparks,* 267 N.C. 87, 147 S.E. 2d 535; *Carter v. Murray,* 7 N. C. App. 171, 171 S.E. 2d 810. When considered in this perspective, plaintiff's evidence tends to show the following: At the time of the accident, plaintiff was employed by the Sanitation Department of the City of Wilmington and worked on the back end of a garbage truck, picking up trash and putting it into the truck. On 12 October 1971, plaintiff's truck was being driven by Garland Nealy and was proceeding southward on Front Street. Nealy stopped the truck with its yellow flashing lights blinking and parked on the right edge of the street to collect some garbage. Plaintiff got off the truck, crossed to the left side of the street, and picked up a garbage can and two plastic bags full of trash. He turned around, looked to his right and left, stepped out into the street a foot or two, and then stopped and stood still. While he was standing still a foot or

two from the curb with the garbage can and plastic bags in his arms, Williams' truck ran into him. Williams had been driving southward, but he was in the northbound lane when the collision occurred; he was driving in the left lane of the street when he struck plaintiff. There was no crosswalk at the point where plaintiff crossed the street. Looking northward along Front Street in the direction from which Williams' truck came, a person could see for three or four blocks.

This evidence does not lead inevitably to the conclusion that plaintiff contributed to his injuries by his own negligence. It may be that plaintiff was negligent, and it may be that he was not; the question is one for the jury to resolve. The court should not have taken the case from the jury and directed a verdict for defendants.

Defendants contend that plaintiff was contributorily negligent in failing to see Williams' truck as it came toward him. In support of their position they cite *Anderson v. Carter, supra; Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214; and *Anderson v. Mann,* 9 N.C. App. 397, 176 S.E. 2d 365, *cert. denied,* 277 N.C. 351. These cases held that when a pedestrian crosses a street at a point other than a crosswalk, he must look carefully in both directions for oncoming traffic, observe any approaching vehicle, and move out of its path. In the present case, however, plaintiff testified that he was not crossing the street when the accident occurred, but was standing still at the edge of the street, a foot or two from the curb. The *Blake* and *Anderson* cases, therefore, are distinguishable.

The trial court erred in granting a directed verdict for defendants.

Reversed.

Judges MORRIS and HEDRICK concur.

CECIL C. JACKSON, JR. v. CAROLYN S. JACKSON; AND JAMES N. GOLDING, WILLIAM C. MORRIS, JR., JAMES F. BLUE, III, AND ANN H. PHILLIPS, DOING BUSINESS AS WILLIAMS, MORRIS, AND GOLDING

No. 7328SC648

(Filed 9 January 1974)

Partnership § 5— malicious prosecution on advice of attorney — liability of partners of attorney

All the partners in a law firm are not liable for a malicious prosecution instituted upon the advice of one of the partners without the participation, authorization, knowledge or approval of the other partners since a lawyer who engages in a malicious prosecution is not acting in the ordinary course of his firm's business. G.S. 59-43.

APPEAL by plaintiff from *Martin (Harry C.), Judge,* 30 April 1973 Session of Superior Court held in BUNCOMBE County.

This is an action for conspiracy, malicious prosecution, and abuse of process.

Plaintiff, Cecil C. Jackson, Jr., filed complaint against his wife, Carolyn S. Jackson, from whom he was separated, and the four partners in the law firm of Williams, Morris and Golding (now Morris, Golding, Blue, and Phillips), alleging that one of the members of the firm, James N. Golding, had conspired with plaintiff's wife to institute criminal proceedings against the plaintiff maliciously and without probable cause.

According to the allegations of the complaint, a warrant was issued on 19 June 1972 for the arrest of plaintiff, charging him with attempting to burn a dwelling house and two automobiles in violation of G.S. 14-66 and G.S. 14-67. The warrant was issued at the instance of plaintiff's wife who had consulted with her attorney, Mr. Golding. Plaintiff was arrested but never tried, and the charges against him were nolle prossed.

Plaintiff sought to hold the defendants Morris, Blue, and Phillips liable for the alleged tortious conduct of their partner, Golding.

Motion for summary judgment was filed by Morris, Blue, and Phillips supported by affidavits which were uncontradicted establishing the fact that they did not participate in or authorize any alleged acts of Mr. Golding.

The court granted their motion and dismissed the action as to William C. Morris, James F. Blue III, and Ann H. Phillips.

Plaintiff has appealed.

Wilson and Morrow, by Harold R. Wilson and John F. Morrow; and Vaughn & Gray for plaintiff appellant.

Uzzell and DuMont, by Harry DuMont, for defendant appellees.

BALEY, Judge.

The single question presented by this appeal is whether all partners in the law firm are liable for a malicious prosecution instituted upon the advice of one of the partners but without the participation, authorization, knowledge, or approval of the other partners. The trial court has denied such vicarious liability and granted summary judgment for the defendant partners who were not personally involved. In our view this decision is correct and is affirmed.

G.S. 59-43 provides: "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

The rules governing partnership tort liability are fully applicable to law partnerships. *See* Crane & Bromberg, Partnership, § 54, at 308-09; *Priddy v. Mackenzie,* 205 Mo. 181, 103 S.W. 968 (1907). Thus the question at issue in this case is whether a lawyer who engages in malicious prosecution is *acting in the ordinary course of his firm's business.*

Advising the initiation of a criminal prosecution is clearly within the normal range of activities for a typical law partnership, but taking such action maliciously and without probable cause is quite a different matter. In this case the acting partner, Mr. Golding, was either conducting himself lawfully and ethically in his relationship with his client, in which event neither he nor any of his partners would have any liability, or he was conducting himself maliciously and unlawfully and would not be acting in the ordinary course of the partnership busi-

ness. Whatever may be the eventual determination of the conduct of Mr. Golding, it is evident that his partners who did not authorize, participate in, or even know about such conduct would not be held responsible for any injury the conduct may have caused.

Canon 15 of the North Carolina Canons of Professional Ethics states:

> "In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyers is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."

Disciplinary Rule 7-102(A) of the North Carolina State Bar Code of Professional Responsibility (effective 1 January 1974) more specifically states:

> "In his representation of a client, a lawyer shall not:
>
> (1) File a suit . . . or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
>
> * * *
>
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

In view of these rules, which clearly forbid any attempt by a lawyer to prosecute a person without cause, it cannot be held that malicious prosecution is within the ordinary course of business of a law partnership.

The North Carolina Supreme Court has refused to hold a partner vicariously liable when his partner commits the tort of malicious prosecution. "[T]he mere fact that [defendant] was a partner . . . without evidence, direct or circumstantial, of at least his knowledge, approval, or consent, would not be sufficient to connect him with the prosecution." *Bowen v. Pollard*, 173 N.C. 129, 134, 91 S.E. 711, 713; *accord, Marks & Co. v. Hast-*

ings, 101 Ala. 165, 13 So. 297 (1893); *Rosenkranz v. Barker,* 115 Ill. 331, 3 N.E. 93 (1885); *Noblett v. Bartsch,* 31 Wash. 24, 71 P. 551 (1903).

The entry of summary judgment is affirmed.

Affirmed.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. TERRY WAYNE COCKMAN AND LOUIS HAROLD LUCAS

No. 733SC802

(Filed 9 January 1974)

Narcotics § 4— possession of marijuana — constructive possession — sufficiency of evidence

Where officers conducted a search of defendants' apartment when neither was there, neither defendant came while the officers were there, and the officers found a large quantity of marijuana, growing marijuana plants, seeds and money, evidence was sufficient for the jury to find that defendants had both the power and intent to control the disposition and use of the marijuana so as to have it in their constructive possession where the evidence tended to show that the apartment was rented to defendants, there was no evidence that they had sublet to anyone, the current telephone bill showed telephone calls to the homes of defendants, one defendant's school ID card was found in a bedroom, and the rental record showed the rent to have been paid by defendants for the month of May six days prior to the May 9 search.

APPEAL by defendants from *Cowper, Judge,* 13 August 1973 Session, Superior Court, PITT County.

Defendants were charged with possession of marijuana with intent to distribute and manufacturing manijuana. Both were found guilty by the jury and each appeals from judgment entered on the verdict. Each was sentenced to two years in the custody of the Commissioner of Correction as a "committed youthful offender" for treatment and supervision pursuant to G.S. 148—Article 3A.

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

James, Hite, Cavendish and Blount, by Marvin Blount, for defendant Cockman appellant.

Leroy Scott for defendant Lucas appellant.

MORRIS, Judge.

Defendants raise a single question on appeal—whether there was sufficient evidence to submit an issue of guilt or innocence to the jury.

The evidence, taken in the light most favorable to the State, tended to show:

Defendants together with another male had rented an apartment in Greenville—Apartment 103-H, Eastbrook Apartments—on 264 Bypass, but about a block from the highway. On 9 May 1973 officers went to the apartment and, pursuant to a search warrant (the validity of which is not at issue), searched the premises. They found over nine pounds of marijuana, six growing marijuana plants, marijuana seeds, and an envelope containing $3400. Marijuana was found in two bedrooms and seven marijuana plants were found in a third bedroom. Marijuana seed were found in the kitchen. Marijuana seed were also found in the top drawer of a bedroom in which marijuana was also found. In the same bedroom was found a white envelope containing $3400. The money was turned over to I.R.S. Only one of the lessees was at the apartment, one Strange, who said that the second bedroom on the left was his, this being where the money, some of the marijuana, and marijuana seed were found. All three bedrooms appeared to have been occupied. An East Carolina University I.D. card bearing the photograph of defendant Lucas was found in the drawer of a dresser in the first bedroom on the left. A Carolina Telephone and Telegraph Company bill addressed to Terry Cockman, 103 Eastbrook Drive Apartments, Apt. H, Greenville, N. C., was found on a table in the living room. Neither defendant was at the apartment when the officers went there, and neither came while the officers were there.

The lease for the apartment was introduced into evidence. It shows that the apartment rented for $192 per month. The lease was signed by Terry Cockman, Louis H. Lucas and Bruce

Strange and began 25 March 1973. The rental record shows that rent was paid for the balance of March, for April, for May, and that a portion of that paid for June was refunded. The applications for the apartment disclose that Bruce L. Strange was from Annapolis, Maryland; that Louis H. Lucas was from Hyattsville, Maryland; and that Terry Cockman was from Rockingham, North Carolina. The applications showed that the only occupation of the three lessees was student. Lucas received $220 per month from the Veterans Administration. The others received their income from their parents.

The telephone bill, introduced into evidence, showed five telephone calls to Rockingham, North Carolina, Cockman's home. A call to Annapolis, Maryland, Strange's home (Strange was an admitted occupant of the second bedroom on the left), and other calls to Winston-Salem, three to Jacksonville, North Carolina, one to Chapel Hill, and one to Holly Oak, Delaware. Lucas's I.D. card gave his address as 3850 Tangle Lane, Winston-Salem. This was issued in September 1972.

Defendants earnestly contend that there is nothing in the evidence to connect them with the contraband or to place them in even constructive possession. We disagree. Defendants' primary argument is that neither defendant was present at the apartment and they could easily have been living elsewhere. In *State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680 (1971), a very similar question was presented. A house was searched and heroin was found. Defendant was not present but the public utility services at that address were listed in his name. There was evidence that heroin purchases had been made before from that address. This evidence is not present in the case *sub judice.* However, under the facts of this case, it seems beyond belief that the amount of marijuana found, the plants, the seed, the large sum of money could lead to any conclusion but that the defendants had knowledge of the presence of the contraband in premises rented by them and that it was there for the purpose of distribution.

In *State v. Allen, supra,* Justice Branch, in affirming defendant's conviction, quoted with approval from *People v. Galloway,* 28 Ill. 2d 355, 192 N.E. 2d 370 (1963), as follows:

> "Where narcotics are found on the premises under the control of the defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which

may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts which might leave in the minds of the jury a reasonable doubt as to his guilt." Id. at 410.

In *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706 (1972), Justice Branch, again writing for the Court, said:

"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." See also *State v. Crouch*, 15 N.C. App. 172, 189 S.E. 2d 763 (1972).

In the case before us, we think the evidence sufficient to show "both the power and intent to control its disposition or use." The apartment was rented to defendants; there was absolutely no evidence that they had sublet to anyone; the current telephone bill showed telephone calls to the homes of defendants; one's I.D. card was found in a bedroom; and the rental record showed the rent to have been paid by the defendants for the month of May on 3 May 1973, the search having been conducted on 9 May 1973.

The jury could find from the evidence that defendants had both the power and intent to control the disposition and use of the marijuana so as to have it in their constructive possession.

The trial judge correctly denied defendants' motions for nonsuit and correctly submitted the matter to the jury.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. MELVIN EARL BROWN

No. 733SC569

(Filed 9 January 1974)

1. **Criminal Law § 167; Searches and Seizures § 3— validity of search warrant — review by issuing judge — no error**

   There is no statutory or constitutional proscription in this State against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge, and defendant in this case has failed to show that he was prejudiced by such procedure.

2. **Searches and Seizures § 3— reliability of informer — general allegation in affidavit sufficient**

   An affidavit which stated that "The affiant received information from a reliable informant who in the past has provided reliable information concerning the drug traffic in Greenville . . . " provided a sufficient statement of the underlying circumstances from which the affiant concluded the informant was reliable to support issuance of a search warrant.

3. **Criminal Law § 168— possession of pistol without permit — nonsuit granted — subsequent charge harmless error**

   In a prosecution for possession of heroin, possession of phenobarbital, possession of a weapon without a permit and resisting officers, where the trial court granted defendant's motion for nonsuit on the charge of possession of a pistol without a permit but subsequently charged the jury that the evidence tended to show that a pistol was found in defendant's pocket, error, if any, was harmless in the light of the other evidence of defendant's possession of heroin.

APPEAL from *Tillery, Judge,* 12 March 1973 Session of PITT County Superior Court.

Defendant was charged with possession of heroin and with three misdemeanors—possession of phenobarbital, possession of a weapon without a permit, and resisting officers. The four charges were consolidated for trial in District Court. Defendant was found guilty of the three misdemeanor charges and probable cause was found as to the charge of possession of heroin. Defendant gave notice of appeal to Superior Court, and the cases were consolidated for trial. Judgment as of nonsuit was entered in the three misdemeanor cases, and defendant was found guilty of possession of heroin.

The evidence presented at the trial tended to establish the following:

Greenville Police Officers, acting on the information of a confidential informant, obtained from Judge Whedbee a warrant

to search the persons and premises of Delores Vines and Melvin Brown. Pursuant to the warrant, they proceeded to the premises and observed two people who came to the front door, looked out the window and ran to the back of the house. The officers identified themselves and forced the front door open. They forced the kitchen door open and attempted to take a brown paper bag from Brown. The bag was dropped in the struggle and when it was recovered, it was found to contain 13 glassine bags containing a white powdery substance, identified by the S.B.I. as heroin.

The officers stated that there were three black males in the room in addition to Brown and Miss Vines at the time of the seizure, and they identified Brown as one of the persons they observed looking out the window.

From judgment committing him to a term of five years in the custody of the State Department of Corrections, defendant appeals.

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

Williamson and Shoffner, by Robert L. Shoffner, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant assigns error to the denial of his motion to dismiss all charges on the ground that he was denied a fair and impartial trial and preliminary hearing because the judge who issued the search warrant also presided at the trial and preliminary hearing. There is no merit to this assignment of error. The three misdemeanor charges were nonsuited upon trial de novo, so defendant has not been prejudiced in that respect. Defendant has likewise failed to show that he has been prejudiced with respect to the heroin charge. There is no statutory or constitutional proscription in North Carolina against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge. While it is the better practice to allow a different judge to rule upon the validity of such a warrant, it does not appear of record that defendant objected to this procedure. Nor can defendant show that a different judge would have ruled in defendant's favor on the issue of probable cause.

[2] Defendant next assigns error to the denial of his motion to suppress the evidence seized pursuant to the search warrant

in that it was based on a defective affidavit. Specifically, he contends that the affidavit fails to meet the probable cause test of *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964), inasmuch as it does not provide a sufficient statement of the underlying circumstances from which the affiant concluded the informant was reliable. The affidavit states:

> "The affiant received information from a reliable informant who in the past has provided reliable information concerning the drug traffic in Greenville . . . "

In *State v. Ellington,* 284 N.C. 198, 202 S.E. 2d 177 (1973), the Supreme Court refused to hold that the following language in an affidavit was insufficient under *Aguilar v. Texas, supra,* to establish the reliability of a confidential informant:

> "Deputy Simmons advises that his informer is 100% reliable, and that information obtained from this same informant recently led to the confiscation of 120,000 Barbiturates recently in New York City."

The obvious distinction between the affidavit in *Ellington, supra,* and the affidavit before us is that the former refers— although generally — to a specific instance of information whereas the latter refers only to a general pattern of information. Nevertheless, we hold that this affidavit is sufficient under *Aguilar v. Texas, supra,* and *State v. Ellington, supra.*

> "[T]he Fourth Amendment's commands, like all constitional requirements, are practical and not abstract. If the teaching of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *State v. Ellington, supra,* at 204, [quoting *U. S. v. Ventresca,* 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed. 2d 684 1965)].

[3] Defendant's final assignment of error is to the court's charging the jury that the evidence tended to show that a pistol was found in defendant's pocket. This charge was made after the court granted defendant's motion for nonsuit on the charge of possession of a pistol without a permit. Nevertheless, defendant has failed to sustain his burden of showing prejudice. It is not sufficient that appellant show error; he must show that it 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 error—if any—was harmless in light of the other evidence of defendant's possession of the heroin.

Affirmed.

Judges HEDRICK and VAUGHN concur.

WILLIAM H. MINGO v. LESTER B. TAYLOR AND ANNEY BELL TAYLOR

No. 7326SC578

(Filed 9 January 1974)

Automobiles § 56— striking unlighted parked car — sufficiency of evidence of negligence

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence where it tended to show that as defendant started up a hill he was blinded by the lights of an oncoming car which was then starting down the hill some 350 feet away, that just after the approaching car had passed, when defendant was approximately halfway up the hill, defendant collided with an unlighted vehicle parked partially on the pavement, and that defendant was traveling 30 to 35 mph and did not apply brakes before the collision, since the jury could have disbelieved testimony by defendant, who was called as a witness by plaintiff, that he was blinded, it could have determined that defendant should have seen the parked car even though it might have been improperly parked, or it could have found that defendant should not have continued at the same speed upon being blinded.

APPEAL by plaintiff from *Snepp, Judge,* 19 March 1973 Session of Superior Court held in MECKLENBURG County.

In this action plaintiff alleges that defendants' negligence was the cause of an automobile accident which resulted in injury to plaintiff.

The accident occurred on Honeywood Avenue, a straight but hilly street in Charlotte. Called as a witness by plaintiff, Lester B. Taylor, defendant, testified that on 18 April 1970 he was driving an automobile owned by his mother and codefendant, Anney Bell Taylor, in which plaintiff was a passenger and that he collided with a car parked on the right side of the street. He described the facts and circumstances surrounding the accident as follows. Defendant was proceeding from a stop sign at the intersection of Kentucky and Honeywood Avenues down a slight incline on Honeywood. As he reached the bottom of this incline and started up another, defendant was blinded by the lights of an oncoming vehicle which was just starting down the hill. He "got as far as [he] could on [his] right without getting off the pavement until [he] gave him as much room" as the approaching driver needed to avoid an accident. Seconds later, but after the approaching car had passed, when he was approximately half way up the hill, defendant collided with a parked car which he had not seen any time prior to the accident. The parked car was partially situated on the pavement on the right side of the road. The distance from the stop sign to the bottom of the first hill was estimated by a surveyor to be 440 feet, and that from the base of the incline to the top of the adjacent hill, to be about 480 feet, although the line of sight was between 350 and 380 feet. Defendant estimated that the approaching car was 350 to 360 feet away when it blinded him. The headlights of defendant's car were on, functioning properly, and enabled defendant to differentiate between a man and a woman 300 to 400 feet away, assuming the woman was wearing a dress. On the night of the accident, the weather was clear and dry. No low hanging branches or anything else obstructed defendant's view down Honeywood Avenue. Defendant was traveling between 30 and 35 miles per hour and did not apply brakes prior to the collision.

Plaintiff testified that although he was riding in the front seat of the car, he "was not watching the road" at the time of the accident, because he "went down to get a cigarette." He also offered evidence on the nature and extent of the injuries sustained as a result of the accident.

At the close of plaintiff's evidence, defendants' motion for a directed verdict pursuant to Rule 50(a) was allowed. Plaintiff appealed.

Hicks & Harris by Richard F. Harris III, for plaintiff appellant.

Wade and Carmichael by R. C. Carmichael, Jr., for defendant appellees.

VAUGHN, Judge.

Plaintiff contends that the Court erred in granting defendants' motion for a directed verdict. This contention has merit. The question presented by defendants' motion is whether when considered in the light most favorable to plaintiff, the evidence is sufficient for submission to the jury. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396; *Sink v. Sink,* 11 N.C. App. 549, 181 S.E. 2d 721. Our conclusion that plaintiff's evidence was sufficent to withstand defendants' motion is supported by the opinions in *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735 and *Smith v. Metal Co.*, 257 N.C. 143, 125 S.E. 2d 377. In *McKinnon,* plaintiff drove his automobile into the back of a slow-moving or stalled truck operated by defendant's employer. It was dark and the truck displayed no rear lights. Plaintiff asserted that he had been blinded by oncoming lights, could only see the right edge of the road, and did not see the truck prior to the accident. The evidence indicated that plaintiff traveled a minimum of 100 feet during a period of several seconds while blinded. The Court observed that while it conceded defendants were negligent, there was also evidence of plaintiff's contributory negligence. Referring to plaintiff, the Court stated that "[b]oth his vision and his prevision seem to have failed him at one and the same time. Such is the stuff of which wrecks are made. The conclusion seems inescapable that the driver of the McKinnon car omitted to exercise reasonable care for his own and his companion's safety . . . . " In *Smith,* plaintiff was also blinded by the lights of an approaching vehicle and drove into an unlighted parked truck. Plaintiff drove 243.5 feet while blinded, and the range of his headlights was about 200 feet. In finding plaintiff contributorily negligent, the Court reasoned that either plaintiff was within 200 feet (the range of his vision) of the parked vehicle when blinded, in which case he should have seen the truck, or else he was

more than 200 feet away when blinded and thus traveled over 200 feet while blinded.

In the present case, the evidence would permit, but not compel, several possible findings by the jury. The jury could have disbelieved defendant's testimony that he was blinded. It could have determined that defendant should have seen the parked car, even though it might have been improperly parked. It could have found that upon being blinded, defendant should not have attempted to continue traveling at the same rate of speed. It was for the jury to determine whether defendant had exercised reasonable care under the circumstances.

Citing *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19, defendants contend that a driver should not be required to anticipate that an unlighted vehicle will be parked in the roadway. The law, however, "charges a nocturnal motorist, as it does every other person, with a duty of exercising ordinary care for his own safety." *Keener v. Beal, supra,* citing *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276. Assuming that a vehicle was improperly parked, *Beal* and similar cases do not absolve other drivers of the duty to keep a "lookout." While operating an automobile, driver must endeavor to become aware of any obstructions in his direction of travel and is deemed to have seen that which through the exercise of due care he ought to have seen. *Keener v. Beal, supra; Chaffin v. Brame, supra; Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

The judgment granting defendants' motion for directed verdict is

Reversed.

Judges MORRIS and BALEY concur.

STATE OF NORTH CAROLINA v. BILLY CHARLES BARRETT

No. 733SC796

(Filed 9 January 1974)

1. Homicide § 14— use of deadly weapon — presumption of malice

The use of a deadly weapon in a homicide raises a presumption of malice which renders the killing at least murder in the second degree.

2. Homicide § 9— self-defense — reasonable force — jury question

In this second degree murder case, evidence that defendant shot the victim while the victim was beating him with a pistol did not show that defendant acted in self-defense as a matter of law where there was also evidence that the victim had been shot in various parts of the body some four or five times and that the victim had tried to run when he was shot.

APPEAL by defendant from *Cowper, Judge,* 6 August 1973 Session of Superior Court held in PITT County.

Defendant was indicted for first degree murder as a result of the death of Johnny Lee Watson. The State elected to try defendant for second degree murder.

The State's evidence tended to show the following. While on routine patrol, Greenville Police Officers D. R. Bullock and Lt. Briley noticed a crowd gathering in front of Brewington's Lounge on 13 May 1973 at 11:30 p.m. After being informed by a bystander that the man lying on the sidewalk had been shot, Officer Bullock called the Rescue Squad while Lt. Briley talked to the victim, Johnny Lee Watson. Officer Bullock arrested defendant who was still at the scene. Bullock searched defendant for a weapon, and defendant volunteered that he had thrown the gun on top of Brewington's Lounge. The gun was never found. Bullock then requested Officer Nichols to take defendant to the hospital for treatment of a scalp wound. Although at this time Officer Nichols attempted to give full *Miranda* warnings, defendant spontaneously described the events and circumstances surrounding the homicide. Officer Nichols stated:

> "Barrett told me that he and Johnny Lee Watson were arguing over money that Johnny Lee Watson owed him or money that he owed Johnny Lee. Barrett also stated that Johnny Lee Watson pulled a gun and was pistol-whipping him with it. Johnny Lee had hit him about the face and on top of the head. Then Barrett said, . . . 'and then I shot him.' After that, Barrett did not say anything else about the shooting, except that he had thrown the gun on the sidewalk."

Officer Nichols testified that he saw no weapons at the scene. As a result of the alleged beating, defendant sustained a cut on the back of his head and was bleeding from the nose and mouth.

The Pitt County Medical Examiner testified that the deceased had bullet wounds on the upper part of his left arm, on the back of his right thigh, and in the left abdomen. There were also two gunshot wounds in his right side.

Testifying in his own behalf, defendant asserted that deceased asked him for money and became argumentative when defendant claimed he did not have any. Defendant then went into Brewington's Lounge for a few minutes and upon going back outside was accosted by deceased who had drawn a pistol. Defendant described the ensuing fight as follows:

> "Johnny Lee grabbed me in my collar and turned me around. When I tried to break aloose from him to run, he hit me back of the head and knocked me to the ground. Then he said, 'I am going to kill you. G—d—it, I am going to kill you right now.' I said, 'Lord have mercy; get this man off me, because I know he's going to kill me.'
>
> At the time this was happening there were several persons around. I called for someone to get him off me, because I was afraid of bodily injury and I knew he was a bad man.
>
> After he stomped me to the ground, he started hitting me with the pistol. Then he stood over me. At first, he hit me there (witness indicating). Then I got dizzy and almost passed out. He just kept beating me. I said, 'Lord have mercy; get this man off me,' and he said, 'g . . d . . . it, I am going to kill you right now.' Then somebody came outside and he looked back. While he was looking back, I tried to run, but he caught me and started beating me again. I finally messed around and got a chance to shoot him.
>
> I had a pistol on me, but I was just intending to try and get him off me.
>
> I did not owe Johnny Lee Watson any money, but he was trying to borrow some money from me.
>
> (DEFENDANT COMES IN FRONT OF JURY.) I was down like this, and Johnny Lee beat me down on my knees. All of the time I was crawling, trying to get away, and he was still beating me. That is when the shooting occurred. I reached in my blouse and shot him."

Defendant also stated that he was afraid of deceased because he "knew that he had a character for violence and for being a violent and dangerous man."

Four defense witnesses testified that defendant and deceased were arguing over money, that deceased began beating defendant with a pistol, that defendant attempted to flee, and that defendant finally shot deceased. There was also testimony that deceased was the first to draw a gun.

On cross-examination, one defense witness stated, "I cannot explain how the man was shot on all four sides in self-defense." Another defense witness, responding to the State's question, testified: "When the shots were fired, I saw the man try to run. I did hear these shots. After that, I did not see what he did with the pistol. I wasn't looking at it. I saw the man when he was turning around and trying to run. Then he hit the cement between the sidewalk."

Defendant moved for a nonsuit when the State rested its case and renewed the motion at the close of all the evidence. The motions were denied. Upon a verdict of guilty of voluntary manslaughter, defendant was sentenced to an active prison term of five years. Defendant appealed.

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

Richard Powell and Samuel S. Mitchell for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that "the trial court committed prejudicial and reversible error by failing to grant defendant's motions for . . . nonsuit." The use of a deadly weapon in a homicide raises a presumption of malice which renders the killing at least murder in the second degree. *State v. Cagle,* 209 N.C. 114, 182 S.E. 697; *State v. Johnson,* 184 N.C. 637, 113 S.E. 617. This presumption is sufficient to enable the State to withstand a motion for nonsuit. *State v. Cagle, supra; State v. Johnson, supra.*

[2] The presumption of malice is rebuttable. The thrust of defendant's argument is that the evidence demanded a finding that, as a matter of law, defendant acted in self-defense and

thus the shooting was both justified and without malice. Whether the evidence rebuts the presumption of malice in a homicide with a deadly weapon is a jury question. *State v. Capps*, 134 N.C. 622, 46 S.E. 730. This rule applies where a defendant claims self-defense. Before a plea of self-defense will excuse a homicide, the defendant must satisfy the jury that he used only such force as was actually necessary or apparently necessary to avoid serious bodily injury or death. The reasonableness of defendant's action and of his belief that force was necessary presents a jury question to be resolved on the basis of the facts and circumstances surrounding the homicide. *State v. Gladden*, 279 N.C. 566, 184 S.E. 2d 249; *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24.

We have considered defendant's other assignments of error and find them to be without merit. We find no prejudicial error in defendant's trial.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JULIUS SMALL

No. 7326SC825

(Filed 9 January 1974)

1. **Criminal Law § 155.5— failure to docket appeal in time — appeal as petition for certiorari**

Defendant's appeal which was not docketed within 90 days after the judgment appealed from is treated as a petition for *certiorari* and granted so that the case may be considered on its merits.

2. **Criminal Law § 40— introduction of former testimony — unavailability of witness, opportunity to cross-examine required**

In order for a court to receive into evidence testimony given at a former trial or at an earlier stage of the same trial, the witness must be unavailable and the party against whom the former testimony is now offered, or a party in like interest, must have had a reasonable opportunity to cross-examine.

3. **Criminal Law § 40— unavailability of defendant who fled — former testimony properly excluded**

Where defendant fled from the courtroom during a recess following a *voir dire* to determine admissibility of his confession, defendant

was not entitled to have his *voir dire* testimony read into evidence, since defendant's absence did not satisfy the requirement of unavailability of the witness for the introduction of his former testimony.

4. **Criminal Law § 40— absent defendant — no opportunity to cross-examine — former testimony excluded**

Trial court did not err in refusing to allow defense counsel to read into evidence the absent defendant's testimony given earlier on *voir dire* since the admission of such evidence would give the State no opportunity to cross-examine defendant.

ON writ of *certiorari* to review trial before *Chess, Special Judge,* 16 April 1973 Session of Superior Court, judgment entered by *Snepp, Judge,* 27 June 1973 Session of Superior Court, held in MECKLENBURG County.

Defendant was indicted for the murder of William Charles Nash and tried at the 16 April 1973 Session of Superior Court of Mecklenburg County. J. D. Bumgardner, a Charlotte policeman, appeared as a witness for the State and testified that defendant, while under arrest at the Charlotte police station, had signed a written statement confessing to the crime.

Before any testimony about defendant's confession was received, the court held a voir dire hearing to determine whether such testimony was admissible. Bumgardner testified that defendant had signed the statement voluntarily, after being fully advised of his rights, and while he was sober. Defendant also testified on voir dire, stating that he had given the confession while drunk, and that it had been obtained by duress, with Bumgardner threatening to beat him unless he confessed. The court found that the confession was voluntary and that evidence relating to it was admissible.

The State produced other evidence corroborating defendant's confession. Defendant then offered his evidence, which tended to show that his confession had been involuntary and that another man had killed William Charles Nash. After four defense witnesses had testified, the court took a recess for lunch. When court reconvened in the afternoon, defendant was not present, and he could not be located although a careful search was made. The court proceeded with the trial in his absence. Counsel for defendant moved to introduce into evidence before the jury the testimony given by defendant on voir dire. The motion was denied by the court.

The jury found defendant guilty of voluntary manslaughter. Two months after the trial, defendant was found and brought

into court for sentencing. He was given a prison term of twelve years by Snepp, Judge, at the 27 June 1973 Session of Superior Court of Mecklenburg County, and he appealed to this Court.

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

Howard J. Greenwald for defendant appellant.

BALEY, Judge.

[1] The judgment in this case was entered on 27 June 1973. The record on appeal was filed more than ninety days later, on 23 October 1973. No order was issued by the trial court extending the time for docketing the record on appeal. Rule 5 of the Rules of Practice in the Court of Appeals provides that the record must be "docketed within ninety days after the date of the judgment, order, decree, or determination appealed from." The penalty for violating this rule is dismissal of the case. Accordingly, defendant's appeal will be treated as a petition for certiorari and is granted in order that the case may be considered on its merits.

[2] The court did not violate any right of defendant by continuing the trial after he fled from the courtroom. *Taylor v. United States*, 94 S.Ct. 194, 38 L.Ed. 2d 174 (1973). Defendant does not dispute this, but he assigns as error the failure of the court to permit his counsel to introduce into evidence his voir dire testimony and read it to the jury. In some situations, a court may receive into evidence testimony given at a former trial or at an earlier stage of the same trial. But in order for such testimony to be admissible, two conditions must be satisfied. First, the witness must be unavailable. *State Bar v. Frazier*, 269 N.C. 625, 153 S.E. 2d 367, *cert. denied*, 389 U.S. 826; *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773; *Glymph v. Glymph*, 4 N.C. App. 274, 166 S.E. 2d 482; McCormick, Evidence 2d, § 255, at 617. Second, "the party against whom the former testimony is now offered, or a party in like interest, must have had a reasonable opportunity to cross-examine." McCormick, *supra*, § 255, at 616; *accord, Bank v. Motor Co.*, 216 N.C. 432, 5 S.E. 2d 318; *McLean v. Scheiber*, 212 N.C. 544, 193 S.E. 708; *Hartis v. Electric R. R.*, 162 N.C. 236, 78 S.E. 164. In this case neither requirement is met.

[3] A witness cannot be considered unavailable when his absence has been procured by the party who seeks to introduce his former testimony. McCormick, *supra,* § 253, at 608-09; *see* 5 Wigmore, Evidence 3d, § 1405, at 155, 158; *Motes v. United States,* 178 U.S. 458 (1900). If a defendant persuaded a witness to abscond, or kidnapped a witness and held him in a secret place, no one would suggest that he should be permitted to use the witness's former testimony. Here defendant has brought about his own absence rather than that of another witness. The effect is the same, and the same rule should apply. Defendant should not be allowed to impose on the court by fleeing the jurisdiction and then introducing his former testimony into evidence. *Cf. State v. Prince,* 270 N.C. 769, 772, 154 S.E. 2d 897, 899.

[4] Defendant has likewise failed to satisfy the second requirement for the introduction of former testimony—the requirement of "a reasonable opportunity to cross-examine." When a criminal defendant testifies, he may be cross-examined on all aspects of the case. He may be questioned, for purposes of impeachment, about prior acts of misconduct and prior criminal convictions. 1 Stansbury, N. C. Evidence (Brandis rev.), §§ 56, 111-12. In this case there was no reason for the State to cross-examine defendant extensively when he testified on voir dire, because the voir dire hearing was concerned only with the voluntariness of defendant's confession. If defendant had taken the stand during the trial itself, the State might have chosen to cross-examine him at length. But the State would be deprived of this opportunity if defendant could introduce his voir dire testimony instead of testifying in person.

The trial court was correct in excluding defendant's voir dire testimony. Defendant has not shown that any error was committed at his trial, and his conviction is affirmed.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. HENRY Z. RATCHFORD

No. 7327SC742

(Filed 9 January 1974)

1. **Criminal Law § 75— confession — voluntariness only determined on voir dire**

The issue before the court on *voir dire* is the voluntariness of defendant's statement as opposed to the truth of the contents of the statement; therefore, where evidence on *voir dire* included an admission by defendant that he was afforded *Miranda* warnings prior to making any statements and that the signature on a written waiver form was his, evidence supported the trial court's finding that the statement was voluntary.

2. **Criminal Law §§ 76, 89— confession — uncorroborated evidence admissible**

The trial court did not err in admitting into evidence an officer's uncorroborated testimony with respect to defendant's in-custody statements, since corroboration bears on credibility, and it is within the province of the jury to consider the lack thereof in resolving conflicts regarding the existence or content of defendant's statement.

APPEAL by defendant from *McLean, Special Judge,* 4 June 1973 Special Session of Superior Court held in CLEVELAND County.

Defendant was indicted for breaking and entering into Woods' Grocery, a sole proprietorship in Shelby, North Carolina, with intent to steal and for the felonious larceny of twenty-five Timex watches, one Polaroid Camera, money and soft drinks.

Clyde Q. Adams, a Shelby Police Officer, testified that on 14 November 1972 he found defendant under a bed in a private residence. Adams was executing an arrest warrant for defendant issued in conjunction with an offense not involved in the present case. While still at the house, Adams noticed defendant was wearing a yellow gold watch. After he and defendant arrived at the police station, the latter was no longer wearing the watch. Adams then located a gold watch on the floorboard in the front passenger compartment of the police cruiser in which defendant had ridden.

Ted Woods, owner of Woods' Grocery, subsequently identified the watch as being similar to those he had had in the past at the store. He was unable to say positively that his inventory on 10 November 1972 included the watch or one like it or that the watch was actually taken from his store.

After finding the watch, Adams asked defendant if it "wasn't the watch he was wearing the time I first observed him in the house. . . . " Defense counsel objected, and the court conducted a *voir dire* on the issue of the voluntariness of defendant's alleged response and any other statement he made. The court informed defense counsel, "You can examine the Officer." Adams stated that defendant was fully informed of his rights upon arrival at the police station and that a waiver thereof was read to defendant. According to Adams, defendant, after being given an opportunity to read the waiver, signed it and ultimately made a statement. Adams further indicated that he merely made notes with respect to the content of defendant's statement and did not keep a verbatim record of the conversation. Defense counsel examined these notes. In response to a question by the court, Adams described the substance of defendant's statement as follows:

> "He told me that he and three other men went to Ted Woods' Grocery Store, broke the back door, went inside on a couple different occasions that same night and took some watches and cameras and drinks out of the place, and he also told me where some of the watches were, which we recovered."

Defendant testified in his own behalf during the *voir dire*. He conceded that he was given *Miranda* warnings but denied making any statement admitting guilt regarding the crime. Defendant did admit, however, telling Adams that if one Whisnant said defendant "did it, then [Whisnant] did it too." Defendant, on cross-examination, acknowledged that the signature on the waiver was his.

The court found facts based on the evidence and concluded "that the defendant was fully advised of his constitutional rights and that thereafter he knowingly, willingly and understandingly waived his rights and freely and understandingly and voluntarily made a statement which the State purports to offer into evidence."

The officer was allowed to testify as to defendant's admissions and also testified that by acting on information supplied by defendant he was able to recover three other watches.

Defendant offered no evidence. The jury found defendant guilty of both breaking and entering with intent to steal and felonious larceny. For the first offense, defendant was sen-

tenced to eight to ten years, and for the second, he was sentenced to five to eight years, suspended for five years.

Attorney General Robert Morgan by W. A. Raney, Jr., Associate Attorney, for the State.

Leslie A. Farfour, Jr., for defendant appellant.

VAUGHN, Judge.

In closely related challenges, defendant contends that the trial court impermissibly cast upon defendant the burden of proving that his statement was involuntary and that therefore the evidence upon which the court based its finding of voluntariness was incompetent. The core of defendant's argument is that he was deprived of the opportunity to attack Adams's credibility through cross-examination. We find defendant's contentions without merit. Defendant's counsel was not restricted in his examination of the witness.

[1] The issue before the court on *voir dire* is the voluntariness of defendant's statement as opposed to the truth of the contents of the statement. *See State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511. When the facts found by the trial court are supported by competent evidence, they are binding on the appellate court, although appellate courts may review the trial court's conclusions of law. *State v. Bishop, supra; State v. McIlwain,* 18 N.C. App. 230, 196 S.E. 2d 614. Although the State has the burden of proving voluntariness, *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503, nothing precludes it from benefiting from defendant's evidence as to voluntariness.

In the present case, although defendant denied making any inculpatory statement, he admitted that he was afforded *Miranda* warnings and that the signature on the written waiver form is his. These admissions are consistent with the State's evidence. The court's findings of fact are supported by competent evidence, and its conclusions of law appropriate. Whether defendant actually made the statement offered in evidence presents a jury question. *State v. Bishop, supra.*

[2] Defendant also contends that his statement "should not have been allowed into evidence without some type of corroborative evidence to substantiate the Officer's testimony. . . . " Corroboration is not required. Because corroboration bears on credibility, it is within the province of the jury to consider the

lack thereof in resolving conflicts regarding the existence or content of defendant's statement. *See State v. Bishop, supra; State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833.

We find no prejudicial error in defendant's trial.

No error.

Judges MORRIS and PARKER concur.

IRVIN A. BROADNAX, ADMINISTRATOR OF THE ESTATE OF FLOYD BOONE, DECEASED v. ROBERT LEE DELOATCH

No. 736SC741

(Filed 9 January 1974)

Automobiles § 90— wrongful death action — sufficiency of instructions

Trial court's instructions in a wrongful death action which contained a summary of the evidence and an explanation of the duty of defendant to keep a reasonable lookout, the duty to keep his vehicle under proper control, and the essentials of reckless and careless driving were sufficient.

APPEAL by plaintiff from *James, Judge,* 1 November 1972 Session of Superior Court held in NORTHAMPTON County.

This is a civil action in which plaintiff seeks to recover damages for the wrongful death of his intestate which plaintiff alleged was proximately caused by defendant's negligence. In his complaint plaintiff, in substance, alleged: Plaintiff is administrator of the estate of Floyd Boone, deceased. On the night of 9 July 1966, Boone drove his automobile in a westerly direction on N. C. Highway 195. At a point about one mile east of Seaboard, N. C., he drove his car to the right shoulder of the road and came to a stop with all wheels of his automobile off of the paved portion of the highway and with all lights on the car burning. While Boone's car was so parked, defendant Deloatch, driving his car also in a westerly direction along the same highway, drove off of the paved portion of the highway and onto the shoulder of the road, colliding with the rear of Boone's parked automobile. The collision threw Boone from his car and caused the injuries which resulted in his death a few hours later.

Plaintiff alleged the collision and Boone's death were proximately caused by defendant's negligence (1) in driving his car in a careless and reckless manner in violation of G.S. 20-140, (2) in driving while under the influence of alcohol, (3) in driving in excess of the posted speed limit, and (4) in carelessly and negligently driving his vehicle off of the travel lane of the highway and onto the dirt shoulder and into the rear of Boone's parked automobile in violation of G.S. 20-146.

Defendant answered, denying the material allegations of the complaint and pleading as a further answer and defense that Boone had operated his vehicle upon the public highways while in an intoxicated condition and that this constituted contributory negligence.

Plaintiff's evidence tended to show: Boone had been at the Santa Fe Inn and left on Highway 195 going toward Seaboard in a westerly direction about 10:00 p.m. About a mile away from the inn and at a farm path leading away from the highway, Boone pulled off the road and parked the car. As Boone pulled off the road he met a car operated by Glenn Williams who started to stop but proceeded down the road about 400 feet to another path where he turned in. The defendant Deloatch, who had also been at the Santa Fe Inn, left several minutes after Boone and also proceeded along Highway 195 in a westerly manner toward Seaboard. Closely behind Deloatch was Perlene Jordan who saw the defendant cross the center line of the highway while he was driving. Williams, who had turned in to the other path in order that he might go back to the Boone car to see if Dan Boone was in the Boone car, saw both of these cars pass as he had been forced to stop in the path when his gears "hung." Williams watched the Deloatch car go by and leave the road to hit the Boone car. Jordan arrived after the collision and Deloatch came to her car to tell her that he had hit Floyd Boone. The Deloatch car was damaged on the right front, and the Boone car, which had been turned from its original position, was damaged across the entire rear of the car. Boone was found near the car and off the road dirty and bleeding from the mouth. The lights of the car were still on but none of the doors were open and no glass was broken from the windows of the car. John Wood of the Highway Patrol arrived to investigate the accident, and Deloatch told him that in attempting to pass another vehicle he had struck the rear of the Boone car when forced to pull back in by an oncoming car. Wood also

found debris in the right lane 116 feet from the Deloatch car, scuff marks on the shoulder leading back from the Boone car 12 feet, and that the conditions at the scene of the wreck were that the weather was clear, the road straight and fairly level, and the highway 21 feet wide with eight feet of usable shoulders.

The parties agreed that the plaintiff's intestate died on 10 July 1966 of a cerebral concussion. Defendant offered no evidence and issues were submitted to the jury. From a verdict and entry of judgment thereon in favor of the defendant, plaintiff appeals assigning error.

James R. Walker, Jr., for plaintiff appellant.

Charlie D. Clark, Jr., for defendant appellee.

VAUGHN, Judge.

Plaintiff contends that the charge of the court was erroneous in two respects: (1) the judge restricted the jury findings to those matters specifically alleged in the complaint rather than charging on those issues arising from the evidence and (2) the judge failed to apply the law to the evidence in compliance with G.S. 1A-1, Rule 51.

Rule 51 requires that the judge "shall declare and explain the law arising on the evidence given in the case." Plaintiff's evidence tends to show that the defendant's car left the road and struck his intestate's parked car, thereby killing his intestate. The instructions contained a summary of the evidence and an explanation of the duty of the defendant to keep a reasonable lookout, the duty to keep his vehicle under proper control, and the essentials of reckless and careless driving. The fact that some of the language of the complaint was used in declaring the law of the case is not error so long as the judge explains all the law arising from the evidence as was done in this case.

In applying the law to the evidence the jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted to them in the affirmative or the negative. *Credit Co. v. Brown,* 10 N.C. App. 382, 178 S.E. 2d 649. We hold that the judge's instructions satisfy the basic requirements of the rule. We further hold that when the charge is considered as a whole, the judge's instruction at the very end of the charge to the effect that the fact

that an accident has occurred and someone has been injured or killed does not carry a presumption of negligence and the burden of proving negligence remains with the plaintiff, was not prejudicial error requiring a new trial. When the court has sufficiently instructed the jury, if the instructions are not as full as a party desires, he should submit a request for special instructions. *Koutsis v. Waddel,* 10 N.C. App. 731, 179 S.E. 2d 797.

On an earlier appeal, *Broadnax v. Deloatch,* 8 N.C. App. 620, 175 S.E. 2d 314, we held that it was error to grant defendant's motion for nonsuit because the case was one for the jury. The jury has now spoken in a trial which we believe to be without prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

ROY W. DARDEN v. JOAN B. DARDEN

No. 736DC770

(Filed 9 January 1974)

1. **Divorce and Alimony § 22— custody properly before court**

The matter of custody was properly before the court where another judge had merely denied defendant's motion for custody but had entered no order awarding custody.

2. **Divorce and Alimony § 24— child custody — evidence of adultery**

The trial court in a child custody proceeding erred in refusing to allow plaintiff to introduce evidence of defendant's adultery since such evidence is relevant upon the question of defendant's fitness to have custody.

3. **Divorce and Alimony § 24— child custody — insufficiency of evidence to support order**

The evidence was insufficient to support a finding that the best interests of a minor child would be served by putting her in custody of the mother where the evidence showed the mother had made no plans for the child while she worked nine hours a day and that while in the custody of the father the child was staying in a home close to her paternal grandparents, the people with whom she stayed had a child her age and both children attended a private school.

4. **Divorce and Alimony § 20— absolute divorce — alimony — rehearing of alimony question — time of award of alimony — relation back**

Where the wife was awarded alimony in an action in which the husband was granted an absolute divorce and the matter of alimony has been remanded for a rehearing, the alimony will be considered as having been awarded at the time of the rendering of the judgment of absolute divorce within the purview of G.S. 50-11(c) if alimony is awarded the wife upon the rehearing.

APPEAL by plaintiff from *Gay, Judge,* May 1973 Civil Session, District Court, HERTFORD County.

Plaintiff brought an action for divorce and custody of the minor children born of the marriage. Defendant answered denying that she abandoned plaintiff and the children and sought custody of the minor daughter, alimony and child support, and a divorce from bed and board. She also asked for counsel fees. Thereafter defendant filed a motion for alimony pendente lite in the amount of $600 per month and $500 counsel fees. Notice of the motion was served on plaintiff. The motion was heard before Judge Blythe who entered an order stating that the matter was heard "on Motion of the defendant for alimony *pendente lite* and custody of minor daughter, said matter being heard on April 27, 1973 and on May 4, 1973, and the plaintiff being present and represented by his attorney, Ernest L. Evans and the defendant being present and represented by her attorney, Thomas L. Jones, and upon the completion of the evidence presented by the plaintiff and the defendant, the Court being of the opinion that said Motion should be denied." The order further adjudicated "that the Motion of the defendant, Joan B. Darden, for alimony *pendente lite* and custody of minor daughter is hereby denied."

Thereafter the matter was heard before Judge Gay who entered an order awarding defendant custody of the minor daughter and $50 per month for her support. He also found defendant to be a dependent spouse and awarded her $200 per month alimony. The order included a direction to plaintiff to pay defendant's counsel the sum of $200. Plaintiff appealed.

Cherry, Cherry, and Flythe, by Ernest L. Evans, for plaintiff appellant.

No counsel for defendant appellee.

MORRIS, Judge.

[1] Unquestionably, the court had jurisdiction to enter a temporary order of custody of the child pending a hearing. G.S. 50-13.5(c)(2). *Brandon v. Brandon,* 10 N.C. App. 457, 179 S.E. 2d 177 (1971). Nor would the fact that the motion and notice did not contain a request for custody hearing, avail plaintiff, because it is obvious from the order entered and the evidence at the trial on the merits that he was present, represented by counsel and presented evidence pertaining to custody. Nevertheless, the court did not enter an order *awarding* custody. The order merely *denied* defendant's motion for custody (although custody was not included in the motion). No judicial award of custody had been made prior thereto and none was made until the order entered on 8 June 1973. It is our opinion that the matter of custody was properly before Judge Gay.

[2] It is further our opinion that the court committed prejudicial error in refusing to allow plaintiff to introduce evidence of defendant's adultery. While evidence of adultery does not impel a finding of unfitness of the adulterous parent, "[e]vidence of adulterous conduct, like evidence of other conduct, is relevant upon an inquiry of fitness of a person for the purpose of awarding custody of minor children to him or to her." *In re McCraw Children,* 3 N.C. App. 390, 395, 165 S.E. 2d 1 (1968). Plaintiff was entitled to have introduced evidence, if any he had, of conduct of defendant which would have to do with her fitness to have custody of the minor child. The court's refusal to allow the evidence to come in was prejudicial error.

Additionally, the court's findings of fact with respect to alimony are not supported by the evidence. For example, the court found that "plaintiff maliciously turned the defendant out of doors by his abusive conduct in striking the defendant and soliciting her to commit unnatural sex acts, and since the separation has failed to provide her any support." Defendant's evidence was "I left him because he cussed me and told me to leave. We were at the farm in Mapleton. I had taken all I could stand. I was nervous and upset. He drove me from the home and I didn't even have a coat on when I left." She further testified that plaintiff had never beaten her but had hit her. The defendant testified that plaintiff had paid the first month's rent on her trailer and had had his sons move her. There was also evidence that he had repaired the car she took when she left

the home. The court found as a fact that plaintiffs' one-half interest in a business in Virginia was worth over $100,000. Defendant's evidence was that the entire business was worth about $100,000. The court found that plaintiff owned a one-fifth interest in a 160-acre farm. The evidence was that he with his brothers and sisters owned the remainder interest after the death of his mother. There was no evidence as to the size of the farm. He found that defendant earned $40 per week whereas her own evidence was that she earned $58.

[3] The court found that the best interests of the child would be served by putting her custody in defendant. Defendant testified that she worked nine hours a day. "If Dana lived with me, she would have to stay with someone else but she is doing that now. *I don't know who she would stay with.*" (Emphasis supplied.) The uncontradicted evidence was that the child was staying at a home in Virginia in close proximity to her paternal grandparents, that the people with whom she stayed had a child her age and both children attended a private Christian School, and were taken to the bus by Mrs. Dunston, with whom she stayed. The defendant had, from the evidence, made no plans for this minor child while she worked nine hours each day. We do not deem the evidence sufficient to support a finding that the child's best interests would be served by giving her custody to defendant.

The matter must be remanded for a hearing on the issues of custody and alimony. The evidence is sufficient to support the finding that plaintiff is entitled to a divorce.

[4] We are, of course, aware of the provisions of G.S. 50-11(c) providing that, with certain exceptions, "a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered *before* or *at the time* of the rendering of the judgment for absolute divorce." (Emphasis added.) If, upon a rehearing, defendant shall be awarded alimony, it shall be considered as having been awarded at the time of the rendering of the judgment of absolute divorce.

Remanded.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. M. L. MITCHELL, DENNIS MITCHELL AND RONALD BROWN

No. 733SC712

(Filed 9 January 1974)

1. **Criminal Law § 113— *joint trial — reading of only one indictment in* instructions**

In a joint trial of three defendants for common law robbery, the right of defendants to have their guilt or innocence determined separately was not violated when the court read only one indictment to the jury and instructed them that each of the three defendants was charged in an identical bill where in the remainder of the charge the court went to great lengths to separate each instruction as to each defendant.

2. **Criminal Law § 102— remark by solicitor — failure to declare mistrial**

The trial court did not err in failing to declare a mistrial following the court's instruction to the solicitor not to "say anything which would tend to prompt the witness as to what he said or to be noticeablc to the jury" where the record does not show what remark the solicitor made or that defendant objected to any remark or made a motion for mistrial.

3. **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 excluded testimony would have been.

APPEAL from *Tillery, Judge,* May 1973 Session of CRAVEN County Superior Court.

Defendants were charged in separate bills of indictment with the common law robbery of Thomas Mewborne. The charges were consolidated for trial, and defendants pled not guilty.

Thomas Mewborne, a taxi driver, testified that in response to a call, he picked up the three defendants, whom he had known for about three years. After Mewborne had turned on to a dirt road, defendant Brown grabbed him around the neck, defendant Dennis Mitchell grabbed his arm, and defendant M. L. Mitchell took his pouch containing $116. He identified defendants as his assailants in court.

Two deputies sheriff testified that they saw Thomas Mewborne on the evening of 16 March 1973 and that he had an injured arm and several facial injuries. Mewborne told the deputies that he had been robbed by the Mitchell boys and someone named Brown.

All three defendants took the stand and offered evidence of alibis. From judgment of conviction, defendants M. L. Mitchell and Dennis Mitchell appeal.

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

Michael P. Flanagan for defendant appellants M. L. Mitchell and Dennis Mitchell.

MORRIS, Judge.

[1] Defendants assign error to the failure of the trial court in its instruction to the jury to read separately the bills of indictment with which each defendant was charged. It is their position that this constitutes a denial of their respective rights to have their trial conducted as though they were being tried alone. Viewing the instructions as a whole, we see no error.

It is true that the trial court read only one indictment to the jury instructing them that each of the three defendants was charged in an identical bill. However, in the remainder of the charge, the court went to great lengths to separate each instruction as to each defendant.

It is well established that, when two or more defendants are jointly charged with a crime, a charge which can be construed to mean that the jury must convict all if it finds one guilty constitutes reversible error. *State v. Tomblin,* 276 N.C. 273, 171 S.E. 2d 901 (1970); *State v. Williford,* 275 N.C. 575, 169 S.E. 2d 851 (1969); *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230 (1969). However, an error of this nature may be cured by a subsequent detailed instruction that the jury is to consider the guilt of each defendant separately. *State v. Tomblin, supra.*

The erroneous instruction in *Tomblin, supra,* could be interpreted by a jury as meaning that they must convict all defendants if they found one guilty.

> "Now, members of the jury, on the charge of rape, the court charges you that if you are satisfied from the evidence and beyond a reasonable doubt that either one or all of these defendants had carnal knowledge, had sexual intercourse, forcibly and against the will of Carolyn Euart on this occasion, that is, if either of these or all of these had carnal knowledge of Carolyn Euart without her consent and against her will, she putting up as much resist-

ance as she could under the circumstances, the court charges you that it would be your duty to return a verdict of guilty of rape as charged in the bill of indictment, and that you may find either of them guilty of rape as charged in the bill of indictment, or you may find them guilty of rape with the recommendation of life imprisonment." Id. at 275.

The charge before us is less susceptible of the above interpretation than is the charge of *Tomblin*. If a subsequent, detailed instruction effectively cures the error in *Tomblin, a fortiori,* it is effective to cure the error—if any there be—in the failure to read separately the three indictments.

[2] Defendants next assign error to the failure of the court to direct a mistrial following the court's remark to the solicitor: "I would suggest that you gentlemen do not say anything which would tend to prompt the witness as to what he said or to be noticeable to the jury." The record reflects no objection to any remarks of the solicitor, nor does it reflect that the solicitor had made a remark—only that "something was said at the State's table"—, nor does it reflect any motion for mistrial by the defendants. In order to seek appellate review of conduct of adverse counsel, counsel must object to the conduct at the time of its occurrence. Even so, a new trial will not be granted for a mere technical error which could not have affected the result, but only for error which is prejudicial and amounts to a denial of a substantial right. *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). Defendants have failed to show that they have been prejudiced.

[3] Defendants' final assignment of error is to the trial court's limiting of the cross-examination of the prosecuting witnesses. However, it does not appear of record what the excluded testimony on cross-examination would have been. Therefore, the propriety of the court's rulings will not be reviewed. *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971).

No error.

Judges BRITT and BALEY concur.

BARBARA JEAN FOY v. THOMAS EDWARD BREMSON, GROVER C. BISSETTE AND LESTER GODWIN

No. 737SC729

(Filed 9 January 1974)

Automobiles § 90— burden of proof — failure to instruct — new trial

In an action by plaintiff to recover for personal injuries sustained when she was struck by defendant's car, the trial court committed prejudicial error in failing to instruct with respect to the burden of proof on all issues except plaintiff's contributory negligence.

APPEAL by plaintiff and defendants Bissette and Godwin from *Webb, Special Judge*, 26 February 1973 Session, Superior Court, WILSON County.

Plaintiff was injured when she was struck by a car driven by defendant Bremson. Plaintiff and defendants Bissette and Godwin had started to a cornfield to gather corn from a combine when the 1967 Ford truck driven by Godwin went into a ditch. The Ford truck was headed in a generally westerly direction. Godwin sent Bissette to get Godwin's 1968 Chevrolet truck, and he and Bissette attempted to pull the Ford truck out of the ditch by attaching a pull chain. There was conflicting evidence as to the exact location of the Chevrolet truck with respect to the center line of the highway. It was parked headed in a generally northern direction opposite the Ford truck. Both trucks were well lighted. Defendant Bremson was traveling in a generally southerly direction. The 1967 Ford truck was to his right and the 1968 Chevrolet truck was to his left. A log chain was hooked to each truck and ran across the lane of travel of defendant Bremson. He hit one or both trucks and then struck plaintiff who was assisting in the operation. Plaintiff was seriously injured. At the time defendant Bissette was hooking the log chain to the truck, one Donnie Boykin had been stationed to the north to warn approaching traffic. Ten issues were submitted to the jury. They answered that plaintiff was not injured by the negligence of defendant Bremson, that she was injured by the negligence of defendant Bissette, that defendant Bissette was acting as the agent of Godwin, that plaintiff was injured by the negligence of Godwin, that plaintiff was not contributorily negligent, that she was entitled to recover $100,000. On Bremson's counterclaim against Bissette and Godwin, the jury answered issues finding that Bissette's and Godwin's negligence caused Bremson's personal injuries and property damage and

that he was not contributorily negligent. Bremson was awarded a total of $4,000. All parties except Bremson appealed.

Narron, Holdford, Babb and Harrison, by William H. Holdford, for plaintiff appellant.

Battle, Winslow, Scott and Wiley, P.A., by Robert L. Spencer, for Godwin and Bissette appellants.

Teague, Johnson, Patterson, Dilthey and Clay, by Robert M. Clay and Dan M. Hartzog, for defendant appellee Bremson.

MORRIS, Judge.

This case must go back for a new trial on all issues. We do not discuss the error in admission and exclusion of evidence. Nor do we discuss all the errors in the charge because on retrial they may not recur. Although there are other prejudicial errors in the trial, one error in the charge is sufficiently prejudicial to require a new trial.

At the beginning of its charge, the court said "And, as to each issue, I'll tell you which party has the burden of proof." Only as to issue 5—plaintiff's contributory negligence—did the court do this.

In *King v. Bass,* 273 N.C. 353, 354, 160 S.E. 2d 97 (1968), the trial court had failed to instruct with respect to the burden of proof. The court, in granting a new trial, said:

> "This Court considered the duty of the trial judge to instruct on burden of proof in the case of *Watt v. Crews,* 261 N.C. 143, 134 S.E. 2d 199, wherein Denny, C. J., speaking for the Court, stated:
>
>> ' "In *Tippite v. R. R.,* 234 N.C. 641, 68 S.E. 2d 285, this Court said: 'G.S. 1-180, as amended, requires that the judge "shall declare and explain the law arising on the evidence given in the case." This places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. It is said that " 'the rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the court. *S. v. Falkner,* 182 N.C. 793, and cases cited.' *Hosiery Co. v.*

Express Co., 184 N.C. 478." *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Crain v. Hutchins,* 226 N.C. 642, 39 S.E. 2d 831.' " '

The trial court failed to give instructions as to the burden of proof on any of the issues. This omission violates a substantial right of appellants and constitutes prejudicial error."

Plaintiff's appeal—New trial.

Defendants' appeal—New trial.

Judges BRITT and BALEY concur.

WALTER H. BRAY, ADMINISTRATOR OF THE ESTATE OF CARLA WHITFORD BRAY v. LUBY WALLACE DAIL

No. 738SC790

(Filed 9 January 1974)

Automobiles § 63— striking child — sufficiency of evidence of negligence

In an action to recover for the wrongful death of a 10-year-old child struck by defendant's motorcycle, plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to keep a proper lookout or in failing to use proper care with respect to speed or control of his motorcycle where it tended to show that defendant passed a car which was traveling at the speed limit of 35 mph, that the driver of the car saw the children ahead during the time or right after defendant passed and followed defendant about a block before the accident, that decedent went into the road to pick up a hoola hoop, that defendant saw her about 50 feet away and began applying brakes, that defendant blew his horn when the child bent down to pick up the hoola hoop, that the child was struck about a foot to the right of the center line in defendant's lane of travel, that no marks were left by his tires, and that defendant's motorcycle came to rest 172 feet from the point of the collision.

APPEAL by plaintiff from *Lanier, Judge,* Special Civil Session, Superior Court, LENOIR County.

Plaintiff's intestate, a 10-year-old girl, was killed when she was struck by a motorcycle operated by defendant. At the end of plaintiff's evidence, defendant's motion for directed verdict was granted. Plaintiff appealed.

Donald P. Brock and Gerrans and Spence, by William D. Spence, for plaintiff appellant.

Jeffress, Hodges, Morris and Rochelle, by Thomas H. Morris, for defendant appellee.

MORRIS, Judge.

The single question presented by this appeal is whether, when considered in the light most favorable to the plaintiff, the evidence is sufficient for submission to the jury. *Kelly v. International Harvester Company*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Sink v. Sink*, 11 N.C. App. 549, 181 S.E. 2d 721 (1971).

In determining the sufficiency of the evidence to go to the jury, all evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may be legitimately drawn therefrom, and with contradictions, conflicts and inconsistencies resolved in plaintiff's favor. *Adams v. Curtis*, 11 N.C. App. 696, 182 S.E. 2d 223 (1971).

Plaintiff's evidence, in its light most favorable to him, when subjected to the foregoing rules, would permit the jury to find the following facts:

At the time of the accident, defendant had travelled the road frequently going back and forth to his work. He was familiar with the area and knew that it was residential and there were houses on both sides of the road. He passed a car which was travelling "the speed limit" which was 35 miles per hour, and the driver of the car "saw the children during the time or right after he passed me. Anyway, I know I looked up ahead and that's when I saw the children. It might have been while he was passing or right after he passed me." She followed him maybe a block right before the accident "about two or three seconds, something like that." She saw the motorcycle hit the child. The child had gone out in the road to pick up a hoola hoop. Defendant saw her about 50 feet away and began applying brakes. No marks were left by his tires. The child was struck about one foot or one and one half feet to the right of the center line in defendant's lane of travel. Defendant blew his horn when the child bent down to pick up the hoola hoop. From the point where blood was found on the highway to where defendant's motorcycle came to rest was a distance of 172 feet.

We think the question of defendant's negligence is a question for the jury.

In *Wainwright v. Miller,* 259 N.C. 379, 381, 130 S.E. 2d 652 (1963), a case very similar factually to the one before us, Justice Sharp said:

> "The duty the law imposes upon a motorist who sees, or by the exercise of reasonable care should see, children on or near the highway has been frequently declared by this Court. He must recognize that children have less discretion than adults and may run out into the street in front of his approaching automobile unmindful of the danger. Therefore, proper care requires a motorist to maintain a vigilant lookout, to give a timely warning of his approach, and to drive at such speed and in such a manner that he can control his vehicle if a child in obedience to a childish impulse, attempts to cross the street in front of his approaching automobile. *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343; *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Walker v. Byrd,* 258 N.C. 62, 127 S.E. 2d 781." *Id.* at 381.

Under the evidence in this case the jury might reasonably have found that defendant failed to see plaintiff's intestate and to blow his horn in time when, in the exercise of a proper lookout and proper care he would have done both; or that he did see the child but ignored the possibility that she might run into the road to pick up the hoola hoop, and did not use proper care with respect to speed or control of his motorcycle; and that the omission of duty proximately caused the death of plaintiff's intestate.

We are of the opinion that the evidence presented was sufficient to withstand the motion for directed verdict.

New trial.

Judges HEDRICK and BALEY concur.

PERFORMANCE MOTORS, INC. v. ALVA JANE RIGGS ALLEN

No. 734SC717

(Filed 9 January 1974)

1. **Pleadings § 32; Rules of Civil Procedure § 15— amendment of pleadings upon remand from appellate court**

   The court's denial of plaintiff's motion to strike defendant's amended answer filed after the case was remanded from an appellate court was tantamount to permitting defendant to file the amended answer, and the court's allowance of the amendment was permitted by G.S. 1A-1, Rule 15(a) and (b).

2. **Criminal Law § 163— broadside assignment of error to charge**

   Assignment of error to the charge which fails to specify the portions of the charge to which defendant excepts is broadside and ineffectual.

APPEAL by plaintiff from *Webb, Judge,* 21 May 1973 Session of Superior Court held in JONES County.

Plaintiff instituted this action on 5 May 1969 to recover the balance of the purchase price of a mobile home sold by plaintiff to defendant, the balance being secured by defendant's note and a conditional sales contract. By claim and delivery proceedings, plaintiff repossessed the mobile home, sold it, and applied the proceeds of the sale on the balance alleged to be due. Defendant counterclaimed, alleging, among other things, breach of warranty.

The case was tried originally at the October 1970 Session of Jones Superior Court at which time a jury returned a verdict in favor of defendant in amount of $4,000 plus interest and from judgment predicated on the verdict, plaintiff appealed. By opinion reported in 11 N.C. App. 381, 181 S.E. 2d 134 (1971), this court ordered a new trial. The Supreme Court allowed certiorari and by opinion reported in 280 N.C. 385, 186 S.E. 2d 161 (1972), that court modified and affirmed the decision of this court. Reference is made to the Supreme Court opinion for a full statement regarding the pleadings and evidence.

At the retrial, evidence substantially the same as that submitted at the original trial was presented. The parties stipulated, among other things, that the maximum amount plaintiff could recover was $855 and the maximum amount defendant could

recover was $4,514.23. Issues were submitted to and answered by the jury as follows:

"1. Did the defendant accept the mobile home after the same was delivered to her lot?

ANSWER: Yes.

2. Did the plaintiff breach the implied warranty of fitness?

ANSWER: Yes.

3. Did the defendant justifiably revoke her acceptance?

ANSWER: Yes.

4. What amount, if any, is the plaintiff entitled to recover of the defendant on the purchase price?

ANSWER: ____________

5. What amount of damages, if any, is the defendant entitled to recover of the plaintiff?

ANSWER: 4360.63."

From judgment entered on the verdict in favor of defendant, plaintiff appealed.

Darris W. Koonce for plaintiff appellant.

Donald P. Brock for defendant appellee.

BRITT, Judge.

[1] Plaintiff assigns as error the failure of the trial court to allow its motion, filed 9 October 1972, to strike defendant's amended answer which was filed on 14 September 1972. In its motion to strike, plaintiff contends the amended answer is "redundant, irrelevant and immaterial," that it invades the province of the jury, and was filed without authority of the court after time for answering had expired.

Defendant contends the amended answer was authorized by the Supreme Court opinion (page 398) in the following words: "The parties may be permitted to amend their pleadings, if they so desire, to conform to the evidence. G.S. 1A-1, Rule 15, Rules of Civil Procedure."

Assuming, *arguendo,* the Supreme Court did not authorize the parties to amend their pleadings without express permission of the trial court, we think the denial of plaintiff's motion to strike defendant's amended answer was tantamount to permitting defendant to file the amended answer. G.S. 1A-1, Rule 15(a), authorizes the court to allow amendments to pleadings "when justice so requires." Rule 15(b) authorizes the court to allow amendments to pleadings "as may be necessary to cause them to conform to the evidence" and provides that amendments may be allowed at any time, even after judgment. The rule also contemplates liberality on the part of the court in allowing amendments to the pleadings. We find no merit in the assignment and the same is overruled.

[2] By its assignment of error number 9, based on exception 9, plaintiff contends the court erred in its charge to the jury. In the record, immediately preceding the jury charge, is written "EXCEPTION NO. 9," and under "GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR" we find: "9. That the court erred in its charge to the jury and statements of fact and law therein. EXCEPTION NO. 9 (R p 81)." At no place in the record does plaintiff specify the portion or portions of the charge to which it excepts.

In *Corns v. Nickelston,* 257 N.C. 277, 278, 125 S.E. 2d 588, 588 (1962), it is said:

> " 'While exceptions to the charge may be noted after trial, when the statement of case on appeal is prepared, even so, such exceptions should be included in appellant's statement of case on appeal as served on the appellee, in order that the latter may be fully apprised at that juncture of the theory of the appeal.' *Moore v. Crosswell,* 240 N.C. 473, 82 S.E. 2d 208. Since the 'exceptions' do not specify wherein it is claimed the court erred in instructing the jury, they are broadside and wholly ineffectual to support the assignments of error."

In *Collyer v. Bell,* 12 N.C. App. 653, 184 S.E. 2d 414 (1971), this court held that an assignment of error to the charge must quote the portion of the charge to which the appellant takes exception, point out the alleged error, and indicate what the court should have charged.

It is true that plaintiff in its brief quoted portions of the charge which plaintiff contends are erroneous but this is not

sufficient to present questions to the charge. We hold that plaintiff's assignment of error to the charge is broadside, therefore, the same is overruled.

We have carefully considered the other assignments of error brought forward and argued in plaintiff's brief but finding them to be without merit, they too are overruled.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIE LEE BLOUNT

No. 7312SC737

(Filed 9 January 1974)

Criminal Law § 162— objections to evidence — necessity and time of making

Defendant was not prejudiced by the admission of certain testimony where he failed to make timely objection and where testimony of the same import was thereafter introduced without objection.

APPEAL by defendant from *Braswell, Judge,* 21 May 1973 Schedule "A" Session, CUMBERLAND Superior Court.

By indictment proper in form defendant was charged with possession of heroin, a felony. Evidence presented by the State tended to show:

On the afternoon of 13 January 1973, police officers, armed with a search warrant, entered a residence at 1910 Newark Avenue in Fayetteville, N. C. In the residence, police found Danny E. Cobb and his girl friend, Mrs. Means, who lived in the residence; Cobb's daughter, Angela C. Smith, her husband and small child who were weekend visitors; and Winifred Cole and defendant. As officers entered the house, Mrs. Means was coming out of the bathroom and the commode had just been flushed. The three Smiths were in one of the bedrooms and Cobb, Cole and defendant were in the living room. Cole and defendant were sitting on a couch. A search of the house disclosed two plastic bags floating in the commode tank, one bag containing 13 tinfoil packets and the other containing 60 tinfoil packets; the packets contained a powdery substance identi-

fied as heroin. In the bedroom occupied by the Smiths, the police found a bottle cap cooker containing residue of heroin. Under one of the two cushions of the sofa, near the division of the cushions, they found a quantity of heroin in a rubber container.

As a witness for the State, Angela Smith testified substantially as follows: She, her husband and child, residents of Greensboro, were visiting her father, having come to Fayetteville the preceding day. Approximately 15 to 25 minutes before the police arrived, she went into the living room where she saw her father sitting in a chair and Cole and defendant sitting on the couch some two feet away. A coffee table was located approximately two feet in front of the couch. On the coffee table was a 33 album cover and on it was "from a quarter spoon to a half spoon" of heroin. The three men, Cobb, Cole and defendant, were smoking marijuana and "snorting" or "sniffing" heroin. When the police knocked on the door, defendant took the album cover to the bathroom after which Mrs. Smith heard the commode flush. Mrs. Means then entered the bathroom. Mrs. Smith admitted that she was using heroin at the time of the raid and thereafter entered a rehabilitation program. (Police found an album cover in the bathroom.)

Defendant offered no evidence. The jury found defendant guilty as charged, and from judgment imposing prison sentence of two and one-half years, with recommendation for the work release program, defendant appealed.

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

Doran J. Berry for defendant appellant (on appeal).

BRITT, Judge.

Defendant's first contention is that the court committed prejudicial error in allowing the witness Angela Smith "to testify in reference to the heroin or marijuana that she had allegedly seen." We find no merit in this contention.

With respect to Angela Smith's challenged testimony, the record reveals:

"Q. All right, did you see anything on that album cover?

A. Yes.

Q. Can you tell us what it was?

A. Heroin.

ATTORNEY HAIR: OBJECTION AND MOVE TO STRIKE.

COURT: Overruled.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 1.

Q. Can you tell us about how much heroin was on the album cover?

A. I would say from a quarter spoon to a half spoon.

Q. Do you mean a quarter of a teaspoon to a half teaspoon?

A. Right.

Q. Can you tell us, please, Mrs. Smith, what, if anything, you saw any of those three men doing while you were there in the living room?

A. Mr. Cobb and Mr. Cole and Mr. Blount were smoking marijuana and snorting heroin.

Q. Can you tell us what you mean they were snorting heroin? Or can you just explain that to the jury a little bit?

A. You can snort heroin by putting it up to your nose and sniffing. Snorting heroin can be done by putting heroin onto a spoon or matchcover and putting it to your nose and sniffing."

It is elementary that an objection to the admission of evidence as necessary to present a defendant's contention that the evidence was incompetent. *State v. Camp,* 266 N.C. 626, 146 S.E. 2d 643 (1966). Ordinarily a defendant must object to the question at the time it is asked and to the answer when given, and where objection is not made to the question but only to the answer of a witness, its exclusion is discretionary with the court. 3 Strong, N. C. Index 2d, Criminal Law, § 162, p. 115; *State v. Fentress,* 230 N.C. 248, 52 S.E. 2d 795 (1949).

It is also well settled that the admission of testimony over objection ordinarily is harmless error when testimony of the same import is theretofore or thereafter introduced without objection. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972).

Applying the stated principles to the case at hand, it appears that defendant did not make a timely objection to the testimony challenged by his Exception No. 1. Furthermore, the admission of the testimony challenged by the exception was rendered harmless when testimony of the same import was thereafter introduced without objection.

By his second and final contention, defendant argues that the court erred in denying his motion for judgment as of nonsuit and for a directed verdict of not guilty interposed at the close of the evidence. This contention is also without merit as we hold that the testimony was more than sufficient to take the case to the jury and support the verdict of guilty.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. CARL GOLDEN

No. 7328SC791

(Filed 9 January 1974)

Receiving Stolen Goods § 5— owner of stolen property — variance between indictment and proof

In a prosecution for receiving stolen property, there was no fatal variance between indictment and proof where the indictment charged that the property belonged to the Asheville City Board of Education and the evidence showed only that the property had been stolen from a certain school but failed to show that it belonged to the Board of Education, since there is no necessity for allegation and proof as to the owner other than to negative ownership in the defendant.

APPEAL by defendant from *Harry Martin, Judge,* 21 May 1973 Criminal Session BUNCOMBE Superior Court.

Defendant was tried upon a bill of indictment, in proper form, charging the felony of receiving stolen goods, a violation of G.S. 14-71. Defendant entered a plea of not guilty, the jury returned a verdict of "guilty of nonfelonious receiving stolen property," and from judgment imposing prison sentence of twelve months, defendant appeals.

Attorney General Robert Morgan, by Assistant Attorney General Richard N. League, for the State.

Sanford W. Brown for defendant appellant.

BRITT, Judge.

Defendant assigns as error the refusal of the court to grant his motion for judgment as of nonsuit interposed at the close of the evidence. The evidence, viewed in the light most favorable to the State, tends to show:

On the night of 20 September 1972, Franklin Jackson, Michael Williams, Benjamin Little, and Ronnie Watkins entered William Randolph School on Montford Avenue in Asheville by breaking a window of a rear entrance. The four then broke into rooms of the school and stole five to seven record players. Some time thereafter the four drove to the business establishment of defendant. The car was parked directly in front of the doorway and the occupants had a clear view into the store. Ronnie Watkins got out of the car and went into the store with one of the stolen record players. Watkins handed defendant the record player and walked with him further into the store. In a minute defendant and Watkins reappeared in the doorway and defendant said, "If you have any more, bring them at different times. I'll buy them all." Watkins received four dollars which was divided among the four.

On this assignment defendant's primary contention is that there is a fatal variance between the indictment and the proof. The indictment charges that defendant "unlawfully and wilfully did feloniously receive and have (1) Audiotronic Record Player, the personal property of the Asheville City Board of Education, valued at $52.64, knowing that the property had been feloniously stolen, taken, and carried away pursuant to a violation of G.S. 14-54 of the General Statutes of North Carolina." Although the evidence showed that the property received by defendant had been stolen from the William Randolph School, there was no showing that the property belonged to the Asheville City Board of Education.

In *State v. Brady,* 237 N.C. 675, 75 S.E. 2d 791 (1953), it is stated that the essential elements of the crime of receiving stolen goods are (1) the stealing of the goods by some other than the accused, (2) that the accused, knowing them to be stolen, received or aided in concealing the goods, and (3) con-

tinued such possession or concealment with a dishonest purpose. *Brady* also holds that in a prosecution for receiving stolen goods, the only purpose of requiring the ownership of the goods to be stated in the indictment is to negative ownership in the accused, and it is not necessary that the indictment state the names of those from whom the goods were stolen. In *State v. McClure,* 13 N.C. App. 634, 186 S.E. 2d 609 (1972), this court held that in a prosecution for receiving stolen goods, it is not essential that the indictment state the names of those from whom the goods were stolen (citing *Brady).*

In other states it has been held that it is not necessary to prove that defendant knew either the owner or the thief except in those jurisdictions in which the offense is strictly accessorial to the theft. See *Wertheimer v. State,* 201 Ind. 572, 169 N.E. 40 (1929), and *Zeargain v. State,* 57 Okla. Crim. 136, 45 P. 2d 1113 (1935). Our State has long viewed the offenses of larceny and receiving as separate and distinct. *State v. Brady, supra; In re Powell,* 241 N.C. 288, 84 S.E. 2d 906 (1954); and *State v. Neil,* 244 N.C. 252, 93 S.E. 2d 155 (1956). G.S. 14-71, defining the offense of receiving, clearly creates an offense not accessorial to larceny. For a discussion of the historical development of the separate offense, see LaFave and Scott, Handbook on Criminal Law, § 93, p. 682 (1972).

If then there is no need for allegation as to the owner, other than to negative ownership in the defendant, we perceive no fatal defect when the proof shows only that the property did not belong to the defendant. This holding is in accord with the essential requirements which call only for proof that the property received was stolen. Needless to say, in prosecutions for receiving stolen property the State would be well advised, whenever possible, to allege and prove the owner of the property. The assignment of error is overruled.

We have carefully considered the other assignments of error brought forward and argued in defendant's brief but conclude that they too are without merit and they are likewise overruled.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. DANNY JONES

No. 7310SC797

(Filed 9 January 1974)

Forgery § 2— uttering — instructions — fraudulent intent

The trial court erred in its instructions on the crime of uttering a forged check when the court in one portion of the charge failed to include intent to defraud as an element of the crime and the court in another portion of the charge instructed the jury that offering the forged check with fraudulent intent constitutes uttering but immediately thereafter instructed that fraudulent intent was immaterial.

APPEAL by defendant from *Martin (Perry), Judge,* 9 July 1973 Session of Superior Court held in WAKE County. Argued in the Court of Appeals on 10 December 1973.

Defendant was charged in a bill of indictment with the crimes of forgery and uttering. Defendant pleaded not guilty. The jury returned a verdict of guilty of uttering a forged check.

The State's evidence tended to show the following: On 3 April 1973 Mr. Will Spence (Spence), an employee of Wachovia Bank & Trust Company, Raleigh, North Carolina, was asked by defendant to cash a check drawn on the account of one Brooks F. Jones and payable to the order of Danny Jones in the amount of twenty dollars ($20.00). The check was on a Wachovia account and was signed with the signature of Brooks F. Jones.

While the defendant was seated at Spence's desk, Spence contacted the bookkeeping department for a comparison of the maker's signature. Spence concluded the signature on the check was not the signature of the Wachovia customer, Brooks F. Jones. Spence then contacted the purported maker of the check, Brooks F. Jones, while his secretary notified the police. Spence then requested defendant to endorse the check a second time in his presence. Defendant had stated to Spence that he had cashed a check in the bank the day before and that Mr. Perkins, another Wachovia employee, had approved the check. On redirect examination Spence was permitted to testify over objection that the check which defendant had cashed the day before was a forgery.

Brooks F. Jones then testified that on 3 April 1973 he went to the Wachovia Bank after Mr. Spence called to see if he had written a check to buy some art work. Upon arrival, Spence

showed the check to Brooks Jones and asked him if he had written it. Brooks Jones told Spence he had not written the check, had not authorized the check to be written on his behalf, and had never seen the defendant before.

Defendant offered no evidence.

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

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for defendant.

BROCK, Chief Judge.

Defendant contends that the trial judge erred in his charge to the jury in applying the law as to the charge of uttering against the defendant.

"Uttering a forged instrument consists of offering to another the forged instrument with the knowledge of the falsity of the writing and with intent to defraud." *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22.

The trial court in its initial portion of the charge on uttering instructed the jury as follows:

> "Now, I charge you, that for you to find the defendant guilty of uttering a forged check, the State must prove these things beyond a reasonable doubt, bearing in mind what I have indicated to you what a reasonable doubt was. First, that the check was falsely made, and that it was endorsed, altered or made in some manner by this defendant. If you find that some of the evidence of the State's case indicates that it was endorsed by the defendant, as some of the State's evidence indicates, and as the State contends, then this would be falsely uttering an instrument or check."

Later on in the jury charge the trial court instructed the jury that " . . . mere offering of the false instrument, in this case a check, with fraudulent intent, constitutes an uttering or publishing. The fraudulent intent, regardless of its successful confirmation is immaterial."

In the first portion of this charge, we find the trial judge attempting to set forth the elements of the offense of uttering. The element of intent to defraud is missing from the instruc-

tions. Within the latter portion of the charge the trial judge instructed the jury that offering the check with fraudulent intent constitutes uttering, but he immediately instructed that fraudulent intent was immaterial.

"Conflicting instructions on the applicable law or on a substantive feature of the case, particularly on the burden of proof, entitle defendant to a new trial, since it must be assumed on appeal that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous." 3 Strong, N. C. Index 2d, Criminal Law, § 168, pp. 130-131.

We do not discuss defendant's remaining assignments of error since the questions presented may not recur upon a new trial.

New trial.

Judges MORRIS and CARSON concur.

STATE OF NORTH CAROLINA v. ROGER DALE CHAPMAN

No. 7327SC651

(Filed 9 January 1974)

Escape § 1— fifth offense — record of prior convictions — sufficiency

In a prosecution for escape, fifth offense, the use of only the commitments issued as a result of prior convictions of escape for the purpose of establishing the prior conviction or convictions was error, since G.S. 15-147 required a transcript of the record of the prior conviction or convictions, i.e., a certified copy of the judgment or judgments.

APPEAL by defendant from *Friday, Judge,* 14 May 1973 Session of Superior Court held in LINCOLN County. Argued in the Court of Appeals on 31 October 1973.

Defendant was charged in a bill of indictment with escape, fifth offense. Defendant, at the time of his last alleged escape, was in custody, serving a sentence for breaking and entering and safecracking, a felony.

Before the jury was empaneled, defendant moved for a change of venue on the ground that a fair and impartial trial

could not be held in Lincoln County because of alleged widespread prejudicial publicity concerning defendant's alleged escape.

The State introduced evidence showing that defendant was placed in the custody of the North Carolina Department of Corrections, Lincoln County Subsidiary, on or about 21 March 1973; that defendant remained in custody until on or about 31 March 1973; and that defendant was returned to custody in the same unit on 11 April 1973.

The State also introduced into evidence three copies of orders committing defendant to the State Prison Department for prior escapes, one copy of the order committing defendant to the Prison Department for breaking and entering and safecracking, and one copy of a "Report of Escaped Inmate," detailing the alleged escape of defendant.

Defendant offered no evidence.

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

Thomas J. Wilson, by John A. Lafferty, Jr., for the defendant.

BROCK, Chief Judge.

Defendant contends that the trial court committed error in admitting into evidence the commitments for sentences imposed for convictions for prior escapes for the purpose of proving the prior convictions of defendant for escape.

The three copies of commitment orders offered by the State constituted the only evidence introduced for the purpose of showing the prior convictions for the offense of escape. The State has attempted to prove that the alleged escape was a *fifth* offense of escape committed by defendant.

It seems that the District Attorney has assumed a greater burden for the State than is necessary. The indictment alleges a *fifth* offense of escape. This creates the chore of offering competent evidence of four prior convictions for the offense of escape. Under G.S. 148-45 the maximum punishment which can be imposed for an offense of escape is authorized for a second offense. If the indictment had charged second offense, instead of fifth, the State would have needed to prove only one of the prior convictions.

"Where a person is charged in a bill of indictment with an offense which, on conviction thereof, is punishable with a greater penalty than on the first conviction, and the indictment properly alleges a prior conviction, G.S. 15-147 provides that 'a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.' cf. *State v. Powell*, 254 N.C. 231, 118 S.E. 2d 617." *State v. Walls*, 4 N.C. App. 661, 167 S.E. 2d 547.

The statute requires a more formal proof of a prior conviction than is required for merely showing lawful custody. The use of only the commitments issued as the result of prior convictions of escape for the purpose of establishing the prior conviction or convictions was error. A transcript of the record of the prior conviction or convictions, i.e., a certified copy of the judgment or judgments, is required by the statute.

We do not consider defendant's remaining assignments of error since the questions presented probably will not recur upon a new trial.

Because of the error in admitting copies of commitments to establish prior convictions for escape, there must be a

New trial.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JOE OXENDINE

No. 7316SC827

(Filed 9 January 1974)

1. **Burglary and Unlawful Breakings § 5— unlawfully opening vending machine — sufficiency of evidence of defendant's guilt**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of unlawfully opening a coin operated vending machine by the unauthorized use of a key in violation of G.S. 14-56.1 where it tended to show that a burglar alarm on a drink machine at a concession stand was activated in the owner's nearby residence, the owner saw that the door of the machine was open and there were people around the machine, the door was closed and locked and the people left in a yellow car, the owner fired a shotgun at the

car, the coin box and several cases of drinks had been removed from the machine, defendant and another were treated at a hospital for gunshot wounds, defendant's yellow car had shotgun pellet marks on it and blood on the left door, and defendant told a deputy sheriff that he stopped his car at the concession stand to allow his companion to get a drink and crackers and that someone shot him in the face.

2. **Criminal Law § 9— aiders and abettors — driver of getaway car**

The trial court in a prosecution for unlawfully opening a vending machine properly instructed the jury on aiders and abettors where there was evidence that defendant drove the getaway car to and from the crime scene.

ON *certiorari* to review the trial of defendant before *McLelland, Judge,* 5 February 1973 Session of Superior Court held in ROBESON County.

This is a criminal action in which the defendant, Joe Oxendine, is charged in a warrant, proper in form, with unlawfully and wilfully opening a coin operated vending machine by the unauthorized use of a key in violation of G.S. 14-56.1.

In open court, the defendant entered a plea of not guilty and from a verdict of guilty as charged and a judgment that the defendant be imprisoned for the term of two (2) years, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Jacob L. Safron for the State.

Musselwhite, Musselwhite & McIntyre by Fred L. Musselwhite for defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns as error the failure of the trial court to grant his motions for judgment as of nonsuit. It is elementary that in a motion for nonsuit the court must consider the evidence in the light most favorable to the State, take it as true, and consider every reasonable inference arising therefrom. *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1968).

The material evidence presented by the State tends to show the following:

Mr. James Locklear is the owner and operator of a grocery store and concession stand near Maxton, N. C. The concession

stand is a well-lighted shed type structure, open on the front to the public highway and located approximately 125 feet from the mobile home in which Mr. Locklear resides.

One of the machines in the concession stand was a soft drink machine, and this machine and three others were connected to a burglar alarm system devised and installed by Mr. Locklear. At approximatetly 6:00 p.m. on 23 July 1972, Mr. Locklear filled the drink machine with drinks, removed the money from the coin box, and locked the machine. Mr. Locklear went to bed shortly thereafter and was awakened at 2:00 a.m. by the activation of the burglar alarm system. Mr. Locklear then testified as to the following events:

> "I got out of bed and went to the window and pulled the window back and I saw that the machine was open. There was somebody at the machine. I don't know how many people there were around the machine and I could not identify the people. * * * There is a type of light in that concession stand. When I saw that my drink machine was open and someone was around it I went to get my gun. * * * The drink machine door was being locked and they were leaving. When the door of the machine was shut they got into the car. I took the gun outside and pulled the trigger and fired the gun at the car. * * *
>
> I could see the car when I fired at it and it was a light yellow color. * * * When I fired, the car left."

When Locklear examined the machine, he found the coin box had been removed and several cases of drinks were missing.

Mr. Locklear informed the Robeson County Sheriff's Department of the events which had transpired; and in the course of their investigation, Officers Goza and Locklear discovered that the defendant and another individual had been admitted to the emergency room of the Scotland County Hospital for treatment of gunshot wounds. Furthermore, investigation at Oxendine's residence disclosed a yellow, black-topped Ford, bearing marks on the left side indicating shotgun pellets and also blood on the left door of the car.

Hubert Stone, a Robeson County deputy sheriff, testified as to the following statements made to him by defendant.

> "Joe Oxendine told me that he and Ben Frank Scott had been together on this night. * * * . . . Ben Frank wanted

him (Oxendine) to take him somewhere to get something to eat. Defendant Oxendine told defendant Scott that he would drop him by and let him get a drink and a cracker. Defendant Oxendine said that they pulled over at James Locklear's concession stand at Prospect. * * *

Oxendine stated that he did not get out of the car and left the motor running. Oxendine stated that he stopped and that just about the time Ben Frank Scott got back into the car someone shot him in the face."

Considering this evidence in the light most favorable to the State, we hold that it is sufficient to justify the trial court's denial of defendant's motions for judgment as of nonsuit. This assignment of error is overruled.

[2] In his only other assignment of error the defendant contends that the court committed error in charging the jury on aiders and abettors. It is the duty of the trial judge, even without special request, to declare and explain the law as to all substantial features of the case arising on the evidence, G.S. 1-180, *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1968); *State v. Blizzard,* 7 N.C. App. 395, 172 S.E. 2d 106 (1970); and we are of the opinion that the evidence in this case was such as to require the court to instruct on the law applicable to aiders and abettors.

The defendant was afforded a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. YVONNE CARTER

No. 7327SC816

(Filed 9 January 1974)

1. Receiving Stolen Goods § 5— receiving stolen furniture — sufficiency of evidence

In a prosecution charging defendant with the felonious receiving of stolen goods, evidence was sufficient to be submitted to the jury where it tended to show that defendant helped her brother-in-law place

stolen furniture in the house where they lived, that she subsequently tried unsuccessfully to sell the furniture, that she stored the furniture in a warehouse, and that she later borrowed money from the warehouse owner by pledging the furniture as security.

2. **Criminal Law § 116— failure of defendant to testify — no comment by trial judge**

Trial court's statement that defendant did not offer any evidence did not amount to a comment by the court on defendant's failure to testify.

APPEAL from *Snepp, Judge,* 16 July 1973 Session of Superior Court held in GASTON County.

This is a criminal action in which the defendant was charged in a bill of indictment, proper in form, with the felonious receiving of stolen goods.

Defendant entered a plea of not guilty to the crime charged and from a verdict of guilty of misdemeanor receiving and the imposition of a prison sentence of two years, she appealed.

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

Whitesides and Robinson by Henry M. Whitesides for defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns as error the trial court's denial of her motion for judgment as of nonsuit. "Upon a motion for judgment as of nonsuit, the evidence must be considered by the court in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence." *State v. Cutler,* 271 N.C. 379, 382, 156 S.E. 2d 679, 681 (1967).

The material evidence offered by the State tended to establish the following:

The defendant lived in Gaston County with Mr. and Mrs. Roy Ledford, her sister and her sister's husband. On 2 July 1971, Roy Ledford and several other persons traveled by truck to Tony's Mobile Home Sales on Highway 29 West, broke into a mobile home located at this site, and removed a refrigerator, gas range, typewriter, sofa, lamp, and several chairs. After

completing this act, Ledford and his accomplices returned to Ledford's home where the defendant helped place the furniture in a room of the house. Roy Ledford and the other members of his party returned to Tony's Mobile Home Sales for a second load; however, they were apprehended inside a trailer on the mobile home lot. On the next day defendant offered to sell the stolen goods to William Roseberry; however, he refused to purchase the goods but did offer to allow defendant to store these items in his warehouse. Defendant and Glenn Montgomery delivered the goods to the warehouse, and Roseberry gave defendant a receipt for the rental fee of eight dollars ($8.00). On 4 July 1971, defendant again visited Roseberry and borrowed twenty dollars ($20.00) by pledging the goods as security.

This evidence, when viewed in the light most favorable to the State, constitutes the exercise of control over the stolen property and is sufficient to withstand defendant's motion for judgment as of nonsuit and to support the verdict.

[2] In her three remaining assignments of error the defendant asserts that the trial court erred in its instructions to the jury (1) in commenting on the defendant's not offering any evidence without explaining in accordance with G.S. 8-54 that no presumption arises from defendant's failure to testify, (2) in using the term "dishonest purpose" in the charge, and (3) in defining the offense of receiving stolen goods. That portion of the charge upon which the defendant's first contention is based, in our opinion, does not amount to a comment by the court on defendant's failure to testify. The court merely stated that the defendant did not offer any evidence and this statement simply served as a preface to the trial judge's recapitulation of certain evidence brought out by the defendant on cross-examination of the State's witnesses. Furthermore, assuming *arguendo* that the comment made by the judge was directed to defendant's failure to testify, we are of the opinion that this instruction, although meager, meets minimum requirements and that defendant has failed to show any prejudicial error. The second and third challenges to the charge are lifted out of context and when the charge is considered contextually as a whole it is found to be fair and complete and free from prejudicial error.

No error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. CURTIS MOSES INGRAM

No. 7321SC753

(Filed 9 January 1974)

Narcotics § 2; Indictment and Warrant § 17— distribution of heroin — name of buyer — fatal variance

Defendant's conviction for distribution of heroin is set aside for variance between the indictment and proof where the indictment alleged that defendant sold heroin to one person and the proof tended to show only a sale to a different person.

APPEAL by defendant from *Wood, Judge,* 7 May 1973 Criminal Session of Superior Court held in FORSYTH County.

Defendant was indicted for feloniously distributing forty-four bindles of heroin.

The State's evidence tended to show the following.

On 29 July 1972, Clarence Gooche, an undercover agent for the State Bureau of Investigation, met with SBI agent Gary Batten at the Coliseum on Cherry Street in Winston-Salem, North Carolina. Gooche, who was based in Raleigh, was sent to Winston-Salem "to make an undercover buy of heroin" from one Reginald Hiawatha (Hi) Hairston. Gooche was introduced to an informer (Howie) who was to assist in making the contact with Hairston. Howie and Hairston were friends.

Howie telephoned Hairston, expressed an interest in purchasing "some dope," and said he and Gooche would come over. Some time between 10:00 p.m. and 10:30 p.m., Gooche and Howie picked Hairston up as he left work. Prior to this meeting, Hairston and Gooche had never seen each other. Gooche asked Hairston to buy between $300.00 and $400.00 worth of heroin. Since Howie was acquainted with Hairston, the latter agreed to make the purchase as a favor to the former. Hairston admitted that he had "experimented" with heroin, that he "knew where to get some when he needed it" and that he did "a lot of favors for people in order to get [his] shots, so to speak."

Gooche, Howie and Hairston parked in front of one of the buildings in Colony Park Apartments about 11:45 p.m. Hairston did not know who lived in the apartment, but he was aware that drug users frequented it. Hairston went into a second floor

apartment while Gooche and Howie remained in the car which was parked approximately 35 to 40 feet from the building.

Hairston described the purchase as follows:

"So, I went up to the apartment and, you know, I went on the inside and began to negotiate, you know, about purchasing the drugs. When I got on the inside, it was Curtis Ingram that I met. I told him what I wanted was $300 worth of dope, three half-loads. So I gave him the $300. He said, 'Well, wait a while.' So, I goes back down to the car and sat and waited. All right. Fifteen or twenty minutes passed. I go back up, you know, to check on everything, and, as I got up the steps, you know, as I was going up the steps, I could vaguely see him standing in the door. So, I walked up to the door. Mr. Ingram, I saw him standing in the doorway, and opened the screen door, handed the package out. I went back down the steps and got in the car and gave the package to this SBI Agent. Well, they took me back to my house and then they left."

The package Hairston gave Gooche contained numerous cellophane wrappers filled with a white powder. The results of a preliminary analysis of one of the bindles indicated that the white powder was heroin. The package was ultimately turned over to Batten who in turn forwarded it to the State Chemical Lab for extensive analysis. The State's chemist testified that the analysis revealed the white substance was heroin.

The verdict was guilty, judgment was entered and defendant appealed.

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

G. Ray Motsinger for defendant appellant.

VAUGHN, Judge.

Defendant contends that his motion for dismissal should have been granted since there was a variance between the allegations in the indictment and the State's evidence at trial. The indictment upon which defendant was tried specified "[t]hat Curtis Moses Ingram . . . did unlawfully, willfully and feloniously distribute a controlled substance to Clarence Gooche . . . [and that] the defendant distributed the said substance by

selling and transferring the same to Clarence Gooche for the price of approximately $300.00 . . . . " The State's evidence tends to prove that defendant sold the heroin to Hiawatha Hairston.

The purpose of an indictment is to give defendant sufficient notice of the charge against him, to enable him to prepare his defense, and to raise the bar of double jeopardy in the event he is again brought to trial for the same offenses. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897; *State v. Dorsett,* 272 N.C. 227, 158 S.E. 2d 15; *State v. Bissette,* 250 N.C. 514, 108 S.E. 2d 858. An indictment not meeting these standards will not support a conviction. Our Supreme Court has held that since the now superseded Uniform Narcotic Drug Act of 1935 did not expressly eliminate the common law requirement that an indictment specify the name of the person to whom a defendant allegedly sold narcotics, an indictment which does not include the purchaser's name, if known, failed to state sufficient facts to sustain a conviction. *State v. Bennett,* 280 N.C. 167, 185 S.E. 2d 147. The Court reaffirmed the general rule that " '[w]here a sale is prohibited, it is necessary, for a conviction, to allege in the bill of indictment the name of the person to whom the sale was made or that his name is unknown, *unless some statute eliminates that requirement.* The proof, must, of course, conform to the allegations and establish a sale to the named person or that the purchaser was in fact unknown.' (Emphasis added.)" *State v. Bennett, supra, quoting State v. Bissette, supra.* The North Carolina Controlled Substances Act under which defendant was charged does not expressly eliminate the requirement that the name of a known purchaser be alleged in the indictment. In any event, where the bill of indictment alleges a sale to one person and the proof tends to show only a sale to a different person, the variance is fatal.

The conviction must be set aside. The State is at liberty to secure another bill of indictment if so advised.

Reversed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JACK EDWARD SYKES

No. 738SC744

(Filed 9 January 1974)

1. Criminal Law § 75— statement by defendant — absence of Miranda warnings

Miranda rules had no application where an officer followed defendant as he weaved back and forth across the street, defendant stopped, and the officer then asked defendant if he had been drinking.

2. Automobiles § 126— breathalyzer test — statutory warnings

Though *Miranda* does not require that an accused subjected to a breathalyzer test be warned that the results may be used against him, G.S. 20-16.2 does require that before the test is administered, an accused must be permitted to call an attorney and to select a witness to observe testing procedures, and defendant was so advised in this case.

APPEAL by defendant from *Martin (Perry), Judge,* 21 May 1973 Session of Superior Court held in WAYNE County.

Defendant was tried for driving under the influence of intoxicating liquor.

The State offered evidence tending to show the following. On 14 June 1973, Highway Patrolman Don Wood was proceeding south on Slocumb Street in Goldsboro at 11:50 p.m. when he observed defendant operating a pickup truck at approximately twenty miles per hour. The posted speed limit in the area was thirty-five miles per hour. Wood followed the truck traveling south on Westbrooke Road during which period the truck weaved back and forth, ran off the right shoulder of the road and crossed the center line "a couple of times." When the truck turned into a driveway and stopped, Wood drove in behind the truck, left his cruiser and "yelled up to the driver to step out." According to Wood,

> " . . . [t]he defendant Jack Edward Sykes got out of the truck. I observed that the defendant was wearing usual work clothes with the exception of his shoes. He was wearing soft pink lady's slippers. I then asked Mr. Sykes for his driver's license and I smelled a high odor of some alcoholic beverage on his breath. I noticed his face was very red and flushed, even more so than today.
>
> I asked Mr. Sykes if he had been drinking and he said yes. I asked him to walk for me. As he was walking there

on the driveway he was staggering and stumbling. He did not walk—

* * *

I asked him to walk for me and in doing so he was staggering and stumbling. I gave the balance test and at the time I gave him this test he fell forward noticeably. I advised Mr. Sykes he was under arrest for driving under the influence and asked him if he would take a breathalyzer test. He said that he would.

* * *

There were two other persons in the truck, both female. I then told Mr. Sykes he was under arrest. A quick search of the vehicle revealed no further alcoholic beverage. As to [sic] Sykes walked to the patrol car he staggered noticeably. I advised him of his Miranda right en route to the jail. He said he understood his rights.

I asked him if he would take the breathalyzer test. He wasn't too sure, but finally said he would.

I asked him then what he had been drinking and he said he had about a pint, excuse me a half a pint of bourbon.

* * *

COURT: Mr. Wood, did the defendant tell you this after you had advised him of his rights?

Yes sir, he did out to the jail, sir."

After transporting defendant to the Wayne County jail, Wood requested Officer Roger Flynn, a licensed breathalyzer operator, to administer the test to defendant. Flynn stated:

" . . . Prior to giving the defendant the test, I advised him of his statutory rights to an attorney or a witness to observe the test, so long as it did not delay the test over 30 minutes. He said he did not want an attorney or witness. I gave the test at 12:25 a.m."

The test indicated an alcoholic content of 0.15 percent.

The record contains the following stipulation:

"The record does not reflect the foundation questions asked by the solicitor for the purpose of qualifying the witness, as to his methods and qualifications to operate the

breathalyzer machine. All objections to the admissibility of breathalyzer test results are hereby specifically waived except as stated as follows:

MR. CONNOR: He agreed to take the breathalyzer test as a result of inquiry by Mr. Wood prior to being advised of his right with respect to the breathalyzer. He had already committed himself to the taking and therefore move to strike with respect to the breathalyzer test; . . . "

Defendant offered no evidence. Upon a verdict of guilty, defendant was sentenced to six months suspended for one year upon condition that he pay a fine of $200.00 and costs and refrain from operating a motor vehicle for twelve months.

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

Douglas P. Connor for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that the officer violated defendant's constitutional rights when, prior to giving *Miranda* warnings, he asked defendant if he had been drinking. We have previously held that under similar circumstances, the rules of *Miranda* have no application. *State v. Tyndall,* 18 N.C. App. 669, 197 S.E. 2d 598, *cert. den.,* 284 N.C. 124, 199 S.E. 2d 662. The assignment of error is overruled.

[2] Defendant also argues that because he "never waived his right to counsel and was not informed of his breathalyzer statutory right prior to his consent to the breathalyzer examination," the results of the breathalyzer test should have been excluded at trial. Defendant argues that "[t]he procedure whereby the arresting patrolman obtained appellant's consent for a breathalyzer examination was in direct violation of appellant's *constitutional* and *statutory* rights." (Emphasis added.) *Miranda* does not require that an accused subjected to a blood or breath test be warned that the results may be used against him. *Schmerber v. California,* 384 U.S. 757, 86 Sup. Ct. 1826; *State v. Randolph,* 273 N.C. 120, 159 S.E. 2d 324.

The statute, G.S. 20-16.2 does, however, require that before the test is administered, an accused must be permitted to call an attorney and to select a witness to observe testing procedures.

The record discloses that before the test was administered, defendant was advised of these rights and expressly declined to exercise them. Defendant contends that the results of the test should not have been admitted as evidence because he agreed to take the test as a result of inquiry by the officer prior to being advised of his right to call counsel. We do not agree. Defendant was free to withdraw from his agreement to take the test.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JONAH RAY STRICKLAND AND WILLIAM McKINNIE

No. 738SC677

(Filed 9 January 1974)

Receiving Stolen Goods § 5— receiving stolen pigs — sufficiency of evidence

Defendants' motion for nonsuit on the charge of receiving stolen goods, knowing them to have been stolen, should have been allowed where the evidence tended to show that nine pigs were stolen by defendants and there was no evidence tending to show that the pigs were stolen by others and then received by these defendants with knowledge that they had been stolen.

APPEAL by defendants from *Lanier, Judge,* 26 March 1973 Session of Superior Court held in WAYNE County.

Defendants were tried for nonfelonious larceny of nine pigs valued at $140.00 and for unlawfully receiving stolen property, the same nine pigs.

The State's evidence tended to show the following. On 26 May 1972, R. E. McCullen discovered that nine feeder pigs, each weighing about 70 pounds, had been taken from his hog pen. One of the pigs had an unusual marking in the shape of an "M" on its left side. The marking was white on black. The other pigs were black with white band-like markings around their necks. All the markings on the pigs were natural, and the livestock had not been branded or tagged for identification purposes.

During the course of his investigation of the theft, James M. Sasser, a Wayne County Deputy Sheriff, called Nahunta Hog Market and was informed that Mack Pierce had purchased several 70-pound hogs on 26 May 1972. McCullen and his son, Randy McCullen, identified nine of the pigs as the ones taken from McCullen's pen. Included in this group was the hog with a natural "M" on its left side. Defendants had sold the animals to Pierce on the same day that McCullen learned they had been taken from his pen.

Pierce testified that the market purchases pigs for slaughter and that he paid defendants the going price of twenty cents a pound or $140.00 for the nine pigs. Pierce had seen both defendants at the market on previous occasions and had bought livestock from defendant McKinnie in the past. With respect to the 26 May 1972 transaction, Pierce did not ask and defendants did not say where or how they obtained the pigs. Defendants arrived at the market in two automobiles and had the pigs in the car trunks. Pierce testified that it was not unusual for sellers to transport pigs in this manner. He further stated:

> "I have bought pigs from William before. As to the question of whether or not I thought why in the world somebody was selling feeder type for 20 cents a pound when they were worth 60 cents a pound in the slaughter business we can kill a feeder pig just as well as we can kill a slaughter pig. I didn't have any thoughts in mind about somebody selling pigs that were worth 50 to 60 cents a pound for 20 cents. If you want to sell the pigs I will buy them. . . . I can't say any specific number as to how many people I have had coming in there selling pigs like that for 20 cents a pound. We buy a lot of pigs, off-grade pigs, feeder pigs. I recognized that they were real nice pigs. . . . It is not unusual for somebody to come there and sell me feeder pigs that are worth 50 to 60 cents a pound if that's the slaughter price. Not if they need the money. I'm the only one in the county. They sell feeder pigs at Rocky Mount and Mount Olive they are the only places they sell feeder pigs."

Defendants offered no evidence. Defendants were found not guilty of larceny. They were found guilty of nonfeloniously receiving stolen property. Both defendants were sentenced to prison terms of two years.

Attorney General Robert Morgan by R. Bruce White, Jr., Deputy Attorney General and Guy A. Hamlin, Assistant Attorney General, for the State.

George F. Taylor for defendant appellants.

VAUGHN, Judge.

The unexplained possession of recently stolen property raises a presumption of fact tending to show that the possessor is guilty of larceny. There was sufficient evidence in this case to have sustained a verdict of guilty as to each defendant on the charges of larceny. Nevertheless, the jury acquitted each defendant of larceny. Defendants contend that the evidence was not sufficient to carry the cases to the jury on the charges of receiving stolen goods, knowing them to have been stolen.

The possession of stolen property, without more, does not raise a presumption that those in whose possession the goods are found immediately after the larceny are guilty of receiving the stolen property knowing it to have been stolen. "[T]he crime of receiving presupposes, as an essential element of the offense, that the property in question had been stolen by someone *other than* the person charged with the offense of receiving. . . . " *In re Powell,* 241 N.C. 288, 84 S.E. 2d 906.

In the case before us, the evidence tends to show that the pigs were stolen by defendants. There is no evidence tending to show that the pigs were stolen by others and then received by these defendants with the knowledge that they had been stolen. Defendants' motion for nonsuit on the charges of receiving stolen goods, knowing them to have been stolen should have been allowed. *State v. Neill,* 244 N.C. 252, 93 S.E. 2d 155.

Reversed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JOHNNY McQUEARY

No. 7326SC767

(Filed 9 January 1974)

Criminal Law § 84— vial of cocaine in plain view — admissibility

Evidence as to the contents of a plastic vial dropped by defendant upon his apprehension by officers was admissible in defendant's trial

for possession of cocaine where officers were justified in detaining defendant on the reasonable suspicion that criminal activity was afoot and where defendant placed the vial in the plain view of the officers.

ON *certiorari* to review trial by *Chess, Special Judge,* at the 16 October 1972 Session of Superior Court held in MECKLENBURG County.

Defendant was indicted for the possession of a controlled substance, cocaine, in violation of G.S. 90-95.

The State's evidence tends to show the following. On 28 January 1972, Officer Michael Harrell and several other members of the Mecklenburg County Vice Squad went to 700 Block of East 7th Street to apprehend a suspect believed to be selling heroin. A community center and grill are located there. Beside the grill is a fenced-in basketball court. One gate to the court faces a street while the other exits onto an alley. The area was "one of the worst places at that time in Charlotte for drugs to be passed or possessed." Officer Harrell's was the first of several police vehicles to arrive. Harrell parked by the basketball court as did some of the other vehicles. At the time, defendant was standing by the court's street gate. When two vehicles stopped by the gate, defendant ran across the court and out the alley gate. No one else in the vicinity ran. Officer Harrell began to chase defendant, and shortly thereafter defendant slipped and fell. When defendant stood up, Harrell, who had his gun drawn, was standing two or three feet away in front of him and saw a small, clear plastic vial in defendant's hand. Defendant dropped the vial. Harrell picked it up and found that the vial contained 8 tinfoil packets of white powder. Harrell testified that after examining the packets, he placed defendant under arrest. A chemist testified that the packets contained cocaine.

Defendant, testifying in his own behalf, stated that a fight occurred while he was in the vicinity of the basketball court, several police officers arrived and that "everybody" scattered. He testified that as he ran across the basketball court towards his automobile, Officer Harrell "pulled his gun and shot," and told him to "hold it." He testified that another officer struck him and he fell to the ground. Defendant denied ever having the vial in question, or any vial similar to it in his possession.

Upon a verdict of guilty, the court imposed an active prison sentence of three years. Defendant appealed.

Attorney General Robert Morgan by Norman L. Sloan, Associate Attorney, for the State.

Chambers, Stein, Ferguson & Lanning by Karl Adkins for defendant appellant.

VAUGHN, Judge.

At trial defendant did not raise the question of the validity of his arrest and did not object to the testimony of the arresting officer when the officer testified about the discovery of the vial and its contents. Defendant did lodge a general objection when the chemist was asked to identify the white powdery substance found in the foil packet and when the State offered the vial and its contents into evidence. On appeal defendant's court appointed counsel skillfully contends that probable cause for defendant's arrest did not exist and that, therefore, the seizure of the plastic vial and its contents violated defendant's constitutional rights, thus rendering the evidence as to the contents of the vial inadmissible.

We do not deem it necessary to resolve the question raised as to whether the arrest of defendant was effectuated when defendant fell to the ground or later after defendant displayed and attempted to dispose of the drugs. "There is no absolute test to ascertain exactly when an arrest occurs. The time and place of an arrest is determined in the context of the circumstances surrounding it." *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9. Even before the vial was seen in defendant's hand, the circumstances were such as to justify the officer in briefly detaining defendant on the reasonable suspicion that criminal activity was afoot. Defendant then, in an attempt to rid himself of the contraband, placed it in the plain view of the officer. There was no search, and it was not error to admit the drugs as evidence.

We have considered defendant's other assignments of error, and they are overruled.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. EUNICE EVANGELINE BOYD

No. 7325SC828

(Filed 9 January 1974)

1. Constitutional Law § 30— speedy trial

Defendant was not denied her right to a speedy trial by her trial on 10 June 1973 after her arrest on 18 June 1972 and her indictment in October 1972 where the case was not reached at one term because of a heavy docket and was deferred at another term because of the unavailability of an essential witness who was taking a three months FBI course, defendant was not in custody and there was no showing that defendant was prejudiced by the delay.

2. Criminal Law § 15— motion for change of venue — pretrial publicity

The trial court in a prosecution for sale of marijuana did not err in the denial of defendant's motion for change of venue made on the ground of unfavorable publicity.

3. Criminal Law § 91— motion for continuance — other narcotics cases tried at same term

In a prosecution for sale of narcotics, the trial court did not abuse its discretion in the denial of defendant's motion for continuance because other narcotics cases were being tried at the same term.

APPEAL by defendant from *Falls, Judge,* 9 July 1973 Session of Superior Court held in CALDWELL County.

Defendant was charged with the sale of marijuana. She pleaded not guilty.

Prior to trial defendant made these motions:

1. For dismissal because she was denied a speedy trial.
2. For change of venue.
3. For continuance because other narcotics cases were being tried at the same term.

All motions were denied.

The State's evidence indicated that Hugh Nelson, an undercover agent for the State, purchased a bag of marijuana from the defendant on 14 June 1972 at the Union 76 Service Station located at the corner of Willow Street and West Avenue in Lenoir, North Carolina.

Defendant claimed an alibi and offered evidence that she was in Charlotte at the time of the sale.

The jury returned a verdict of guilty and from a prison sentence based thereon, defendant has appealed.

Attorney General Morgan, by Assistant Attorney General Ralf F. Haskell, for the State.

Carpenter and Bost, by John F. Bost III, for defendant appellant.

BALEY, Judge.

Defendant assigns as error the denial of her motions for dismissal for failure to grant her a speedy trial, for change of venue, and for a continuance. None of these assignments of error have any merit.

[1] The defendant was arrested 18 June 1972, indicted at October Term, 1972, and tried 10 June 1973. The case was not reached at one term because of the heavy docket and deferred at another term because of the unavailability of an essential witness who was taking a three months course at the Federal Bureau of Investigation in Washington, D. C. The defendant was not in custody, and there is no showing that she has been prejudiced in any respect by the delay in trial. *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659; *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779.

[2] Motions for change of venue on the ground of unfavorable publicity are addressed to the discretion of the trial judge and will not be disturbed on appeal unless a manifest abuse of such discretion is shown. *State v. Mitchell,* 283 N.C. 462, 465, 196 S.E. 2d 736, 738. Here there is nothing in the record to indicate that the jury as chosen was aware of any adverse publicity or had been influenced in any manner by such publicity.

[3] The ruling of the trial court upon a motion for continuance is not subject to review in the absence of an abuse of discretion. *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811. Not only must there be a showing of such abuse of discretion, but the defendant must have been prejudiced thereby. In this case the record fails to show that any juror had heard any testimony in any prior narcotics cases at the same term which would have unduly influenced his judgment in the defendant's case, and no prejudice to defendant has been shown by denial of her motion for continuance.

The plastic bag of marijuana after proper identification is clearly admissible in evidence, and the defendant's objection to its admissibility was properly overruled. 1 Stansbury, N. C. Evidence (Brandis rev.), § 118, pp. 355-8.

In defendant's trial and the judgment imposed, we find no error.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. SAMUEL P. MARTIN

No. 7321SC818

(Filed 9 January 1974)

1. **Safecracking— sufficiency of indictment**

   Indictment in a safecracking case which stated that the safe was opened "by the use of chopping tools" followed the language of G.S. 14-89.1 and was entirely proper.

2. **Criminal Law § 138; Safecracking— sentence under old statute**

   Crime of safecracking committed in 1971 prior to amendment of G.S. 14-89.1 is punishable by imprisonment for a term ranging from ten years to life imprisonment.

3. **Criminal Law §§ 23, 158— plea bargain — evidence omitted in record — no review**

   Where the record showed that defendant agreed to plead guilty to a charge of safecracking in exchange for the solicitor's promise to nol pros twenty-nine other indictments against him and the solicitor carried out his promise, but the record showed no plea bargaining with respect to the length of defendant's sentence, the court could not grant defendant relief for the alleged violation of such a plea bargain.

ON writ of *certiorari* to review trial before *Wood, Judge,* 28 August 1972 Session of Superior Court held in FORSYTH County.

Defendant was indicted for safecracking. He was represented by court-appointed counsel and pleaded guilty. The court found that such plea was entered freely, understandingly and

voluntarily, without undue influence, compulsion or duress, and without promise of leniency.

Defendant received a prison sentence of 30 to 40 years and gave notice of appeal. The appeal was not perfected in apt time, but petition for writ of certiorari was granted by this Court.

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

Teeter, Parrish & Yokley, by D. Blake Yokley, for defendant appellant.

BALEY, Judge.

Defendant makes three contentions: (1) that the bill of indictment is defective because it fails to specify how the safe was forced open, (2) that the punishment imposed was excessive, (3) that the judgment of the court was not in accord with a plea bargain made with the solicitor which provided that defendant receive a sentence of only 10 to 15 years. We find all of these contentions to be without merit.

[1] The indictment clearly states that the safe was opened "by the use of chopping tools." It follows the language of the safecracking statute, G.S. 14-89.1, and is entirely proper. *See State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596.

[2] Prior to 19 April 1973, G.S. 14-89.1 provided that a person convicted of safecracking could be sentenced to a prison term ranging from ten years to life imprisonment. On 19 April 1973 the General Assembly ratified chapter 235 of the 1973 Session Laws, reducing the punishment for safecracking and setting it at two to thirty years' imprisonment. Defendant asserts that in view of this new statute, his sentence of 30 to 40 years is excessive. However, section 2 of chapter 235 provides: "This act shall apply to all offenses committed after its ratification and shall become effective upon ratification." Since the crime in this case was committed in 1971, before chapter 235 was ratified, defendant can be punished under the old statute. *State v. Cameron,* 284 N.C. 165, 200 S.E. 2d 186.

[3] With respect to any plea bargaining agreement, when the State enters into such an agreement with the defendant, it must be honored. *Santobello v. New York,* 404 U.S. 257 (1971); *State v. Martin,* 18 N.C. App. 398, 197 S.E. 2d 58. If the State violates

such an agreement, the defendant is entitled to replead. *State v. Martin, supra.* But the courts cannot grant relief for the violation of a plea bargain unless the terms of the bargain are shown in the record. In this case the record shows that the court was informed that defendant agreed to plead guilty in exchange for the solicitor's promise to nol pros twenty-nine other indictments against him, and the solicitor carried out this promise. However, defendant has shown nothing in the record to indicate any agreement concerning the length of his sentence.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. DOUGLAS REYNOLDS

No. 736SC812

(Filed 9 January 1974)

1. **Intoxicating Liquor § 19— instructions — requiring proof of possession and sale**

   Defendant was not prejudiced by the court's charge requiring the State to prove both possession and sale of non-taxpaid liquor in order for defendant to be found guilty under the warrant in this case.

2. **Criminal Law § 150— threat of active sentence if defendant appealed — denial of right to appeal**

   Defendant was denied his unlimited right to appeal when the court informed defendant that sentence would be suspended unless he decided to appeal, in which case an active sentence would be imposed.

APPEAL from *Copeland, Judge,* 16 July Session, HERTFORD County Superior Court.

Defendant was charged with possession of non-tax-paid whiskey for purpose of sale, and he entered a plea of not guilty. The State presented evidence which tended to show that Officer Robinson of the North Carolina A.B.C. Board went to the premises of defendant and inquired of defendant the price of a pint of liquor. Defendant quoted a price, the two men agreed on a sale, and defendant returned two or three minutes later with a pint of whiskey. A.B.C. Officer Price testified that he received the bottle from Officer Robinson on the date of the purchase, and that in his opinion it contained non-tax-paid whiskey.

At the close of State's evidence, defendant's motion for nonsuit was denied, and he presented no evidence. Defendant was found guilty by a jury, and from judgment committing him to an active sentence of six months, he appeals.

Attorney General Morgan, by Associate Attorney John R. Morgan, for the State.

Cherry, Cherry and Flythe, by Joseph J. Flythe and Ernest L. Evans, for defendant appellant.

MORRIS, Judge.

[1] The defendant assigns error to the following portion of the court's instruction to the jury:

> "Now in this case you may consider one of two verdicts, guilty of possession of non-tax-paid liquor and guilty of selling it, or not guilty."

It is his contention that this charge did not give the jury the alternative of finding him guilty of either possession or sale of the whiskey.

In this case, the warrant charged that defendant had "in his possession non-taxpaid whiskey and for the purpose of sale and did sell same to State ABC Officer John Roberson (undercover) to wit: (1) one pint." The warrant is clearly written as one count. Defendant cannot contend he was prejudiced by the court's charge. The charge was correct and in accord with the warrant. As drawn, the warrant placed a greater burden on the State to prove defendant's guilt. The State, under the charge was required to prove both possession and sale beyond a reasonable doubt before defendant could be found guilty. The trial judge so charged.

[2] Defendant next assigns error to the court's inquiring of defendant prior to sentencing whether he intended to appeal. The court informed the defendant that he would suspend his sentence unless he decided to appeal his conviction, in which case he intended to give him an active sentence. It is well established that it is error for the trial court to change a suspended sentence to an active sentence upon learning of defendant's intention to appeal. *In re Moses,* 17 N.C. App. 104, 193 S.E. 2d 375 (1972); *State v. May,* 8 N.C. App. 423, 174 S.E. 2d 633 (1970).

We are of the opinion that the rule is equally applicable here. The threat of an active prison sentence if he appealed as opposed to a probationary type sentence if he did not, in our opinion, effectively denied to defendant an unlimited right of appeal. The sentence imposed must, therefore, be stricken and the case remanded for resentencing.

Remanded.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JOHN MOODY REISCH

No. 733SC775

(Filed 9 January 1974)

1. **Criminal Law § 51— expert testimony — finding that witness expert**

   Ruling by the trial court admitting testimony that tablets were LSD amounted to a finding by the court that the witness offering the testimony was qualified as an expert.

2. **Criminal Law § 118— contentions of parties — instructions**

   Though the trial court may have emphasized discrepancies in defendant's evidence more than those in State's evidence, defendant was not prejudiced, since the court is not required to give equal time to each side, but is required only to give a clear instruction applying the law to the evidence and giving the positions taken by the parties as to the essential features of the case.

ON *certiorari* to review the order of *Tillery, Judge,* 26 March 1973 Session of CARTERET County Superior Court.

Defendant was charged in a valid bill of indictment with the distribution of two tablets of Lysergic Acid Diethylmide—commonly known as L.S.D. Defendant pled not guilty, and the jury returned a verdict of guilty.

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

David S. Henderson and Benjamin H. Baxter, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant assigns error to the trial court's allowing P. T. Williamson of the S.B.I. to give testimony identifying as L.S.D. the two tablets transferred to an undercover agent of the S.B.I. He contends that it was improper for the court to allow this testimony without an express ruling that he was an expert in the field of forensic chemistry. Furthermore, contends defendant, the record is devoid of evidence which would support such a finding. There is no merit to this assignment of error.

> "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. (Citations omitted.)" *State v. Perry*, 275 N.C. 565, 572, 169 S.E. 2d 839 (1969).

Defendant would have us distinguish his case from the *Perry* case in that he objected to the expert testimony, whereas defendant in *Perry* did not. Whether the ruling of the trial court in admitting expert testimony is a ruling on an objection is immaterial. The ruling admitting the proferred testimony amounts to a finding by the court that the witness is qualified as an expert.

[2] Defendant next assigns error to the following portions of the court's instruction to the jury:

> "The defendant further offered evidence which in substance tends to show that Mr. Maness, his uncle, recalled that with reasonable certainty but not a hundred percent, that the defendant was in his company all of that day and that he must have spent the night there because there was only one way he could get out after he put the lock on the door and that would have been for Mr. Maness to unlock it for him. And that is what some of the evidence for the defendant tends to show. Again, I have not undertaken to give it all but so much as necessary to explain the law."

Defendant contends that this constitutes a comment on the evidence in violation of G.S. 1-180. We do not agree. The trial court may have—as defendant contends—emphasized discrepancies in defendant's evidence more than those in State's evidence, but we see no prejudice to defendant. The court is not required to

give equal time to each side; nothing more is required than a clear instruction applying the law to the evidence and giving the positions taken by the parties as to the essential features of the case. *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58 (1962).

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIE DALTON BROWN

No. 7319SC821

(Filed 9 January 1974)

Criminal Law § 161— appeal as exception to judgment

The appeal is an exception to the judgment and presents the face of the record proper for review.

APPEAL by defendant from *Seay, Judge,* June 1973 Session of Superior Court held in RANDOLPH County.

The defendant, Willie Dalton Brown, was charged in a two-count bill of indictment proper in form with forgery and uttering a forged instrument.

The defendant, represented by court appointed counsel, pleaded not guilty. He was found not guilty of forgery and guilty of uttering a forged instrument.

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

Attorney General Robert Morgan and Associate Attorney Archie W. Anders for the State.

Coltrane and Gavin by W. E. Gavin for defendant appellant.

HEDRICK, Judge.

The appeal is an exception to the judgment and presents the face of the record proper for review, *State v. Thurgood,* 11 N.C. App. 405, 181 S.E. 2d 128 (1971); *State v. Martin,* 10

N.C. App. 181, 178 S.E. 2d 32 (1970); 3 Strong, N. C. Index 2d, Criminal Law, Sec. 161, p. 112.

We have carefully reviewed the organization of the court, the plea, the verdict, and the judgment and find

No error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. GREG GARNER

No. 733SC665

(Filed 9 January 1974)

Criminal Law § 113— necessity for instruction on alibi

The trial court erred in failing to instruct the jury that defendant, who relied on alibi, did not have the burden of proving it where defendant's trial occurred prior to the opinion of *State v. Hunt,* 283 N.C. 617.

APPEAL by defendant from *Rouse, Judge,* 16 April 1973 Session of Superior Court held in CARTERET County.

Defendant was convicted of feloniously distributing marijuana in violation of G.S. 90-95.

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

A. B. Cooper, Jr. and Wheatly & Mason by C. Wheatly, Jr., attorneys for defendant appellant.

VAUGHN, Judge.

At trial defendant offered evidence that he was not present at the time and place the alleged crime was committed. The jury was not instructed that defendant, who relied on an alibi, did not have the burden of proving it. The trial occurred prior to the opinion of our Supreme Court in *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 and, therefore, the omission of the instruction constituted prejudicial error. *State v. Moore,* 19 N.C. App. 368, 198 S.E. 2d 760.

New trial.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DAVID ALDRIDGE, JR.

No. 7319SC817

(Filed 9 January 1974)

APPEAL by defendant from *Exum, Judge,* 6 August 1973 Session, Superior Court, CABARRUS County.

Defendant was charged with operating a motor vehicle on a public street or highway while his operator's license was suspended. In district court he waived, in writing, his right to assigned counsel. He entered a plea of guilty and appealed to the superior court from the judgment entered. In superior court he entered a plea of not guilty, was found guilty by the jury, and appealed from the judgment entered on the verdict. He was represented in superior court by court-appointed counsel, appointed upon a determination of defendant's indigency.

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

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

MORRIS, Judge.

Defendant's counsel requests this Court to review the record to determine whether prejudicial error was committed at defendant's trial. After a careful examination of the record, we are unable to find error in the proceedings in the trial court. Defendant was convicted by a jury upon a plea of not guilty. The warrant was proper in form, and the evidence for the State was more than sufficient to support the jury's verdict. The suspended sentence imposed is within the statutory limits.

It is clear from the record that defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge BROCK and Judge CARSON concur.

HAROLD KOHLER v. J. A. JONES CONSTRUCTION COMPANY, A CORPORATION

No. 7326SC774

(Filed 16 January 1974)

1. **Contracts § 12— construction of contract**

Agreement that plaintiff would be "entitled to 5% of all cash monies recovered" on a dam project in a foreign country gave plaintiff the right to receive 5% of all cash monies received from the project without regard to whether those monies were the product of direct payments to defendant or a result of indirect payments such as the sale of recouped equipment or an award by the foreign government used by defendant to pay vendors and subcontractors of the project.

2. **Appeal and Error § 30; Witnesses § 7— answer outside scope of question — admissibility**

Although the answer of a witness exceeded the bounds of the question, the answer was properly admitted where it contained facts which were relevant to the inquiry.

3. **Contracts § 27— action on contract — sufficiency of evidence**

In an action to recover under an agreement that plaintiff would receive 5% of all monies recovered on a foreign dam project, plaintiff's evidence was sufficient to support findings by the jury that defendant and its partners had collected $653,000 as a result of the sale of equipment used in the dam project and that the government of the foreign country in which the dam was built had made an "award" of $1,000,000 to defendant and its partners.

4. **Appeal and Error § 31— misstatement of evidence — necessity for calling to court's attention**

Slight inaccuracies in the court's statement of the evidence must be called to the attention of the court in time to afford opportunity for correction in order for an exception thereto to be considered.

APPEAL by defendant from *Webb, Judge,* 30 April 1973 Session of Superior Court held in MECKLENBURG County.

This is a civil action in which the plaintiff, Harold Kohler, is attempting to recover for services allegedly rendered under a contract with the defendant, J. A. Jones Construction Company.

The defendant and its wholly owned subsidiary, the Charles H. Tompkins Company, owned a 75% interest in a joint venture entered into for the purpose of constructing the Derbendi Khan Dam Project in Iraq. This project was completed in 1962; however, the partners in this venture were unsuccessful in their

efforts to recover from the Government of Iraq claims totalling $16,123,288.00. In addition, they made unproductive attempts to secure the release from Iraq of certain equipment used by the partners in the construction of the dam. These above circumstances precipitated two separate agreements between plaintiff and defendant both of which called for plaintiff to render services which hopefully would result in defendant's realization of its claims.

Plaintiff was first employed by defendant in 1958 and served as Vice-President of its Heavy Construction Division. On 4 June 1964 the plaintiff and defendant entered into a written agreement (Plaintiff's Exhibit 1-A) under the terms of which plaintiff, acting as a consultant, and H. Haywood Robbins, acting as attorney, were to "immediately proceed and attempt to obtain an equitable settlement for the Derbendi Khan contract in Iraq." Both plaintiff and Robbins were to be paid 5% of the recovery amount for their individual and respective services. Between June and October of 1964 plaintiff resigned his position with defendant and established himself as an independent consultant; and in October, 1964, plaintiff, as an independent consultant, entered into another agreement with defendant (Plaintiff's Exhibit 2-A), the pertinent portions of which are as follows:

> "In consideration of the services which you are to render as a consultant to the J. A. Jones Construction Company on the Derbendi Khan Dam Project, Iraq, you are to receive $2,000.00 per month for twelve (12) months' services. * * *
>
> In addition to the consultant fee of $2,000.00 per month for 12 months, you will be entitled to 5% of all cash monies recovered on the Derbendi Khan Project.
>
> This does not include any consideration for you for the return of our bank guarantees and removal of liquidated damages. However, should we lose our bank guarantees and/or monies due to liquidated damages, such net cash losses will be deducted before determining percent of participation.
>
> * * *
>
> It is clearly understood that this, along with lump sum payment of $10,000.00, completely fulfills all contracts

in writing and/or verbal between the J. A. Jones Construction Company and Harold Kohler."

Plaintiff continued in the employ of defendant under the October 1964 agreement until November 1965 at which time the defendant unilaterally terminated its relationship with plaintiff.

Plaintiff initiated the present action in March 1966 and at trial offered evidence which tended to show the following:

Plaintiff was closely connected with the Derbendi Khan Dam Project for a period of several years—initially as Vice-President of the Heavy Construction Division of defendant and after 6 October 1964 as independent consultant to defendant. Under the 6 October 1964 agreement, plaintiff rendered numerous services to the defendant. These services included: (1) Development of a scheme to construct a canal project in Iraq the dual purpose of which was to entice Iraq to pay the claims of the joint venture partners and to release equipment belonging to the joint venture; (2) In close conjunction with the canal project, plaintiff wrote letters, memoranda, and/or made visits to top governmental officials including the President of the United States, the Secretary of State, the Secretary of Commerce, the Undersecretary of State, one United States Senator, and other governmental officials, soliciting their assistance in the canal project; (3) Plaintiff assisted in the preparation of a voluminous document detailing the unpaid claims of the Government of Iraq prior to this document being submitted to the proper officials in that country.

Plaintiff's evidence further tended to show that in August 1965, the Economic Planning Board of Iraq made an "award" of approximately $1,000,000.00 to the joint venture partners and also that defendant was able to recoup approximately $653,000.00 from the sale of equipment released by Iraq. Plaintiff claims he is entitled to 5% of the total of these two sums.

Defendant's evidence tended to show the following: Mr. Stafford, treasurer of defendant, testified that the records of defendant corporation disclosed the sale of certain equipment recovered by the joint venture; however, he stated that no entry of any "award" made by the Government of Iraq had been placed on the books of the defendant. Defendant's evidence did not challenge either the receipt of proceeds from the sale of the equipment or the existence of an "award" but rather contended that these did not culminate in the reception by defendant of

"cash monies" as that term was intended to be used in the October 1964 agreement. Defendant's evidence also revealed that the canal project advocated by plaintiff was a source of displeasure among Iraq officials and had a negative rather than positive effect on defendant's hopes of recovery.

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

"1. Did the plaintiff and the defendant enter into a contract on October 6, 1964, as alleged in the Complaint?

ANSWER: Yes.

2. What amount, if any, is the plaintiff entitled to recover for services to defendant under that contract?

ANSWER: $74,000.00."

From a judgment for plaintiff entered on the verdict, defendant appealed.

Harkey, Faggart, Coira & Fletcher by Charles F. Coira, Jr., and Francis M. Fletcher, Jr., for plaintiff appellee.

Warren C. Stack for defendant appellant.

HEDRICK, Judge.

The numerous exceptions and assignments of error brought forward and argued by defendant present for resolution the following principal issues: (1) What was the intent of the parties in the 6 October 1964 agreement? (2) Was there sufficient competent evidence to support the submission of the issues to the jury and to support the verdict rendered? (3) Did the trial court commit prejudicial error in the charge to the jury?

I.

[1] The parties do not dispute the fact that they entered into an agreement on 6 October 1964 but rather their disagreement centers around the scope of such contract. Defendant corporation maintains that there was never any intention to compensate plaintiff for cash monies recovered by defendant in an indirect manner, while plaintiff contends that he is entitled to 5% of any cash monies recovered regardless of the direct or indirect form of such recovery. It is elementary that in con-

struing a contract to ascertain the intention of the parties, the court must take note of the language used, the purpose to be accomplished by the contract, the circumstances of the parties when they made the contract, and the subject matter of the contract. *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968); *Sell v. Hotchkiss*, 264 N.C. 185, 141 S.E. 2d 259 (1965); *De-Bruhl v. Highway Commission*, 245 N.C. 139, 95 S.E. 2d 553 (1956). See also, Corbin on Contracts, Vol. 3, § 538, pp. 67-69 (1960). Furthermore, "[i]f there be no dispute in respect of the terms of the contract and they are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written." *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946). Applying these principles to the present case, we determine that the clear intent of the parties in the 6 October 1964 agreement was that plaintiff should recover 5% of *all* cash monies received from the Derbendi Khan Dam Project without regard to whether these monies were the product of direct payments to defendant or a result of indirect payments such as the sale of recouped equipment or a governmental award used by defendant to pay vendors and subcontractors of the project.

Several factors support the preceding conclusion. In the October agreement the word "all" appears before the words "cash monies" in that portion of the contract which reads, ". . . you will be entitled to 5% of *all* cash monies recovered on the Derbendi Khan Dam Project" (our emphasis). Defined in a plain, ordinary manner "all" is a pervasive, wide-ranging word and should not be limited to a narrow meaning as argued by defendant. Additionally, the October contract expressly excludes "any consideration for [plaintiff] for the return of our bank guarantees and removal of liquidated damages." Defendant having taken the step to expressly exclude this item from plaintiff's recovery, the conclusion necessarily follows that failure to expressly exclude other methods of recovery results in their inclusion by plaintiff in the total sum of cash monies subject to his 5%.

The final point to be made on the question of the intention of the parties is that the circumstances surrounding the October agreement reveal that defendant and its joint partners were in danger of incurring substantial losses in the Derbendi Khan Project and thus perhaps were susceptible to entering into what might in hindsight seem a bad bargain. Nevertheless, "[t]he

agreement of the parties is controlling, and when the language is explicit, neither party may contend for an interpretation at variance with the language on the ground that the writing did not truly express his intent; nor may the courts grant relief merely because the contract is a hard one." 2 Strong, N. C. Index 2d, Contracts, § 12, p. 313.

II.

[2, 3] Next we must consider whether plaintiff successfully carried his burden of proving that defendant recovered certain "cash monies." Our discussion of this question necessarily includes defendant's contention that the court erred in admitting certain evidence. Evidence presented by the plaintiff plus cross examination of two of defendant's witnesses (the Treasurer of the defendant corporation and an employee of a subsidiary of defendant) disclosed that the Derbendi Khan partners had collected approximately $653,000.00 after 10 October 1964 as a result of the sale of equipment used in connection with the Derbendi Khan Project. Defendant at no time denied having received such proceeds but rather asserted, as we have already discussed above, that the agreement between the parties did not incompass payment to plaintiff for indirect "cash monies" received by defendant. The more difficult question is whether there was sufficient evidence to support inclusion of the so-called "award" in the total amount of "cash monies" out of which plaintiff was entitled to 5%. As to this point, defendant attacks as error the admission into evidence of certain testimony of H. Haywood Robbins, which testimony was in deposition form due to the fact that Robbins was no longer living. The most objectionable portion of this testimony is set forth below:

"Q. Is that Thomas Mann?

MR. STACK: Objection. Overruled.

A. Yes.

MR. STACK: Move to strike the answer. Overruled.

EXCEPTION NO. 476

A. He was friendly with Mr. Kohler and I for some reason and he began to apply certain leverage to the Iraqian Government, through not only their, I think certain leverage was applied through, I don't think it, I know it, through other sources which we had contacted and

had kept informed by memorandum and as a result the Iraqian Government paid to the . . . at least Mr. Jones, Jr. and Sr. told Mr. Kohler and I, and this was confirmed by the State Department, some nine hundred thousand dollars plus, I can't remember the exact figure.

MR. STACK: Move to strike the answer.

COURT: I am going to allow the motion as to the statement that this was confirmed by the State Department. * * *"

It is quite obvious that the answer given is not responsive to the question asked, however, as Justice Higgins stated in *State v. Ferguson,* 280 N.C. 95, 185 S.E. 2d 119 (1971), "If an unresponsive answer produces irrelevant facts, they may and should be stricken and withdrawn from the jury. However, if the answers bring forth relevant facts, they are nonetheless admissible because they are not specifically asked for or go beyond the scope of the question." The answer given by Robbins contained facts quite relevant to the subject under discussion and was properly admitted even though it exceeded the boundaries established by the question. Furthermore, the testimony of Robbins was corroborated by the introduction of other evidence relating to the "award." This additional evidence includes: (1) Kohler's testimony regarding the award and (2) Plaintiff's Exhibit No. 51, which is a copy of Decision No. 32 (the "award"). We have carefully examined the exceptions relating to the admission of testimony and find no prejudicial error therein. Furthermore, we are of the opinion that the evidence was sufficient to require the submission of the case to the jury and to support the verdict rendered.

III.

[4] The final issue for discussion is whether the trial court committed error in its instructions to the jury. Defendant correctly points out two mistakes made by the trial court in its recapitulation of the facts and claims that these were prejudicial in nature. This contention is deemed nonmeritorious because slight inaccuracies in the statement of the evidence must be called to the court's attention in time to afford opportunity for correction, in order for an exception thereto to be considered, *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536 (1966); and defendant having failed to allert the court to these mistakes cannot now be heard to complain.

Defendant further contends that the trial court committed prejudicial error by expressing an opinion on the evidence in its instructions to the jury. We have carefully examined each of the exceptions upon which this contention is based and find that the court fairly, correctly, and adequately declared and explained the law arising on the evidence and expressed no opinion prejudicial to defendant in his recapitulation of the evidence.

Defendant has noted in the record 536 exceptions which he has grouped under 24 assignments of error. Some of these exceptions have been expressly abandoned and others are deemed abandoned under Rule 28 of the Rules of Practice in this Court, since defendant has advanced no argument or cited any authority in support thereof. The remaining exceptions have been carefully examined and considered by this court and found to be without merit.

We find no error in the trial of the superior court sufficiently prejudicial to warrant a new trial.

No error.

Judges CAMPBELL and VAUGHN concur.

WILLKINGS L. HARTLEY v. GEORGE R. BALLOU AND WIFE, MILDRED H. BALLOU

No. 733SC773

(Filed 16 January 1974)

1. Sales § 17— finding supported by evidence — review

In a breach of warranty action to recover for water damage sustained as the result of improper construction of a house, the trial court's finding with respect to waterproofing of the basement, leakage after repairs, and specific amounts expended to repair the basement and damaged appliances was supported by competent evidence and is affirmed on appeal.

2. Sales § 6— house sale by builder — implied warranty of fitness

In the sale of a house by a builder-vendor, there is an implied warranty that the house has been or will be completed in an efficient and workmanlike manner and that it will be suitable for habitation upon completion, and this implied warranty applies irrespective of the status of the house relative to completion.

3. Sales § 19— sale of house — water leakage — breach of implied warranty of fitness — measure of damages

The measure of damages in an action based on breach of warranty is the difference between the fair market value of the article as warranted and as delivered, together with such special damages as were within the contemplation of the parties; therefore, where plaintiff purchased a house from defendant builder and the basement flooded repeatedly, plaintiff was entitled to the difference in market value of the house and to the cost of repairs to appliances, cleaning and painting, air travel and cablegrams, extra heating and air conditioning and pumping water from the house, since it was within the contemplation of the parties at the time of the making of the contract that improper construction could lead to water damage with attendant expenses to plaintiff.

APPEAL by defendant from *Tillery, Judge,* February 1973 Session, CARTERET County Superior Court.

Defendant and his wife were the owners of a lot in the River Heights subdivision of Morehead City. On 24 October 1969, plaintiff and his wife (now deceased) contracted to buy from defendant a completed house built by him on said lot. The transaction was closed on 4 December 1969, and around Christmas day 1969 plaintiff's wife moved into the house while plaintiff, a Marine Engineer, was at sea.

When plaintiff returned home on 18 February 1970, he found that the house was still wet from seepage that occurred during his absence. The carpeting had been removed from the basement, two inches of concrete had been added to the floor and there had been an attempt to waterproof the basement walls with tar paper.

Defendant had, during the period of plaintiff's absence, made extensive efforts to correct the situation. He had dug drainage ditches, poured two inches of concrete in the basement and attempted to seal the blocks of the foundation with hot tar and tar paper. The ditches around the foundations were backfilled with gravel. These repairs were made at an expense to defendant of $4,000.

Plaintiff testified that after February 1970, he saw no more water in the basement until October 1971, when the area experienced its first hurricane of the season with six to seven inches of rain. At that time there was two feet of water in the basement, and mold began to form in part of the house. Since the water in the basement did not recede, plaintiff had it pumped

and had to make several repairs to appliances damaged in the house.

In February 1972, the Morehead City area experienced its second hurricane of the season with a rainfall of approximately five inches. The basement of plaintiff's house was again flooded, with 18 to 24 inches of water. After about half the water had receded, plaintiff repeated the process of having the basement pumped, the appliances repaired and the rugs cleaned. On 23 February 1972, plaintiff sold the house to C. H. Bennett, the developer of the subdivision.

Over defendant's objection, plaintiff was allowed to testify as to his opinion of the fair market value of the house as well as to the expenses incurred in the repairs following the flooding.

At the close of plaintiff's case, defendant moved for a directed verdict. The motion was granted as to defendant Mildred H. Ballou, since no connection was shown between her and the building of the house. The motion was denied as to defendant George R. Ballou. The motion as to defendant George R. Ballou was renewed and again denied at the close of all the evidence. From judgment entered against him defendant appeals.

Hamilton, Hamilton, and Phillips, by Luther Hamilton, Jr., for plaintiff appellee.

Bennett and McConkey, P.A., by Thomas S. Bennett and James W. Thompson III, for defendant appellant.

MORRIS, Judge.

[1] Defendant first assigns error to the court's findings of fact and conclusions of law. He contends the following finding of fact was erroneous:

> "The garage was built on a concrete slab on top of the ground and extended northwardly from the north wall of the basement and waterproofing could not be applied to the entire length of the outside of the north wall of the basement."

The testimony in the record is to the effect that the garage was in fact built on a slab abutting the north wall of the house. There was, in addition, testimony that the men attempting to

waterproof the basement wall were unable to get to the entire length of the wall beneath the carport. Where jury trial is waived—as it was in this case—the court's findings of fact are conclusive if supported by any competent evidence and will be affirmed on appeal. *Nichols v. Insurance Co.,* 12 N.C. App. 116, 182 S.E. 2d 585 (1971). For the same reason, there is no merit to the assignment of error to the finding that the wall continued to leak following the repairs in January and February, 1970. The testimony is uncontradicted that approximately 18 months after the repairs the basement was again flooded. Likewise, the findings of fact with respect to specific amounts expended to repair the basement and appliances are supported by competent evidence, and they are affirmed.

Defendant's next group of assignments of error presents to this Court a case of first impression, i.e., whether there is an implied warranty of fitness or habitability in a sale of residential real estate between a builder-vendor and a buyer. Our research reveals no case in the appellate courts of this State which have spoken to this issue. In *Lindstrom v. Chesnutt,* 15 N.C. App. 15, 189 S.E. 2d 749 (1972), we found it unnecessary to reach the issue of implied warranty inasmuch as the evidence presented was sufficient to allow the jury to find an express warranty in the contract of sale. We continue to acknowledge, however, the current trend in this area away from the concept of *caveat emptor* and toward the concept of implied warranty of fitness. As we noted in *Lindstrom v. Chesnutt, supra,* the purchase of a home is not an everyday transaction for the average family, and, in many instances, it is the most important transaction of a lifetime.

The majority of jurisdictions continue to apply the rule of *caveat emptor* to sales of dwellings by builder-vendors. Annot. 25 A.L.R. 3d 383. The rationale behind this line of authority was cogently expressed by the Supreme Court of Alabama in *Druid Homes, Inc. v. Cooper,* 272 Ala. 415, 131 So. 2d 884 (1961). Plaintiff homeowner brought action against defendant builder-vendor to recover for damage caused when water from bathroom facilities emptied under the house without any drainage. In holding that there were no implied warranties as a matter of law in a contract to purchase real estate, the Court set forth the basis for the necessity of such a rule. The need for certainty of title in real estate transactions was among the foremost of the Court's considerations, and it noted that the

purchaser is free to protect himself by express agreement. The Court distinguished the body of law recognizing implied warranties with respect to sales of personalty, and noted that such warranties ordinarily apply only to sales of articles which—unlike land—are susceptible to uniformity and standard quality or are sold by samples.

Several jurisdictions have adopted the so-called "English Rule" recognizing implied warranties of fitness or habitability, but limiting their application to cases where the house was under construction at the date of the contract and completed later. In *Miller v. Cannon Hill Estates, Ltd.*, 2 K.B. 113 (1931), plaintiff purchased a house under construction, but was forced to abandon it because of the excessive moisture he discovered following completion of the house. In holding that there are implied warranties in the sale of an uncompleted house, the King's Bench distinguished the cases dealing with a house completed prior to the contract for sale. The very nature of the transaction, said the Court, makes it clear that the purchaser intends to use the house built for him as a dwelling upon its completion, whereas the purchaser of a completed dwelling may have many purposes for the building. Since the house is completed, he is, unlike the purchaser of an uncompleted dwelling, able to notice obvious defects and to protect himself with an express warranty. Thus, reasoned the Court, the buyer of an uncompleted dwelling is entitled to rely upon an implied warranty that the house will be completed in a manner to make it suitable for habitation. Among the decisions adopting the English rule in this country are *Glisan v. Smolenske,* 153 Colo. 274, 387 P. 2d 260 (1963); *Minemount Realty Co., Inc. v. Ballentine,* 111 N.J.Eq. 398, 162 A. 594 (1932); *Vanderschrier v. Aaron,* 103 Ohio App. 340, 140 N.E. 2d 819 (1957); *Jones v. Gatewood,* 381 P. 2d 158 (Okla. 1963); *Hoye v. Century Builders,* 52 Wash. 2d 830, 329 P. 2d 474 (1958).

While the gradual acceptance of the English rule in the past two decades represents a departure from the firmly entrenched majority rule of *caveat emptor* in the sale of dwelling house, recent decisions in several states have expanded the English rule—extending the application of implied warranties of habitability to houses completed prior to contract of sale. Among the leading cases in this recent line is *Carpenter v. Donohoe,* 154 Colo. 78, 388 P. 2d 399 (1964), wherein the Court held that there is no basis for applying a different rule to the sale of a near completed house than to a completed house.

> "That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it." *Id.* at 83.

The English rule has likewise been extended in the following cases: *Bethlahmy v. Bechtel,* 91 Idaho 55, 415 P. 2d 698 (1966); *Schipper v. Levitt & Sons, Inc.,* 44 N.J. 70, 207 A. 2d 314 (1965); *McKeever v. Mercaldo,* 3 Pa. D. & C. 2d 188 (1954).

We agree that a completed house can be inspected, to a limited extent, for defects by a purchaser before he signs the contract to buy. However, looking at the situation in a practical way, we are of the opinion that most potential homeowners lack the competency to do their own inspections. Even if he were skilled, there is little he could uncover, because most litigation is over defects which are found in the home's foundation. This can only be checked effectively at a time when none of the building proper has been constructed. It would seem to us, therefore, that the purchaser of a completed house is relying much more heavily on the superior skill and knowledge of the builder than is the purchaser of a house under construction.

Another anomalous outcome is the situation where a developer is constructing more than one house in a subdivision. One who purchases one of the houses one day before it is completed gets the benefits of an implied warranty that the house is free from structural defects and fit for habitation. The one who buys the house next door two days later—one day after completion—buys without implied warranty.

[2] Although the majority of jurisdictions continue to adhere to the rule of caveat emptor in the sale of residential real estate by a builder-vendor, we feel that the recent trend recognizing implied warranties of fitness and habitability is the better reasoned view. We, therefore, hold that in the sale of a house by a builder-vendor, there is an implied warranty that the house has been or will be completed in an efficient and workmanlike manner and that it will be upon completion suitable for habitation. This implied warranty applies irrespective of the status of the house relative to completion.

Since defendant's assignments of error to the denial of his motions for directed verdict are predicated upon the fact that

the implied warranty of fitness and habitability has not heretofore been recognized in North Carolina, these assignments are overruled. Likewise is the assignment of error to the conclusion that there existed an implied warranty overruled.

Defendant next assigns error to the court's allowing opinion testimony as to the fair market value of the house as well as the expenses incurred by plaintiff in travel and repairs occasioned by the flooding. It is defendant's position that the court misapplied the measure of damages by allowing recovery for both the diminished value of the land and the expenses incurred.

[3] This position is not well taken. The measure of damages in an action based on breach of warranty is the difference between the fair market value of the article as warranted and as delivered, together with such special damages as were within the contemplation of the parties. *Insurance Co. v. Chevrolet Co.,* 253 N.C. 243, 116 S.E. 2d 780 (1960). Not only must the special damages be within the contemplation of the parties at the time of the making of the contract, they must be properly pleaded. *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592 (1946). Thus, the difference in market value is recoverable in the present case as general damages. It was within the contemplation of the parties at the time of the making of the contract that improper construction could lead to water damage with attendant expenses to the plaintiff. Plaintiff has specifically alleged these expenses —repairs to appliances, cleaning up and painting, air travel and cablegrams, extra heating and air conditioning, and pumping water from the house—and he is therefore entitled to recover for them.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. MITCHELL WOOTEN

No. 7318SC799

(Filed 16 January 1974)

1. Criminal Law § 92— possession of heroin, amphetamines — consolidation of charges

The trial court did not err in consolidating for trial charges of possession of heroin and possession of amphetamines.

2. **Arrest and Bail § 3— arrest without warrant — reasonable grounds**

Officers had reasonable grounds to believe that defendant had heroin on his person and an officer was justified in arresting defendant without a warrant where the evidence tended to show that a reliable informer told officers that he had seen defendant dispensing heroin at a named location, officers found defendant at the named location which was known by officers to be a place where heroin was sold, defendant immediately left the area when the officers arrived, officers later found defendant's car and defendant returned to it shortly thereafter, officers approached defendant and identified themselves, and defendant ran. G.S. 15-41(2).

3. **Criminal Law § 87— leading questions — allowance discretionary**

The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be disturbed on appeal, absent a showing of abuse of discretion.

4. **Criminal Law § 162— motion to strike — necessity**

Defendant was not prejudiced by the admission of answers to two questions where defendant did not move to strike the answers.

5. **Narcotics § 3— bags of heroin — similarities in analyzed and unanalyzed bags — relevancy**

Testimony by a chemist who analyzed the contents of four glassine bags chosen at random from among the twenty-nine found on defendant at his arrest that there was no difference in the size and shape of the bags not analyzed and those analyzed was relevant and material in defendant's trial for possession of heroin.

6. **Criminal Law § 102— solicitor's jury argument — matters in record — no error**

Remarks of the solicitor in his jury argument which did not go outside the record did not constitute prejudicial error.

7. **Narcotics § 4.5— possession of heroin — instructions as to guilt**

Trial court did not err in failing to instruct the jury that defendant's guilt or innocence of possession of heroin could not be determined by the testimony of an expert witness as to scientific measurement or detection.

APPEAL by defendant from *Crissman, Judge,* 28 May 1973 Criminal Session Superior Court, GUILFORD County.

Defendant was charged in separate bills of indictment with possession of heroin and possession of amphetamines. The charges were consolidated for trial, and he was found guilty as charged in each case. He appeals from the judgment of imprisonment entered on the jury verdicts.

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

Frye, Johnson and Barbee, by Walter T. Johnson, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant first assigns as error the court's overruling his objection to the State's motion for consolidation of the two charges for trial. Defendant concedes that the court is expressly authorized by statute, G.S. 15-152, to consolidate for trial two or more charges against the same defendant where the crimes charged are of the same class and are so connected in time or place that evidence at the trial of one charge will be competent and admissible at the trial of the other charges. His contention that the crimes charged are not of the same class is without merit. We are not impressed with defendant's argument that because a charge of possession of heroin carries a far greater "anti-social stigma," the defendant was prejudiced by joining the two charges for trial. Neither does defendant's argument that the charge of possession of amphetamine was a misdemeanor at the time of the charge and, therefore, the two charges could not be consolidated, have any merit. Amphetamine was a Schedule II controlled substance under G.S. 90-90 at the time of defendant's arrest on 13 December 1972. G.S. 90-88 provides:

> "(a) The North Carolina State Board of Health shall administer those portions of this Article having to do with the scheduling of controlled substances under this Article, and may add, delete, or reschedule substances within Schedules I through VI of this Article . . . "

Pursuant to an order entered 23 March 1972 by the State Board of Health, amphetamine was made a Schedule II controlled substance. G.S. 90-95(e) makes the possession of a Schedule II controlled substance a felony. Defendant does not contend that the State Board of Health in any way failed to comply with the provisions of G.S. 90-88. This assignment of error is overruled.

[2] Defendant next urges that the court committed prejudicial error in allowing the State to introduce evidence seized from the defendant at the time of his arrest. Defendant takes the position that the arrest was made without a warrant, and,

therefore, the evidence seized without a search warrant was not admissible.

Defendant concedes that the right of the officers to arrest defendant, if the right existed, is controlled by the provisions of G.S. 15-41(2): "When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

The evidence of the State, in summary, was as follows: The arresting officers received a telephone call from an informant whom they knew and whose information had resulted in the arrest and conviction of several people. One officer, on voir dire, gave the names of three persons convicted as the result of information given by this informant. He further testified that he could check the files for more names. The informant told the officers that defendant was at that time at the A & T State University campus on the Student Union parking lot, that he had a large quantity of heroin on his person, and that he had seen defendant selling heroin to individuals in the parking lot. The informant further gave the officers a description of the car defendant was driving and its license number and a description of the coat defendant was wearing. The officer testified that it was their normal procedure, upon only a telephone call, to check out the information before getting a search warrant and that it would take about an hour and one-half to get a search warrant. The two officers proceeded immediately to the location. They saw defendant, whom they knew and who knew them. Defendant was standing by his car in a group of people, one of whom was known to the officers as a seller and user of heroin. When defendant saw the officers, he immediately got in his car and left. The car was as described and bore the license number given by the informant. The officers got in their car and drove around the area of the campus looking for defendant. They found his car parked on the Moore Gymnasium parking lot, but he was not in it. They parked their car nearby and waited for him to return. He returned in a very short while riding in a white Chevrolet which stopped behind defendant's car. Defendant got out of the back seat and walked over to his car, unlocked it and got in. The officers went up to his car, told him they were police officers and asked him to get out. Defendant did get out. The officer again told him he was a police officer. Defendant began backing away. The officer asked him to wait a minute, that he wanted to talk to him. The officer ran his hand

in his pocket to bring out his badge and I.D. card and at that time defendant started running. The officer caught him and held him until the officer with him helped subdue defendant. Defendant was placed under arrest for possession of heroin and searched. A needle, syringe, 29 glassine bags of heroin and four amphetamine tablets were found on defendant's person.

Defendant does not contend that the possession of heroin is not a felony. It is, of course, and "is a continuing offense, committed wherever, whenever, and so long as a person has such substance in his possession, whatever the purpose of such possession may be." *State v. Roberts,* 276 N.C. 98, 104, 171 S.E. 2d 440 (1970). The only point remaining for determination is whether the arresting officers had reasonable ground to believe that defendant was then in possession of some quantity of heroin.

The informant had been reliable in the past, the defendant left immediately when he saw the officers, he was at a place known by the officers to be a place where heroin was sold. He was standing by his car in a group of people, one of whom was known by the officers to be a user of heroin. When the officers found his car, he was not in it but returned shortly. When the officer asked to talk to him and identified himself as a police officer, defendant ran. We are of the opinion that the evidence is sufficient to support the trial judge's finding that the officers had reasonable ground to believe that defendant had heroin on his person and that the officer was justified in making the arrest without a warrant. Assignment of error No. 6, that the court should have granted defendant's motion for nonsuit based on the inadmissibility of the evidence seized, is also overruled.

[3] By his third assignment of error defendant contends that the court erred in failing to sustain his objection, on two occasions, to leading questions asked by the solicitor. In neither instance was error committed. Both questions were asked during the voir dire examination. In the first instance, the solicitor rephrased the question and no objection was interposed. In the second, defendant did not move to strike the answer. In any event "the allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be disturbed on appeal, at least in the absence of abuse of discretion." *State v. Painter,* 265 N.C. 277, 284, 144 S.E. 2d 6 (1965). No abuse of judicial discretion appears.

[4] Defendant's fourth assignment of error is directed to the trial judge's failure to sustain defendant's objections to questions asked about one Claude Boone. The first objection was made to a question asked on voir dire. This was in the absence of the jury and could not possibly have prejudiced defendant with the jury. The other two questions were asked in the presence of the jury. Each question was directed to a police officer. In neither case did the defendant move to strike the answer. The solicitor asked the officer how he knew Claude Boone. The answer was that Boone had been under investigation by the department, but that he did not talk to Boone because he had no information on him and was not sufficiently friendly with him to strike up a conversation with him. The other question was directed to another officer who was asked who was with Boone. The answer was that he was standing next to defendant. We can see no possible prejudice to defendant by these answers which were not the subject of a motion to strike.

[5] Defendant next argues that the testimony of the chemist who analyzed the substance contained in four of the 29 glassine envelopes to the effect that there was no difference in the size and shape of the bags not analyzed and those analyzed was prejudicial error. We do not agree. There was uncontradicted evidence that 29 glassine bags were found. The fact that they were all of the same size and that each contained approximately the same amount and that the contents of each bag had a very similar appearance is relevant and material. The expert had already testified that he picked four bags at random to test and each of the four bags contained heroin.

Defendant cites no authority and gives no reason or argument in support of his assignment of error No. 7. This assignment of error is, therefore, deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[6] By assignment of error No. 8 defendant contends that certain remarks by the solicitor constituted prejudicial error. The solicitor, after the verdict was in, put in writing the remarks which defendant contends are objectionable. Defendant agreed that these were the remarks made. The remarks did not go outside the record. "[W]hen the prosecuting attorney does not go outside the record and his characterizations of the defendant are supported by the evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument." [Citing *State v. Bowen*, 230 N.C. 710,

55 S.E. 2d 466 (1949).] *State v. Westbrook,* 279 N.C. 18, 39, 181 S.E. 2d 572 (1971).

[7] Finally, defendant contends that the court should have instructed the jury that defendant's guilt or innocence of possession of heroin could not be determined by the testimony of an expert witness as to scientific measurement or detection. Defendant cites no authority for this novel proposition nor did he request any such special instruction. The charge of the court required the jury to determine defendant's guilt or innocence from their own recollection of the evidence presented to them. They were clearly instructed upon the law applicable to the facts and were told several times that they must find guilt beyond a reasonable doubt from all the evidence. We find no prejudicial error in the court's charge to the jury.

Defendant has had a fair trial, free from prejudicial error, and the jury found against him. In his trial we find

No error.

Chief Judge BROCK and Judge CARSON concur.

STATE OF NORTH CAROLINA v. ROBERT BOYD KING

No. 7318SC704

(Filed 16 January 1974)

Obscenity— indecent exposure — "go-go" dancers — willing viewers

The indecent exposure statute, G.S. 14-190.9, does not contemplate willing viewers but only those who are offended and annoyed by the exposure; consequently, the statute does not apply to dancers in a night club who exposed their private parts to willing viewers.

APPEAL by defendant from *Crissman, Judge,* 9 April 1973 Regular Criminal Session, Superior Court, GUILFORD County.

Defendant was charged under G.S. 14-190.9 with "unlawfully, wilfully, and (sic) aid(ing) and abet(ting) in the act of indecent exposure by knowingly, allowing and permitting Sandra Faye Hall to expose her private parts at The Rathskeller, 716 W. Market Street, Greensboro, North Carolina, a public place, and did allow this (sic) premises, which he has control

over to be used for the purpose of such an act." There were three other warrants identical in content with the exception of the name of the girl. Defendant was convicted in each instance in District Court. On appeal to Superior Court, defendant moved to quash the warrants. This motion was denied, and defendant was convicted by the jury on each count. From judgments imposing an active six months sentence on each count, to run consecutively, defendant appealed.

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

Comer and Dailey, by John F. Comer, for defendant appellant.

Benjamin F. Davis, Jr., for Civil Liberties Union Legal Foundation, Inc., Amicus Curiae.

CAMPBELL, Judge.

Defendant's first assignment of error raises the question of the constitutionality of G.S. 14-190.9. The charges in this case arise under that statute which is entitled "Indecent Exposure" and provides:

> "Any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

We agree with defendant that this statute is separate and apart from the general obscenity statutes, G.S. 14-190.1 through G.S. 14-190.8, all of which deal with dissemination of obscenity. See *State v. McCluney,* 280 N.C. 404, 185 S.E. 2d 870 (1971). It is clear, also, that the State chose not to proceed under the obscenity statute, G.S. 14-190.1(2), which proscribes as illegal conduct the dissemination of obscenity by presenting or directing "an obscene play, dance or other performance or participates

directly in that portion thereof which makes it obscene." Defendant candidly concedes that the conduct of the girls in the alleged dance was obscene, but he argues that since the indecent exposure statute is excluded from the obscenity statutes, the criminal act charged under the indecent exposure statute becomes an act not requiring the element of obscenity.

Prior to the 1971 amendment, the indecent exposure statute read as follows:

> "Any person who in any place wilfully exposes his person, or private parts thereof, in the presence of one or more persons of the opposite sex whose person, or the private parts thereof, are similarly exposed, or who aids or abets in any such act, or who procures another so as to expose his person, or the private parts thereof, or take part in any immoral show, exhibition or performance where indecent, immoral or lewd dances or plays are conducted in any booth, tent, room or other public or private place to which the public is invited; or any person, who, as owner, manager, lessee, director, promoter or agent, or in any other capacity, hires, leases or permits the land, buildings, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for any such immoral purposes, shall be guilty of a misdemeanor. Any person who shall willfully make any indecent public exposure of the private parts of his or her person in any public place or highway shall be guilty of a misdemeanor. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

It is obvious that the conduct promoted by defendant in the case before us could have been subject to a criminal charge under that statute. However, in 1971, the General Assembly amended the obscenity statutes and the indecent exposure statute. In amending the indecent exposure statute the prohibition against procuring or "taking part in any immoral show, exhibition or performance where indecent, immoral, or lewd dances are conducted in any booth, tent, room or other public or private place to which the public is invited . . . " was deleted. In our opinion this proscription was placed in the obscenity statutes and is covered by G.S. 14-190.1, particularly § (2) thereof.

We are aware of *City of Portland v. Derrington,* 253 Ore. 289, 451 P. 2d 111 (1969), cert. denied 396 U.S. 901, 90 S.Ct.

212, 24 L.Ed. 2d 177 (1969), and *Hoffman v. Carson,* 250 So. 2d 891 (Fla. 1971). In *Hoffman,* the statute was entitled "Exposure of sexual organs" and provided:

> "It shall be unlawful for any person to expose or exhibit his sexual organs in any public place or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or so to expose or exhibit his person in such place, or to go or be naked in such place. Provided, however, this section shall not be construed to prohibit the exposure of such organs or the person in any place provided or set apart for that purpose."

In that case, the appellant claimed that the standard "vulgar or indecent manner" was so vague as to leave the ordinary citizen in doubt as to what manner of behavior was actually proscribed. Appellant was arrested for going totally nude and exposing her sex organs in the course of her performance at a cocktail lounge. The Florida Court said:

> "Because of the nature of the statute, the terms in question must be construed as necessarily relating to a lascivious exhibition of those private parts of a person which common propriety requires to be customarily kept covered in the presence of others. This construction necessarily also applies to the language, 'or so to expose or exhibit his person in such place, or to go or be naked in such place.' " Id. at 893.

The Court went on to hold that the statute was "directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law (citing cases) and generally considered as having a reasonable relationship to the public welfare, and, therefore, within the police power of the Legislature." Id. The Court was careful to point out that the holding was not meant to suggest that nudity or exposure in all instances would be violative of the statute, but that as a performance or event moved more toward speech or expression and further from conduct, the standards of *Roth v. U. S.* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957), and *Memoirs [A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 2d 1 (1966)], might be applicable.

We find that at the time of the arrest in *Hoffman,* i.e., 1970, the Florida obscenity statute would not have proscribed the conduct for which appellant was arrested. However, in 1971, the Legislature added to Chapter 847 the obscenity statute, 847.011(4) as follows: "Any person who knowingly promotes, conducts, performs or participates in an obscene, lewd, lascivious, or indecent show, exhibition, or performance by live persons or a live person before an audience is guilty of a misdemeanor of the first degree. . . " Prior to this amendment the appellant could only have been charged under the indecent exposure statute.

In *City of Portland v. Derrington, supra,* the ordinance under which defendant was arrested read as follows: "It is unlawful for any female person to appear or be in a place where food or alcoholic beverage is offered for sale for consumption on the premises, so costumed or dressed that one or both breasts are wholly or substantially exposed to public view."

We do not disagree with the Court's holding that "(W)hen nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours." Id. at 292-293.

Our situation, it appears to us, is unlike *Hoffman* and *Derrington.* In North Carolina we have obscenity statutes which are separate and apart from the indecent exposure statute and which clearly and expressly proscribe the conduct for which appellant was arrested. The indecent exposure statute, certainly as it now is written, is simply a codification of the common law crime of exposure of one's private parts, whether intentional or unintentional, in a situation where the exposure could be viewed by the public. The statute does not contemplate willing viewers, but those who are offended and annoyed by the exposure. See *State v. Roper,* 18 N.C. 208 (1835); *State v. King,* 268 N.C. 711, 151 S.E. 2d 566 (1966); *State v. Lowery,* 268 N.C. 162, 150 S.E. 2d 23 (1966). If our statute provided for two species of offenses: first, the appearing in public places naked or partly so, with intent of making a public show of the nudity of the offender; and, second, any obscene exhibition of the person, the result might be different. *State v. Hazle,* 20 Ark. 156 (1859).

We certainly do not say that G.S. 14-190.9 is unconstitutional. We merely say that it is not applicable to the conduct

here. If the officers be so advised, defendant could be charged under G.S. 14-190.1, which we have held not to be unconstitutional on its face. *State v. Bryant* and *State v. Floyd,* (filed 19 December 1973). We do hold that the court committed reversible error in failing to grant defendant's motion to quash the warrants in this case.

Reversed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS SHORE

No. 7325SC814

(Filed 16 January 1974)

1. **Criminal Law § 66— legality of detention — fingerprints and photographs — identification in hallway**

   Evidence of identification of defendant from fingerprints and photographs and identification of defendant by robbery victims in the hallway of the police station was not inadmissible on the ground that the evidence was obtained during illegal detention of defendant where the court found upon competent evidence that defendant voluntarily accompanied an officer to the police station and allowed himself to be photographed and fingerprinted while in detention.

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

   Robbery victims' in-court identifications of defendant were based upon their observations of defendant during the robbery and were not tainted by a pretrial photographic identification or by identification of defendant in the hallway of the police station.

3. **Criminal Law § 60— lifting of fingerprints — absence of finding witness is expert**

   The trial court did not err in the admission of testimony by an officer who lifted latent fingerprints without finding that the officer was an expert in "lifting" fingerprints where the officer merely described the method used in lifting the prints but stated no opinion as to whose fingerprints were lifted.

4. **Criminal Law § 60— fingerprints — chain of custody**

   The State's evidence established a sufficient chain of custody of lifted fingerprints to permit a fingerprint expert to give testimony concerning them where it showed that a police officer lifted the fingerprints and placed them on some stationery, that the stationery was sent to the expert in a sealed envelope by first class mail, that the expert received the unopened envelope and opened it with a letter

opener, and that the expert then used the prints in making comparison tests.

5. **Criminal Law § 112— charge on alibi — sufficiency**

Although the desired form of pattern instruction on alibi was not offered, defendant received the benefit of an instruction on alibi when the court twice instructed the jury that witnesses had testified that defendant was not at the scene of the crime and therefore could not have committed it.

APPEAL by defendant from *Falls, Judge,* 16 July 1973 Session of Superior Court held in CATAWBA County. Argued in the Court of Appeals on 10 December 1973.

Defendant was charged in three bills of indictment with the felonies of armed robbery. From a verdict of guilty as charged in all three bills, defendant received two active sentences totaling fifty-two to sixty years in the State Prison, and a sentence of thirty years suspended upon stated conditions.

The State's evidence tended to show that on 7 June 1973, Capitol Credit Plan, Inc., a finance company in Hickory, North Carolina, and two individuals were robbed by two Negro males. Mr. Stephen Clark (Clark), an assistant manager of Capitol Credit Plan, observed the two males during the robberies for a period of five to seven minutes, neither of the two robbers wearing any form of disguise to hinder identification. Later that afternoon at the Hickory Police Headquarters, Clark identified one of the two robbers, Gallaway, from a group of eleven photographs. Clark was also requested to go to the Winston-Salem Police Department on the same day to view additional photographs. In Winston-Salem, Clark *selected* the defendant's photograph from a group of eight males as the man who held a gun on him during the course of the robberies.

Corporal F. M. Golics (Golics) of the Winston-Salem Police Department, on duty on 7 June 1973, was dispatched to the residence of one William Gallaway on Britt Drive in Winston-Salem. At the residence, Golics found a vehicle matching the description and bearing the same license number of the vehicle involved in the robbery in Hickory. While observing the vehicle, Golics observed Gallaway and defendant pull into the driveway of the residence on a motorcycle. When the two males left on the motorcycle, Golics apprehended them and requested them to follow him to the police station to talk with detectives there. The two males followed Golics voluntarily on the motorcycle.

At the police station defendant was informed that he was being detained for questioning with respect to a robbery in Hickory. Defendant was advised of his constitutional rights, photographed and fingerprinted. Defendant and Gallaway, at separate intervals, were taken into a hallway for the purpose of identification by witnesses at the scene of the robbery. Defendant was taken to Hickory where arrest warrants were issued and served upon his return.

Defendant's evidence tended to show that on 7 June 1973, defendant was at home until about 11:00 a.m. when he accompanied Gallaway to Town and Country Honda in Winston-Salem, that he was apprehended by Winston-Salem Police that afternoon while Gallaway was taking him home, and was taken to the police station.

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

Wilson and Morrow, by John F. Morrow, for defendant.

BROCK, Chief Judge.

Defendant contends that the trial court committed prejudicial and reversible error in admitting evidence of alleged identification of defendant from fingerprints and photographs taken while defendant was allegedly illegally detained. Defendant also contends that identification of defendant by witnesses for the State in the hallway of the police station during illegal detention deprived defendant of his constitutional rights of due process, and admission into evidence of such identification constituted reversible error.

At the conclusion of voir dire examination with respect to the circumstances surrounding the arrest of defendant, the trial judge found that defendant voluntarily accompanied the police to the police station; that defendant allowed himself to be fingerprinted and photographed while in detention; that defendant was identified in the hallway of the police station and by his photograph taken while in detention; and that defendant agreed to go to Hickory where a warrant for his arrest would be served on him for armed robbery. The trial judge concluded that the in-court identification of defendant by State's witnesses was not tainted by any outside confrontation but was based upon the identification made from observations during the course of the robberies.

[1, 2] Findings of the trial court upon *voir dire* are binding on appeal when supported by competent evidence. *State v. Wingard,* 9 N.C. App. 719, 177 S.E. 2d 330. There was plenary competent evidence to support the trial judge's findings of fact, and the findings justify the conclusion that there was no illegal detention of defendant. The witnesses' in-court identification was not tainted by any outside confrontation but was of independent origin. This assignment of error is overruled.

[3] Defendant contends that the trial court committed prejudicial error in allowing the State's expert witnesses on the lifting and comparison of fingerprints to state their opinions before the State had laid a proper foundation for the admission of such evidence. Specifically, the defendant initially contends that the testimony of Captain O. M. McQuire should have been stricken because of the failure of the trial court to have him qualified as an expert in "lifting" fingerprints. The testimony of Captain McQuire disclosed no opinion or intimation as to whose fingerprints were lifted. It merely described the method used in lifting the prints. This assignment of error is overruled.

[4] Defendant also argues that the trial judge committed prejudicial error in allowing State's witness Stephen R. Jones to testify as to the comparison of the latent fingerprints submitted by Captain McQuire with the fingerprints of defendant on the fingerprint card taken while defendant was in detention. Defendant does not challenge Jones as an expert witness but rather contends that the State failed to lay a proper foundation for the introduction of this evidence by failing to show a proper "chain of custody."

The sequence of events constituting the chain of custody shows that Captain McQuire "lifted" the latent prints and placed them on letterhead stationery from Capitol Credit. The stationery was then sent along with a fingerprint card of defendant's fingerprints to the State Bureau of Investigation in a sealed envelope, first class mail. The envelope was received, unopened, by Jones when his secretary carried the envelope from the S.B.I. mailroom to his desk. Jones then opened the envelope with a letter opener. Jones took the materials within, ran his comparison tests, and concluded that latent prints on the stationery and prints on the fingerprint card were identical.

We fail to see how the chain of custody was broken. This assignment of error is overruled.

[5] Defendant contends that the failure of the trial court to instruct the jury on the affirmative defense of alibi constituted prejudicial error. The recent case of *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 (1973), holds that the trial court is required to give an instruction as to alibi only when requested by defendant. This decision changes the old law that the trial judge must instruct the jury on the defense of alibi, even absent a request by defendant for such instruction. The *Hunt* decision, *supra,* was rendered on 12 July 1973. The instant case went to trial on 17 July 1973. The earlier date of the two advance sheets containing *Hunt, supra,* is dated 16 August 1973.

Even if we should concede, which we do not, that defendant does not fall under the scope of *Hunt, supra,* because of the lapse between the time the decision was rendered and the first report in the advance sheets, we cannot agree with defendant's contention. The record of the trial reveals that the trial judge, in recapitulating testimony, twice stated alibis proffered on behalf of the defendant. Although the desired form of pattern instruction on the defense of alibi was not offered, in substance, defendant twice received the benefit of the instruction that witnesses testified that he was not at the scene of the robbery on the date and time in question but was elsewhere, and could not, therefore, have committed the act, alone or in concert. This assignment of error is overruled.

For the reasons stated, we find the defendant had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and CARSON concur.

SUSIE T. PETTY v. WILLIAM ALLEN ALDRIDGE AND ANN W. ALDRIDGE, BY HER GUARDIAN AD LITEM, WILLIAM A. ALDRIDGE

No. 7315SC37

(Filed 16 January 1974)

1. Automobiles § 90— violation of statute as negligence per se — instruction improper

In plaintiff's action to recover for personal injuries sustained by her when defendant drove her vehicle into the rear of plaintiff's

vehicle, the trial court's instruction with respect to when violation of a statute is negligence *per se* and when it is not negligence *per se* was error, since the evidence did not disclose any violation of a motor vehicle statute.

2. **Automobiles § 90— negligence as proximate cause of collision — instruction improper**

Where the question was whether defendant's negligence, if any, was a proximate cause of the injuries, if any, plaintiff received, the trial court erred in instructing the jury that they were to determine if defendant was negligent and if that negligence was one of the proximate causes of the collision between the vehicles.

3. **Automobiles § 90— negligent act of defendant — jury question — erroneous instruction**

Trial court's instruction to the jury that they were to consider what amount, if any, they found to be fair and reasonable compensation for suffering both of body and mind which they found "proximately resulted from the negligent act of the defendant" was error, since that instruction could have allowed them to think that defendant committed a negligent act and this determination, having been made by the court, was not for them to consider.

APPEAL by defendants from *Chess, Judge,* 24 July 1972 Session, Superior Court, ALAMANCE County.

Plaintiff seeks damages for personal injuries allegedly received as the result of the negligent operation of an automobile by defendant Ann W. Aldridge. Plaintiff alleged, and her evidence tended to show, that at about 3:30 p.m. on 2 January 1968, she had parked her automobile at the east curb of Tarlton Avenue in Burlington, N. C., and was sitting in the car waiting for her son to be released from school and come get in the car.

Defendant, Ann Aldridge, a 19-year-old girl driving a Ford automobile owned by her father, defendant William Allen Aldridge, drove the Ford automobile into the rear of plaintiff's car.

Plaintiff's evidence tended to show that at the time she did not think she was hurt but that she began to have pain and muscle spasms, was treated by an orthopedic surgeon, and was given a 15% permanent disability by him, this being the minimum disability. The evidence was that prior to the accident, she was a crossing guard for a school in Burlington and received some $33.75 each two weeks for this work. She was also tying tail cords in her home for Burlington Industries, had been doing so since 1966, and was paid $9.00 per 1,000. She testified she could do 10,000 per week. The evidence was she was receiving

more at the time of trial for her work for the City of Burlington as a crossing guard for a school than she was at the time of her injury, that she had done no more work at home for Burlington, did not know what their needs were during the years since the accident as to tail cords and had no agreement with them as to how many she would tie for them per year.

The defendant did not put on any evidence. The jury returned a verdict for plaintiff and awarded damages in the amount of $22,000.00. From the judgment entered on the verdict, defendants appealed.

Vernon & Vernon by John H. Vernon, Jr., and Wiley P. Wooten, for plaintiff appellee.

Jordan, Wright, Nichols, Caffrey & Hill by Karl N. Hill, Jr., for defendant appellants.

PARKER, Judge.

Defendants bring forward and argue in their brief some 15 assignments of error. Since, in our view of the case, the defendants are entitled to a new trial because of prejudicial errors in the charge, we do not discuss those assignments of error directed to the rulings of the court in admission or exclusion of evidence since these are not likely to occur at another trial.

We only discuss those errors in the charge which are sufficiently prejudicial singly or cumulatively to require a new trial.

[1] The court charged the jury with respect to when violation of a statute is negligence *per se* and when it is not negligence *per se*. This instruction was not warranted, because the evidence did not disclose any violation of a motor vehicle statute, and the instruction served only to confuse the jury. To add further to the confusion, the court charged:

> "In this case, members of the jury, the plaintiff is invoking the alleged violation by the defendant of one or more of the following statutes. North Carolina General Statute 20-141, Section (c). This statute provides that the fact that a person is driving a vehicle within the speed limit does not relieve him of the duty to exercise due care, when the circumstances indicate that he or she should do so to avoid collision or injury, he or she is required to

decrease speed when special hazards exist with respect to pedestrians or other traffic. A violation of this statute is negligence within itself."

After a conference at the bench with the attorneys the court said: "Members of the jury, the court has just given you a charge relating to special hazards. The court instructs you to disregard that instruction and don't use it in your deliberations." The court did not retract its instruction with respect to situations where violation of a motor vehicle statute might be negligence *per se*. Indeed the error was compounded when the court proceeded to instruct that the plaintiff was "invoking the alleged violation" by defendant of failing to keep control of her automobile and a further violation of failure to keep a proper lookout. Immediately following these instructions the court instructed that the plaintiff was invoking the "alleged *violation of one or more of these statutes* or laws" by the defendant as "being *the* direct immediate and proximate cause" of plaintiff's injuries. Again the court makes it possible for the jury to speculate that if defendant failed to keep a proper lookout and failed to keep her automobile under control she was guilty of violation of a statute which would constitute negligence *per se* and no other facts could be considered.

[2] In addition, in the court's mandate on the first issue, he instructed that if the plaintiff had fulfilled the responsibility cast upon her in presenting evidence which by its quality and convincing power had satisfied the jury, by its greater weight, that defendant was negligent in the particulars which he set out and that the negligence was one of the proximate causes of the *"collision between the vehicles,* then it would be your duty to answer the first issue in favor of the plaintiff, that is YES." Of course, the issue was whether the plaintiff was *injured* by the defendant's negligence. There was no doubt but that the defendant's car ran into the rear of plaintiff's parked vehicle. The question was whether defendant's negligence, if any, was a proximate cause of the injuries, if any, plaintiff received.

[3] Finally, the court instructed the jury that they were to consider what amount, if any, they found to be fair and reasonable compensation for suffering both of body and mind which you find "proximately resulted from *the* negligent act of the defendant." Whether defendant was negligent was a question for the jury as well as whether his negligence, if any, was a proximate cause of plaintiff's injuries. This last instruction to the

jury could well have allowed them to think that the court had said that defendant *committed* a negligent act and this determination, having been made by the court, was not for them to consider.

The cumulative effect of these errors in the charge, we think, is to leave the jury—the trier of fact—without the proper guidance necessary for a determination of the issues in the case.

New trial.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. LARRY VAMPLE AND JAMES CROSBY, JR.

No. 7318SC792

(Filed 16 January 1974)

1. **Criminal Law § 168— charge considered as a whole**

If the trial court's charge considered as a whole presents the law fairly and clearly, there is no ground for reversal, even though some of the expressions, standing alone, may be regarded as erroneous.

2. **Criminal Law § 161— assignments of error abandoned**

Assignments of error are deemed abandoned since no exceptions supporting them are brought forward in defendants' brief and no argument or authority is stated in support of them. Rule 28, Rules of Practice in the Court of Appeals.

3. **Robbery § 4— common law robbery — sufficiency of evidence**

In a common law robbery prosecution testimony by the victim that he was beaten and robbed and testimony by an accomplice that a codefendant held the victim while he, the defendant and others hit the victim, and that the codefendant took the victim's pocketbook was sufficient to require submission of the case to the jury.

4. **Robbery § 5; Criminal Law § 9— common law robbery — aiding and abetting — instruction required**

Where the evidence in a common law robbery case was susceptible to the inference that defendant was present and encouraged the robbery or that he was present but silent or that he was not present, the trial court's instruction on aiding and abetting was insufficient where it stated *only* that "a person who aids and abets another to commit a crime is guilty of that crime . . . . [I]f he aids and abets, whether he actually participates in it, real actively involved, . . . he would be just as guilty as those that actually struck the blows or grabbed

the pocketbook . . . . If he is along and aids and abets, he would be just as guilty."

APPEAL from *Crissman, Judge,* 28 May 1973 Regular Criminal Session of GUILFORD County Superior Court, Greensboro Division.

Defendants were charged in a valid bill of indictment with the common law robbery of Jack Norman Glass. Defendants, through counsel, pled not guilty.

Jack Norman Glass testified that a group of six or seven boys accosted him on the sidewalk in front of a laundromat and refused to allow him to pass. When he refused to give them money they had asked for, the group took him behind the laundromat, struck him with their fists, broke his glasses, and took his wallet. He was unable to identify any of his assailants in court.

Charles Parker testified that he was one of the group of boys who accosted Glass in front of a laundromat. He testified that he and defendant Vample were the first of the group to assault Glass. After they took him around behind the building, defendant Crosby came and stood around while they beat him. Parker and Vample thereupon took the wallet from Glass with Crosby still "standing around there." Parker did not see Crosby strike Glass, nor did he see Crosby receive a share of the money taken from Glass's person.

Detective Brady of the Greensboro Police Department read into evidence a statement given by Charles Parker before trial which was substantially identical to his testimony except that in the statement he stated defendant Crosby hit Glass twice in the eye and took the credit card from his billfold.

At the close of State's evidence, motion for nonsuit was denied as to both defendants.

Defendants presented evidence that tended to establish the following:

Irvin Holt saw Vample walking away from a crowd of boys in front of the laundromat immediately before he saw Glass approach. He saw the bunch of boys assault Glass and take him behind the laundromat. After they had left Glass, Holt and another boy went to help him. He further testified that he

saw neither Vample nor Crosby when the assault and robbery took place.

Defendant Crosby took the stand on his own behalf. On the day of the robbery, he saw defendant Vample at the Florida Street Shopping Center, and they drank some wine and beer together at the shopping center. After he finished drinking and left the shopping center, he walked toward the laundromat; and as he passed, he obsesrved 10 to 15 people behind the laundromat. As he approached, the crowd left the rear of the laundromat. Later that day, he saw many of this group at the recreation center, but at no time did he go behind the laundromat with them, nor did he see defendant Vample with them.

At the close of all the evidence, motion for nonsuit was renewed and again denied as to both defendants.

From judgments committing them each to active sentences of four to six years, defendants appeal.

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

Assistant Public Defender Vaiden P. Kendrick for defendant appellants.

MORRIS, Judge.

[1] Defendants' assignments of error Nos. 4, 6, 7, 8, 9, 10, 11 and 12 are all directed to the instructions of the court to the jury. We agree with defendants that in some instances the charge could have been more clearly stated. Nevertheless, we are of the opinion that none of the errors assigned by these assignments of error constitute error sufficiently prejudicial to warrant a new trial. If the charge, considered as a whole, presents the law fairly and clearly, there is no ground for reversal, even though some of the expressions, standing alone, may be regarded as erroneous. *State v. Humphrey,* 13 N.C. App. 138, 184 S.E. 2d 902 (1971).

[2] Assignments of error Nos. 1, 3, 5, and 14 are deemed abandoned, since no exceptions supporting them are brought forward in defendants' brief and no argument or authority is stated in support of them. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[3] Defendant Crosby by assignment of error No. 2 contends the court committed prejudicial error in denying his motion for judgment as of nonsuit. If the evidence, considered in the light most favorable to the State, giving the State the benefit of all reasonable inferences, and resolving all doubts in favor of the State tends to establish guilt, then the denial of the motion for nonsuit is proper. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971). The testimony of Glass that he was beaten and robbed and the testimony of Parker that Vample held Glass while he and the others, including Crosby, hit Glass, and that Vample took Glass's pocketbook is more than sufficient to take the case to the jury as to both defendants.

[4] The thirteenth assignment of error has merit and is sufficient to warrant a new trial for defendant Crosby. It is evidently the State's contention that defendant Vample participated directly in the beating and robbery of Glass, while defendant Crosby was standing by at least encouraging Vample and with knowledge of what was going on and ready to help Vample if need be. Crosby was, therefore, entitled to an instruction on the law of aiding and abetting.

The evidence concerning defendant Crosby in the case *sub judice* is susceptible to three inferences on the part of the jury. Crosby was either present and encouraging the robbery, present but silent, or he was not present. The only instructions given by the court concerning aiding and abetting were as follows:

> "A person who aids and abets another to commit a crime is guilty of that crime. Now, you must clearly understand that if he aids and abets, whether he actually participates in it, real actively involved, that he would be just as guilty as those that actually struck the blows or grabbed the pocketbook or did some of the other things. If he is along and aids and abets, he would be just as guilty."

However, mere presence at the scene of the crime is not sufficient to denominate an accused an aider and abettor. It is not sufficient that the accused is aware of the commission of a crime, makes no effort to prevent the crime, or silently acquiesces or intends to render aid if necessary. He must give active encouragement to the perpetrator by word or deed or make known his intention to render aid if necessary. *State v. Dawson,* 281 N.C. 645, 190 S.E. 2d 196 (1972); *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655 (1967).

When the State presents evidence tending to show defendant might have aided and abetted, it is incumbent upon the trial court to explain the principles of aiding and abetting which apply to the particular evidence in the case. *State v. Madam (X)*, 2 N.C. App. 615, 163 S.E. 2d 540 (1968). This charge is not sufficient as to aiding and abetting, and for that reason, defendant Crosby is entitled to a new trial.

As to defendant Vample—Affirmed.

As to defendant Crosby—New trial.

Chief Judge BROCK and Judge CARSON concur.

IN THE MATTER OF: CEDRIC STEELE, JUVENILE

No. 7426DC67

(Filed 16 January 1974)

Infants § 10— delinquent child petition — findings required in order

In disposing of a delinquent child petition the trial court is not required by G.S. 7A-286 to make detailed findings of fact with respect to available home and community resources before committing a juvenile to the Board of Youth Development.

APPEAL by Juvenile Steele from *Johnson, Judge,* 24 September 1973 Session, Juvenile District Court Divison, MECKLENBURG County.

This fifteen-year-old juvenile was tried on a petition alleging:

"3. That the child is a delinquent child as defined by G.S. 7A-278(2), in that at and in the county named above and on or about the 6th day of August, 1973, the child did unlawfully and wilfully assault Dennis Gaines, 433 Sylvania Avenue, Charlotte, N. C., with a .22 Caliber pistol, a deadly weapon, by shooting him in the left side of the head above the left eye, as he walked down the 1900 block of Bancroft Street, Charlotte, N. C. Dennis Gaines required approximately 14 stitches for the head wound in the emergency room at Memorial Hospital.

The offense charged here is in violation of G.S. 14-33(b)1."

The hearing was conducted on 26 September 1973, with no formal record of testimony being preserved. The trial judge summarized the evidence which he heard, and this summary discloses that Dennis Gaines was a distant relative of the juvenile Steele and lived in the same vicinity. Gaines, on the afternoon of August 6, 1973, left his summer employment and was walking towards his home. Gaines was kicking or throwing rocks and gravel in front of him as he walked along the street. He saw the juvenile Steele and a group of youths approaching, and they called out and told him to stop throwing rocks at them. Gaines did stop kicking or throwing rocks and then Steele approached him and pulled a pistol from somewhere about his person and said, "Freeze, man," or "I'm going to shoot you." The pistol was fired, and the bullet struck Gaines above his left eye. Gaines was not rendered unconscious and Steele attempted to wrap a shirt around his head to stop the bleeding and then went with Gaines to the home of Gaines where Gaines was then taken to the hospital. Gaines had 14 stitches taken in the wound and was still receiving treatment for possible eye damage. Gaines had said nothing to Steele on this occasion and Gaines had not known Steele to carry a pistol prior to this. Steele did not testify at the hearing but tendered testimony to the effect that he and a group of male youths were going to play basketball when they saw Gaines approaching about 40 yards away and that Gaines was throwing rocks at the time and was asked to stop doing so. Steele did not know that the pistol would fire and did not remember pulling the trigger. The mother of Steele offered to pay the medical expenses of Gaines and had told the mother of Gaines that she would do so.

The following order was entered by the presiding judge.

"JUVENILE ORDER

THIS CAUSE COMING ON TO BE HEARD and being heard this the 26th day of September, 1973, of a petition dated the 5th day of September, 1973, alleging that the above named juvenile is delinquent. Said juvenile appeared in Court accompanied by Mr. Donald S. Gillespie, Attorney at Law, his mother, Ms. Darthula Steele and witnesses for the State: Dennis Gaines and Mrs. Mary Gaines.

Said juvenile, through counsel, in open Court, ADMITTED the allegations as alleged in the petition dated September 5, 1973.

THE COURT FINDS AS A FACT that Cedric Steele did on or about the 6th day of August 1973, unlawfully and wilfully assault Dennis Gaines, 433 Sylvania Avenue, Charlotte, North Carolina, with a .22 Caliber pistol, a deadly weapon, by shooting him in the left side of the head above the left eye, as he walked down the 1900 block of Bancroft Street, City. The said Dennis Gaines required approximately 14 stitches for the head wound in the emergency room at Memorial Hospital, and THE COURT FURTHER FINDS AS A FACT that the above named juvenile is DELINQUENT with respect thereto.

THE COURT MAKES THE FURTHER FOLLOWING FINDINGS OF FACT:

(1) that said juvenile's behavior constitutes a threat to persons and or property in the community and further constitutes a threat to his own personal welfare and safety;

(2) that the community resources and or community-level alternatives available would not meet the needs of the juvenile; and

(3) that it would be in the best interest and welfare of the above named juvenile that he be committed to the Board of Youth Development for an indeterminate period of time, not to exceed his 18th birthday, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the above named juvenile, one Cedric Steele, be COMMITTED to the BOARD OF YOUTH DEVELOPMENT for an indeterminate period of time, however, not to exceed his 18th birthday. Said juvenile to be detained at the Juvenile Diagnostic Center pending his placement by the Board of Youth Development. The Juvenile Diagnostic Center is hereby authorized to render to said juvenile such medical and surgical care as may be prescribed for him by a licensed physician.

THIS the 26th day of September, 1973.

C. E. JOHNSON
Presiding Judge"

To the entry of this Order, the juvenile duly excepted and appealed; and in addition thereto, the juvenile requested that he not be committed pending the disposition of the appeal. This request was denied, and the terms of commitment in the order of 26 September 1973 were left in full force and effect. The juvenile excepted and assigned this as error.

Attorney General Robert Morgan by Associate Attorney William Woodward Webb and Assistant Attorney General Parks Icenhour for the State.

Donald S. Gillespie, Jr., for Juvenile Appellant.

CAMPBELL, Judge.

The appellant asserts that there was error in the trial for that the trial court did not make sufficient findings of fact in order to adequately dispose of the case. The appellant asserts that before disposing of the case, the trial judge should make an in-depth study of available home or community resources before committing a juvenile to the Board of Youth Development; that such a study is contemplated by the statute, G.S. 7A-286, and that the court order should reveal that such a study has been made and that complete findings of fact to this effect should be incorporated in the order. We agree that the statute gives the trial judge ample tools to make a study in order to dispose of the case "to provide such protection, treatment, rehabilitation or correction as may be appropriate in relation to the needs of each child subject to juvenile jurisdiction and the best interest of the State." We do not think, however, that it is incumbent upon the trial judge to incorporate detailed findings of fact in his order. We think the order in the instant case was adequate and was supported by the evidence.

No error.

Judges HEDRICK and BALEY concur.

JENNIE GINN BY HER DULY APPOINTED NEXT FRIEND, W. DORTCH LANGSTON, JR. v. MILDRED SMITH AND HUSBAND, RUPERT SMITH, JAMES MORGAN SMITH AND WIFE, MARYLEEN SMITH, AND CLARENCE GINN

No. 738SC795

(Filed 16 January 1974)

Appeal and Error § 8— deceased incompetent plaintiff — appeal by next friend — failure to substitute administrator — dismissal of appeal

Appeal from dismissal of action as to part of the defendants is dismissed because it was not prosecuted by the real party in interest where the incompetent plaintiff died after the action was instituted on her behalf by her next friend, the trial court authorized and directed that an administrator of deceased plaintiff's estate be substituted as plaintiff, and no administrator has been appointed and substituted as plaintiff but the next friend has undertaken to prosecute the appeal. G.S. 1A-1, Rule 25(a); G.S. 28-172.

APPEAL by plaintiff from *James, Judge,* 20 August 1973 Session of Superior Court held in WAYNE County. Argued in the Court of Appeals 29 November 1973.

Sasser, Duke and Brown, by John E. Duke and J. Thomas Brown, Jr., for the plaintiff.

Strickland and Rouse, by Thomas E. Strickland, for the defendants.

BROCK, Chief Judge.

In April 1965 Mr. W. Dortch Langston was appointed Next Friend of Jennie Ginn upon the allegation that she was *non compos mentis* by reason of senility and upon the allegation that she had a cause of action against defendants. Complaint was filed in this action by the said Next Friend in April 1965 and demurrer thereto was filed in May 1965. The matter thereafter languished in the Superior Court until August 1973.

By order entered 20 August 1973, Judge James decreed that certain of defendants were not proper parties and dismissed the action as to them. This appeal is purportedly taken from that portion of the order dismissing the action as to some of the defendants.

In the same order of 20 August 1973, Judge James found that Jennie Ginn is deceased and decreed that a proper party

should qualify as her administrator and be made the party plaintiff in this action. So far as the record on appeal discloses, no action has been taken to have an administrator appointed and substituted as party plaintiff. The record on appeal reveals that this appeal is docketed and pursued by Mr. W. Dortch Langston, Jr., Next Friend of Jennie Ginn.

G.S. 1A-1, Rule 25(a) provides: "No action abates by reason of the death of a party if the cause of action survives. In such case, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may order the substitution of said party's personal representative or successor in interest and allow the action to be continued by or against the substituted party." G.S. 28-172 provides that in the event of the death of a person, his right to prosecute a cause of action which survives, shall survive to the executor, administrator or collector of his estate. Therefore, the executor, administrator or collector of the estate of Jennie Ginn became the real party in interest in this action after her death.

Every claim shall be prosecuted in the name of the real party in interest. G.S. 1A-1, Rule 17. However, in this action, although the trial judge expressly authorized and directed the substitution of an administrator of the estate of Jennie Ginn as plaintiff, the Next Friend has undertaken to prosecute this appeal.

Appeal dismissed.

Judges PARKER and VAUGHN concur.

ERNEST LAWING AND WIFE, JENNY LEE LAWING v. ARTHUR JAYNES AND WIFE, EDITH JAYNES AND ERNEST LAWING AND WIFE, JENNY LEE LAWING v. JOHN C. McLEAN AND WIFE, KATHLEEN H. McLEAN

No. 7329SC725

(Filed 6 February 1974)

1. **Registration § 3— recorded option — expiration — notice**

A recorded option showing an expiration date of 1 March 1966 did not constitute constructive notice of the optionees' claim to the property in 1971.

2. **Lis Pendens— notice not indexed**

Where notice of *lis pendens* filed in the office of the clerk of superior court had not been indexed, the record of plaintiffs' pending action against defendants for specific performance of an option contract for the sale of real property did not constitute constructive notice to subsequent purchasers that plaintiffs claimed an interest in the property. G.S. 1-118.

3. **Vendor and Purchaser § 2— option contract — testimony as to willingness to perform**

In an action for specific performance of an option contract which had an expiration date of 1 March 1966, the trial court properly allowed plaintiffs to testify that since February 1966 they have been ready, willing and able to do what the option contract called for them to do.

4. **Appeal and Error § 57— failure to find material facts**

When the trial court fails to find the material facts to dispose of the issues, the case must be remanded for a new trial.

5. **Vendor and Purchaser § 5— option contract — conveyance to third person — damages — specific performance**

Ordinarily, when defendant by his own act makes compliance with an option contract impossible, his liability upon the agreement is for damages only; however, where defendant conveys a portion of the land subject to an option and retains a portion, specific performance may be decreed for the portion retained.

6. **Husband and Wife § 3; Vendor and Purchaser § 10— action for specific performance of option — notice to third person — agency of husband for wife**

In an action to set aside a deed conveying to defendants, a husband and wife, property which plaintiffs had exercised an option to purchase, the trial court failed to resolve a material issue where the court found that the husband had actual knowledge of the pendency of a lawsuit brought by plaintiffs against the original owners to obtain specific performance of the option contract but the court failed to make findings as to whether the husband had authority to act for the wife and whether notice to him was notice to her.

7. **Husband and Wife § 3— agency of husband for wife**

The agency of the husband for his wife may be shown by direct evidence or by evidence of facts and circumstances which will authorize a reasonable and logical inference that he was authorized to act for her.

8. **Vendor and Purchaser § 10— specific performance of option — purchase by third person — actual notice of claim by optionee**

If defendants purchased land from the original owners with actual notice or knowledge of a pending suit brought by plaintiffs to compel specific performance of an option contract by the original owners to convey the land to plaintiffs, defendants are in no better position than the original owners to defend a suit for specific performance of the contract with plaintiffs.

9. **Specific Performance; Vendor and Purchaser § 5— option contract — specific performance — manner of performance**

In a judgment ordering specific performance of an option contract, the court erred in directing that the contract be performed in a manner other than that provided in the contract itself.

10. **Specific Performance; Vendor and Purchaser § 10— option contract — purchase by third person — specific performance — payment of purchase money to third person**

Where the court orders specific performance of a contract to convey land which has been conveyed by the vendor to, and paid for by, a third person, the judgment should not declare the third person's deed void and direct payment of the purchase money to the vendor but should require a conveyance by the third person and entitle him to the purchase money.

APPEALS by defendants from *Thornburg, Judge,* 21 May 1973 Session of Superior Court held in HENDERSON County. Argued in the Court of Appeals 24 October 1973.

These two cases were consolidated for trial and for appeal. In one case plaintiffs allege an option to purchase real estate from defendants Mr. and Mrs. Jaynes (Jaynes) under which plaintiffs timely elected to exercise their right and that Jaynes refused to convey the real estate. Plaintiffs seek specific performance by Jaynes. In the other case plaintiffs allege that defendants Mr. and Mrs. McLean (McLean) purchased a portion of the real estate from Jaynes with notice of plaintiffs' rights. Plaintiffs seek to have the deed from Jaynes to McLean declared void and cancelled of record because it constitutes a cloud on the title to the real estate.

Jury trial was waived and the cases were tried before Judge Thornburg sitting without a jury. From judgments rendered for plaintiffs in both cases, defendants appealed.

Bennett, Kelly and Long, by E. Glenn Kelly, for the plaintiffs.

Prince, Youngblood and Massagee, by K. Youngblood and Edwin R. Groce, for the defendants.

BROCK, Chief Judge.

Plaintiffs filed in this Court a motion to dismiss defendants' appeal because of their failure to comply with Rule 28 of the Rules of Practice in the Court of Appeals. It seems there are substantial violations by defendants of Rule 28; however, we have determined that we will consider the merits of both appeals as best we can from the state of the record. Plaintiffs' motion to dismiss is denied.

Plaintiffs' action against Jaynes was instituted 13 April 1966. Plaintiffs' action against McLean was instituted 27 December 1972.

Plaintiffs offered evidence which tended to show the following: On or about 9 March 1964, plaintiffs and Jaynes entered into an option contract wherein plaintiffs were granted the option for two calendar years from 1 March 1964 to purchase from Jaynes a tract of land fully described in the option, containing approximately thirty-three and one-half acres. The price was determinable by the terms of the option. The option contract further granted to plaintiffs the right to purchase the Jaynes' cows and milk base at prices determinable by the terms of the contract. On 26 February 1966 (within the two years granted in the option) plaintiff Ernest Lawing went to the Jaynes' residence and advised Mr. and Mrs. Jaynes that plaintiffs were exercising the right to purchase the real estate. Plaintiff asked them to accompany him to have the papers prepared and stated that he was prepared to pay in cash. Jaynes objected because plaintiffs did not desire to exercise the right to purchase the cows and milk base. Mrs. Jaynes ordered plaintiff to leave the premises, which he did immediately. Plaintiff returned home where he and Mrs. Lawing prepared and forwarded to Mr. and Mrs. Jaynes a letter of notice that plaintiffs elected to exercise their option to purchase the real estate and that they did not desire to purchase the cows and milk base. This letter was forwarded by certified mail on 26 February 1966 and was received by Jaynes on 1 March 1966. In the letter plaintiffs also nominated a surveyor to determine the exact acreage and re-

quested Jaynes to advise if the nominee was acceptable. Jaynes has not tendered or delivered a deed to plaintiffs and has not answered plaintiffs' letter of notice. The plaintiffs still desire to purchase the real estate and have been ready, willing and able, at all times since 26 February 1966, to pay the purchase price calculated under the terms of the option contract.

The option contract was duly recorded in the office of the Register of Deeds of Henderson County on 10 March 1964. The action against Jaynes was instituted 13 April 1966. On 13 April 1966, the action against Jaynes was entered upon the Summons Docket in the office of the Clerk of Superior Court of Henderson County. When Jaynes filed answer on 31 May 1966, the action was transferred to the Civil Issue Docket. Notice of lis pendens was filed in the office of the Clerk of Superior Court of Henderson County on 19 June 1966, but it was not indexed until 22 May 1973 (during the week of the trial of these two cases). It was served on Jaynes on 10 June 1966.

In February 1971 during a discussion of the Jaynes property, plaintiff told Mr. McLean: "Johnny, I have got a lawsuit pending in Court in this matter. I've got an option to buy his property and I've got a special paper filed, filed on top of this lawsuit in litigation and it never has come up in Court. There's special paper filed right on top of it, telling anybody if they want to buy this property, that there is a lawsuit pending in Court."

On 4 March 1971, McLean purchased by warranty deed from Jaynes the major portion of the real estate described in the option contract and in the lawsuit pending between Jaynes and plaintiffs. On 27 December 1972 plaintiffs instituted this action against McLean.

Defendants did not offer evidence contradictory of plaintiffs' evidence. Defendants Jaynes offered evidence which tended to show that during 1964 they sold their cows and milk base subject to the option to plaintiffs. Defendants McLean offered evidence which tended to show that the notice of lis pendens filed by plaintiffs on 10 June 1966 was not indexed until 22 May 1973 (during the week of the trial of these two cases).

In order to clarify the disposition of this appeal, we set out in full the findings of fact by the trial judge.

"1. That all parties are properly before the Court, are represented by competent counsel, and have each indicated

readiness to proceed; that the cases were without objection consolidated for purpose of trial and judgment; that the action entitled 'ERNEST LAWING et ux v ARTHUR JAYNES, et ux' was commenced by the plaintiffs against the defendants Jaynes on April 13, 1966 to compel specific performance by the defendants to convey to plaintiffs certain real property lying and being in Henderson County, North Carolina and described in a real estate option contract recorded in Deed Book 419, at page 311, Henderson County Register of Deeds Office.

"That said action was filed in the County where subject land lies, named the parties, the object of the action, and described the land to be affected; that said action was properly indexed in the Summons Docket on the 13th day of April, 1966, and the Civil Issue Docket on the 31st day of May, 1966.

"2. On June 10, 1966, the plaintiffs filed a Notice of Lis Pendens against the defendants Jaynes, a copy of said Notice being subsequently served on the defendants Jaynes.

"3. The Notice of Lis Pendens was not indexed in the Office of the Clerk of Superior Court of Henderson County until May 22, 1973 although said Notice was on file in the Office of said Clerk and although it was indexed in the summons docket and the civil issue docket in said Clerk's Office.

"4. The option recorded in Deed Book 419 at page 311, Henderson County Register of Deeds Office was recorded in said Register's Office at 11:15 A.M., On March 10, 1964.

"5. On February 26, 1966, the plaintiff, Ernest Lawing, notified in person the defendants Jaynes that the plaintiffs were exercising the option to purchase the real estate described in the option. Ernest Lawing further advised defendants on February 26, 1966, that the plaintiffs would either pay cash for the real estate or would pay for the same in the manner called for in the option contract.

"6. The plaintiffs also mailed on February 26, 1966, to the defendants Jaynes a letter dated February 26, 1966, in which the plaintiffs advised defendants Jaynes of the plaintiffs' exercise of said option to purchase the real estate in accordance with the terms of said option.

"7. The defendants Jaynes received said letter on March 1, 1966.

"8. The defendants Jaynes have since February 26, 1966 failed, refused and neglected to execute and deliver to plaintiffs a deed for the real estate described in said option.

"9. The defendants Jaynes executed and delivered to the defendants McLean a deed for most of the real property described in the option contract. Said deed was dated March 4, 1971 and was recorded on March 5, 1971, at 4:00 p.m., in Deed Book 482 at page 455, Henderson County Register of Deeds office.

"10. The defendants McLean had constructive notice on and prior to March 5, 1971 of the plaintiffs' option contract which was previously recorded in the Henderson County Register of Deeds Office and record notice of the pending action filed by the plaintiffs against the defendants Jaynes in the year 1966 for specific performance under the terms of said option contract.

"11. The defendant John C. McLean had actual notice that plaintiffs claimed an interest in the real estate subject to plaintiffs' option and had this actual notice prior to March 5, 1971.

"12. The plaintiffs have been ready, willing and able to complete the performance of their obligations under the option contract since February 26, 1966 although the defendants Jaynes have refused to comply with the same.

"13. If the defendants Jaynes had complied with the option contract and had conveyed the real property described therein to the plaintiffs as called for in said contract, and if the plaintiffs had made the payments called for in said contract, the real property described in the contract would very likely have been paid for at this time.

"14. After the Court heard the evidence and argument of counsel and announced its decision in this cause, but before the Court entered any Judgment, counsel for the plaintiffs Lawing announced in open Court that plaintiffs would accept the determination by Don Hill, Surveyor, of the total amount of acreage described in the option contract and would consent to use Mr. Hill's determination of the amount

of acreage as a basis for the payment to the defendants Jaynes."

Defendants do not except to findings of fact number 1 through 7. It seems clear to us that these findings are supported by competent evidence.

Defendants except to finding of fact number 8 upon the ground that it is not supported by competent evidence. Clearly, plaintiffs testified that Jaynes had never delivered to plaintiffs a deed for the land, had never offered to do so, and have never replied to their notice of intention to exercise the option other than to demand that plaintiff remove himself from Jaynes' premises. Testimony concerning defendants Jaynes' failure, refusal and neglect to deliver a deed to plaintiffs was admitted without objection. This assignment of error is overruled.

Defendants do not except to finding of fact number 9. It seems clear to us that this finding of fact is supported by competent evidence.

[1, 2] Defendants except to finding of fact number 10 upon the ground that it is not supported by competent evidence. This is probably a conclusion of law rather than a finding of fact, but without deciding which it is, we hold that it is error. First, the recorded option showing an expiration date of 1 March 1966 does not constitute constructive notice of plaintiffs' claim to the property in 1971, five years after the last day upon which the option could be exercised. No deed from Jaynes to plaintiffs appearing of record, so far as the recording of the option was concerned, defendants McLean were entitled to treat the option as at an end. *Trogden v. Williams,* 144 N.C. 192, 56 S.E. 865. Second, without a properly filed and indexed notice of lis pendens, the record of the action pending between plaintiffs and Jaynes did not constitute constructive notice to defendants McLean as a subsequent purchaser. G.S. 1-118. This assignment of error is sustained.

Defendants do not except to finding of fact number 11. It seems clear to us that this finding of fact is supported by competent evidence.

[3] Defendants except to finding of fact number 12 upon the ground that it is not supported by competent evidence. This exception is based upon defendants' former exception to the trial court's permitting plaintiffs to testify that since February 1966

plaintiffs have been ready, willing and able to do what the option contract called for them to do. We see no merit in these exceptions. The plaintiffs testified without objection as follows: "I still want to buy this land, am still willing to pay $500.00 an acre for it and have Donald Hill survey it. I am still willing to pay $9,000.00 for the house and to pay for the house and acreage exactly as the terms call for in this Option Contract." Plaintiffs, in detail, explained that they were ready, willing and able to abide by the terms of the option. The testimony complained of by defendant merely points out that the same conditions existed continuously from February 1966. The evidence was properly admitted and it clearly supports the finding of fact. This assignment of error is overruled.

Defendants except to finding of fact number 13 upon the ground that it is not supported by competent evidence. We agree with defendant that the record is devoid of direct evidence to support the statements by the trial judge under finding of fact number 13. However, from the terms of the option, it can be mathematically computed that the trial judge's statements under finding of fact number 13 are probably correct. Nevertheless, whether correct or appropriate, or whether finding of fact or conclusion of law, we fail to see prejudice to defendants. It is error which is prejudicial to appellant that justifies relief. This assignment of error is overruled.

Defendants do not except to finding of fact number 14. It seems that this finding is only a recitation by the court of plaintiffs' announcement in open court. We are not convinced of the relevance of this unilateral statement, but it seems harmless.

Our decision sustaining defendants' exception to finding of fact number 10 is not dispositive of these appeals. It relates only to the McLean case and to strike finding of fact number 10 in its entirety does not fully dispose of the McLean appeal.

Defendants bring forward an additional exception to the evidence. Defendants Jaynes argue that the trial court committed error when it permitted plaintiffs to testify about a conversation with defendants McLean. Clearly, this argument is without merit. The Jaynes and McLean cases were consolidated for trial without objection. The testimony was competent in the McLean case, and was in no way prejudicial to defendants Jaynes. This assignment of error is overruled.

For the reasons hereinafter stated, the conclusions of law and the judgment entered by the trial judge are erroneous and must be vacated.

Findings of fact numbers 1, 5, 6, 7, 8, 9, and 12 resolve all of the material issues involved in the Jaynes case, and entitle plaintiffs to a proper judgment against Jaynes in accordance with the principles hereinafter set out.

[4] The findings of fact are not dispositive of the material issues in the McLean case because they fail to determine whether Mr. McLean was acting for himself only, or was acting in behalf of Mrs. McLean and himself, or indeed who conducted the negotiations, when the purchase of a portion of the property in controversy was made from Jaynes. When the trial court fails to find the material facts to dispose of the issues the case must be remanded for a new trial. 1 Strong, N. C. Index 2d, Appeal and Error, § 57, p. 221. Therefore, there must be a new trial in the McLean case.

"An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms, and it is the right to have them specifically enforced that imparts to them their usefulness and value. Strictly speaking, however, it is inaccurate to speak of the specific performance of an option; an option is an agreement by which a person binds himself to perform a certain act for a stipulated price within a designated time, leaving it to the discretion of the person to whom the option is given to accept it upon the terms specified, which, so long as it remains unaccepted, is a unilateral writing lacking in the mutual elements of a contract. The remedy of specific performance can be invoked only upon the theory that the optionee has accepted the offer and the agreement has ceased to be an option and has ripened into a mutually binding and mutually enforceable contract." 71 Am. Jur. 2d, Specific Performance, § 142, p. 184.

The option to purchase the real estate was severable from the option to purchase the cows and the milk base. They constituted two options written into the same memorandum. Indeed, defendants Jaynes to some extent treated them as severable. They conveyed the cows and the milk base during the period of time plaintiffs had the right to purchase them. The trial judge was correct in treating the option to purchase the

land as severable from the option to purchase the cows and the milk base.

[5] The act of defendants Jaynes in conveying a portion of the property to defendants McLean complicates the relief available against Jaynes. "Since a court of equity will not do a useless thing or make a nugatory decree, specific performance will not, as a rule, be decreed against a defendant who is unable to comply with his contract." This is true even though the inability to comply is caused by defendants' own act. 71 Am. Jur. 2d. Specific Performance, § 69, p. 99. Ordinarily, when defendant, by his own act, makes compliance with the option impossible, his liability upon the agreement is for damages only. 71 Am. Jur. 2d, Specific Performance, § 126, p. 161. However, where defendant conveys a portion of the land subject to the option and retains a portion, specific performance may be decreed for the portion retained.

[6, 7] The evidence in this case tends to show and the trial court so found, that Mr. McLean had actual notice of the pendency of the lawsuit against Jaynes to obtain specific performance by Jaynes to convey the land in controversy to plaintiffs. However, as pointed out above, the trial court failed to resolve the material issue of the authority of Mr. McLean to act for Mrs. McLean. The agency of a husband for his wife may be shown by direct evidence or by evidence of facts and circumstances which will authorize a reasonable and logical inference that he was authorized to act for her. Slight evidence of agency of a husband for his wife is sufficient to charge her when she receives, retains, and enjoys the benefits of the contract. *Norburn v. Mackie,* 262 N.C. 16, 136 S.E. 2d 279; 41 C.J.S., Husband and Wife, § 70, pp. 548-49. *See also Tomlins v. Cranford,* 227 N.C. 323, 42 S.E. 2d 100, where the following is stated: "But defendants contend that this evidence of notice [of insanity of grantor] related only to the male defendant, that the *feme* defendant is the grantee, and there is no evidence she had any knowledge thereof. This contention is supported by the record, but it will not avail them. All the evidence tends to show that the male defendant, in procuring the deed, was acting as agent for his wife. Notice to him was notice to her. She now ratifies his acts and claims the fruits of his efforts. She cannot claim the one and escape the other. *See also, Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785.

[8] As pointed out above, the recorded option from Jaynes to plaintiffs showing an expiration date of 1 March 1966 did not constitute constructive notice to McLean in 1971 of plaintiffs' claim to the property. Also, as pointed out above, in the absence of a properly filed and indexed notice of lis pendens, the record of the action pending between plaintiffs and Jaynes did not constitute constructive notice to McLean in 1971 of plaintiff's claim to the property. The doctrine of lis pendens as it is ordinarily understood in this State only affects third persons who may take title after complaint is filed *and* notice of lis pendens is filed and cross-indexed in the Record of Lis Pendens. G.S. 1-117 and G.S. 1-118. However, our statutes deal only with *constructive* notice. Where a third party buys from defendants with *actual* notice or knowledge of the suit, and its nature and purpose, and the specific property to be affected, he takes title burdened with the same obligations as his grantors'. *See Morris v. Basnight,* 179 N.C. 298, 102 S.E. 389. If defendants McLean purchased from defendants Jaynes the land in controversy, or a portion thereof, with *actual* notice or knowledge of the suit pending between plaintiffs and defendants Jaynes to compel specific performance by Jaynes of an obligation to convey the land in controversy to plaintiffs, defendants McLean are in no better position than defendants Jaynes to defend a suit for specific performance of the contract with plaintiffs.

[9] The judgment appealed from directs that the contract be performed in a manner other than as provided in the option. This was error. "In rendering a decree of specific performance, the court has no power to decree performance in any other manner than according to the agreement of the parties." 71 Am. Jur. 2d, Specific Performance, § 211, p. 270. *See also, McLean v. Keith,* 236 N.C. 59, 72 S.E. 2d 44; 7 Strong, N. C. Index 2d, Specific Performance, p. 35.

[10] "In a suit to compel specific performance of a contract to convey land which, subsequently to the execution of the contract, has been conveyed by the vendor to, and paid for by, a third person, the decree should require a conveyance by the latter, and entitle him to the purchase money, and not declare his deed void and direct payment of the purchase money to the original vendor." 71 Am. Jur. 2d, Specific Performance, § 221, p. 287. A decree of specific performance should be equitable to both the plaintiffs and the defendants. Generally for the form, purpose

and content of a decree for specific performance, see 71 Am. Jur. 2d, Specific Performance, F. Decree, §§ 221-226, pp. 287-297.

The results are these:

In the Jaynes case the findings of fact will not be disturbed; the conclusions of law and decree are vacated; and the cause is remanded for entry of a proper decree upon the facts as found.

In the McLean case a new trial is ordered.

Jaynes appeal. Remanded with directions.

McLean appeal. New trial.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. JODIE V. AUSTIN

No. 7420SC74

(Filed 6 February 1974)

1. **Criminal Law § 169— objection to evidence — subsequent similar evidence admitted without objection — no prejudice**

In a prosecution charging defendant with having had carnal intercourse with his daughter on 6 March 1973 where the solicitor asked the prosecuting witness whether her father had had sexual relations with her after 6 March, the witness answered in the affirmative, and defendant then objected and moved to strike, defendant was not prejudiced since he subsequently allowed the witness to testify at length with respect to a subsequent incident involving sexual relations with him without further objection or motion to strike.

2. **Constitutional Law § 33; Criminal Law § 88— testimony by defendant — recall of defendant for further cross-examination**

A defendant is not required to testify in his own behalf, but if he does, he occupies the position of any other witness, is entitled to the same privileges and is equally liable to be impeached or discredited; therefore, it follows that a defendant who avails himself of the privilege of testifying in his own behalf is subject to being recalled for further cross-examination, since the court has full discretion to allow a witness to be examined at any stage of the trial out of the usual order or to be recalled for re-examination.

3. **Criminal Law §§ 80, 89; Incest— motel registration card — genuineness of signature not proved — admissibility for corroboration**

A motel registration card bearing the names of defendant and his daughter was admissible in an incest prosecution to corroborate

testimony of the prosecuting witness even though there was no evidence as to the genuineness of defendant's purported signature on the card.

Judge CARSON dissenting.

APPEAL by defendant from *Chess, Special Judge,* 30 July 1973 Session Superior Court, UNION County. Argued in the Court of Appeals 22 January 1974.

Defendant, upon proper and valid indictment, was convicted of incest with his daughter. From judgment on the jury's verdict of guilty, defendant appealed.

Facts necessary to decision are set out in the opinion.

Attorney General Morgan, by Associate Attorney Thomas M. Ringer, Jr., for the State appellee.

Joe P. McCollum, Jr., for defendant appellant.

MORRIS, Judge.

[1] The indictment charged defendant with having had carnal intercourse with his daughter, Jane Denise Austin, on 6 March 1973. The solicitor asked the prosecuting witness whether her father had had sexual relations with her after 6 March. The witness answered: "Yes, Sir." At that point defendant interposed an objection. The solicitor then asked: "When was the last time he had sexual relations with you?" The witness answered: "April 20." At that point this appears in the record: "Objection. Motion to Strike. (No ruling) Exception No. 1." The witness, without further objection or motion to strike, related the sordid occurrences of 20 April.

Defendant allowed the witness to testify at length with respect to the episode of incest on 20 April without further objection or motion to strike. When incompetent evidence has been admitted over objection, and the same evidence is thereafter admitted without objection, the benefit of the objection is ordinarily lost. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969). Regardless of the technical reasons for not considering defendant's first assignment of error, it is without merit. Defendant argues that it is prejudicial. This we certainly concede. We do not concede that it is error. Defendant cites the general rule that evidence tending to show defendant has committed a crime other than the one for which he is being charged is in-

admissible. However, "[c]ontrary to the general rule, in prosecutions for crimes involving illicit sex acts of a consensual character, it is permissible for the state to introduce evidence of both prior and subsequent acts of like nature as corroborative or explanatory proof tending to show the disposition of the defendant to engage in the act and rendering it more probable that the act relied on for conviction occurred." 2 Strong, N. C. Index 2d, Criminal Law, § 34, p. 540; *State v. Sutton,* 4 N.C. App. 664, 167 S.E. 2d 499 (1969). This assignment of error is overruled.

Defendant, in his brief, candidly states that his assignments of error two and three are abandoned.

[2] By his fourth assignment of error, defendant contends that the court committed reversible error when it required defendant to go back on the stand for additional questioning, upon motion of the State and over defendant's objection. Defendant urges that this was in direct violation of G.S. 8-54 which provides:

> "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to answer any question tending to criminate himself."

This statute gives a criminal defendant the privilege of testifying in his own behalf. It is not his duty to do so, and he cannot be compelled to testify. If he does, however, "he occupies the position of any other witness. He is entitled to the same privileges and is 'equally liable to be impeached or discredited.' " *State v. Williams,* 279 N.C. 663, 669, 185 S.E. 2d 174 (1971), and cases there cited.

It follows, therefore, that a defendant who avails himself of the privilege of testifying in his own behalf is subject to being recalled for further cross-examination, since the court has full discretion to allow a witness to be examined at any stage of the trial out of the usual order or to be recalled for re-examination.

1 Stansbury, N. C. Evidence, Brandis Revision, Witnesses, § 24; 7 Strong, N. C. Index 2d, Trial, § 14; *Rose and Day, Inc. v. Cleary,* 14 N.C. App. 125, 187 S.E. 2d 359 (1972), cert. denied 281 N.C. 315 (1972). This assignment of error is overruled.

[3] By defendant's remaining assignment of error, he contends that the court committed reversible error in allowing into evidence a card from the Alamo Plaza Motel, used for registering guests of the motel, which was dated 20 April 1973 and on which appeared the names of Jodie and Jane Austin. Defendant contends that this evidence was inadmissible because no witness had testified to the genuineness of any purported signature of the defendant on the exhibit. The evidence was not introduced for that purpose. The witness, the motel desk clerk, did not testify to the signature on the card nor was she asked whether defendant signed the card. The evidence was introduced by the State in rebuttal. The prosecuting witness had testified that defendant, her father, had taken her to a motel in Charlotte on 20 April and had had sexual intercourse with her at that motel. Defendant took the stand and by his evidence denied it. The evidence that the Alamo Plaza Motel in Charlotte had a registration card dated 20 April 1973 and bearing the names of Jodie and Jane Austin was offered in corroboration of prosecuting witness's evidence on direct examination. This card was made in the regular course of business. Its credibility was for the jury, who could have inferred that someone else signed the card, that there was another Jodie Austin, or that Jane Austin was there with another man who used her father's name. The evidence might or might not, in the eyes of the jury, corroborate the prosecuting witness. It was, however, offered for that purpose, and for that purpose was admissible.

We find no reversible error in defendant's trial.

No error.

Chief Judge BROCK concurs.

Judge CARSON dissents.

Judge CARSON dissenting.

The defendant's daughter, Jane Austin, testified that the defendant committed an act of incest with her on two specific

occasions—6 March 1973, the date alleged in the bill of indictment, and 20 April 1973, the date she says that her father took her to the Alamo Plaza Motel in Charlotte. The defendant denied taking his daughter to the Alamo Plaza Motel on 20 April, but he admitted being with her in Charlotte on that date. He testified that the principal of the school she attended called him to come and get her on that date and that he took her with him to Charlotte to look at an automobile he was considering buying. He denied ever having had sexual relations with her. In rebuttal, the State did not recall Jane Austin to the witness stand. It called Mrs. E. S. Wolf, a desk clerk at the Alamo Plaza Motel in Charlotte.

Mrs. Wolf testified that she had been working for the Alamo Plaza for 23 years and was familiar with the records kept by the motel. She identified state's exhibit 7 as a registration card that:

> . . . we have the guest write their names and their home address on. Before they check in they write on it and then they pay. This is the type of card that was used by the Alamo Plaza Motel on the 20th of April, 1973.
>
> Q. And whose name appears thereon?
>
> Objection. Overruled.
>
> A. Jodie and Jane Austin.
>
> Exception.
>
> The address is 608 State Street, Rockingham, N. C. It is the customary practice of the motel to have the guests to sign his or her (sic) before checking in. It is in handwriting.

State's exhibit 7 was introduced into evidence over the objection of the defendant.

There can be no doubt but that the registration card bearing the purported signature of the defendant was highly prejudicial to the defendant. It was the only evidence other than the testimony of the daughter directly bearing on whether or not the defendant had committed the acts in question. The only question before us, therefore, is whether or not the introduction of this registration card into evidence was erroneous.

The defendant cites the case of *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971), in support of his position that the document was inadmissible unless the signature was shown to be his signature. In the Vestal case several paper writings were admitted into evidence over the objection of the defendant. These paper writings were a financing statement, a chattel mortgage, a note, and a check. A signature purported to be of the defendant was on each of the documents. The court held that introduction of these documents was erroneous without handwriting testimony or other testimony showing that the signature on them was actually that of the defendant. The State in its brief candidly admits that it is unable to distinguish the ruling in the Vestal case from the facts in the instant case. I agree that the admission was erroneous and believe that it was also highly prejudicial.

The majority opinion further states that the admission of the registration card was only for the purpose of corroborating the testimony of Jane Austin. However, no mention of corroboration was made either at the time of its introduction or in the subsequent charge of the jury. Without any restrictions imposed by the trial court, the jury most likely considered the document as substantive evidence. Regardless of the purpose, however, its introduction was erroneous and highly prejudicial to the defendant. I believe that a new trial should be awarded.

R. E. UPTEGRAFF MANUFACTURING COMPANY v. INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO LOCAL UNION NO. 189 AND JOHN COLLIER, DAVID PEPPER, FRED HAISLIP, JOSEPH EVANS, CHARLIE NORWOOD, MELVIN HARRIS, AND PAUL BOBBITT, JR., AND DAVID BARROW, AND JOE WILLIAMS

No. 736DC750

(Filed 6 February 1974)

1. **Judgments § 9— consent judgment — signature of parties — oral consent**

A consent judgment need not be signed by the parties in order to become effective since the parties may give their consent orally.

2. **Judgments § 9; Injunctions § 4; Rules of Civil Procedure § 65— consent restraining order — reasons for issuance**

When a restraining order provides that it is issued by consent of the parties, it sufficiently sets forth the reason for its issuance within the purview of G.S. 1A-1, Rule 65(d).

3. **Judgments § 21— consent restraining order — failure to set forth reasons for issuance — void or irregular**

Even if a consent order restraining picketing failed to set forth the reasons for its issuance as required by G.S. 1A-1, Rule 65(d), defendants would have been bound by the consent order since it would not have been void but only irregular.

4. **Rules of Civil Procedure § 65— inapplicability of Rule 65(d) to contempt orders**

Rule 65(d) applies only to injunctions and restraining orders and not to contempt orders.

APPEAL by defendants from *Maddrey, Judge,* 23 August 1973 Session of District Court held in HALIFAX County.

Plaintiff operates a manufacturing plant in Halifax County. The individual defendants, except for Joe Williams, are employees of plaintiff and members of defendant International Union of Electrical, Radio, and Machine Workers, AFL-CIO Local Union No. 189 (hereinafter referred to as the Union). In 1973 the Union called a strike, and its members left work and began to picket plaintiff's plant. Defendant Joe Williams, an AFL-CIO representative, assisted the striking employees.

On 23 February 1973 plaintiff filed a complaint before Judge Maddrey of the Halifax County District Court, alleging that defendants had picketed plaintiff's plant in large numbers so as to intimidate the non-striking employees and others conducting business with the plant, had threatened the non-striking employees, and had engaged in specific acts of violence and vandalism which were set out in detail. On the same day Judge Maddrey issued a temporary restraining order limiting the number of persons who could picket plaintiff's plant, restricting the places where they could engage in picketing, and forbidding violent conduct or threats of violence. Defendants were directed to appear in District Court on March 2 and show cause why the order should not be made permanent.

Defendants failed to appear in District Court on March 2, mistakenly believing that court had been canceled for that day. On March 3 Judge Maddrey issued an order continuing the February 23 order in force until modified by some future order.

Between March 3 and March 15 defendants filed a motion to set aside the February 23 and March 3 orders, and plaintiff moved to hold certain defendants in contempt for violating the February 23 order. A hearing was held on these motions on

March 15. At the hearing, the parties withdrew their motions and agreed on the terms of a consent order. This order was not actually signed by the parties to indicate their consent, but it was signed by Judge Maddrey and provided in part as follows:

> "This cause came on for hearing . . . pursuant to a show-cause order heretofore issued by the Court . . . [and] before the Court heard any evidence, defendants filed an answer, motion to be allowed to present evidence in opposition to the order heretofore entered, and a motion to dismiss the orders heretofore entered for the reasons as set forth in said motion; that the parties through their attorneys conferred and agreed that in consideration of the entry of this order by consent that all prior motions and orders herein entered shall be superseded by this order including plaintiff's motion that certain of said defendants be held in contempt of Court.
>
> "NOW, THEREFORE, by consent it is ordered, adjudged and decreed as follows:
>
> "1. That all prior orders heretofore entered herein are superseded by this order in consideration of which plaintiff withdraws its motion that certain defendants be held in contempt of Court."

The order imposed restrictions on the number and location of pickets at plaintiff's plant in terms very similar to those of the restraining order issued on February 23. Like the February 23 order, it prohibited violent or threatening conduct. It did not allow defendants to picket on public streets or highways. This order will hereinafter be referred to as the "first consent order."

After March 15, defendants became dissatisfied with the first consent order, and they prepared a new order, which was identical to the first one except that it permitted picketing on public streets and highways. They submitted it to Judge Maddrey, and he signed it. Defendants also signed this order, which will hereinafter be referred to as the "second consent order," but plaintiffs refused to sign it, contending that the first consent order was still binding.

On May 11 Judge Maddrey issued an order designed to clear up the confusion as to which of the two consent orders was actually in effect. He held that the first consent order was valid and binding and had been in full effect ever since March

15; that it was consistent with the agreement reached by the parties at the March 15 hearing; that the parties had consented to it although they did not sign; and that the second consent order would be set aside.

On May 11 Judge Maddrey also issued an order holding defendant David Barrow in contempt of court for violating the first consent order by kicking a dent in the automobile of a non-striking employee and attempting to prevent him from entering plaintiff's premises. Barrow was given a suspended sentence.

On June 4 Judge Maddrey issued an order holding defendants Paul Bobbitt, Jr., and Ronald Wood in contempt for violating the first consent order by assaulting a non-striking employee. Bobbitt and Wood were given thirty-day jail sentences, which were suspended on condition that they pay a fine and not violate the consent order in the future.

On August 23 Judge Maddrey issued another order, holding defendants Paul Bobbitt, Jr., Ronald Wood, Larry Pepper, Melvin Harris, John Collier and the Union in contempt for various violent acts. Pepper, Harris and Collier were given suspended sentences, and the Union was fined. The court activated the suspended sentences received by Bobbitt and Wood on June 4, and imposed an additional sentence of sixty days on Bobbitt and ninety days on Wood.

All defendants have appealed to this Court.

Allsbrook, Benton, Knott, Allsbrook & Cranford, by J. E. Knott, Jr., for plaintiff appellee.

Hubert H. Senter for defendant appellants.

BALEY, Judge.

Defendants have excepted to all of Judge Maddrey's orders and assert that all of them are invalid. They attack the consent order of March 15 on two grounds. First, they contend that it was not in fact based on the consent of the parties; and second, they argue that it violated Rule 65(d) of the Rules of Civil Procedure.

[1] Clearly a consent order cannot be valid unless the parties actually consent to it. "The power of the court to sign a consent judgment depends upon the unqualified consent of the parties

thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment." *King v. King,* 225 N.C. 639, 641, 35 S.E. 2d 893, 895; *accord, Overton v. Overton,* 259 N.C. 31, 129 S.E. 2d 593; *Highway Comm. v. Rowson,* 5 N.C. App. 629, 169 S.E. 2d 132. Defendants argue that since the parties never signed the first consent order, they did not consent to it; and likewise, since plaintiff did not sign the second consent order, it did not consent to that order. However, a consent judgment need not be signed by the parties in order to become effective. *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826. The parties may give their consent orally. *Perley v. Bailey,* 89 N.H. 359, 199 A. 570 (1938); *Schoren v. Schoren,* 110 Ore. 272, 290-91, 222 P. 1096, 1097 (1924); *see Westhall v. Hoyle,* 141 N.C. 337, 53 S.E. 863. In this case Judge Maddrey found as a fact that at the hearing on March 15 the parties had consented orally to the provisions of the first consent order. A litigant who has consented to an order may withdraw his consent at any time before the order is signed and entered, *Lee v. Rhodes,* 227 N.C. 240, 41 S.E. 2d 747, but here the record shows that defendants gave no indication of their dissatisfaction with the first consent order until March 30, fifteen days after the order was signed. Even at that time they signified their previous consent by signing a second consent order which did not significantly change the first order. Defendants' contention that the order of March 15 is void for want of consent cannot be sustained.

[2] Rule 65(d) of the North Carolina Rules of Civil Procedure provides: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance . . . . " Judge Maddrey's order of March 15 states only that it was issued by consent of the parties, and defendants question whether this is a sufficient statement of reasons. It would appear that the order does comply sufficiently with Rule 65(d). A consent order is based solely on the consent of the parties, and not on any determination of facts or application of legal principles by the judge. In fact, a consent order is generally referred to as a contract between the parties, entered on the records with the approval of the court. *Layton v. Layton,* 263 N.C. 453, 139 S.E. 2d 732; *Stanley v. Cox, supra; Highway Comm. v. Rowson, supra.* When an order provides that it is issued by consent of the parties, it correctly sets forth the reason for its issuance.

[3] Even if Judge Maddrey's statement of reasons had been insufficient under Rule 65(d) defendants would still have been

bound by the consent order, because it would not have been void but only irregular. An order is void only when it is issued by a court that does not have jurisdiction (or, in the case of a consent order, when it is issued without the parties' consent). *Lumber Co. v. West,* 247 N.C. 699, 102 S.E. 2d 248; *Travis v. Johnston,* 244 N.C. 713, 95 S.E. 2d 94; *Bass v. Moore,* 229 N.C. 211, 49 S.E. 2d 391. An order issued "contrary to the method of practice and procedure established by law" is classified as irregular. *Collins v. Highway Commission,* 237 N.C. 277, 284, 74 S.E. 2d 709, 715; *accord, Pruitt v. Taylor,* 247 N.C. 380, 100 S.E. 2d 841. A void order is a nullity, binding on no one, and may freely be ignored. *Lumber Co. v. West, supra; Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460. But an irregular order stands as the judgment of the court and is binding on the parties until it is corrected. *Lumber Co. v. West, supra; Collins v. Highway Commission, supra.* If the consent order had been irregular, defendants would still have been required to obey it, and they could have been held in contempt for violating it.

[4] Defendants contend that the court violated Rule 65(d) in issuing the orders of May 11, June 4 and August 23. This contention is without merit, because Rule 65(d) applies only to injunctions and restraining orders. One of the May 11 orders was a contempt order, and the other confirmed the validity of the first consent order. The orders of June 4 and August 23 were contempt orders. None of these orders came within the scope of Rule 65(d). Defendants also assert that the orders of May 11, June 4 and August 23 were contingent upon a prior void order, the consent order of March 15; but since the consent order was valid, this argument is untenable.

It is not necessary for this Court to consider whether any error was committed in the orders of February 23 and March 3. These two orders were superseded by the March 15 consent order and are no longer in effect. Defendants' contempt sentences were imposed for violation of the March 15 order. If the February 23 and March 3 orders were in any way improper, the error was not prejudicial to defendants.

This case involves conduct of defendants over a period of several months with intermittent court appearances. The restraining order of the trial court was clear, and the evidence of its violation was specific, detailed, and well-documented. By its various suspended judgments in the face of such contumacious conduct, the court demonstrated a patient and conciliatory

attitude toward the defendants, but respect for the law must be maintained. The judgments of Judge Maddrey holding defendants in contempt of court and imposing appropriate sentences and fines are affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

ROBERT EARL NOLAN v. MARIE CLAUDE BIET NOLAN

No. 7421DC45

(Filed 6 February 1974)

1. **Divorce and Alimony § 23— child over eighteen — increase in child support — error**

Trial court exceeded its authority in entering an order increasing the amount of child support due from plaintiff with respect to two children of the parties since those children were nineteen and twenty-one years of age and there was no showing that the children were insolvent, unmarried and physically or mentally incapable of earning a livelihood. G.S. 50-13.8.

2. **Divorce and Alimony § 23— decrease in child's needs — increase in child support — error**

In fixing the amount of child support payments, the court must consider both the earnings of the father and the needs of the children; therefore, the trial court erred in increasing the amount of child support for a minor child of the parties where the evidence showed that the father's income had increased but indicated that the child's needs had decreased.

3. **Costs § 3; Divorce and Alimony § 23— order increasing child support — award of attorney fees error**

Where defendant sought an order increasing alimony and child support, the trial court erred in awarding defendant's counsel attorney's fees of $1000 where the trial court failed to make a finding of fact with respect to the wife's ability to defray the expense of the suit as required by G.S. 50-13.6.

APPEAL by plaintiff from *Henderson, Judge,* 11 June 1973 Session of District Court held in FORSYTH County.

This is a civil action wherein plaintiff, Robert Earl Nolan, sought and obtained an absolute divorce from defendant, Marie Claude Biet Nolan, on 7 September 1971 in the District Court

of Forsyth County. The present proceeding was heard on a motion filed in the cause by defendant on 4 May 1973 and in this motion the defendant requested that an order be entered requiring the plaintiff to pay increased alimony to the defendant and increased support for the three children still receiving support under a deed of separation entered into between plaintiff and defendant on 16 September 1969.

Both plaintiff and defendant offered evidence at the completion of which the trial judge made the following relevant findings of fact which are summarized below except where quoted.

Plaintiff and defendant were married in France in 1947 and lived together until 1969, at which time they separated by mutual consent. Four children were born of the marriage between plaintiff and defendant: Carolyn Ann Nolan, born May 17, 1949; Patrick Biet Nolan, born August 28, 1951; Michelle Alice Nolan, born May 18, 1954; and Robert Eric Nolan, born January 11, 1956. On 16 September 1969 plaintiff and defendant entered into a deed of separation, the terms of which required plaintiff to pay defendant permanent alimony in the sum of $1,000.00 per month and child support for each of the four children named above in the amount of $275.00 per month.

The increased child support payments being sought by defendant are predicated upon paragraph 8 of the deed of separation which reads as follows:

> "The provisions of this agreement, as they relate to alimony and child support and education shall be subject to modification on account of change of condition arising subsequent to the execution of this agreement to the same extent and in the same manner as though such amounts had been determined by a court of competent jurisdiction without the consent of either party."

The court found that a substantial change of condition had occurred as to the children in that:

> "(a) There has been substantial increase in living costs generally, due to the decline in purchasing power of the dollar.
>
> (b) There has been substantial increase in the living costs of defendant and of the children.

(c) There has been increase in educational expenses necessarily incurred for the education and maintenance of the children.

(d) There has been substantial increase in plaintiff's earnings.

(e) There has been substantial decrease in the amount of support plaintiff is obligated to pay, due to the fact that the oldest child, Carolyn Ann Nolan, is no longer dependent."

Based on these changes of conditions the court determined that the amount of support presently paid the three children still eligible for payments under the terms of the agreement, while adequate at the time of the execution of the deed of separation, is no longer sufficient to meet their reasonable financial requirements. The court also found that the evidence failed to disclose that the sum presently being paid as permanent alimony to defendant is insufficient.

Based on the foregoing findings of fact, the court ordered (1) that defendant's motion for an order requiring plaintiff to pay increased permanent alimony be denied; (2) that the child support payments for the three children still entitled to receive such under the deed of separation be increased to $350.00 per month per child; (3) that plaintiff pay to defendant's attorney the sum of $1,000.00 "for services rendered to defendant on behalf of the three younger children above named."

The plaintiff appealed from this Order.

Hudson, Petree, Stockton, Stockton & Robinson by W. F. Maready, James H. Kelly, Jr., W. A. Holland, Jr., for plaintiff appellant.

Randolph and Randolph by Clyde C. Randolph, Jr., for defendant appellee.

HEDRICK, Judge.

[1] In his initial assignment of error the plaintiff contends that the trial court erred in its determination that the two children of plaintiff who were over the age of eighteen were entitled to increased child support payments. The fact that the parties have entered into a separation agreement providing for support payments does not deprive the courts of their inherent as well as

statutory authority to protect the interests and provide for the welfare of *minors*. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963); *Story v. Story*, 221 N.C. 114, 19 S.E. 2d 136 (1942). See also, Lee, North Carolina Family Law, Vol. 2, § 152, pp. 224-5 (1963). Since the enactment of G.S. 48A in 1971, the decisions of this Court and the Supreme Court have concluded that the father's legal obligation to support his child ceases when the child reaches the age of eighteen, *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E. 2d 299 (1972); *Taylor v. Taylor*, 17 N.C. App. 720, 195 S.E. 2d 355 (1973), provided that it is not shown that the child is insolvent, unmarried, *and* physically or mentally incapable of earning a livelihood. *Crouch v. Crouch*, 14 N.C. App. 49, 187 S.E. 2d 348 (1972), cert. denied 281 N.C. 314 (1972); *Choate v. Choate*, 15 N.C. App. 89, 189 S.E. 2d 647 (1972); G.S. 50-13.8. In the case at hand, two of the children involved, being nineteen and twenty-one years of age respectively, have passed their minority, and this fact coupled with the failure to show that the children are insolvent, unmarried, *and* physically or mentally incapable of earning a livelihood terminates the inherent authority of the courts to consider the children as wards of the court. Thus, the trial judge exceeded his authority as to these two children and the order entered requiring increased payments for them must be reversed.

Having determined that the courts have the inherent authority to provide for the welfare of minor children, we must next investigate the correctness of that portion of the trial court's order which required an increase in the amount of support payments to the minor child Robert Eric Nolan (Eric). Plaintiff contends that such increase was incorrectly ordered. The order awarding increased child support payments must be examined in light of the following statement of Denny, C. J., in *Fuchs v. Fuchs*, *supra*, at p. 639.

> "[W]here parties to a separation agreement agree upon the amount for 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. We further hold that the court upon motion for an increase in such allowance, is not warranted in ordering an increase in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase is awarded solely on the ground

that the father's income has increased; therefore, he is able to pay a larger amount."

[2] The only evidence presented in this case relative to "a change in conditions or of needs" as to the minor child Eric indicates that the needs of this child have decreased. At the time the parties signed the separation agreement, Eric was enrolled in a private school; and the cost of his tuition, room, and board was $242.00 per month. Presently this child attends public school in Winston-Salem and his only expenses introduced into evidence were $30.00 for lunches at school and $20.00 for drum lessons. This evidence does not support the trial court's finding of fact that there had been a change of conditions as to the minor child Eric and the absence of such a finding of fact necessitates that the increased support ordered be reversed because in fixing the amount of child support payments the court must consider *both* the earnings of the father and the change of conditions and needs of the children. *Fuchs v. Fuchs, supra; Calhoun v. Calhoun,* 7 N.C. App. 509, 172 S.E. 2d 894 (1970). Although the parties do not dispute the finding of fact that the father's income has increased, this factor alone is not sufficient to order an increase in child support payments. *Fuchs v. Fuchs, supra.*

[3] Finally, plaintiff contends that the trial court erred in awarding attorney's fees of $1,000.00 to the defendant's counsel. We agree with this contention. G.S. 50-13.6 in pertinent part provides:

> "In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith *who has insufficient means to defray the expense of the suit.*"

The trial court having failed to make a finding of fact with respect to the wife's ability to defray the expense of this suit as required by G.S. 50-13.6, we hold that the court abused its discretion in ordering plaintiff to pay attorney's fees. Moreover, if the court had made a finding of fact that the wife was unable to defray the expense of this suit, this finding would not have been supported by the uncontroverted evidence as such evidence revealed that the wife receives $1,825.00 per month for alimony and child support. Furthermore, the trial court's award of attorney's fees was improper for reasons already discussed in this

opinion, *viz.* the lack of authority of the trial court to enter an order as to the two children over eighteen and the failure of the trial court to make adequate findings of fact to support the order entered as to increased support payments for the minor child. *Taylor v. Taylor, supra.* Therefore, under the circumstances of this case, it was error for the court to order the plaintiff to pay $1,000.00 to defendant's counsel.

For the reasons stated those portions of the order dated 16 July 1973 requiring plaintiff to pay defendant increased child support for Patrick, Michelle, and Eric and an attorney's fee of $1,000.00 are

Reversed.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. DOROTHY P. SNEED

No. 7321SC793

(Filed 6 February 1974)

1. **Criminal Law § 169— evidence of threats made to co-conspirator — no connection with defendant — harmless error**

In a prosecution for conspiracy to commit safecracking, re-direct examination of a co-conspirator with respect to threats he received while in prison, though improper since there was no connection made between defendant and the threats, was not so prejudicial to defendant as to require a new trial.

2. **Criminal Law § 169— statements by co-conspirator to police — admission harmless error**

Even if the trial court erred in allowing a co-conspirator to testify that he had given statements to the police concerning his participation in other crimes and some of the statements did not involve defendant, such error was not prejudicial to defendant.

APPEAL by defendant from *Wood, Judge,* 7 May 1973 Session of FORSYTH County Superior Court.

The defendant, Dorothy P. Sneed (Sneed), was charged with two separate bills of indictment alleging conspiracy to commit safecracking and being an accessory before the fact to the felony of safecracking. The cases were consolidated, and

pleas of not guilty were entered. The jury returned a verdict of guilty as to each offense. From an active sentence pronounced thereon, the defendant gave notice of appeal.

The State's evidence showed that on 6 June 1971 the door to the warehouse of Tuttle Lumber Company had been forced open and that another door between the warehouse and the showroom had likewise been forced open. A safe was located in the showroom, and the door had been blown off the safe by means of some explosive. A considerable amount of debis was scattered about, and the immediate area around the safe was in shambles. Approximately three hundred dollars had been taken from the safe.

The co-conspirators—Darrell Eugene Hicks (Hicks) and Marvin David Pennell (Pennell)—testified at the trial. Pennell testified that he was serving a sentence for safecracking. He further testified that he had known the defendant for four years. He stated that he and Hicks were at Sneed's house the morning of the crime and were given some walkie-talkies to use in the safecracking at Tuttle Lumber Company. The plans were made in Sneed's bedroom between Sneed, Pennell, and Hicks. The dynamite was wired and taped with tape Sneed got from the kitchen. Sneed agreed to park her car in a parking lot in front of Tuttle Lumber Company and report on the walkie-talkie if police were patrolling the street. They spent about an hour planning and preparing for the crime.

Sneed left first, followed by Hicks and Pennell. They stopped behind a nearby barn and could see Sneed parked across the street from the lumber company. They attempted to call her on the walkie-talkie but could only hear static. They proceeded to break and enter the building and prepared for the explosion. They checked several times from the window and Sneed was still there. She drove away before the explosion, but Hicks and Pennell continued as planned. They used a hammer and knocked the handle off the safe, leaving a hole an inch deep. They packed the hole with dynamite and wired the cap. They ignited the dynamite, and the safe door was blown open. Some of Sneed's friends had shown Hicks how to use dynamite. The money from the safe was divided between the three participants. Sneed was given one hundred dollars.

On cross-examination Pennell testified that he had committed other offenses and had other indictments pending. He

stated that no law enforcement officer had made any promise nor had the solicitor promised to *nol pros* or assist in the other cases. He stated that the solicitor had said he would try to help out with the prison conditions.

On re-direct examination, the following ensued:

The Solicitor: What were your prison conditions that you were complaining to me about?

Pennell: Well, problems I was having, and so forth, all different problems and everything.

The Solicitor: Well, David, I want you to tell His Honor and the gentlemen of the jury exactly what you told me your problems were out there.

Pennell: Well, I had a couple of threats about Dot Sneed.

Defense Counsel: Objection, Your Honor.

The Court: Overruled. You asked him about it.

The Solicitor: Go ahead.

Pennell: I had a couple of threats about Dot Sneed.

The Solicitor: What about? About testifying?

Pennell: Yes sir. And one, this man knowed (sic) her, and he threatened me. I don't know if Dot put him up to it or what. I think she did but I couldn't say because I don't know.

Darrell Eugene Hicks (Hicks), the other conspirator, testified substantially the same as Pennell. He testified that he and Pennell stole the dynamite from a construction site and took it to Sneed's house to keep. His account of the robbery and the defendant's participation did not differ from that of Pennell. He also testified that he had given statements to the police of other crimes in which he was involved and that some of them did not include Dot Sneed.

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

Henry C. Frenck for the defendant.

CARSON, Judge.

[1] The defendant's first assignment of error relates to the re-direct examination of the co-conspirator Pennell and his testimony concerning the threats he received. Re-direct examination may be used to remove any obscurity or uncertainty adduced by the cross-examination. *Highway Comm. v. Yarborough,* 6 N.C. App. 294, 170 S.E. 2d 159 (1969) ; 1 Stansbury, N. C. Evidence (Brandis Revision), § 36. However, in the instant case, it appears to go beyond merely explaining the facts elicited on cross-examination. The matters concerning the threats would have been improper on direct examination since there was no connection shown with the defendant. *State v. Brantley,* 84 N.C. 766 (1881) ; 1 Stansbury, N. C. Evidence (Brandis Revision), §§ 77 & 78. The witness' reference to prison conditions did not remove the incompetence of the testimony concerning the threats. However, the defendant also has the burden of showing the objectionable matter to be prejudicial. *State v. Brown,* 271 N.C. 250, 156 S.E. 2d 272 (1967) ; *State v. Bailey,* 12 N.C. App. 280, 182 S.E. 2d 881 (1971). Here there was detailed testimony from the two co-conspirators concerning the defendant's participation. It is most unlikely that the existence of the threats would make the testimony of the witnesses any more or less believable. While the admission of the threats may have been erroneous, we hold that any error was harmless considering all the testimony.

[2] The defendant also contends that error was committed by allowing the co-conspirator Hicks to testify that he had given statements to the police concerning his participation in other crimes and that some of these statements did not involve Sneed. Again, considering the testimony as a whole, it is difficult to perceive how this would be prejudicial even if erroneous. Not only must the defendant show error to warrant a new trial; he must also show the error to be prejudicial to the defendant and that a different result would likely have ensued except for the error. *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364 (1963). If there is no reasonable possibility that the error complained of might have contributed to the conviction, the error will be held harmless. *State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516 (1973) ; *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972).

In the instant case there is an abundance of evidence to sustain the conviction. The jury clearly believed the testimony

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

No error.

Chief Judge BROCK and Judge MORRIS concur.

GEORGE GIFFEN SEARCY, BY HIS GUARDIAN AD LITEM, GREGORY W. SCHIRO v. GEORGE GIFFEN JUSTICE
— AND —
ANNETTE SEARCY LEVI v. GEORGE GIFFEN JUSTICE

No. 7421DC31

(Filed 6 February 1974)

1. **Bastards § 10.5— action to establish paternity — instructions — period of gestation**

The trial court in an action to establish paternity brought pursuant to G.S. 49-14 erred in charging the jury that the person who had intercourse with plaintiff ten lunar months before the birth of her child would be the father of her child since the court ignored the possibility of a premature birth or an unusually long pregnancy; furthermore, the court expressed an opinion on the evidence in relating such erroneous statement to the testimony of the plaintiff.

2. **Bastards § 10.5; Trial § 36— action to establish paternity — charge on reasonable doubt — expression of opinion**

The trial judge in a paternity action expressed an opinion on the evidence in his charge on reasonable doubt when he instructed the jury that it should not go outside the evidence to imagine doubt to render a verdict in favor of defendant without also instructing the jury that it could not render a verdict for plaintiff on mere surmise or conjecture.

3. **Bastards § 10.5; Trial § 36— action to establish paternity — character of the parties — expression of opinion in the charge**

The trial judge in a paternity action expressed an opinion on the evidence in instructing the jury that defendant could be the father of plaintiff's child even if plaintiff were of bad character and defendant were of good character without also instructing the jury that someone other than defendant could be the father even if plaintiff were of good character and defendant's character were bad. G.S. 1A-1, Rule 51(a).

4. **Bastards § 10.5; Trial § 36— action to establish paternity — instructions arousing sympathy for plaintiff — expression of opinion**

The trial court in a paternity action expressed an opinion on the evidence in instructing the jurors that if they found defendant to be

the father of plaintiff's child, plaintiff could be awarded payments for support of the child, whereas if they returned a verdict for defendant, plaintiff would be entitled to nothing, since the instructions tended to arouse sympathy for plaintiff and to encourage the jurors to reach a verdict for plaintiff because of their belief that someone should be responsible for support of the child.

5. **Bastards § 10.5; Trial § 36— unequal stress to plaintiff's evidence**

The trial judge in a paternity action expresseed an opinion on the evidence when he discussed plaintiff's evidence carefully and at length but used only two sentences in summarizing defendant's evidence where each party offered approximately the same amount of testimony.

6. **Criminal Law § 70; Evidence § 27— tape recordings**

Tape recordings, if audible and properly authenticated, may be used as substantive evidence.

7. **Criminal Law § 70; Evidence § 27— tape recordings**

Whether a tape recording is sufficiently audible to be admitted in evidence is largely a matter for the discretion of the trial court.

8. **Criminal Law § 70; Evidence § 27— tape recordings**

A tape recording should not be excluded merely because parts of it are inaudible if there are other parts than can be heard; nor should a tape be excluded on the ground that it cannot be heard by all twelve jurors at the same time since the court should have the jurors take turns sitting next to the machine and play the tape over again until all have heard it.

APPEAL by defendant from *Henderson, Judge,* 4 June 1973 Session of District Court held in FORSYTH County.

Plaintiff Annette Searcy Levi brought this action under G.S. 49-14 and 49-15 to establish the paternity of her illegitimate son, George Giffen Searcy, and to obtain support payments. Her eight-year-old son acting through a guardian ad litem brought a similar action, and the two cases were consolidated for trial.

Plaintiff offered evidence that her son was born on August 26, 1964, and that she did not have sexual intercourse with anyone other than defendant from October 1963 until 1970. Defendant's evidence tended to show that plaintiff had sexual relations with five other men during the latter part of 1963.

Defendant offered in evidence a tape recording of a conversation between himself and plaintiff in which plaintiff is alleged to have admitted that she had intercourse with five men besides defendant during the last three months of 1963. The court refused to admit the tape recording into evidence.

Each of the parties presented evidence tending to show that his own character was good and that the character of the other party was bad.

The jury found that defendant was the father of George Giffen Searcy. From judgment declaring defendant the father of George Giffen Searcy and awarding support payments, defendant appealed.

Randolph & Randolph, by Clyde C. Randolph, Jr., for plaintiff appellees.

Francis M. Coiner and Arthur J. Redden for defendant appellant.

BALEY, Judge.

Defendant contends that the trial court on several occasions violated Rule 51(a) of the North Carolina Rules of Civil Procedure by expressing an opinion in his instructions to the jury. Defendant also assigns as error the failure of the court to admit in evidence the tape-recorded conversation between himself and plaintiff. Defendant's assignments of error relating to the charge are well founded and entitle him to a new trial, and thus it is unnecessary for this Court to decide whether the tape recording was properly excluded.

Under Rule 51(a) the trial judge may not express an opinion, either directly or by implication, in favor of any party at any stage of the trial. *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221; *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481; *Worrell v. Credit Union,* 12 N.C. App. 275, 182 S.E. 2d 874. "The trial judge occupies an exalted position. Juries entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a result, he must abstain from conduct or language which tends to discredit or prejudice [any party] or his cause with the jury." *State v. Carter,* 233 N.C. 581, 583, 65 S.E. 2d 9, 10.

[1] The court's charge to the jury included the following instruction: "The person who had intercourse with the plaintiff, Annette Searcy Levi ten lunar months before August the 26, 1964 biologically would be the father of this child." This statement is innaccurate, because the term of pregnancy is not always exactly ten lunar months; in some cases it may be substantially

longer or shorter. "There is neither medical nor legal agreement as to the period of gestation in human beings. The period is apparently not the same for all women, varying even in the different pregnancies of the same woman." 3 Lee, N. C. Family Law, § 250, at 191-92; *see Byerly v. Tolbert,* 250 N.C. 27, 108 S.E. 2d 29; *cf. State v. Key,* 248 N.C. 246, 102 S.E. 2d 844. In flatly asserting that the person who had intercourse with plaintiff ten lunar months before the birth of her child would be the father of her child, the court ignored the possibility of a premature birth or an unusually long pregnancy.

But what is far more prejudicial, the court then related this improper statement to the testimony of plaintiff by charging:

> "Now she testified that she dated the defendant from August 1963 until October 1970, that she neither dated nor had intercourse with any other man during that time, as the Court remembers her testimony. The defendant, on the other hand says that she told him of five men that she had had intercourse with during this interim we're talking about. Now as the Court recalls, no person who has gone upon the stand has testified that any person had intercourse with the plaintiff ten lunar months before the birth of this child on August the 26, 1964. The plaintiff contending that she had intercourse with the defendant, all along and had intercourse with no one else and that the defendant, therefore, was father of the child."

The implication is inescapable that in the opinion of the court more weight should be attached to the testimony of plaintiff than to the evidence submitted by defendant.

[2] An additional violation of Rule 51(a) involved the court's charge on reasonable doubt. G.S. 49-14 provides that in a civil action to establish paternity, proof of paternity must be beyond a reasonable doubt. The trial court defined reasonable doubt in the following manner:

> "The Supreme Court of North Carolina, in a case filed on the eleventh day of April, 1973, a recent case, has attempted to again define reasonable doubt. The Court says this: The phrase reasonable doubt means just what the words imply. It is a doubt based upon reason arising from a thorough and impartial consideration of all of the evidence in the case or lack of evidence as the case may be.

> "This, of course, is a criminal case in which reasonable doubt is being defined. It says this: Neither should you go outside the evidence to imagine doubt to justify an acquittal.
>
> "The Court would instruct you that you shouldn't go outside of the evidence in this case to imagine doubt to render a verdict in favor of the defendant and against the plaintiff."

The case to which the court was referring was *State v. Mabery*, 283 N.C. 254, 195 S.E. 2d 304. In that case the Supreme Court approved an instruction on reasonable doubt containing the following sentence: "While you cannot convict the defendant on mere surmise or conjecture, neither should you go outside the evidence to imagine doubt to justify an acquittal." The first part of this sentence is favorable to the defendant; the last part is favorable to the State, or in a paternity case, to the plaintiff. The trial judge in the present case quoted the last part of the sentence, but he ignored the first part. As a result, his instruction on reasonable doubt was unduly weighted in favor of plaintiff.

[3] The instruction on character evidence was similarly unbalanced. On this subject the court charged as follows:

> "Character evidence as the Court understands it, goes to the veracity of the person testifying in a case. Certainly because a man has a good character would not be substantive evidence on which this issue might be answered. Since that question has come up, I will say this: if, indeed the plaintiff, Annette Searcy Levi is a person of bad character does not mean that the defendant, if you find him to be a person of good character could not father her a baby which was born on August 26, 1964."

The court did not instruct the jury that someone other than defendant could have been the father of plaintiff's child even if plaintiff were of good character and defendant's character were bad. Instead of being a neutral statement of the law, the instruction was entirely favorable to plaintiff. A juror listening to it could easily have concluded that the court felt that defendant's character evidence was irrelevant and unimportant and should be ignored.

[4] Another violation of Rule 51(a) occurred in the court's instructions on the results that would follow from the jury's

verdict. The judge discussed this subject extensively and pointed out to the jurors that if they found defendant to be the father of plaintiff's child, plaintiff could be awarded payments for the support of the child, whereas if they returned a verdict for defendant, plaintiff would be entitled to nothing. The instructions were worded in such a way as to arouse sympathy for plaintiff and encourage the jurors to reach a verdict for plaintiff because of their belief that someone should be responsible for the support of the child. This is not an appropriate basis for the jury's decision. In actions under G.S. 49-14, the jury decides only the factual issue of paternity, and the court decides what payments should be awarded for the support of the child. The jurors should be concerned only with the facts and evidence before them, and they should not be encouraged to speculate on matters not presented to them. *Cf. State v. Davis,* 238 N.C. 252, 77 S.E. 2d 630.

[5] Finally, Rule 51(a) requires that the judge "give equal stress to the contentions of the various parties" in recapitulating the evidence presented at the trial. He may not set forth one side's evidence fully and in detail while briefly glancing over the evidence produced by the other party. *See Key v. Welding Supplies,* 273 N.C. 609, 160 S.E. 2d 687; *Pressley v. Godfrey,* 263 N.C. 82, 138 S.E. 2d 770; *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196. In this case the judge discussed plaintiff's evidence carefully and at considerable length, but in summarizing the evidence for defendant he used only two sentences. This disparity cannot be explained, as in cases such as *State v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668, and *State v. Crutchfield,* 5 N.C. App. 586, 169 S.E. 2d 43, by the fact that defendant produced little or no evidence; here each party offered approximately the same amount of testimony. The court's failure to stress each party's evidence equally constitutes a violation of Rule 51(a).

[6-8] Since defendant must be granted a new trial, it is not necessary to decide whether the court should have admitted into evidence the tape-recorded conversation between plaintiff and defendant. However, it may be appropriate to make the following observations in order to avoid any error on retrial. Tape recordings, if audible and properly authenticated, are admissible in evidence. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561; *Hicks v. Hicks,* 271 N.C. 204, 155 S.E. 2d 799; *State v. Knight,* 261 N.C. 17, 134 S.E. 2d 101. They may be used as substantive evidence, and not merely to illustrate or corroborate the testi-

mony of a witness. *State v. Lynch, supra.* Whether a tape recording is sufficiently audible to be admitted is largely a matter for the discretion of the trial court. *Johns v. United States,* 323 F. 2d 421 (5th Cir. 1963); *Monroe v. United States,* 234 F. 2d 49 (D.C. Cir.), *cert. denied,* 352 U.S. 873 (1956); *State v. Prokopiou,* 8 Utah 2d 259, 332 P. 2d 980 (1958). However, a tape should not be excluded merely because parts of it are inaudible if there are other parts that can be heard. *United States v. Hall,* 342 F. 2d 849 (4th Cir.), *cert. denied,* 382 U.S. 812 (1965); *People v. Jackson,* 125 Cal. App. 2d 776, 271 P. 2d 196 (1954); *Gomien v. State,* 172 So. 2d 511 (Fla. App. 1965); *Lynch v. State,* 2 Md. App. 546, 236 A. 2d 45 (1967), *cert. denied,* 393 U.S. 915 (1968); *State v. Spica,* 389 S.W. 2d 35 (Mo. 1965), *cert. denied,* 383 U.S. 972 (1966). Neither should a tape be excluded on the ground that it cannot be heard by all twelve jurors at the same time, which appears to be the basis upon which it was excluded by the trial court. If the tape can be heard and understood by the jurors sitting nearest to the tape recorder, but not by all twelve, the court should simply have the jurors take turns sitting next to the machine, and play the tape over again until all have heard it. *See generally* Annot., 10 L.Ed. 2d 1169 (1963); Annot., 58 A.L.R. 2d 1024 (1958).

Because of the errors in the court's charge, there must be a

New trial.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. J. C. CASTOR

No. 7419SC178

(Filed 6 February 1974)

Homicide § 15; Criminal Law §§ 77, 168, 169— first degree murder — silence of defendant as admission — no prejudicial error

In a first degree murder prosecution the trial court erred in allowing into evidence testimony by a witness that defendant made no denial when she told an SBI agent in the presence of defendant that defendant and a third person accompanied her to the victim's home, that defendant was in the house when the shot was fired, and that they went to the house for the purpose of robbing the victim, and the court erred in instructing the jury that they could consider defendant's

silence in the face of the witness's statements as evidence of his guilt; however, defendant was not sufficiently prejudiced by the testimony and instruction to warrant a new trial. Fifth Amendment to U. S. Constitution; Art. I, § 23 of the N. C. Constitution.

ON *certiorari* to review judgment of *Collier, Judge,* entered at the 15 November 1971 Session of Superior Court held in CABARRUS County. Certiorari was allowed on 17 October 1973 and the case argued in the Court of Appeals on 23 January 1974.

By indictment, proper in form, defendant was charged with the murder of Pearl Walker (Miss Walker) on 24 June 1971. He was placed on trial for first-degree murder and pleaded not guilty.

The evidence most favorable to the State is summarized in pertinent part as follows:

Edith Crisco, as a witness for the State, testified: She was 19 at the time of the trial. She spent a large part of 24 June 1971 with defendant and Phillip Scearcy, riding around in an automobile, drinking beer, and doing other things. On the night of 24 June 1971, the three of them went to Miss Walker's home (shown by other testimony to be in a rural area of Cabarrus County). Prior to going there she had heard defendant say they were going to the Walker home to get some money. At the time they arrived at the home, defendant was armed with a sawed-off shotgun and Scearcy was armed with a rifle. They stopped the car some distance from the Walker home; defendant got out of the car and went to the home, leaving her and Scearcy in the car. She "thought" Scearcy went to the house later. After defendant left the car, she drove it up closer and parked beside the house. She heard voices in the house and heard Miss Walker say, either once or twice, "Lord, have mercy on me." Thereafter, she heard one shotgun blast and the only people in the house at that time were defendant and Miss Walker. During the time defendant was in the house he had a towel wrapped around his head, covering most of his face, and had his fingers covered with Scotch tape. After defendant emerged from the house, she (Crisco), defendant and Scearcy left and went to Gerald Stirewalt's mobile home. Later, defendant buried the shotgun.

Other testimony showed: Police officers went to the Walker home at about 11:30 a.m. on Friday (sometimes referred to as June 24 but at other times as June 25). The home is located in the country, some 43 feet west of Cox Mill Road. They found

the home completely "ransacked," with drawers pulled out of bureaus and contents scattered over the floor, the telephone wires had been cut, mattresses were thrown off the beds, carpet had been torn up, pictures on the wall had been torn loose or disarranged, and the pipe leading from an old wood burning stove in the living room had been ripped loose. Police found Miss Walker's body in a pool of blood in her living room; she was lying on the floor on her back, clothed in a thin cotton housecoat pulled up to her waist. She had a large wound in her right shoulder and neck area which a pathologist testified was caused by a shotgun and resulted in her death. Crisco made a statement to police on 8 July 1971, substantially corroborating her testimony on the witness stand. Crisco went to the scene of the crime with officers and pointed out where the car was first parked and where she later parked it. Defendant and Scearcy were arrested in Jacksonville, Florida, on or about 8 July 1971.

Brenda Leasor testified: She was acquainted with defendant and "had seen" Scearcy. On 17 June 1971, she met defendant at a party and after the party saw him at Stirewalt's trailer at which time defendant told her that "they knew where some money was and they were going to get it." She saw defendant on 25 June 1971 at Stirewalt's trailer and defendant told her "they had done the job." "As to whether he described the person he had to kill, he just said it was an old colored lady." On redirect examination, she testified that defendant related to her on that Friday night that he had shot an old Negro woman, that Scearcy had called his name and that Scearcy said he would have to shoot her or she would be able to identify them.

SBI Agent Jack Richardson testified that Brenda Leasor made a statement to him substantially the same as the testimony given by her.

Defendant did not testify but offered several witnesses whose testimony tended to show where defendant was in Cabarrus County at various hours up until 10:30 p.m. on 24 June 1971; that he and Edith Crisco were seen together early in the morning (around 3:30 or 4:00 a.m.) of 24 or 25 June 1971; and that he was seen at various places during the day of 25 June 1971.

The jury for their verdict found defendant guilty of second-degree murder and from judgment imposing prison term of 30 years, less credit for time spent in jail awaiting trial, defendant

appealed. He later withdrew his appeal but thereafter petitioned for a writ of certiorari which was allowed.

Attorney General Robert Morgan, by Assistant Attorney General Richard N. League, for the State.

Smith, Carrington, Patterson, Follin & Curtis, by J. David James and Michael K. Curtis, for defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends the trial court erred in failing to quash the bill of indictment upon which defendant was tried for the reason that the indictment does not indicate that it was returned as a true bill. We find no merit in this assignment as the indictment clearly discloses that it was returned as a true bill.

By his second and third assignments of error, defendant contends the trial court erred (1) in allowing into evidence certain statements allegedly made by Edith Crisco in the presence of defendant and defendant's response thereto, and (2) instructing the jury that they could consider defendant's silence in the face of the statements as evidence of his guilt. The assignments have merit.

The challenged testimony was given by SBI Agent Barrier. He testified, among other things, that he talked with Edith Crisco on the night she was arrested, 1 July 1971, and again on 8 July 1971; that the latter conversation took place in the presence of defendant; that on that occasion, in response to questions from Barrier, she stated that defendant and Scearcy accompanied her to the Walker home, that defendant was in the house when the shot was fired, and that they went to Miss Walker's house "for the purpose of robbing the old woman." The solicitor then asked Barrier if defendant made any denial and Barrier's answer was that defendant did not. Defendant's motion to strike Barrier's answer that defendant made no denial was overruled.

The challenged instruction to the jury was as follows:

> "Evidence had been received which tends to show that a statement accusing the defendant of the crime charged in this case was made in his presence and the defendant neither denied or objected to the statement. This evidence should be considered by you with great caution before you may consider the defendant's silence on this as evidence of

his guilt, you must find first that the defendant—that the statement was in fact made in the hearing of the defendant, second, that he understood it and that it contained an accusation against him and third, that all the circumstances including the content of the statement and the identity of the person making it in the other person's presence was sufficient to make a reply natural and proper and fourth, that the defendant had an opportunity to reply. Unless you find all these things to be present you must completely disregard this evidence. If you consider the defendant's silence together with all other facts and circumstances in this case in determining the defendant's guilt or innocence."

Defendant contends the challenged testimony and instruction violated his right to remain silent as guaranteed by the Fifth Amendment to the Federal Constitution and by § 23 of Article I of the State Constitution. This contention is supported by decisions of the U. S. Supreme Court and our State Supreme Court and the current rule appears to be stated accurately in 2 Stansbury's N. C. Evidence § 179, at 53-54 (Brandis rev. 1973), as follows:

"It was formerly a general rule that silence might amount to an admission though the party (usually, of course, a *criminal* defendant) was in custody under a charge of crime, and though the person making the statement was incompetent to testify as an adverse witness; but in some custodial circumstances no reply was required and, therefore, the evidence was inadmissible. More recently, relying upon then section 11 (now section 23) of Article I of the North Carolina Constitution and upon a decision of the Supreme Court of the United States, our Court held that officers questioning an accused must advise him of his right to remain silent. If such a warning is given, it is obvious that his silence may not be used against him. If no warning is given, and the circumstances would be such as to make a confession inadmissible, evidence as to silence also seems to be inadmissible. Therefore, whenever an accused has been taken into custody and officers are present, evidence of an admission by silence is banned, at least as substantive evidence."

Nevertheless, we do not think defendant was sufficiently prejudiced by the challenged testimony and instruction to war-

rant a new trial. In *State v. Taylor,* 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972), we find:

> "Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967); *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969). Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963)."

See also *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972); *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972); *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); and *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971).

Applying the test quoted above to the case at bar, considering the overwhelming competent evidence presented against defendant, particularly the testimony of Edith Crisco and Brenda Leasor, we perceive no reasonable possibility that the challenged testimony and instruction had any significant bearing on the jury finding defendant guilty of murder. As was said in *Schneble v. Florida, supra,* "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of [the improperly admitted evidence] is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the [incompetent evidence] was harmless error."

For the reasons stated, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOSEPH SCARBOROUGH

No. 735SC124

(Filed 6 February 1974)

1. **Criminal Law §§ 34, 67— testimony that victim had heard same voice on other occasions**

In a common-law robbery prosecution, the victim was properly allowed to testify that the voice he heard on the night in question was the same voice he had heard on previous occasions; furthermore, such testimony, when considered in conjunction with the victim's previous unresponsive testimony that defendant had "hijacked" him twice, did not constitute impermissible evidence of an unrelated crime where the court sustained defendant's objection to the unresponsive testimony and ordered the victim to conform his replies to the questioning.

2. **Criminal Law § 169— failure of record to show excluded testimony**

Where the record fails to show what the answer of the witness would have been had she been permitted to answer the question objected to, the exclusion of the answer cannot be held prejudicial.

3. **Criminal Law §§ 34, 86— sexual deviation by prosecuting witness — bias toward defendant**

Although testimony by defendant in a robbery case that he had found the prosecuting witness performing a deviate sexual act with a child may have been admissible to demonstrate the witness's bias against defendant, the exclusion of such testimony did not result in prejudicial error where defendant was thereafter permitted to testify that at a later date the prosecuting witness had approached him with a proposition and offered him money and that defendant threatened to report the prosecuting witness to the police, since the jury was thus alerted that the prosecuting witness's testimony might have been motivated by vindictive sexual frustration.

4. **Robbery § 5— common law robbery — instructions on intent**

Although the trial court in a prosecution for common law robbery failed to label the requisite state of mind as "felonious intent," the court adequately instructed the jury on such element when it charged that in order to convict defendant the jury must find that at the time defendant "intended to deprive him of its use permanently."

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

The court did not err in instructing the jury that, when evaluating defendant's testimony, it "ought to take in consideration the interest that the defendant has in the result of the action," where immediately thereafter the court cautioned the jury that if it found defendant had sworn to the truth, it should give his testimony the same weight it would give to that of any disinterested and unbiased witness.

ON *Certiorari* to review order of *Wells, Judge,* 27 March 1972 Session of Superior Court held in NEW HANOVER County.

Defendant was charged in indictment, proper in form, with common-law robbery of Robert Harold. He pled not guilty. The State offered evidence, primarily through the testimony of Robert Harold, tending to show that at about 8:30 p.m., 12 February 1972, in Wilmington, N. C., Robert Harold, age 61, left the Soul Cafe to walk unaccompanied through the rain to his residence about a block away. As he passed the old Liberty Cafe, Harold was struck on the side of the face and fell to the ground, momentarily unconscious. Harold regained consciousness but remained physically immobile and was dragged by the back of his collar about 25 feet into an alley, where he was rolled over onto his back and a handkerchief containing approximately $9.50 in bills and coins was removed from his pocket. When his assailant stood up, Harold "had a good look at his face, and it was Joseph Scarborough." The defendant then struck Harold again and left. Throughout these events, Harold had heard the defendant's orders, curses and threats. Defendant offered evidence tending to show that throughout the evening of 12 February 1972 he had been sick with flu at his fiancee's mother's house where he rented a room. The jury returned a verdict of guilty as charged and judgment was imposed sentencing defendant to prison for a term of five years with recommendation that he serve such sentence under work release.

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

David A. Nash for defendant appellant.

PARKER, Judge.

[1] Three of defendant's assignments of error concern the admission or exclusion of testimony. Defendant's first assignment of error challenges the following testimony given by prosecuting witness Harold on redirect examination:

> "The voice that you heard on this night that you have described, is this the same voice you said you had heard on previous occasions?
>
> "[Defense Counsel]: Objection.
>
> "COURT: Overruled.
>
> "[Harold]: Yes."

This question, designed to strengthen Harold's identification of Scarborough as his assailant by demonstrating his familiarity with Scarborough's voice at the time of the robbery, which Harold had indicated upon cross-examination, was clearly relevant to the issues at trial. The contention set forth in appellant's brief—that this testimony, in conjunction with the witness's previous testimony upon cross-examination wherein he "was allowed to testify over objection by the defendant's attorney that the defendant had hijacked him on two previous occasions," constituted impermissible evidence of an unrelated crime—is without merit. The record reveals that upon cross-examination, Harold was asked:

> "[Defense Counsel]: But you said that you recognized him by his voice?
>
> "[Harold]: But I figured you were coming to that. Judge, Your Honor, this man hijacked me twice.
>
> "[Defense Counsel]: Object, Your Honor.
>
> "COURT: Objection is sustained. You answer his question."

The trial court correctly sustained defense counsel's objection to Harold's unresponsive answer, ordered Harold to conform his replies to the questioning, and presumably would have granted a subsequent motion to strike the unexpected testimony had defendant so moved. In these circumstances, we find no merit to this assignment of error.

[2] Next, defendant contends that he should have been permitted to ask defense witness Rebecca Gore, "Do you know [Harold's] character in the community?" We need not consider whether the trial court erred in sustaining the solicitor's objection to the question. Since the record fails to disclose what the witness's answer would have been, exclusion of the answer cannot be held prejudicial. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20. This assignment of error is overruled.

[3] Defendant next assigns error in the trial court's refusal to allow defendant to testify with respect to prior encounters with the prosecuting witness Harold. Upon direct examination, defendant testified:

> "[Scarborough]: I have had a couple of run-ins before with Mr. Harold. Briefly after I came home from prison

last year, I was at the Soul Cafe with a group of other people, and they called my attention to Mr. Harold, who was behind the old Nixon Supermarket. I went around there and found him performing a deviate sexual act with a child.

"[Solicitor] : I object to this and ask that it be stricken.

"[Court] : Objection is sustained."

This testimony may very well have been relevant to demonstrate Harold's bias against the defendant. We think, however, that its exclusion did not result in prejudicial error. Immediately after the trial court sustained the solicitor's objection to this line of questioning the defendant was permitted to testify:

> "Well, omitting that, we had harsh words on that occasion. At a later date, my cousin and I were coming down the street and Mr. Harold approached me with a proposition, which I stated to him was not my type of thing. He offered me money and I still told him no, and told him that the next time we had a run-in about this I would report him to the police."

Thus, the jury was alerted to the possibility that the prosecuting witness's testimony might have been motivated by vindictive sexual frustration.

Defendant next assigns error in the failure of the trial court to grant his motions for nonsuit and to set aside the verdict as against the weight of the evidence. Viewed in the light most favorable to the State and giving the State the benefit of all reasonable inferences arising therefrom, the evidence was clearly strong enough to warrant submission to the jury. This being so, we similarly find no reviewable abuse of discretion in the subsequent denial of defendant's motion to set aside the verdict. This assignment of error is also overruled.

[4, 5] Finally, defendant contends error in two portions of the jury charge. First, defendant assigns error in the failure of the trial court to instruct the jury that the taking of personal property with "felonious intent" is an essential element of common-law robbery and to explain and define "felonious intent." Reading the charge as a whole, however, the trial court adequately instructed the jury on this critical element. In delineating the elements of common-law robbery, the trial court

charged the jury that it must find "[f]ourth, that at the time the defendant Mr. Scarborough intended to deprive him of its use permanently," and repeated this at the close of the charge. The jury was well apprised of the state of mind required for conviction. The mere fact that the trial court failed to label its definition of the requisite state of mind "felonious intent" does not constitute error. See *State v. Lee,* 282 N.C. 566, 193 S.E. 2d 705. Finally, defendant suggests that the trial court committed an impermissible expression of opinion when it charged the jury that, when evaluating Scarborough's testimony, it "ought to take in consideration the interest that the defendant has in the result of the action." However, immediately following the challenged instruction the court cautioned the jury that if they found the defendant had sworn to the truth, they should give his testimony the same weight they would give to that of any disinterested or unbiased witness. When so qualified, the challenged portion of the charge has been held to be without error. *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512, and cases cited therein. Defendant's assignments of error concerning the jury charge are without merit. In the trial and judgment imposed we find

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. GERRY ANTHONY COBLE, REGINALD GARNER AND WILEY SPINKS

No. 7419SC86

(Filed 6 February 1974)

1. Criminal Law §§ 91, 92— motion for continuance — motion for separate trials — one defendant asked about compliance with lower court judgment

The trial court did not err in the denial of defendants' motions for continuance and for separate trials made on the ground that one defendant had been branded as a previously convicted criminal when the solicitor called him before the court on another matter and, in the presence of the panel from which the jury was selected, inquired as to whether such defendant was ready to comply with a lower court

judgment "which is a monetary compliance," no reference having been made to any crime or conviction for crime.

2. Criminal Law § 99— question by trial court — no expression of opinion

In a prosecution for breaking and entering of a store building and larceny of property therefrom, the trial court did not express an opinion on the evidence in asking the owner of the store whether he had authorized any of the defendants "to enter" his building. G.S. 1-180.

3. Criminal Law § 42— chain of custody of exhibits

Where an SBI agent testified that he found red fibers at the crime scene and a pair of red fabric gloves in one defendant's automobile and retained possession of them until he mailed them to the fiber comparison division of the SBI office in Raleigh, and an SBI chemist testified that he received the fibers and gloves through the mails and retained them in his possession until he analyzed them and that in his opinion the fibers found at the crime scene were the same material as the fibers in the gloves, the State's evidence showed a sufficient chain of custody of the fibers and gloves to permit their admission in evidence, although there was no showing as to what happened to the two exhibits between the time they were analyzed by the chemist and the time they appeared at trial.

APPEAL by defendants from *Seay, Judge,* 11 June 1973 Session of Superior Court held in RANDOLPH County.

By separate indictments each of the three defendants was charged with (1) the felonious breaking and entering on 17 January 1973 of the building occupied by Ronald Coleman, doing business as the Stereo Shack, in Asheboro, N. C., and (2) the felonious larceny after such breaking and entering of described personal property having a value of $3,144.70. Over defendants' objections the three cases were consolidated for trial. All defendants pled not guilty. Ronald Coleman testified that on the morning of 17 January 1973 he found the door on his store broken open after it had been closed and properly locked on the previous night. He also testified concerning the nature and value of the property which was missing. An accomplice of defendants, Morris Dean Cockman, testified that he and the three defendants were the persons who broke into the store and stole the described merchandise therefrom. The State also presented evidence, some of which will be referred to in the opinion, corroborating Cockman's testimony. Defendants offered no evidence.

The jury found each defendant guilty as charged. From judgments imposing prison sentences, defendants appealed.

Attorney General Robert Morgan by Associate Attorney Norman L. Sloan for the State.

Miller, Beck & O'Briant by F. Stephen Glass for defendant appellants.

PARKER, Judge.

[1] Appellants assign error to denial of their motions for continuance and to consolidation of the cases for trial. They contend they were entitled to a continuance because shortly prior to their arraignment the solicitor called defendant Spinks before the court on another matter and, in the presence of the panel from which the jury was to be selected, the following colloquy occurred:

> Solicitor: "Your Honor, this matter is brought over from last week. The defendant moved to remand for compliance with the judgment in the lower court, which is a monetary compliance."
>
> "Are you ready to comply right now, Mr. Spinks?"
>
> Defendant Spinks: "No, sir."
>
> Solicitor: "Mr. Bell represents you?"
>
> "(Mr. Bell is called into the courtroom.)"
>
> "MR. BELL: Yes, Mr. Solicitor?"
>
> Solicitor: "Mr. Spinks remanded last week. He was given until today to comply."
>
> "MR. BELL: If your Honor please, he says he is not in a position to comply."
>
> "THE COURT: Then the motion is denied."

Appellants, noting that defendant Spinks neither testified nor placed his character in issue at the upcoming trial, argue that this exchange branded Spinks as a previously convicted criminal in the eyes of the panel from which the jury was subsequently selected, thereby at once prematurely introducing inadmissible evidence against him and denying all defendants their right to be tried before an impartial tribunal. We disagree.

The purportedly prejudicial dialogue, if the jury panel paid any attention to it at all, was no more than a brief and

ambiguous reference to some court proceeding which, so far as was disclosed to the prospective jurors, might well have been civil in nature. No reference was made to any crime or conviction for any crime, the only reference being to compliance with some judgment in the lower court, "which is a monetary compliance." Appellants' contention that this brief dialogue resulted in denying them a fair trial is simply without substance. Except where based upon a right guaranteed by the Federal or State Constitution, a motion for a continuance is addressed to the sound discretion of the trial court and the ruling of that court is not subject to review absent an abuse of discretion. *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811. The same is true of the motion by the State to consolidate the cases for trial. *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386. We find no abuse of discretion appearing from the present record in regard to the trial court's rulings on either motion, and accordingly find appellants' first two assignments of error without merit.

[2] Appellants next assign as reversible error the action of the trial judge in asking a question of the State's witness, Ronald Coleman. In this connection the judge did not ask, as appellants' counsel states the question in their brief, whether the witness had authorized any of the defendants "to break into" his building. The judge merely asked: "Did you authorize either Gerry Anthony Coble, Reginald Garner, Wiley Spinks to enter your building?" The judge was careful to use the neutral phrase, "to enter," rather than the criminally pejorative expression, "to break in." While G.S. 1-180 prohibits the judge from expressing an opinion as to what has or has not been proven by the testimony of a witness, it is not improper, and is sometimes necessary, for the judge to ask questions of a witness in order to get the truth before the jury. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376. Here, neither by repeated questioning nor by the phrasing of the limited question asked did the judge convey any impression of judicial leaning to the jury. No prejudicial error resulted.

[3] Finally, appellants contend it was error to allow in evidence State's Exhibit 5, a test tube containing certain small red fibers which were found on a stereo tape cabinet in the premises which had been broken into, and State's Exhibit 6, a pair of red fabric gloves found in defendant Spinks's automobile. An SBI agent testified that he found the fibers and the gloves during the course of his investigation on the day after the break-

ing and entering and that he retained possession of them until he mailed them to the Chemical Section, Fiber Comparison, at the SBI office in Raleigh. The SBI chemist testified that he received these exhibits through the mails and retained them in his possession until he analyzed them by microscopic examination and chemical testing of the dyes, his analysis resulting in his opinion that the fibers in State's Exhibit 5 were the same material as the fibers in State's Exhibit 6. The record shows no objection to any of the foregoing testimony of the investigating SBI agent or the SBI chemist concerning Exhibits 5 and 6, defendants' sole objection being made only when the solicitor, at the conclusion of the chemist's testimony, offered the exhibits in evidence. Appellants contend it was error to allow the two exhibits in evidence because, so they argue, there was a break in the "chain of evidence" as to what happened to the two exhibits between the time they were analyzed by the State's chemist and the time they appeared at the trial. Appellants' contention is without merit. The evidence revealed a complete chain of custody from the time the exhibits were first obtained by the investigating SBI agent through the time of their subsequent analysis by the chemist. Thus, the State's evidence did show a "chain of custody" sufficient to demonstrate that the red fibers and red fabric gloves, recovered respectively from the Stereo Shack and Spinks's automobile, were the identical objects which subsequent laboratory analysis showed were made of the same material, thus assuring that the incriminating analysis was made on material actually connected with defendants rather than upon objects from some other source. This the State's evidence demonstrated, and thereafter the SBI chemist, who had performed the analysis, was free to identify the exhibits based on his personal experience with them. There was no error in allowing the exhibits in evidence.

The evidence of defendants' guilt was overwhelming. The record establishes that they received a fair trial free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

LARRY TURPIN v. OUR LADY OF MERCY CATHOLIC CHURCH

No. 7421SC89

(Filed 6 February 1974)

Negligence § 59— basketball player on church court — licensee — absence of wilful or wanton act

Plaintiff, basketball player in an industrial league, was a licensee and not an invitee while playing a practice game on a court in a gymnasium owned by defendant church after a member of the church had been granted permission for plaintiff's team to practice in the church's gymnasium since there was no mutuality of interest; consequently, defendant would not be liable for injuries received by plaintiff when he crashed through a glass door at the end of the court after running down the court on a fast break because plaintiff's injuries were not caused by any wilful, wanton or reckless act on the part of defendant.

APPEAL by plaintiff from *Crissman, Judge,* 17 September 1973 Session of Superior Court held in FORSYTH County.

Civil action for damages for personal injuries sustained by plaintiff while playing basketball on defendant's court. Plaintiff's arm was cut when he crashed through the glass in a door at the end of the court after running down the court on a fast break. Plaintiff alleged defendant was negligent in failing to provide a proper protective cage over the window in the door and in failing to warn plaintiff of the removal of a protective cage previously on the door. Defendant denied negligence and pled plaintiff's contributory negligence. After adversely examining plaintiff, defendant moved for summary judgment on the basis of the facts shown by the pleadings, by plaintiff's deposition, and by an affidavit of The Reverend Monsignor Newman of defendant church. These, supplemented by testimony of Monsignor Newman presented by plaintiff at the hearing, show no genuine issue as to the following facts:

Defendant church maintained a gym and basketball court primarily for use by the church school. The court was not open for use by the general public, though on occasion nonmembers of the church were granted permission to use it without charge. In 1971 plaintiff played basketball in an industrial league in Winston-Salem. He was not a member of defendant church and did not know if any member of his team was a church member. Plaintiff's team needed a place to practice. Permission for use of the church basketball court for this purpose was granted by

one of the Sisters to a Mr. Laycock, who was a church member and whose wife was employed as a regular teacher at the church school. Mr. Laycock was a member of one of the basketball teams in the industrial league and had occasionally assisted, on a volunteer and unpaid basis, in coaching one of the younger intramural teams at the church school.

On 15 March 1971 plaintiff's team played a practice game with one of the other teams in the industrial league at defendant's court, this being the second or third time they had been there. The court was regulation length. At one end there was a stage and at the other a wall about four feet back from the playing surface. Midway between the basket and the outside boundary on the right side of the court, there was a door in the wall.

Defendant made a fast break from the basket at the end of the court where the stage was and went down the right side of the court toward the basket at the opposite end. He ran full speed down the court, looking back to catch the pass. When he turned around, he was already at the end of the court. He let the ball go and, the wall being so close, ran up the wall and put his hands out to try to stop. As he did so, his left arm went through the glass in the door, resulting in his injuries. A wire grill, which ordinarily covered the door, had been removed sometime previously when the door was painted, and this screen had not been replaced. The church provided mattresses, which were piled up in the gym, and when church teams played these were pulled up to cover the door to prevent anyone from getting hurt.

The court granted defendant's motion for summary judgment and plaintiff appealed.

Wilson & Morrow by John F. Morrow for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr. and James H. Kelly, Jr. for defendant appellee.

PARKER, Judge.

Under facts shown as to which there was no genuine issue, plaintiff was a licensee and not an invitee on defendant's premises. "To constitute one an invitee of the other there must be some mutuality of interest." *Pafford v. Construction Co.,* 217 N.C. 730, 9 S.E. 2d 408. Here there was none. That one member

of a team in the league in which plaintiff played was also a member of defendant church who on occasion gave of his time assisting in coaching a church school team, merely explains how permission for use of the basketball court was obtained. It falls short of furnishing any basis for finding mutual benefit to plaintiff and defendant from plaintiff's presence on defendant's premises. Although invitation does not in itself establish the status of invitee, as witness the cases holding a social guest is a mere licensee, it is essential to it. "An invitation differs from mere permission in this: an invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so." Restatement (Second), Torts, § 332, Comment b. Here, all facts show that plaintiff was on defendant's premises by defendant's permission but not by its invitation.

In *Pafford v. Construction Co., supra,* Barnhill, J. (later C.J.), speaking for the Court, said:

> "A license involves the idea of permission on the one side—its acceptance on the other. A licensee is rightfully on the property but this right depends on the licensor's consent—consent that may be revoked at any time. He is doing what without such consent would be unlawful. The consent carries with it no more than the right to use the property in the condition in which it is found. No greater obligation is implied. A mere consent means no more. [Citation omitted.]
>
> * * * * *
>
> "The owner or person in possession of property is ordinarily under no duty to make or keep property in a safe condition for the use of a licensee or to protect mere licensees from injury due to the condition of the property, or from damages incident to the ordinary uses to which the premises are subject. There is no duty to provide safeguards for licensees even though there are dangerous holes, pitfalls, obstructions or other conditions near to the part of the premises to which the permissive use extends. Neither is the owner or person in charge ordinarily under any duty to give licensees warning of concealed perils, although he might, by the exercise of reasonable care, have discovered the defect or danger which caused the injury. It follows that,

as a general rule, the owner or person in charge of property, is not liable for injuries to licensees due to the condition of the property, or as it has been expressed, due to passive negligence or acts of omission. [Citations omitted.] The duty imposed is to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger. [Citations omitted.] The licensee who enters on premises by permission only goes there at his own risk and enjoys the license subject to its concomitant perils."

Under all material facts shown, plaintiff's injuries were not caused by any willful, wanton or reckless act on the part of defendant. Summary judgment being justified on that ground, it is unnecessary for us to consider whether it would also be justified because the admitted facts establish plaintiff's contributory negligence as a matter of law. See *Clary v. Board of Education,* 19 N.C. App. 637, 199 S.E. 2d 738.

The judgment appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

ROY HARLEY HOGUE, JR. v. PAULINE BLACKBURN HOGUE

No. 7421DC1

(Filed 6 February 1974)

Divorce and Alimony § 18— alimony pendente lite and counsel fees — dependent spouse not in need of means of subsistance — denial proper

Since a dependent spouse is entitled to alimony *pendente lite* only upon a showing that she is entitled to the relief she demands and that she is without means to subsist during the pendency of the action, and defendant's pleadings in this case stated in no uncertain terms that she had subsisted for a number of years without financial assistance of plaintiff, the trial court did not err in denying defendant's motion for counsel fees and alimony *pendente lite* after having found that defendant was the dependent spouse. G.S. 50-16.3.

APPEAL from *Henderson, Judge,* March 1973 Session of FORSYTH County, the General Court of Justice, District Court Division. Argued in the Court of Appeals 15 January 1974.

Plaintiff and defendant were married on 5 March 1950, and they lived together until July 1971, at which time plaintiff allegedly abandoned defendant. They have lived apart continuously since that time. On 20 October 1972, plaintiff filed his complaint seeking absolute divorce. Defendant answered that plaintiff wrongfully abandoned her; and by way of cross action and counterclaim, she made multiple allegations concerning her mistreatment at the hands of plaintiff. The allegations material to the case on appeal are as follows:

> "The plaintiff wilfully and wrongfully abandoned defendant on or about the first of July 1971 and both before and since said time has wilfully and wrongfully failed and refused to provide adequate support for her in accordance with his means, and since he left home at said time he has refused to pay even the monthly payments on the deed of trust against the homeplace, to which the deed of conveyance therefor is made out to both of them at his insistence, amounting to $134.40 per month, forcing this defendant to make said payments since then to avoid a foreclosure; and this defendant has further been forced to pay the taxes thereon, fire insurance, upkeep and repairs, and all other expenses in connection with the home."

> 4. (a) "Plaintiff . . . insisted on defendant's selling her home before their marriage for about $10,000 and buying another home to be put in both names, in which defendant put up the cash, including $10,000 from sale of her old home, $7,000 she inherited from her father's estate, $4,000 she borrowed from her sister and which she paid back, and the plaintiff promised to help pay for this home but never did pay anything except the monthly payments on the mortgage until he left, and refused to support his wife and child except for a very few groceries now and then; defendant bought most everything in and around the house with her own money, and since he left defendant has had to pay everything, including payments on the mortgage on the house, taxes, insurance, repairs, etc."

> 4. (b) (16) "On a Friday night the plaintiff became mad about something or somebody and jumped on defendant and knocked one tooth out and loosened three others which had to be pulled when defendant got to a dentist on Monday thereafter, causing three days of serious pain and suffering.

It cost $300 but plaintiff would not pay it and the defendant had to pay the bill."

4. (b) (18) "One night in 1968 their daughter, Connie, was working at Food Fair after going to school at Mount Tabor High School. Defendant was scared to death to be in the house with plaintiff when Connie was not there. On this night plaintiff had been cursing defendant for a couple of hours. Defendant had been running from the kitchen to the den to keep plaintiff from beating her. Defendant dodged him, and when he could not get to her with his fists he started in on the furniture. . . . The damage was estimated to be over $2,000. . . . Plaintiff did not mention or offer to pay for the furniture destroyed. . . . "

(19) " . . . Defendant had to pay a bad check he had given the YMCA before he left. Plaintiff had just wrecked another Ford car. Defendant paid the last three payments on the Ford in order to buy and replace another."

5. " . . . Plaintiff warned defendant that he would kill her before he would pay her any support, and he finally brought this suit hoping to get half the value of the home that defendant had paid for except some monthly payments he made on the mortgage. But he paid nothing of any consequence on running the house, groceries, insurance, taxes, repairs, shrubbery for the yard, etc.

6. Defendant's first husband had been killed in an accident when they had been married only ten weeks. Defendant went to work and worked seven years on two jobs most of the time and bought and paid for her home. Defendant married plaintiff when he had no job but he promised to get a job and begin work. He became unhappy with their home in her name and wanted her to sell it and buy or build another, with his name on the deed. At his pressing insistence defendant finally sold her home for $10,000 and built their present home at a cost of $30,000, besides all improvements and expenses since then. Defendant put the $10,000 in the new house and about $7,000 she got from her father's estate when he died. She had paid for some lots and she sold them to help pay expenses. Defendant always paid the taxes, insurance, repairs and upkeep on the house. He paid nothing except $134.40 per month on the loan against the new house, and when he abandoned her in July 1971 he

stopped paying the monthly payments on the mortgage and has paid nothing to defendant since that time. He makes about twice as much as she does and is able to pay his part. Defendant has paid out about $40,000 on the home and expenses in running it.

Defendant borrowed $4,000 in addition to the mortgage loan from her sister to apply on the cost of the house—and defendant paid every cent of it back. She has paid her doctor bills all this time, when most, if not all, were due to his cruelty and mistreatment. This suit for divorce was brought by him in bad faith, principally in an effort to collect one-half the value of the homeplace in which he has very little financially. There is still a balance due on the mortgage of $7,700 or more, the payments on which she has had to make to keep the home from being sold under the mortgage. Defendant also had to pay for their daughter's schooling, including one year at college."

9. "Plaintiff since said time—July 1971—has not paid anything whatever for her support and maintenance and continues to live in a trailer, including nonpayment of the monthly payments due under the deed of trust on the home, to which the deed of conveyance is made to both of them."

10. "Plaintiff earns about $10,000 or more per year and is strong and healthy, and has the means and is able to pay a reasonable sum for defendant's support and the payments on the mortgage on the home, as well as the taxes, insurance, etc., and the defendant does not earn enough to pay same, is without sufficient means to cope with plaintiff in presenting her case before the court, and an injustice will be done unless plaintiff is directed to pay her a reasonable allowance for her support and for payments due on the mortgage on the home, and for her attorney's fee, and she is a dependent spouse."

The remaining allegations in the answer are related to various acts of physical abuse and terrorism by plaintiff toward defendant and have no relation to the contention of defendant on appeal.

Plaintiff in his reply denied all the foregoing allegations. Defendant moved that the court award her support and counsel fees pendente lite. In denying the motion, the court made, *inter alia,* the following findings of fact:

" . . . that the defendant, Pauline Blackburn Hogue, is employed at R. J. Reynolds Tobacco Company and has been so employed for some 20 years or more; that in the year 1972 the defendant had a gross income of $5,441.81 and a net income of $4,054.00, and that she is presently earning approximately the same amount or more; that the plaintiff and defendant own a home as tenants by the entirety; . . . that the plaintiff, Roy Harley Hogue, Jr., filed for an absolute divorce on October 20, 1972, and that until said divorce was filed the defendant had not made any demands upon the plaintiff for support or subsistence; that thereafter, the defendant, Pauline Blackburn Hogue, filed answer to said divorce action and a cross action for alimony pendente lite and permanent alimony;

And it further appearing to the Court and the Court finds, from the evidence of the defendant, Pauline Blackburn Hogue, on her cross action, that she had made the payments on the homeplace of the parties since the separation and that she has been able to pay her debts incurred by herself for her support and the upkeep of the home and the payments on the home without assistance from the plaintiff or by other means;

* * *

And it further appearing to the Court and the Court finds that the plaintiff is employed at R. J. Reynolds Tobacco Company and has an earning, after deductions, of approximately $600.00 per month; that he has expenses in excess of $500.00 per month;

And it further appearing to the Court and the Court finds that the plaintiff, Roy Harley Hogue, Jr., is the supporting spouse and the defendant, Pauline Blackburn Hogue, is the dependent spouse;

And it further appearing to the Court and the Court finds that the defendant, Pauline Blackburn Hogue, is not substantially in need of financial assistance from the plaintiff, Roy Harley Hogue, Jr., during the pendency of this action until said issues can be determined by a jury;".

From the order of the trial court denying support and counsel fees pendente lite, defendant appeals.

Wilson and Morrow, by Harold R. Wilson and John F. Morrow, for plaintiff appellee.

Deal, Hutchins and Minor, by Fred S. Hutchins, Sr., for defendant appellant.

MORRIS, Judge.

Defendant's sole assignment of error is to the trial court's denial and continuance of the motion for alimony and counsel fees pendente lite after having found that the defendant was the dependent spouse and the plaintiff was the supporting spouse. We hold that the motion was properly denied.

G.S. 50-16.3 provides in pertinent part:

"(a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

It is clear from the face of this statute that in order for defendant to be awarded alimony pendente lite, it must appear that she is the dependent spouse, that she is entitled to the relief she demands *and* that she is without means to subsist during the pendency of this action. *Rickert v. Rickert,* 282 N.C. 373, 193 S.E. 2d 79 (1972). The two subdivisions of section (a) are conjunctive; thus, the grounds stated in both subdivisions must be found to exist before alimony pendente lite may be awarded. *Presson v. Presson,* 13 N.C. App. 81, 185 S.E. 2d 17 (1971).

It is not necessary that we consider the questions of the defendant's dependency or whether she is entitled to relief. Her pleadings have stated in no uncertain terms that she has subsisted for a number of years without financial assistance of plaintiff. Defendant has failed to allege facts sufficient to show

pursuant to G.S. 50-16.3(a)(2) that she has not sufficient means to subsist during the pendency of the action and to defray the necessary expenses thereof. The order denying support and counsel fees pendente lite will not be disturbed.

No error.

Chief Judge BROCK and Judge CARSON concur.

STATE OF NORTH CAROLINA v. THEODORE ROOSEVELT QUICK, JR.

No. 7310SC810

(Filed 6 February 1974)

1. **Burglary and Unlawful Breakings § 5— breaking into vehicle with intent to commit larceny — items of property in vehicle — sufficiency of evidence**

In a prosecution charging defendant with the felonious breaking and entering of an automobile with intent to commit larceny, State's evidence that the car which defendant broke into contained papers, a shoe bag and cigarettes was sufficient to establish the essential element of G.S. 14-56 that the vehicle contain "any goods, wares, freight, or other things of value."

2. **Criminal Law § 112— instruction on reasonable doubt**

The trial court's instruction on reasonable doubt when read as a whole fairly and clearly stated the law.

3. **Burglary and Unlawful Breakings § 6— breaking into vehicle with intent to commit larceny — instructions — no error**

In a prosecution for felonious breaking and entering of an automobile with intent to commit larceny, the trial court's error, if any, in instructing that anything in the trunk of the automobile was in the automobile, and in overstating the arresting officer's familiarity with defendant was harmless, and the court did not err in instructing the jury that the alleged mistreatment of defendant by the arresting officer was not an issue before them.

4. **Burglary and Unlawful Breakings § 6; Criminal Law § 113— written instructions given jury — no error**

Trial court did not err in allowing the jury to take with them to the jury room written elements of the offense charged.

5. **Burglary and Unlawful Breakings § 8; Criminal Law § 138— presentence investigation — remarks of assistant solicitor to trial judge — no error**

Defendant was not prejudiced where an assistant solicitor visited the trial judge in his chambers and made remarks about defendant,

since pre-sentence investigation is approved provided defendant is afforded an opportunity to rebut the allegations made against him, and defendant was afforded such opportunity in this case.

APPEAL from *Godwin, Judge,* 18 June 1973 Regular Criminal Session of WAKE County Superior Court. Argued before Court of Appeals 16 January 1974.

Defendant was charged with the felonious breaking and entering of an automobile with intent to commit larceny in contravention of G.S. 14-56.

The testimony offered by witnesses for the State tended to establish that on 3 March 1972, Mr. and Mrs. Leland Mason were guests at the Velvet Cloak Motel in Raleigh. Mr. Mason's 1972 Cadillac automobile was parked in front of their room with the doors locked. It contained no personal property other than various papers, pens, cigarettes, matches and a shoe bag. The trunk of the car contained the spare tire and tire tools.

Officer J. R. Hester of the Raleigh Police Department testified that he observed defendant, a Negro male, enter the parking lot of the motel. Shortly thereafter, he observed defendant seated in the right front seat of Mr. Mason's Cadillac going through the glove compartment. Officer Hester arrested the defendant at that time, and defendant struggled to get away as Officer Hester attempted to handcuff him. When Officer Hester pulled defendant out of the car, defendant had in his hand a clothes hanger which he thereupon tossed into the bushes. A search of defendant's person revealed no objects of personal property taken from the car.

At the close of State's evidence defendant's motion for nonsuit was denied, and defendant offered no evidence.

Following the instructions of the trial court on 19 June, the jury retired but was unable to reach a verdict. When the jury reconvened for further deliberation on 20 June, the court offered them a writing containing the elements of the crime with which defendant was charged. Defendant's counsel submitted an affidavit to the effect that while the jury was deliberating, an assistant solicitor—who had not been involved in the prosecution of the case—visited the presiding judge in his chambers and made derogatory remarks about the defendant.

The jury returned a verdict of guilty, and from the entry and signing of judgment, defendant appealed.

Attorney General Morgan, by Associate Attorney Robert R. Reilly for the State.

Gerald L. Bass for defendant appellant.

MORRIS, Judge.

[1] There is no merit to defendant's contention that his motion for nonsuit was improperly denied. In evaluating the sufficiency of State's evidence to withstand motion for nonsuit, the court is to resolve all doubts in favor of the State and give to the State the benefit of all reasonable inferences. If the evidence thus evaluated and considered in the light most favorable to the State tends to establish guilt, then the denial of the motion for nonsuit is proper. *State v. McNeill,* 280 N.C. 159, 185 S.E. 2d 156 (1971). Defendant's specific contention is that the State's evidence does not establish an essential element of G.S. 14-56— that the vehicle contained "any goods, wares, freight, or other things of value." The papers, shoe bag and cigarettes are without question personal property, and as such they may be the subject of larceny. Thus, the State's evidence has charged all elements of the offense, and this assignment of error is overruled.

[2] Defendant next assigns error to the court's instructions on reasonable doubt.

> "The term 'reasonable doubt' has a legal meaning. You must apply all of the law applicable in this case, to the facts as you find them to be. So I will define for you the term 'reasonable doubt.' I mean by that term whenever it has or will be used during these instructions to you, a possibility of innocence, a possibility of innocence based on common sense and reason and arising out of the evidence in the case, or a lack of it, as the situation may be.
>
> So, if upon a full, a fair consideration of all of the evidence presented during the trial, you find that you are fully satisfied that the defendant is guilty, you find that you are entirely convinced that he is guilty, you have no reasonable doubt.
>
> If, however, you find from such a consideration of the evidence that you have any doubt based on common sense and reason, and arising out of the evidence or a lack of it; not with regard to what any witness who has testified has had

> to say to you, but if you find from such a consideration of the evidence that you have any doubt, with regard to any one of the five facts which are essential to constitute guilt in this case, then you do have a reasonable doubt; and if you find that you do you are required to return a verdict of not guilty and acquit the defendant."

The specific language to which defendant objects is "not with regard to what any witness who has testified has had to say to you." The charge of the court should be read contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970). The above charge when read as a whole fairly and clearly stated the law and this assignment is overruled.

[3] Defendant excepts to the court's instructing the jury that "anything in the trunk of the automobile was in the automobile." This assignment of error is addressed to the proposition that since there was nothing of value in the interior of the car, there could be no violation of G.S. 14-56. The error, if any there be, is harmless; for, as we have stated, there were, in fact, sundry items of value in the interior of the car. It is not sufficient that defendant show mere technical error. He must show that absent the error, a different result would likely have ensued. *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).

There is no merit to defendant's assignment of error to the court's recapitulation of Officer Hester's testimony as follows:

> " . . . that the police officer, Mr. Hester, knew the defendant at that time; that he had known him for some time; that he knew what he looked like, and that he knew who he was looking at when he got an opportunity to see the features of the person sitting in the automobile at the time he approached him;".

Officer Hester's uncontradicted testimony was that he had seen defendant prior to the arrest, his face was familiar, but he did not know his name. While the court has in fact overstated the officer's familiarity with defendant, this discrepancy is at most harmless error within the holdings of *Bass* and *Crump, supra.*

There was testimony to the effect that Officer Hester pointed his pistol at defendant's head, threatened to shoot him and scuffled with him while attempting to place the handcuffs

on him. The court instructed the jury that the mistreatment of defendant was not an issue before them. This instruction was correct, and there is no merit to defendant's contention that the court thereby belittled counsel's efforts in the cross-examination of the officer.

[4] Likewise, there is no merit to the contention that the court erred in permitting the jury to take with them to the jury room written elements of the offense charged. The court prepared the writing and allowed them to take the writing with them for use in their further deliberation. As was said in *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973), "The writing only served to aid the jury in following the oral instructions already given." On authority of *Frank,* we hold that the procedure followed here did not constitute prejudicial error and this assignment of error is overruled.

[5] Defendant's final assignment of error is to the remarks of the assistant solicitor to the trial court concerning the reputation and character of defendant. Pre-sentence investigation bearing on mitigation or aggravation of the offense of which a defendant has been convicted has been specifically approved by the Supreme Court. *State v. Pope,* 257 N.C. 326, 126 S.E. 2d 126 (1962). There is no requirement that defendant or his attorney be present at such an investigation, but it is required that defendant be afforded the opportunity to rebut the allegations thus made against him and offer relevant facts in mitigation. *Id.* The record shows that counsel for defendant was aware of the assistant solicitor's visit to the judge's chambers. The defendant had ample opportunity to rebut the allegations of the assistant solicitor on the day of sentencing—two days after the allegations were made.

> "In our opinion it would not be in the interest of justice to put a trial judge in a strait jacket of restrictive procedure in sentencing. He should not be put in a defensive position and be required to sustain and justify the sentences he imposes, and be subject to examination as to what he has heard and considered in arriving at an appropriate judgment. He should be permitted wide latitude in arriving at the truth and broad discretion in making judgment. Presentence investigations are favored and encouraged. There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amount-

ing to a denial of some substantial right. *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342." *State v. Pope, supra*, at 335. Defendant received a fair and impartial trial and we find

No error.

Chief Judge BROCK and Judge CARSON concur.

IRIS MARIE ROBERTS RAYLE v. JACK HELMA RAYLE

No. 7419DC110

(Filed 6 February 1974)

Divorce and Alimony § 16— presumption that husband is supporting spouse — rebutting evidence — jury question

In the provision of G.S. 50-16.1(4) stating, "A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife," the word "deemed" has the same meaning as "presumed" and the provision creates a presumption which may be rebutted; therefore, where there is evidence tending to show that the husband is not the supporting spouse, a question of fact for jury determination is presented.

APPEAL by plaintiff from *Warren, Judge*, 20 August 1973 Session of District Court held in RANDOLPH County.

In this action plaintiff seeks alimony without divorce, possession of certain real estate, and the custody of and support for the minor child of the parties. On 26 June 1973, pursuant to a hearing, the court entered an order awarding the custody of the child to plaintiff with visitation privileges in defendant, requiring defendant to pay $200 per month for the support of the child, and awarding plaintiff possession of certain real estate with a proviso that defendant pay any indebtedness outstanding on the real estate. The court denied plaintiff's motion for temporary alimony.

At the 20 August 1973 Session of the court, the case came on for trial on the merits on plaintiff's claim for permanent alimony. Issues were submitted to and answered by the jury as follows:

"1. Were the plaintiff and defendant married to each other on July 2, 1950, as alleged in the complaint?

ANSWER: Yes.

2. Did the defendant abandon the plaintiff as alleged in the complaint?

ANSWER: Yes.

3. Is the defendant a supporting spouse as alleged in the complaint?

ANSWER: No.

4. Is the plaintiff a dependent spouse as alleged in the complaint?

ANSWER: No."

From judgment denying plaintiff permanent alimony, she appealed.

Ottway Burton for plaintiff appellant.

Bell, Ogburn & Redding, by William H. Heafner, for defendant appellee.

BRITT, Judge.

In her principal assignment of error, plaintiff contends the trial court erred in submitting issues 3 and 4 with respect to whether plaintiff was a dependent spouse and defendant was a supporting spouse. She contends that an affirmative answer to the second issue, wherein the jury found that defendant abandoned plaintiff, and the absence of evidence that defendant was incapable of supporting her, entitled plaintiff to alimony as a matter of law. We reject these contentions.

G.S. 50-16.1, subsections (3) and (4) provide:

"(3) 'Dependent spouse' means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

"(4) 'Supporting spouse' means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife."

Crucial to a decision in this case is an interpretation of the last sentence of G.S. 50-16.1(4): "A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife." Since there was no evidence that defendant was incapable of supporting his wife, our specific question is, what is meant by "a husband is *deemed* to be the supporting spouse?"

Our overall guide in interpreting and construing statutes is well stated by Justice Huskins in *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 478-479, 164 S.E. 2d 2, 6-7 (1968), as follows:

> "This requires us to construe and interpret the language of the statute. In this task we are guided by the primary rule of construction that the intent of the legislature controls. 'In the interpretation of statutes, the legislative will is the all important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. The legislative intent has been designated the vital part, heart, soul, and essence of the law, and the guiding star in the interpretation thereof.' 50 Am. Jur., Statutes, Sec. 223. As stated by Bobbitt, J., in *Lockwood v. McCaskill,* 261 N.C. 754, 757, 136 S.E. 2d 67, 69: 'In performing our judicial task, "we must avoid a construction which will operate to defeat or impair the object of the statute, if we can reasonably do so without violence to the legislative language." *Ballard v. Charlotte,* 235 N.C. 484, 487, 70 S.E. 2d 575 [577].' Furthermore, ' . . . where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and purpose of the law should control, and the strict letter thereof should be disregarded. *S. v. Barksdale,* 181 N.C. 621, 107 S.E. 505.' *Duncan v. Carpenter,* 233 N.C. 422, 426, 64 S.E. 2d 410, 413. And, where possible, 'the language of a statute will be interpreted so as to avoid an absurd consequence. *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797; *State v. Scales,* 172 N.C. 915, 90 S.E. 439. A statute is never to be construed so as to require an impossibility if that result can be avoided by another fair and reasonable construction of its terms.' *Hobbs v. Moore County,* 267 N.C. 665, 671, 149 S.E. 2d 1, 5.
>
> "If the language of a statute is clear and unambiguous, judicial construction is not necessary. Its plain and definite meaning controls. *Davis v. Granite Corporation,* 259 N.C.

672, 131 S.E. 2d 335. But if the language is ambiguous and the meaning in doubt, judicial construction is required to ascertain the legislative intent. *State v. Humphries*, 210 N.C. 406, 186 S.E. 473; *Young v. Whitehall Co., supra* (229 N.C. 360, 49 S.E. 2d 797).

"Words and phrases of a statute 'must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.' 7 Strong's N. C. Index 2d, Statutes, Sec. 5."

A large part of the statutory law in this jurisdiction relating to alimony was rewritten by the 1967 General Assembly pursuant to a study and report by a distinguished Committee on Family Law. The rewrite is set forth in Chapter 1152 of the 1967 Session Laws, now codified for the most part as G.S. 50-16.1, *et seq.* It appears from our research that the sentence we are attempting to interpret was adopted as a floor amendment in the waning days of the legislative session, therefore, was not subjected to the close scrutiny given other provisions of the act.

While the phrase "unless he is incapable of supporting his wife" presents no problem here, it will, no doubt, present problems in other cases. The word in the sentence that presently poses difficulty is "deemed" and definitions given the word in dictionaries provide very little help. In the widely used *The Synonym Finder*, by J. I. Rodale and Staff, we find "deem" listed as a synonym for "presume." Equating the terms "deem" and "presume" finds support in *Davis v. Indemnity Co.*, 227 N.C. 80, 40 S.E. 2d 609 (1946), in an opinion by Justice (later Chief Justice) Barnhill. In *Davis*, the court was confronted with the interpretation of the provision "mysterious disappearance of any insured property shall be presumed to be due to theft" incorporated in an insurance policy as a part of the definition of theft. The court held (pages 82-83, 610-611):

"This more liberal definition of theft, thus provided, creates a rule of evidence binding on the parties. Proof of the mysterious disappearance of insured property, nothing else appearing, is proof of theft . . . . It is stipulated that the inference of theft arises, as of course, upon proof of a mysterious disappearance.

"This conclusion or inference is more than a mere permissive inference. Theft is to be presumed, and to presume means to take for granted until the contrary is proved, *Morford v. Peck,* 46 Conn., 380, *Green v. Maloney,* 30 A. 672, *S. v. Evans,* 41 A., 136; to deem, *Cooper v. Slaughter,* 57 So., 477; to accept as being entitled to belief without examination or proof, *Ferrari v. Interurban St. Ry. Co.,* 103 N.Y.S., 134. So then it is agreed that when insured property mysteriously disappears it shall be deemed or taken for granted that it was stolen.

"But, in our opinion, it does not constitute an irrebuttable presumption. Theft is presumed or taken for granted unless the contrary is made to appear. The surrounding facts and circumstances, if any, which tend to show that the property was lost or mislaid or that its disappearance was not in fact due to theft are to be considered by the jury in arriving at a verdict, the burden of proof being at all times on the plaintiff."

Applying the stated principles to the task at hand, we think the General Assembly intended that the term "deemed" should have the same meaning as "presumed"; that the term creates a rule of evidence; and that it will be taken for granted that a husband is the supporting spouse until the contrary is shown. But, in our opinion, the sentence does not constitute an irrebuttable presumption and where there is evidence tending to show that the husband is not the supporting spouse, a question of fact for jury determination is presented. *Davis v. Indemnity Co., supra.*

A different construction would render meaningless many portions of the 1967 act, particularly the provisions of Subsections (3) and (4) of G.S. 50-16.1 defining "dependent spouse" and "supporting spouse," and contravene the manifest purpose of the General Assembly.

The evidence in the case at bar tended to show: Plaintiff and defendant were married in 1950 and their only child was born in 1958. Plaintiff had been employed outside of the home continuously since the marriage except for six years following the birth of their child. At the time of the trial, she was employed by Loflin's Hosiery Mill and worked there during all of 1972. During 1972, her gross earnings exceeded $6,000, "something like $6,900." In 1972, defendant had an income of $6,000

but prior to 1972 his annual income was as much as $7,000. Plaintiff did not know if defendant had any savings account but during the ten year period prior to the trial, she had accumulated $6,000 in savings.

We hold that the court did not err in submitting issues 3 and 4 to the jury, and, when they were answered in the negative, entering judgment in favor of defendant.

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

No error.

Judges PARKER and VAUGHN concur.

LEWIS C. AUMAN v. CROUSE DAIRY PRODUCTS, INC.

No. 7422SC159

(Filed 6 February 1974)

1. **Appeal and Error § 49— answer to hypothetical question — exclusion not prejudicial**

Plaintiff was not prejudiced where the trial court excluded an answer of an expert witness to a hypothetical question, since plaintiff was able to establish what he sought when the hypothetical question was rephrased and the witness was allowed to answer.

2. **Negligence § 29— injury from separation of rim and tire from hub — worn nuts — evidence of defendant's negligence insufficient**

In an action to recover damages for personal injury allegedly caused by the force of a rim and tire separating from a hub of defendant's trailer, the trial court properly granted defendant's motion for directed verdict based on plaintiff's failure to show actionable negligence on the part of defendant in not warning plaintiff of a dangerous condition, since the only evidence that would tend to show notice to defendant of a dangerous condition was that the exterior of the nuts holding the lugs was worn, but there was no showing that the worn nuts caused the accident or that a reasonable man would be led to believe that the rim would disengage if the lug nuts were worn.

APPEAL by plaintiff from *Lanier, Judge,* 10 September 1973 Civil Session of DAVIDSON Superior Court.

In this action plaintiff seeks to recover damages for personal injury allegedly caused by the force of a rim and tire separating from a hub of defendant's trailer.

Plaintiff's evidence tended to show: On 22 April 1969, plaintiff was working at Denton Service Station, Denton, N. C. At approximately 8:20 that morning Bobby Lee Talbert (Talbert), employed by defendant, drove a tractor and trailer owned by defendant up to the station. Talbert requested plaintiff to remove a flat tire from the right rear of the trailer and replace it with a spare. The trailer was equipped with dual wheels and as the flat tire was on the inside, it was necessary to remove both wheels to make the repair. After the right side of the rear axle was "jacked up," plaintiff got an electric wrench to remove the nuts holding the wheels. While plaintiff was squatting in front of the wheels preparatory to removing the outside wheel, the tire and rim on the outside suddenly separated from the hub and struck plaintiff, causing serious injuries.

The outside tire was mounted on a split-rim which used an inner locking ring to secure the tire on the rim. The rim was mounted on the hub by five spokes connected to the wheel by lugs, which fitted against a bevel on the rim, and nuts fastened the lugs to the spokes. The inner wheel was mounted on the same spokes, separated from the outer by a spacer, and held secure by the same nuts. After the separation occurred the inner wheel, spacer, and the locking ring of the outer wheel were left on the spokes. New nuts were used when the tire was repaired later because the old ones were worn.

The rim in question was bisected transversely in order that the circumference might be decreased to facilitate the mounting of the tire. The edges of the split of the rim were worn and, in the opinion of an expert witness, the wear was caused by friction created by use. Other opinion evidence was to the effect that the wear would allow pressure from the tire tube to cause the two edges of the rim to slip, one over the other, at the point of intersection, thus decreasing the circumference, disengaging the locking ring, and causing the wheel to fly off the hub.

Plaintiff's employer, who was present at the time of the occurrence and was called as a witness for plaintiff, testified on cross-examination that he had been in the service station business for 40 years and was very familiar with the type of rim in question; that plaintiff had worked with him for about

three years prior to his injury and during that time had assisted in changing and repairing tires; that prior to the accident, he (the witness) inspected the tire and wheel to the extent that he knew the inflated tire was on a split rim but did not see "anything I thought was in any danger or doubt or anything like that happening."

Aaron Crouse (Crouse), owner of the defendant corporation, testified by deposition that the trailer was a 1949 model which defendant had owned about 18 to 24 months; that he had not inspected the rims, nuts, or lugs of the trailer other than to notice that the nuts were worn and would be difficult to remove. He had instructed the employees of defendant to replace the nuts as needed.

Plaintiff's claim is based upon the theory that defendant was negligent in that "[t]he wheels, rim, clamps and lugs on the rear of the trailer were old and worn, making them extremely dangerous to any persons changing the tires or being in front of the tire, all of which was known to the defendant, or in the exercise of due care should have been known, but the defendant used, kept, and maintained the vehicle in this condition and failed to give any notice or warning to the plaintiff whatsoever."

At the close of plaintiff's evidence, defendant's motion for directed verdict on the ground that plaintiff had failed to show actionable negligence was allowed and from judgment dismissing his action, plaintiff appeals.

Walser, Brinkley, Walser & McGirt, by Charles H. McGirt and G. Thompson Miller, for plaintiff appellant.

Henson, Donahue & Elrod, by Perry C. Henson, Daniel W. Donahue, and Sammy R. Kirby for defendant appellee.

BRITT, Judge.

[1] Plaintiff first assigns as error the exclusion of an answer of an expert witness to a hypothetical question propounded by plaintiff. The court explained that its ruling was based on the fact that there was no evidence that the condition of the wheel (rim), then in evidence, was the same as it was at the time of the accident some four years prior to the trial. The witness was allowed to answer for the record. Plaintiff rephrased his hypothetical and the witness was allowed to answer. As plaintiff now

contends, there was evidence that the conditions were the same; however, comparing the answers to the two questions, we find that they are substantially the same and this excluded fact was not crucial to the witness' answer. As plaintiff was able to establish what he sought on the first question, we can perceive no prejudice. The assignment of error is overruled.

[2] Plaintiff contends on his second assignment of error that there was sufficient evidence of actionable negligence to withstand defendant's motion for directed verdict and relies heavily on *Stroud v. Transportation Co.*, 215 N.C. 726, 3 S.E. 2d 297 (1939). The evidence in *Stroud* tended to show: The inside tire of dual wheels on a truck had lost air and employees of the defendant had stopped at a service station to reinflate the tire. The employees tried to do this themselves but were unable to do so because the tire tube had a short valve stem which defendant had installed in place of a long valve stem provided for the tube orignally. The proximity of the two wheels limited access to the shortened stem to such a degree that an 18 year old employee of the defendant, who had a smaller hand, offered his service. In so doing, his hand was mashed when the inside wheel flew loose. The evidence further showed that short valve stems were not as safe as the long ones and that defendant itself, in inflating tires on its trucks, used a long air hose chuck, or nozzle, as a safety device; that the truck had been driven eighteen or twenty miles with a slack tire on the inner wheel, and although presumably supported by the outer fully inflated tire, the supporting rim or flange of the inner tire may have been disarranged from its proper assemblage by bumping on irregularities in the road, this effect being more easily brought about on account of the increase of weight upon the inflated tire.

In *Stroud,* the Supreme Court held that plaintiff's evidence was sufficient to go to the jury; we quote from the opinion (page 729): "The defendant owed to this plaintiff the duty of refraining from subjecting him without warning to danger from a condition which was known to it, or could have been known by the exercise of due care, and 'there is a general duty owing to others of not injuring them by any agency set in operation by one's act or omission.' 45 C.J., p. 645; *Cashwell v. Bottling Works,* 174 N.C., 324, 93 S.E., 901."

We think *Stroud* is clearly distinguishable from the case at hand. Here, the only evidence that would tend to show notice to defendant of a dangerous condition was to the effect that

the exterior of the nuts holding the lugs was worn. But there was no showing that the worn nuts caused the accident or that a reasonable man would be led to believe that the rim would disengage if the lug nuts were worn. Testimony showed that the worn condition of the edges of the rim would not be noticed by the ordinary person. Crouse did not observe the condition and there is no evidence that defendant created the condition. Rather the evidence is to the effect that the condition would naturally occur from use.

We perceive no violation of any duty defendant owed plaintiff, therefore, the trial court properly allowed defendant's motion for directed verdict and the assignment of error relating thereto is overruled. The judgment appealed from is

Affirmed.

Judges PARKER and VAUGHN concur.

IRENE C. CLARK v. HUGH EDWARD BARBER

No. 7422SC47

(Filed 6 February 1974)

1. **Pleadings § 32; Rules of Civil Procedure § 15— amendment of pleadings — allegation of contributory negligence**

The trial court did not err in permitting the defendant to amend his pleadings after the conclusion of plaintiff's evidence in order to allege contributory negligence. G.S. 1A-1, Rule 15(b).

2. **Automobiles § 90— instructions on following too closely — absence of supporting evidence**

In an action to recover for injuries allegedly sustained by plaintiff when defendant's vehicle struck her vehicle from the rear and caused it to collide with a third vehicle, the trial court erred in instructing the jury that *plaintiff* would be negligent if she "followed another vehicle more closely than was reasonable and prudent with regard to the safety of others" where there was no evidence which would support the inference that plaintiff was following any other vehicle immediately prior to the collision. G.S. 1A-1, Rule 51(a).

APPEAL by plaintiff from *Rousseau, Judge,* 25 June 1973 Session of Superior Court held in IREDELL County.

This is a civil action brought by plaintiff to recover damages for personal injuries sustained in an automobile accident which occurred on U. S. Highway #70 near Statesville, North Carolina on 8 August 1969.

The complaint alleged that plaintiff was driving a 1969 Dodge car owned by Mildred H. Patterson in a westerly direction when the car was struck from the rear by a 1962 Chrysler operated by the defendant Hugh Edward Barber and caused to collide with a 1966 Ford automobile owned by Hurley Albert Morgan. The complaint charged Barber with operating his car in a negligent manner, at a dangerous speed, without keeping proper lookout or keeping his car under control, and while under the influence of some intoxicating beverage.

The answer of Barber denied all allegations of negligence in the complaint.

The order at the pretrial conference to which both parties agreed provided for the submission of the following issues: (1) Was the plaintiff injuried by the negligence of the defendant as alleged in the complaint? (2) What amount, if any, is the plaintiff entitled to recover of the defendant?

At the trial plaintiff testified and presented other evidence from State Highway Patrolman E. W. Biddle, who investigated the accident, Dr. Harry G. Walker, who treated her injuries, and Mildred Patterson, the owner of the car plaintiff was operating and a passenger in the car at the time of the accident. Upon the conclusion of plaintiff's evidence, the defendant moved to amend his answer to allege contributory negligence of the plaintiff and specifically "that plaintiff was following the vehicle immediately in front of her too closely and that the plaintiff failed to keep a proper lookout for other traffic on the highway—in particular for the vehicle occupied and driven by Hurley Morgan . . . . "

Over plaintiff's objection this amendment was allowed.

The defendant did not offer any evidence.

The court submitted issues of negligence, contributory negligence, and damages and the jury answered both the negligence and contributory negligence issues in the affirmative.

From judgment dismissing the action, plaintiff has appealed.

Jay F. Frank for plaintiff appellant.

Pope, McMillan & Bender, by W. H. McMillan, for defendant appellee.

BALEY, Judge.

[1] The plaintiff assigns as error the action of the trial court in permitting the defendant to amend his pleadings after the conclusion of the plaintiff's evidence in order to allege contributory negligence. The court then submitted the issue of contributory negligence and charged the jury with respect to this issue, which plaintiff contends is erroneous.

Rule 15(b) of the Rules of Civil Procedure provides:

> "*Amendments to conform to the evidence.*—When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues."

It is clear that the court has authority under Rule 15(b) to permit an amendment to the pleadings at any time when there is no material prejudice to the opposing party and such amendment will serve to present the action on its merits. *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697; *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721.

[2] The real question in this appeal concerns the failure of the court to comply with Rule 51(a) of the Rules of Civil Procedure in its instructions to the jury. In our judgment under the evidence in this case the court failed to declare and explain properly the law arising on the evidence and indeed charged the jury upon a state of facts which did not appear in evidence. The court quoted plaintiff as having stated "that she was following the other car some distance" and left the impression throughout the entire charge that plaintiff was following upon the highway the Ford car operated by Hurley Morgan. There is no evidence in the record that plaintiff was following the Morgan car upon the highway. The court instructed the jury that plaintiff would be negligent if she "followed another vehicle more closely than

was reasonable and prudent with regard to the safety of others," when there was no evidence which would support the inference that plaintiff was following any other vehicle immediately prior to the collision.

This case appears to have been tried upon the theory that three cars were proceeding down the highway with the Morgan car in front, plaintiff's car immediately following, and defendant's car in the rear. According to the evidence of patrolman Biddle, the Morgan car "was damaged to the left front and some damage along the side," the car operated by plaintiff "sustained damage to the rear and front," and defendant's car "sustained damage to the front." All the evidence showed that the damage sustained by the Morgan car was in the front and left side. The location of this damage made it physically impossible for the plaintiff to have been following the Morgan car at the time of the collision. The pretrial order stipulates:

> "(g) Presence of other vehicles, where significant: 1966 Ford automobile belonging to Hurley Albert Morgan immediately in front of Patterson [plaintiff's car] and Barber [defendant] automobiles *with rear wheels off the pavement facing South.*" (Emphasis added.)

The plaintiff testified: "It [the Morgan car] could have been sitting off the highway. . . . I didn't drive into his car. I do not know where his car was before I was knocked into it."

Admittedly the evidence concerning how and where this accident occurred is somewhat confusing, but there is nothing to indicate that plaintiff was following another vehicle prior to the collision. The instructions of the court are based upon an assumption of facts which are not in evidence and must be held for error. *Supply Co. v. Rozzell,* 235 N.C. 631, 70 S.E. 2d 677; *In re Will of Atkinson,* 225 N.C. 526, 35 S.E. 2d 638; *Penny v. R. R. Co.,* 10 N.C. App. 659, 179 S.E. 2d 862, *cert. denied,* 278 N.C. 702, 181 S.E. 2d 603.

Plaintiff is entitled to a new trial for error in the charge. Other assignments of error brought forward by plaintiff are not discussed as they will likely not occur in a second trial.

New trial.

Judges CAMPBELL and HEDRICK concur.

MAVER JONES v. DONALD R. JONES

No. 7421DC129

(Filed 6 February 1974)

1. **Divorce and Alimony § 22— divorce action — jurisdiction as to child custody and support**

When a divorce action is instituted, jurisdiction with respect to custody of and support for the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant part of the subject matter of the court's jurisdiction in the divorce action.

2. **Divorce and Alimony § 22— child custody and support — separation agreement — authority of court to determine custody and support**

A separation agreement providing for child custody and support did not bar the court in a divorce action from making different provisions with respect to the custody of, or support for, the children.

APPEAL by plaintiff from *Clifford, Judge,* 10 September 1973 Session of District Court held in FORSYTH County.

In this action, instituted on 5 July 1973, plaintiff seeks (1) an absolute divorce on the ground of one-year separation, (2) custody of and support for three minor children born to the marriage, and (3) an injunction enjoining defendant from harassing and annoying plaintiff and the children. Defendant filed answer in which he admitted the allegations of the complaint relating to marriage, residence, separation, birth of children, and their custody in plaintiff. However, in a further answer and defense, he alleged that the parties had entered into a deed of separation providing for the custody of and support for the children and that he had complied fully with the terms of the agreement; he pleaded the agreement as a bar to plaintiff's prayer for any relief pertaining to the children.

On 6 August 1973, the court granted plaintiff an absolute divorce on ground of one-year separation. On 8 August 1973, the court conducted a hearing with respect to child custody and support. Before any evidence was presented, defendant moved for dismissal on the ground that the deed of separation constituted a bar to plaintiff's claim for custody and child support. The court deferred ruling on defendant's motion and proceeded to hear evidence from plaintiff concerning the children and their needs. Plaintiff admitted signing the deed of separation and that defendant had complied with the agreement with re-

spect to support for the children. Defendant was called as a witness by plaintiff and gave testimony regarding his financial situation.

At the close of plaintiff's evidence, defendant renewed his motion to dismiss the proceedings on the ground that "there was no judicial issue in controversy" and that plaintiff's claim for custody and child support was barred by the deed of separation. Plaintiff asked the court to enter an order awarding custody of the children to plaintiff and requiring defendant to pay child support greater than that provided for in the agreement. In the alternative, plaintiff asked for an order incorporating the terms of the separation agreement into a judicial decree.

The court granted defendant's motion to dismiss and refused to enter an order providing for support and custody of the children. From an order dismissing her motion "as not being founded upon judicial issues in controversy," plaintiff appealed.

White and Crumpler, by Michael J. Lewis, for plaintiff appellant.

H. Glenn Pettyjohn for defendant appellee.

BRITT, Judge.

Did the trial court err in its order? We hold that it did.

In 2 Lee, N. C. Family Law, § 152, pp. 223-224, we find:

"Contracts of parents respecting the custody and support of their children are not binding on the courts. The custody and maintenance of young children is a matter of great importance to the State. It is not a property right of the parents. The interests of the State in the welfare of the child transcends any agreement of the parties. The court may, of course, recognize and enforce the agreement of the parents when, in its opinion, the agreement is for the best interest of the child. When the welfare of the child is involved, as in divorce cases, the parents cannot so bind themselves as to foreclose the court from an inquiry as to what that welfare requires.

" 'It is not illegal for parents who have separated to enter into a contract with each other for the custody and maintenance of their child, but the court will not recognize such contract unless it is one which insures the proper care

and maintenance of the child. If there is a contract it should be made known to the court so that it may be considered along with other factors which affect an award of custody.'

" 'Such agreements, however, are usually given serious consideration, and the court may, in its discretion, approve a custody agreement in whole or in part. Where such agreement is conducive to the general welfare of the child, it will be respected, and it may be incorporated into the decree and enforced, although the power of the court subsequently to modify the decree as to the custody of the children is not thereby abridged.' "

In *Story v. Story,* 221 N.C. 114, 116, 19 S.E. 2d 136, 137 (1942), we find: "No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by separate agreement or by a consent judgment; (citations); but they cannot thus withdraw children of the marriage from the protective custody of the court."

[1] When a divorce action is instituted, jurisdiction with respect to custody of and support for the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant part of the subject matter of the court's jurisdiction in the divorce action. *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879 (1957). G.S. 50-8 requires that in all divorce actions the complaint shall set forth the name and age of any minor child or children of the marriage, and in the event there are no minor children of the marriage, the complaint shall so state. The obvious reason for this requirement is to bring to the attention of the court any minor children that might be affected by the divorce, to the end that the court will protect the interests of those children.

[2] Applying the stated principles to the instant case, it is clear that the separation agreement did not bar the court from making different provisions with respect to the custody of, or support for, the children. The court very properly conducted a hearing concerning the children and their needs and the recitations in the order indicate that the court considered adequate the provisions of the agreement relating to the children.

However, we hold that the court should not have dismissed the custody and support "proceedings" but in its order should

have made findings (1) to the effect that the parties had entered into a separation agreement with provisions for custody and support of the children, (2) as to whether the provisions regarding custody were for the best interest of the children, and (3) as to whether the provisions regarding support were adequate, considering defendant's ability to pay. While the court was not compelled to incorporate in its order the child custody and support provisions of the agreement, as plaintiff argues, the court had authority to do so.

For the reasons stated, the order appealed from is vacated and the cause is remanded for further proceedings consistent with this opinion.

Order vacated and cause remanded.

Judges PARKER and VAUGHN concur.

IN RE: FORECLOSURE OF DEED OF TRUST FROM HOWARD T. GARDNER (SINGLE) RECORDED IN BOOK 881, PAGE 343, RANDOLPH COUNTY REGISTRY

No. 7419SC11

(Filed 6 February 1974)

1. **Clerks of Court § 2; Mortgages and Deeds of Trust § 33— funds held by clerk of court — issues of fact as to ownership — jurisdiction of clerk**

   Where a respondent in this action filed answer raising issues of fact as to the ownership of money on deposit with the clerk, the proceeding should have been transferred to the civil issue docket of the superior court for trial, since the clerk thereafter had no jurisdiction to adjudicate ownership of the funds which he held for safekeeping under G.S. 45-21.31(e). G.S. 45-21.32(c).

2. **Courts § 6— appeal from clerk of superior court — jurisdiction of superior court**

   Though the order of the clerk of superior court adjudicating ownership of funds which he held for safekeeping was a nullity, when by appeal the matter came before the judge of the superior court, the judge did have jurisdiction to proceed to hear and determine all matters in controversy. G.S. 1-276.

3. **Limitation of Actions § 12; Rules of Civil Procedure § 13— counterclaim — relation to commencement of action — statute of limitations**

   A defendant's counterclaim relates to the commencement of the action, and if it is not barred by the statute of limitations at that time, it does not become barred afterwards during the pendency of the action.

4. **Limitation of Actions § 12; Rules of Civil Procedure § 13— counterclaim — failure to serve on guardian ad litem — claim not barred by statute of limitations**

Where the sole matter involved in this proceeding was the determination of the rights of the parties in the funds on deposit with the superior court clerk, respondent's counterclaim based on fraud related directly to that matter, and her claim was not barred by the statute of limitations at the time the proceeding was originally commenced in 1971, nor when a guardian *ad litem* was appointed for one respondent and made a party to the proceeding, nor when respondent filed her answer asserting her claim, respondent's claim related to the date of commencement of the proceeding, and the trial court erred in entering summary judgment against respondent based on its finding and conclusion of law that failure of respondent to serve her counterclaim on the guardian *ad litem* allowed the statute of limitations to continue to run so that her claim based on fraud discovered in 1969 was barred at the time judgment was entered in 1973.

APPEAL by respondent, Mary Gardner Brady, from *Seay, Judge,* 19 February 1973 Session of Superior Court held in RANDOLPH County.

This is a proceeding pursuant to G.S. 45-21.32 to determine ownership of surplus funds deposited with the clerk of superior court following foreclosure of a deed of trust on real property. On 2 July 1964 Howard T. Gardner, single, executed a deed of trust to secure an indebtedness of $10,000.00 to Randolph Savings & Loan Association. Immediately thereafter he executed a deed conveying the land subject to the deed of trust to James H. Gardner, Blanche A. Gardner, and Mary G. Brady "or the survivor of them, for and during the life of said parties of the second part, or the survivor of them." Howard T. Gardner defaulted under the deed of trust, and on 8 April 1971 the trustee sold under the power of sale. After payment of the indebtedness secured and all costs of foreclosure, there remained a surplus from the sale of $19,698.58, which the trustee paid to the clerk of superior court pursuant to G.S. 45-21.31. The present proceeding was brought by James H. Gardner and Blanche A. Gardner (hereinafter referred to as petitoners) to determine ownership of that fund.

In their petition, filed with the clerk of superior court on 16 June 1971, petitioners alleged: They, together with Mary Gardner Brady (hereinafter referred to as respondent Brady), are entitled to have the present values of their respective life interests computed and paid to them; Howard T. Gardner is entitled to the remainder; petitioner James H. Gardner was

born 16 July 1902, petitioner Blanche A. Gardner was born 6 July 1907, and respondent Brady was born 12 March 1901; the present value of the three life estates should be computed by first ascertaining the present value of the interest of the youngest of the three life tenants, computed on the basis of the mortuary tables, and then dividing the amount so ascertained among the three life tenants in ratio to the relative values of the separate life interests of each. Petitioners also alleged that Howard T. Gardner, owner of the remainder interest, had been committed to Dorothea Dix Hospital in Raleigh, and asked that a guardian ad litem be appointed to represent him. Notice of filing of the petition was served on Howard T. Gardner and on respondent Brady.

On 19 July 1971 the clerk of superior court entered an order in which he found Howard T. Gardner to be *non compos mentis* and appointed William W. Ivey guardian ad litem to represent him in this proceeding. A copy of the petition was served on the guardian ad litem who filed answer on 10 August 1971 in which he did not deny the allegations of the petition and prayed that "such orders be entered and such action taken as will best protect the interest of Howard T. Gardner."

On 26 July 1971, a week after the guardian ad litem had been appointed for Howard T. Gardner, respondent Brady filed her answer to the petition. In this answer she admitted that Howard T. Gardner had executed the deed purporting to convey the life estates but denied "that there are any life tenants involved in this matter whatsoever." As part of her answer, and "by way of a further defense and a further cause of action against the petitioners" and against the respondent Howard T. Gardner, respondent Brady alleged: The petitioners are husband and wife and are the parents of the respondent, Howard T. Gardner; petitioner James H. Gardner is the brother of respondent Brady; in 1964 the petitioners and Howard T. Gardner persuaded respondent Brady to invest $10,000.00 of her money which, together with $10,000.00 borrowed from the Randolph Savings & Loan Association, was used to pay the purchase price for the property, title to which was taken in the name of Howard T. Gardner; petitioners and Howard T. Gardner represented to respondent Brady that they would secure repayment of the $10,000.00 advanced by her by a second deed of trust on the property; instead of doing so, they "procured a fraudulent deed purporting to give to Mary Gardner Brady a life estate";

respondent Brady discovered this in August 1969, at which time she told petitioners and Howard T. Gardner that she wanted return of her money for the down payment of the property in the amount of $10,000.00 plus interest from 1964 until paid; the deed conveying the life estates "should be reformed and modified to show that it is a second lien or deed of trust." In her prayer for relief, respondent Brady asked that the matter be transferred to the civil issue docket of the superior court in Randolph County, that no further proeedings be had before the clerk of superior court, that she be accorded a trial by jury on all issues raised, and that she recover $14,020.00 out of the money on deposit in the office of the clerk. Copies of the answer of respondent Brady were served on the attorneys for petitioner and upon the respondent Howard T. Gardner, service on the latter being made by mailing a copy to him at Dorothea Dix Hospital in Raleigh. Respondent Brady's answer was not served upon the guardian ad litem.

Petitioners moved to strike portions of the answer of respondent Brady, which motion was allowed by Judge Walter E. Johnston, Jr. by order dated 22 September 1971. On the same date, Judge Johnston entered an order confirming the order of the clerk which appointed the guardian ad litem for respondent Howard T. Gardner. From these two orders, respondent Brady attempted to appeal to the North Carolina Court of Appeals. This Court, by opinion filed 23 February 1972, dismissed the appeal under Rule 4 of the Rules of Practice in this Court. *Gardner v. Brady,* 13 N.C. App. 647, 186 S.E. 2d 659.

In the meantime, on 4 October 1971, petitioners filed a reply to the answer of respondent Brady in which they admitted that the purchase price of the property was $20,000.00 and that respondent Brady had paid a portion of said amount. While denying that there was any misrepresentation or fraudulent conduct with respect to execution of the 1964 deed, petitioners pled that had such misrepresentation or fraudulent conduct existed, respondent Brady, by exercise of reasonable diligence, should have discovered it more than three years prior to the institution of this action, and petitioners pled the three year statute of limitations as a bar to respondent to Brady's claim for relief.

Following dismissal of the attempted appeal to this Court, and on 14 September 1972, petitioners filed a motion with the clerk of superior court asking for summary judgment under

Rule 56 of the Rules of Civil Procedure, stating as grounds for their motion that respondent Brady had alleged in her further cause of action that petitioners and Howard T. Gardner had defrauded her, that she had discovered this fraud in August 1969, that as of the date of filing the motion for summary judgment respondent Brady had not instituted an action on her alleged cause of action by issuance of a summons and complaint as required by the Rules of Civil Procedure, and that she had become barred from instituting such an action by the three year statute of limitations. The matter came on for hearing before the clerk of superior court of Randolph County, at which hearing respondent Brady entered a special appearance and moved to dismiss on the ground that the clerk was without jurisdiction to hear the matter. The clerk overruled respondent Brady's motion and proceeded with the hearing. Following this hearing, the clerk entered an order, dated 9 October 1972, making findings of fact and concluding as a matter of law that respondent Brady had "not instituted an action based on the alleged fraud set forth in her Answer to the Petition within three years of the time she alleges in her Further Cause of Action that the fraud occurred and therefore her cause of action is barred by the three year statute of limitations." The clerk's order further determined the rights of the respective parties in the funds on deposit and directed distribution in the manner and amounts as alleged in the petition.

Respondent Brady appealed from the order of the clerk to the superior court, where the matter first came on for hearing before Judge Armstrong, who entered an order dated 22 December 1972 finding "from the pleadings and from the Order entered by the Clerk that Howard T. Gardner through his guardian ad litem, William W. Ivey, is a proper party and a necessary party in connection with the final determination of this matter; that Mary Gardner Brady, one of the parties in this proceeding, has filed an Answer in which she has attempted to allege a counterclaim against James H. Gardner, Blanche A. Gardner and Howard T. Gardner; that at the time of the filing of this counterclaim, Howard T. Gardner was represented in this proceeding by William W. Ivey his duly appointed guardian ad litem; that Mary Gardner Brady did not serve a copy of her alleged counterclaim on William W. Ivey, guardian ad litem for Howard T. Gardner and that Howard T. Gardner, through his guardian ad litem, William W. Ivey, has not filed an Answer or otherwise pleaded to said counterclaim or done anything to

waive the requirement as to service." On these findings, Judge Armstrong continued the hearing until the next session of superior court in order to give respondent Brady time to "make or attempt to make Howard T. Gardner a party in connection with her alleged counterclaim."

The matter next came on for hearing before Judge Thomas W. Seay, Jr., presiding at the 19 February 1973 civil session of superior court. After hearing argument of counsel, Judge Seay signed an order dated 22 March 1973 in which he overruled petitioners' motion for summary judgment, finding that respondent Brady's answer and further answer had raised questions of fact to be answered by the jury. In a separate judgment, also dated 22 March 1973, Judge Seay proceeded to adjudicate the rights of Howard T. Gardner. In this judgment the court made findings of fact, including findings that no exception had been taken to the order of Judge Armstrong and that respondent Brady had not attempted to make Howard T. Gardner a party to this proceeding "in connection with her alleged counterclaim." The judgment contains conclusions of law as follows:

> "1. Any alleged cause of action by Mary Gardner Brady against Howard T. Gardner is now barred by the Statute of Limitations. The alleged counterclaim was never served on William W. Ivey, the duly appointed guardian ad litem of Howard T. Gardner. The basis of the alleged counterclaim is fraud and the alleged fraud was discovered in August of 1969.
>
> "2. Howard T. Gardner is entitled to a remainder interest in the $19,673.58 computed on the basis of the present value of the alleged life estates of James H. Gardner, Blanche A. Gardner and Mary Gardner Brady. The present value of the youngest of the three life tenants being Blanche A. Gardner would be computed based on the Mortuary Tables (55.717%) which comes to $10,961.53. The ratio of the present value of each of the life tenants to the total value of all of the life tenants based on their ages and the Mortuary Tables would be figured on a percentage basis and is as follows: Mary Gardner Brady .2991; James H. Gardner .3222; Blanche A. Gardner .3787. Based upon the foregoing ratio the present value of the alleged life estate of James H. Gardner is $3,531.80, the present value of the alleged life estate of Blanche A. Gardner is $4,151.13 and the present value of the alleged life estate of Mary Gardner

Brady is $3,278.60. After deducting the present value of the three life tenants in the $19,673.58 now on deposit in the office of the Clerk of the Superior Court of Randolph County there is a remainder of $8,712.05 to which Howard T. Gardner, remainderman is entitled."

On these findings of fact and conclusions of law the court adjudged that Howard T. Gardner is entitled to receive $8,712.05 out of the funds on deposit in the office of the clerk, directed the clerk to hold said amount in trust for him, and authorized the clerk to pay the guardian ad litem $600 for his services.

Respondent Brady excepted and appealed.

Ottway Burton for respondent, Mary Gardner Brady, appellant.

William W. Ivey, guardian ad litem for Howard T. Gardner, appellee.

PARKER, Judge.

[1] When respondent Brady filed answer raising issues of fact as to the ownership of the money on deposit with the clerk, the proceeding should have been transferred to the civil issue docket of the superior court for trial. G.S. 45-21.32(c). Thereafter the clerk had no jurisdiction to adjudicate ownership of the funds which he held for safekeeping under G.S. 45-21.31(e), his only concern being that the adjudication of this question be made by a court of competent jurisdiction. *Koob v. Koob,* 283 N.C. 129, 195 S.E. 2d 552. Therefore, the clerk had no jurisdiction to enter the order dated 9 October 1972 purporting to adjudicate ownership in the fund.

[2] Though that order was a nullity, when by appeal the matter came before the judge of the superior court, the judge did have jurisdiction "to proceed to hear and determine all matters in controversy." G.S. 1-276; *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602; *Hall v. Artis,* 186 N.C. 105, 118 S.E. 901. In this connection, however, a timely demand for trial by jury having been made by respondent Brady, all issues of fact properly arising on the pleadings should have been submitted to a jury unless, upon a motion for summary judgment properly supported as provided in G.S. 1A-1, Rule 56, it was shown that there was no genuine issue as to any material fact and that one of the parties was entitled to judgment as a matter of law. The

trial court, finding there were issues of fact for determination by the jury, correctly overruled petitioners' motion for summary judgment by its order dated 22 March 1973. However, by separate judgment entered on the same date, the court rendered judgment as a matter of law in favor of the respondent guardian ad litem, and the question presented by this appeal is the validity of that judgment.

At the outset, we note that the record does not reveal any motion for summary judgment under Rule 56 or for judgment on the pleadings under Rule 12(c) filed by the guardian ad litem or his ward, Howard T. Gardner. On the contrary, the judgment appealed from simply recites that "Howard T. Gardner, through his guardian ad litem, has made a special appearance before [the] Court requesting that the present value of his remainder interest be alotted to him." The precise meaning of this recitation is not clear, since the guardian ad litem was in all respects a party to this proceeding and had filed answer to the original petition. It would appear that the trial court predicated its judgment in favor of the guardian ad litem on the theory that respondent Brady's claim, as set forth in her answer "by way of a further defense and a further cause of action," was in the nature of a separate civil action for relief based upon fraud; that no service of the answer having been made upon the guardian ad litem within three years after August 1969, the date when respondent Brady alleged she first discovered the fraud, her claim insofar as the rights of the guardian ad litem and his ward were concerned was barred by the three year statute of limitations; and, these facts being shown, the guardian ad litem was entitled to judgment as a matter of law. In this there was error.

[3, 4] The sole matter involved in this proceeding was the determination of the rights of the parties in the funds on deposit with the clerk. Respondent Brady's claim related directly to that matter. On the facts disclosed by the pleadings her claim was not barred at the time this proceeding was commenced by the filing of the petition on 16 June 1971, nor was it barred at the time the guardian ad litem was appointed and made a party to this proceeding on 19 July 1971, nor when respondent Brady filed her answer asserting her claim on 26 July 1971. Our Supreme Court held in *Brumble v. Brown*, 71 N.C. 513, that a defendant's counterclaim, even one not based on the same transaction as that which gave rise to plaintiff's cause of action, relates to the

commencement of the action, and that if it is not barred by the statute of limitations at that time, it does not become barred afterwards during the pendency of the action. Subsequent decisions may have modified this holding as to counterclaims not based on the same facts giving rise to the original cause of action and which are first asserted in amended pleadings. See: 1 McIntosh, N. C. Practice and Procedure 2d, § 327; Annotation, 127 A.L.R. 909. Further, it is clear that the statute of limitations continues to run as to new parties at least until they are made parties to the litigation. *Acceptance Corp. v. Spencer,* 268 N.C. 1, 149 S.E. 2d 570; *Speas v. Ford,* 253 N.C. 770, 117 S.E. 2d 784. In the present case, however, we see no reason why the rule announced in *Brumble v. Brown, supra,* should not apply. Respondent Brady's claim to the funds arose out of the same transactions as gave rise to the claims of the other parties to this litigation. Her claim was not barred when the proceeding was commenced or when the guardian was appointed and made a party. She made a timely assertion of her claim in the first and only pleading which she filed. Accordingly we hold that her claim related to the date of commencement of this proceeding, that it was not barred by the statute of limitations on that date at least insofar as the present record discloses, and that it did not become barred thereafter either as to the petitioners or as to the respondent, Howard T. Gardner, or his guardian ad litem.

Rule 5(b) of the Rules of Civil Procedure does provide in part that "[a] pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record." This requirement, however, does not make a new or separate litigation out of a counterclaim or cross claim which arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Therefore, whatever other consequences may flow from respondent Brady's failure to serve a copy of her answer on the guardian ad litem, such failure did not result in changing the rule of *Brumble v. Brown, supra,* so as to cause the statute of limitations to run against her claim until such service is accomplished.

The judgment appealed from being erroneous, it is reversed and this proceeding is remanded to the superior court for trial of the issues properly arising on the pleadings. The evidence presented and the verdict rendered will, of course, determine

the nature of the legal questions which will be presented at the trial. While we refrain from expressing an opinion on questions not yet presented, we do note that even should petitioners prevail before the jury, they may not be entitled to division of the funds in the manner set forth in their petition. A life interest measured by the lives of the survivor of two or more persons is not the exact actuarial equivalent to an estate computed on the basis of the life expectancy of the youngest of such persons, since the life expectancies of the remaining members of the group affect the computation to some degree. Further, this State recognizes a tenancy by the entirety in a life estate in land, and "[a]nother peculiar incident of an estate by the entirety is, that if an estate be given to A., B. and C., and A. and B. are husband and wife, nothing else appearing, they will take a half interest in the property and C. will take the other half." *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566.

The judgment appealed from is reversed and this proceeding is remanded to the superior Court of Randolph County for trial.

Reversed and remanded.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIE CARR AND WILLIAM BILL DAVIS

No. 735SC582

(Filed 6 February 1974)

1. **Criminal Law § 87— redirect examination of witness — propriety of question**

The District Attorney did not invade the province of the jury in asking a State's witness on redirect examination, "The 1968 Ford that you were driving or riding in the day that you and these two defendants stole the Geedy vehicle, whose Ford was that?" since, in formulating the question, the District Attorney relied upon prior testimony which was admitted without objection.

2. **Criminal Law § 71— *testimony as to defendant's vehicle* — shorthand statement of fact**

Where a State's witness testified that he sold defendant a car, a bill of sale giving the serial number of the car was introduced, and a detective then testified that he took into possession the car described

by the State's witness, such testimony did not invade the province of the jury in determining whether or not it was the same vehicle; rather, the detective's testimony constituted a shorthand statement that the car he took bore the same serial number as that sold to defendant.

3. **Searches and Seizures § 1— impoundment of vehicle — necessity of voir dire to determine legality**

Where the evidence tended to show that a detective took into his possession a vehicle operated by the brother of defendant following the arrest of the brother for driving without a license, driving without a registration card, and operating a vehicle without liability insurance, and the vehicle was then impounded according to standard procedure in order to protect the vehicle and its contents, the trial court did not err in refusing to hold a *voir dire* to determine legality of the impoundment.

4. **Criminal Law § 84— search of impounded vehicle by private citizen — admissibility of evidence**

Trial court did not err in allowing a witness to testify that he searched an impounded vehicle and identified thereon parts which had previously been stolen from a vehicle belonging to him, since the search was made by a private individual and no question of an unlawful search in the constitutional sense was raised.

APPEAL by defendants from *Rouse, Judge,* 5 March 1973 Session of Superior Court held in NEW HANOVER County. Argued in the Court of Appeals on 27 November 1973.

Defendants were each tried upon the first count of bills of indictment containing three counts. The first count in each indictment alleged the felonious larceny of a 1967 Chevrolet, the property of John Edward Geedy. The State took a "nol pros with leave" as to the second and third counts in each bill.

Quinton Irvin Brown (Brown), charged with the same offense as defendants, testified for the State. Brown testified that in July 1972, he and defendants went to Wilmington, stole a 1967 Chevrolet Chevelle automobile, and removed from it a console, drive shaft, engine, mag wheel rims, transmission, and rear end. The vehicle was then abandoned in a wooded area. Brown was arrested on 8 September 1972 for automobile larceny.

Detective C. H. Page of the Wilmington Police Department testified that on 11 September 1972 he stopped and took into his possession a 1966 Chevrolet Chevelle belonging to defendant Davis. The vehicle was impounded at Parrish Wrecker Service in Wilmington.

While the impounded vehicle was at Parrish Wrecker Service, John Edward Geedy examined the vehicle and identified the

parts missing from his vehicle installed on the impounded vehicle.

Defendants offered no evidence. The jury found each defendant guilty, and they have appealed.

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

Charles E. Rice III, for defendant Willie Carr.

Stephen E. Culbreth, for defendant William Bill Davis.

BROCK, Chief Judge.

Defendants contend that the trial court committed prejudicial error upon two occasions in allowing, over objection, testimony which invaded the province of the jury.

[1] Specifically, defendants first contend that the District Attorney invaded the jury province in asking Brown the following question: "The 1968 Ford that you were driving or riding in the day that you and these two defendants stole the Geedy vehicle, whose Ford was that?"

An examination of the record reveals that the question objected to was propounded after Brown had testified to the acts involved in the larceny in which he had participated. Furthermore, the first statement by Brown using the phrase, "On the day that I say the three of us stole Mr. Geedy's car, . . . ", was elicited from Brown during cross-examination. The District Attorney, in formulating the question during redirect examination, relied upon prior testimony which was admitted without objection. This assignment of error is overruled.

[2] Defendants also contend that the testimony of Detective Page that he stopped and took into his possession the same vehicle described by the preceding witness invaded the province of the jury in determining whether or not it was the same vehicle.

Prior to the testimony of Detective Page, State's witness Edward L. Johnson, a car salesman, had testified that he had sold a 1966 Chevrolet Chevelle to defendant Davis. A bill of sale was introduced showing that a 1966 Chevrolet Chevelle, serial number 138176A125187, had been sold to defendant Davis.

Detective Page testified that he took into possession the 1966 Chevrolet described by State's witness Johnson. This constituted a shorthand statement that the Chevrolet bore the same serial number as the one described by Johnson. If this was technical error, we see no prejudice because immediately thereafter the witness proceeded to recite the serial number of the vehicle. This assignment of error is overruled.

The evidence discloses that on 11 September 1972 Detective Page took into his possession the 1966 Chevrolet Chevelle operated by James Russell Davis, brother of defendant Davis, following the arrest of James Russell Davis for the offenses of driving without an operator's license, driving without a registration card, and operating a motor vehicle without liability insurance. The vehicle was then impounded according to standard procedure in order to protect the vehicle and its contents. In order to make a record of the vehicle he had impounded, Detective Page examined it to obtain its serial number. After 11 September 1972 the vehicle was examined by John Edward Geedy at Parrish Wrecker Service. Geedy identified the stolen parts which had been installed in the impounded vehicle.

Defendants at this point requested a voir dire; the trial court declined to hold a voir dire. Defendants contend that the trial court committed error in denying the request for a voir dire into the legality of the impoundment of the 1966 Chevrolet and the subsequent search and seizure of certain items therefrom.

[3] Impoundment of an automobile subsequent to the arrest of the operator is a necessary step in arrest procedure. Impoundment not only serves the function of protecting the vehicle and its contents while the operator is in custody, but also protects the arresting officer and the governmental agency which employs the officer from litigation which might result from leaving an unattended automobile on the public highways or streets. We find no material challenge to the legality of impounding the vehicle subsequent to a valid arrest. The evidence was already before the Court and a voir dire was unnecessary.

Had the vehicle in question been searched by the police, it seems that the search would have been a valid search, even if the stolen articles were accidentally uncovered in the course of the search. An inventory search of an impounded vehicle, pursuant to a lawful arrest, where the search is not a direct search for

fruit of other crimes, is recognized as a valid exercise of police authority. *See* Annot., 48 A.L.R. 3d 537 (1973).

[4] This search was made by a private individual, John Edward Geedy, in an attempt to find property stolen from him. The record does not suggest that Geedy searched at the request of the police. Inasmuch as the search was made by a private individual, not a governmental agent, no question of an unlawful search of the vehicle in the constitutional sense is raised. The trial court was correct in allowing the witness to testify following denial of the request for a voir dire. This assignment of error is overruled.

In our opinion, the defendants had a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

ADDIE ELAINE SAUNDERS HAMMER v. LACY DONALD ALLISON AND NANCY CATES MOORE

No. 7419SC5

(Filed 6 February 1974)

Rules of Civil Procedure §§ 33, 37— *failure to answer interrogatories — dismissal of action proper*

Where plaintiff was properly served with interrogatories but refused to answer them without good cause, did not serve on defendant objections to any of the interrogatories or ask for an extension of time to answer, the trial court properly dismissed plaintiff's action. G.S. 1A-1, Rule 37(d).

APPEAL by plaintiff from *Seay, Judge,* 30 April 1973 Session, Superior Court, RANDOLPH County. Argued in the Court of Appeals on 22 January 1974.

Plaintiff brought this personal injury action on 2 March 1972. Answer was filed on 16 June 1972. On motion of defendant Nancy Cates Moore (Moore), the court entered an order on 8 September 1972 providing for the taking of plaintiff's deposition on 29 September 1972. On that date, counsel for plaintiff moved that the order of 8 September 1972 be set aside for

that defendant Lacy Donald Allison (Allison) had not been served. This motion was denied. The commissioner, appointed by the court, found facts, among which were: that notice of the taking of the plaintiff's deposition had been sent to defendant Allison; that counsel for plaintiff announced to the commissioner that he had advised his client, the plaintiff, not to appear and would not then attempt, by telephone or otherwise, to get her to the court in order that the commissioner and counsel for defendant Moore could proceed with the deposition. On 10 October 1972, defendant filed a motion, attaching the commissioner's findings of fact, asking that the plaintiff's action be dismissed for failure to appear for the taking of her deposition. Notice of the motion was served on counsel for plaintiff. On 29 December 1972, Judge Armstrong signed an order finding as facts the foregoing sequence of events. He further found that counsel for plaintiff offered no explanation as to why he told his client not to appear for the deposition; that the defendant Allison had not been served and no evidence was presented that he was a party to the proceeding; that plaintiff had failed to show any facts sufficient to justify her failure to appear at the time and place appointed for the taking of her deposition. The order further provided that plaintiff's counsel had assured the court that he would have his client available for the taking of her deposition on 13 December 1972, at a place and time set out, and in response thereto, she did appear. On 15 February 1973, defendant Moore filed interrogatories which were served on plaintiff. The interrogatories indicated that at the taking of the deposition plaintiff agreed to furnish defendant certain information which she did not then have available, but had not done so. The interrogatories covered several areas, it appearing that plaintiff had had an accident subsequent to the one then in litigation, and the interrogations were designed to get information with respect to doctor's bills and treatment separated for the two accidents. On 15 April 1973, defendant Moore filed a motion for dismissal of plaintiff's action for failure to answer the interrogatories. Notice was duly given. A hearing was held on the motion at which plaintiff was allowed to testify. The court entered an order finding facts and allowing defendant Moore's motion dismissing the action. From the entry of the order, plaintiff appealed.

Ottway Burton for plaintiff appellant.

Miller, Beck and O'Briant, by Adam S. Beck, for Nancy Cates Moore, defendant appellee.

MORRIS, Judge.

The only question presented by this appeal is whether the court committed reversible error in dismissing plaintiff's action for her failure to answer interrogatories. In its order the court made the following findings of fact:

> "1. That this is a motion filed by the defendant, Nancy Cates Moore, to dismiss the action of the plaintiff on the grounds that the plaintiff has failed to answer certain Interrogatories that were served on her on the 15th day of February, 1973.
>
> 2. The plaintiff was examined at this hearing by her attorney, Ottway Burton, and admitted, on oral examination, that she had not answered the Interrogatories appearing in the file that were served on her on the 15th day of February, 1973.
>
> 3. The Interrogatories relate to information which the plaintiff had been unable to furnish at a prior deposition.
>
> 4. A copy of the Notice of the Motion to Dismiss and a copy of the Motion to dismiss were duly served on the plaintiff on the 6th day of April, 1973, by leaving a copy of said Notice with Motion attached with the plaintiff, Addie Elaine Saunders Hammer.
>
> 5. The plaintiff, Addie Elaine Saunders Hammer, and her attorney, Ottway Burton, were present for this hearing. The plaintiff has failed, without good cause, to answer the Interrogatories under Rule 33 after proper service of such Interrogatories."

Based on those findings, all of which are adequately supported by the evidence presented at the hearing, the court concluded that the "defendant is entitled to an Order dismissing the plaintiff's alleged cause of action by reason of the plaintiff's refusal, without good cause, to answer the Interrogatories submitted under Rule 33, after proper service of such Interrogatories," and ordered the case dismissed.

G.S. 1A-1, Rule 33, provides:

> "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a

partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 30 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 30 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objections is made shall be deferred until the objections are determined, but the making of objections to certain interrogatories shall not delay the answering of interrogatories to which objection is not made. If the objections are overruled, the court shall fix the time for answering the interrogatories.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but a judge of the court in which the action is pending, as defined by Rule 30(h), on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule."

We note that plaintiff did not serve on defendant Moore any objections to any of the interrogatories as was her right under the rule, nor did she ever ask for an extension of time.

G.S. 1A-1, Rule 37(d), provides:

"(d) *Failure of party to attend or serve answers.*—If a party or an officer or managing agent of a party without good cause fails to appear before the person before whom the deposition is to be taken, after being served with a proper notice, or without good cause fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, a judge of the court in which the action is pending, as defined by Rule 30(h), on motion and notice may make such orders as may be just including, among others, the striking of all or any part of any pleading of that party, or dismissing the action or proceeding or any part thereof, or the entry of a judgment by default against that party."

Unquestionably, the court had the right to dismiss plaintiff's action. The record before us reveals nothing which would be sufficient to constitute an abuse of discretion. We have, of course, disregarded the "evidence" plaintiff attempts to place before us in her brief unsupported by the record. The record clearly reveals a determined effort on the part of plaintiff's counsel to disregard the rules of civil procedure and the orders entered by the court. The dismissal of plaintiff's action by the court was proper and did not constitute reversible error.

Affirmed.

Chief Judge BROCK and Judge CARSON concur.

STATE OF NORTH CAROLINA v. WALTER GUNTER AND L. C. KING

No. 7324SC801

(Filed 6 February 1974)

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

The State's evidence was sufficient for the jury in a prosecution of two defendants for housebreaking and larceny where it tended to show that a house was forcibly entered and two rifles, a shotgun, money and other personal property were stolen therefrom, on the night in question a witness dropped defendants and a third person off in front of the victim's house and went back for them some 15 minutes later, defendants and the third person put what appeared to

be guns in the trunk of the car, and a watch belonging to the third person was found on the floor of the victim's house.

APPEAL by defendant from *Falls, J.*, May 1973 Session of MADISON County Superior Court.

The defendants Walter Gunter and L. C. King were indicted in separate bills charging the felonies of housebreaking and larceny. The cases were consolidated for trial. From a judgment of guilty as charged and active sentences pronounced thereon, the defendants gave notice of appeal.

The State's evidence tended to show that Emmitt and Patricia Norton lived in the Sodom-Laurel section of Madison County. On 18 January 1972, the Nortons and their children went to a basketball game at Laurel School, locking the house before they left. When they returned from the basketball game around 9:15, they found that the house had been forcibly entered and ransacked. There was mud all over the interior of the house and a crowbar was lying on the floor. In addition, a watch which did not belong to the Nortons, was lying on the floor. Two rifles and a shotgun had been stolen along with money and various other items of personal property.

Sheriff E. Y. Ponder testified that he went to the Nortons' home about 10:00 on the night in question. He found that the lock had been knocked off the back door and that the house had been entered. He described the house substantially in the same manner as the Nortons had described it. He found a Lyons watch lying on the floor. As a result of information obtained by him, he issued warrants for the defendants L. C. King, Walter Gunter, and Boyd Buckner. They were arrested in a day or two. Buckner admitted that the Lyons watch belonged to him and that he had lost it, but he did not remember where. He further admitted being with the defendants and John Gahagan on the night of the crime.

John Gahagan testified for the State. He stated that he had known Buckner and the defendants Gunter and King all of his life. He was with them on 18 January 1972, the night the offenses took place. He testified that the four of them had been to an A.B.C. store in Hot Springs and then had ridden around for a while. They were in Buckner's car, and Buckner had been driving. They asked Gahagan if he would drive. They asked him to let them off in front of the Norton house and to return and

get them a few minutes later. Gahagan let the other three out in front of the Norton house and drove around for about 15 minutes. When he came back, he flashed his headlights, and the three came up the bank onto the road and asked for the car keys. They raised the trunk and put something into it. The items they put into the trunk were in the shape of guns. All three of them got back into the car, and they drove into Tennessee and drank some coffee and some beer.

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

Joseph B. Huff for the defendant.

CARSON, Judge.

At the conclusion of the State's evidence and again at the end of all the evidence, each defendant moved for judgment as of nonsuit. The denial of these motions is the only assignment of error presented to us on this appeal. It is well established that on a motion for judgment of nonsuit, the evidence is to be taken in the light most favorable to the State together with any logical inferences that can be drawn therefrom. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Bronson,* 10 N.C. App. 638, 179 S.E. 2d 823 (1971). Applying that test to the facts in question, there was certainly enough evidence to be submitted to the jury on the question of the breaking and larceny. The defendants and Boyd Buckner were dropped off in front of the victims' home at the time the crime took place. The circumstances were highly suspicious. They were picked up by their accomplice a short time afterward, and they placed in the trunk of the car what appeared to be guns. Buckner's wrist watch was found inside the Norton home. There was an abundance of evidence in this case to be submitted to the jury, and the trial judge quite properly denied the motion for nonsuit.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. BOBBY DEAN HUFF

No. 7417SC80

(Filed 6 February 1974)

1. **Automobiles § 126; Criminal Law § 64— opinion testimony as to intoxication — lay witness**

In a prosecution for drunken driving, the trial court did not err in permitting two police officers who had observed defendant to give opinions that defendant was under the influence of an intoxicating liquor on the occasion in question.

2. **Criminal Law § 122— additional instructions after deliberations had begun**

Where the jury had deliberated several hours without reaching a verdict, the trial judge did not err in giving the jury additional instructions in which he admonished the jurors that he did not wish them to do anything against their consciences, instructed the jury that if they were unable to reach a unanimous verdict the case would be recalendared for trial at some future date, and informed the jurors of the proper function of a jury.

APPEAL by defendant from *Winner, Judge,* 30 July 1973 Session of Superior Court held in SURRY County.

This is a criminal action in which the defendant, Bobby Dean Huff, was charged in a warrant, proper in form, with driving a motor vehicle on a public highway while under the influence of intoxicating liquor and operating a motor vehicle at a speed of 100 miles per hour in a 60 mile per hour zone. Upon a verdict of guilty in the District Court, the defendant appealed and was tried by a jury in the Superior Court.

At trial the State offered evidence which tended to show that on 26 November 1972 defendant was operating a motor vehicle on Highway #52 when he was stopped by Officer Garaventa of the North Carolina Highway Patrol. Officer Garaventa testified that he had been following defendant for a short time when the defendant's vehicle suddenly increased its speed to a rate in excess of 100 miles per hour. Upon stopping defendant's vehicle, the trooper observed that defendant had been drinking, and he arrested defendant for operating a motor vehicle while under the influence of intoxicating beverage. The defendant was then taken to the patrol station where he refused to allow patrolman Williams to administer a breathalyzer test. Both Officers testified that based on their observations of defendant that it

was their opinion that the defendant was under the influence of an intoxicating beverage. Defendant offered no evidence.

Having been found guilty of both offenses and sentenced to a prison term of six months, the defendant appealed.

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

Folger & Folger by Fred Folger, Jr., for defendant appellant.

HEDRICK, Judge.

[1] By his first two assignments of error the defendant contends that the trial court erred when it permitted the solicitor to ask Officers Garaventa and Williams if they had an opinion as to whether the defendant was under the influence of an intoxicating beverage. It is well-settled in this jurisdiction that a lay witness may give his opinion as to whether a person was under the influence of an intoxicating beverage provided the witness was afforded an opportunity to observe him. *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Warren,* 236 N.C. 358, 72 S.E. 2d 763 (1952); *State v. Harris,* 213 N.C. 648, 197 S.E. 142 (1938). In the instant case the questions asked by the solicitor were proper in form and not leading questions as suggested by defendant. These questions established a proper foundaton for the opinion testimony offered by the two witnesses as they included detailed accounts of both witnesses' opportunities to observe defendant. These assignments of error are not sustained.

Defendant's assignments of error 4, 5, and 6 are directed to certain portions of the trial court's charge to the jury. We have carefully examined each exception upon which these assignments of error are based and find that each challenged instruction is lifted out of context. The charge when construed contextually as a whole is fair and free from prejudicial error. *State v. Lee,* 282 N.C. 566, 193 S.E. 2d 705 (1972); *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536 (1966); 7 Strong, N. C. Index 2d, Trial, § 33 at p. 330 (1968).

[2] Citing *State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767 (1966) and *State v. Roberts,* 270 N.C. 449, 154 S.E. 2d 536 (1967), the defendant maintains that the trial court erred in its

additional instructions to the jury which instructions were given as a result of the jury deliberating for several hours without reaching a verdict. In substance these additional instructions admonished the jurors that the court did not wish them to do anything against their consciences; instructing the jury that if they were unable to reach an unanimous verdict then the case would be recalendared for trial at some future date; and informed the jurors of the proper function of the jury. It is our opinion that the cases cited by defendant are readily distinguishable from the present case and that the additional instructions in this case are similar to those approved in other decisions of our Supreme Court. See, *In re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1 (1960); *State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683 (1971), cert. denied 409 U.S. 948; *Kanoy v. Hinshaw,* 273 N.C. 418, 160 S.E. 2d 296 (1968). This assignment of error is overruled.

In defendant's trial in the Superior Court we find

No error.

Judges CAMPBELL and BALEY concur.

BARBARA C. WESTMORELAND v. SAFE BUS, INC.

No. 7421DC23

(Filed 6 February 1974)

Master and Servant § 99— Workmen's Compensation claim — award of attorney's fees — no jurisdiction in district court

An action to recover pursuant to G.S. 97-10.2(F)(1)b of the Workmen's Compensation Act a sum representing legal fees allegedly owed to plaintiff by defendant was within the exclusive province of the Industrial Commission, and the district court's award of attorney fees was improper.

APPEAL by defendant from *Henderson, Judge,* 23 July 1973 Session of District Court held in FORSYTH County.

This is a civil action wherein the plaintiff, Barbara C. Westmoreland, attorney, seeks to recover pursuant to G.S. 97-10.2 (F)(1)b of the Workmen's Compensation Act the sum of $416.00 from defendant, Safe Bus, Inc. The amount which

plaintiff claims represents certain legal fees allegedly owned to plaintiff by defendant.

The pleadings establish the following uncontrovered facts: On 21 November 1970, Mrs. Frances J. Mason, an employee of defendant, was injured when the company bus she was driving collided with a vehicle driven by a person not a party to this suit. Mrs. Mason was temporarily totally disabled and unable to work from 21 November 1970 until June 1971 and during this period the defendant, a self-insured company, paid $1,248.00 to Mrs. Mason pursuant to the Workmen's Compensation Act. Thereafter, plaintiff was retained by Mrs. Mason to represent her in a claim against Charles Dillard and William Claybrooks, Jr. (the alleged third party tortfeasors) for the personal injuries suffered in the accident of 21 November 1970. Ultimately, the employee's claim against the third party tortfeasors was settled for a total of $7,500; however, the liability insurance carrier for the third party tortfeasors, having been notified by defendant of its subrogation claim, paid $1,248.00 to defendant and $6,252.00 to Mrs. Mason.

After employee's claim against the third party tortfeasors was settled, plaintiff, the employee's attorney, effecting the settlement, requested the Industrial Commission to award her a fee equal to one-third of the amount of the recovery paid by the liability insurance carrier to the defendant, employer.

Neither party having given notice to the Industrial Commission of the injury or any of the proceedings resulting in the settlement of the claim, the Industrial Commission refused to make "any ruling in the case."

While admitting the factual allegations of the complaint, the defendant denied any liability and moved to dismiss.

Plaintiff moved for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c), Rules of Civil Procedure, and this motion was allowed. From a judgment on the pleadings that plaintiff recover of defendant $416.00, the defendant appealed.

Westmoreland and Sawyer by Barbara C. Westmoreland for plaintiff appellee.

Erwin and Hayes by Richard C. Erwin and Roland H. Hayes for defendant appellant.

HEDRICK, Judge.

Defendant, among other things, contends that the District Court has no authority to entertain an action predicated upon the Workmen's Compensation Act. We agree. In an action of the type now before us, the Industrial Commission can award an attorney's fee not to exceed "one third of the amount obtained or recovered of the third party," G.S. 97-10.2(F) (1)b, provided (1) the employer has filed a written admission of liability for benefits with the Industrial Commission or (2) an award final in nature in favor of the employee has been entered by the Commission, G.S. 97-10.2(F) (1).

Plaintiff, having no express or implied contract with the defendant, bottoms her claim in the present case upon the aforementioned statutes; however, these statutes do not confer any authority upon the District Court to order an employer to pay attorney's fees. This action is within the exclusive province of the Industrial Commission, *Cox v. Transportation Co.*, 259 N.C. 38, 129 S.E. 2d 589 (1963); therefore, the District Court's award of attorney's fees was improper. *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969); *Spivey v. Wilcox Company*, 264 N.C. 387, 141 S.E. 2d 808 (1965).

For the reasons stated herein the order of the District Court is

Reversed.

Judges CAMPBELL and BALEY concur.

CITY OF WINSTON-SALEM v. HAROLD E. PARKER AND WIFE, ROSA W. PARKER; R. E. GOODALE, TRUSTEE; ADDIE MAYE TUTTLE; MODERN CHEVROLET COMPANY AND R. D. BOYER PLUMBING CO., INC.

No. 7421SC9

(Filed 6 February 1974)

Eminent Domain § 5; Trial § 11— condemnation — just compensation — prejudicial jury argument

The well established measure of damages in an eminent domain proceeding in N. C. is the difference in the fair market value before and after the taking of the property by the sovereign; thus, the desire

of the landowner to part with the property is irrelevant to the issue *of just compensation, and jury argument* by defendants' counsel with respect to such matters was prejudicial to plaintiff.

APPEAL by plaintiff from *Wood, Judge,* 9 April 1973 Civil Session, FORSYTH County Superior Court. Argued in the Court of Appeals 15 January 1974.

Defendants own a tract of land containing 7674.26 square feet, located at the southeast intersection of Academy Street and Hawthorne Road in the City of Winston-Salem. On 4 December 1972, the City of Winston-Salem initiated a condemnation proceeding to acquire a triangular portion of defendants' property. The subject property contains 419.22 square feet and was the portion of the lot situated on the northwest corner, i.e., adjacent to the intersection.

By consent order, all issues were resolved except the just compensation to be paid for the taking of the property. The case was heard on the issue of just compensation by Judge Wood, sitting with a jury.

Defendants offered the testimony of L. C. McClenny, an expert in the field of real estate, to the effect that the property would be damaged in the amount of $11,564 if the triangular area were taken for intersection improvements. The expert witnesses for the City, Michael D. Avent and W. R. Weir, Jr., fixed the damage at $750 and $1,240, respectively. In addition, City Engineer Harold Bolick gave testimony concerning the effect of the proposed improvements on the property.

In rebuttal, defendant Harold E. Parker testified to the condition of the property and the duplex located thereon.

The jury found that defendants were entitled to recover $4,000 from the City. From the signing and entry of judgment, plaintiff, the City of Winston-Salem, appealed.

Womble, Carlyle, Sandridge and Rice, by Roddey M. Ligon, Jr., for plaintiff appellant.

White and Crumpler, by James G. White, for defendant appellees.

MORRIS, Judge.

Plaintiff presents numerous assignments of error. Although we have considered all of them, we limit our discussion to only one of the assignments of error.

It is plaintiff's contention that the trial court erred in allowing counsel for defendants to make arguments to the jury which were intended to persuade them to render a favorable verdict for reasons other than the evidence with respect to the value of the property before and after the taking. In addition, plaintiff maintains that portions of the jury argument were based on matters on which there had been no testimony and which were intended solely to prejudice the jurors against the City. Plaintiff interposed several objections to portions of the argument and contends that the court committed prejudicial error in failing to sustain the objections. We agree.

The impact of defendants' jury argument could not have been harmless. We do not quote the lengthy portions to which plaintiff objected, but the implication is unmistakable that the City has grievously injured a landowner who did not wish to part with part of his property, and that the City has expended an inordinate amount of time and effort in insuring that defendants be treated unfairly and compensated inadequately.

The well-established measure of damages in an eminent domain proceeding in North Carolina is the difference in the fair market value before and after the taking of the property by the sovereign. *Glace v. Pilot Mountain,* 265 N.C. 181, 143 S.E. 2d 78 (1965); *Statesville v. Anderson,* 245 N.C. 208, 95 S.E. 2d 591 (1956). Thus, the desire of the landowner to part with the property is irrelevant to the issue of just compensation —the only issue of fact in the hearing below.

While counsel is allowed wide latitude in arguing his case to the jury, it is error for the trial court to allow him to argue matters not justfied either factually or legally by the evidence. *Jenkins v. Hines Co.,* 264 N.C. 83, 141 S.E. 2d 1 (1965). Counsel for defendants has gone far afield of the facts in evidence and the law regarding the measure of compensation at issue.

While we might not, in this case, consider the argument of counsel sufficiently prejudicial standing alone to warrant a new trial, when it is coupled with the most favorable stress placed by the court on defendants' contentions, we are of the opinion that appellant is entitled to a new trial.

New trial.

Chief Judge BROCK and Judge CARSON concur.

FRANKIE CHEEK BOYER v. GEORGE W. BOYER

No. 7421DC154

(Filed 6 February 1974)

1. **Divorce and Alimony § 16— alimony without divorce — indignities — occurrences after separation — instructions**

In an action for alimony without divorce, an instruction that the jury should not consider the testimony of plaintiff's private detective to show any indignity offered plaintiff because "anything he testified to happened after the date of the separation of the parties," if erroneous, was not prejudical to plaintiff since the detective's testimony was fully admitted before the jury and was fully recapitulated in the charge, and defendant and a third person testified they were together on the two occasions concerning which the detective testified.

2. **Trial § 42— unanimity of verdict — instructions**

The trial court did not err in failing to instruct the jury that its answers to the issues had to reflect a unanimous vote absent a request for such instruction.

APPEAL by plaintiff from *Leonard, District Judge,* 17 September 1973 Session of District Court held in FORSYTH County.

Action for alimony without divorce, child custody and support, and attorney fees. Plaintiff-wife and defendant-husband were married on 6 February 1954 and lived together until 28 March 1973, when they separated. Plaintiff filed this action on 11 June 1973, alleging that for several months prior to the separation defendant would not communicate with her or with their children, that he would take weekends trips by himself, that he was moody, "and that such conduct created a situation as to render the condition of the plaintiff intolerable and life burdensome." Plaintiff also alleged that both before and after the separation defendant dated one Peggy Smith and that "said conduct is such that it constitutes an indignity to the person of the Plaintiff so as to render her condition intolerable and life burdensome."

Defendant filed answer denying he had offered indignities to the person of plaintiff, but admitting that on 6 April 1973 he had visited Peggy Smith and her children in her apartment for approximately one hour and that on one occasion he went to a movie with Peggy Smith. Defendant counterclaimed for a divorce from bed and board, alleging as grounds that plaintiff is extremely jealous and on many an occasion had accused him falsely of marital infidelity, that she constantly

nagged him, and that on 28 March 1973 she demanded he pack his clothes and leave. Plaintiff replied, denying the charges against her in the counterclaim.

After trial on the merits, issues were submitted to the jury and answered as follows:

> "1. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome?
>
> "ANSWER: No.
>
> "2. Did the plaintiff offer such indignities to the person of the defendant as to render his condition intolerable and his life burdensome?
>
> "ANSWER: No.
>
> "3. Did the plaintiff abandon the defendant?
>
> "ANSWER: No."

From judgment on the verdict dismissing plaintiff's action and defendant's counterclaim, plaintiff appealed.

Wilson & Morrow by Harold R. Wilson and John F. Morrow for plaintiff appellant.

Teeter, Parrish & Yokley by Carol L. Teeter for defendant appellee.

PARKER, Judge.

[1] Appellant brings forward two questions. First, she contends the trial court erred in its charge by instructing the jury not to consider the testimony of a private detective, employed by plaintiff after the separation, to show any indignity offered plaintiff, as "anything he testified to happened after the date of the separation of the parties." If this instruction be error, we find it insufficiently prejudicial to warrant a new trial. The detective's testimony was fully admitted before the jury and, despite the instruction complained of, was fully recapitulated in the charge. In addition, both defendant and Peggy Smith testified they had been together on April 6th and 7th, 1973, the two occasions concerning which the detective testified, though they denied they had engaged in any impropriety. This testimony, together with a mass of testimony from

both parties concerning their relationship over many years, was fully before the jury. We find no reversible error in the portion of the charge complained of in appellant's first question.

[2] For her second question, appellant contends that the court erred in failing to instruct the jury that its answers to the issues had to reflect a unanimous vote. In this there was no error. "[I]n the absence of a request, a trial judge is not required to charge the jury that its verdict must be unanimous." *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577. In order to determine whether there has been unanimous agreement to a verdict, each party has the right to have the jury polled. 2 McIntosh, N. C. Practice and Procedure 2d, § 1575. Here, there was no request for an instruction and no request that the jury be polled.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. ALEXANDER ERVIN WILLIAMS

No. 7312SC776

(Filed 6 February 1974)

Weapons and Firearms— possession of firearm by felon —restoration of citizenship rights — amendment to statute

Defendant's conviction of possession of a firearm by a felon must be set aside where defendant in 1966 was unconditionally released from parole upon an armed robbery conviction and defendant's citizenship rights were restored by the 1973 amendment to G.S. 13-1 which was enacted after defendant's indictment upon the charge of possession of a firearm. G.S. 14-415.1.

APPEAL by defendant from *Brewer, Judge,* 25 June 1973 Session of Superior Court held in CUMBERLAND County.

Prosecution for violation of the Felony Firearms Act, G.S. 14-415.1. On 30 September 1957 defendant pled guilty in Cumberland Superior Court to a charge of armed robbery and was sentenced to prison for a term of not less than ten nor more than fifteen years. In 1966, after serving seven years in prison

and two years on parole on account of the sentence imposed on 30 September 1957, defendant was unconditionally released from parole. The present case arose on 21 July 1972 when a Fayetteville police officer searched defendant's car by consent and founded a loaded .22 caliber pistol under the armrest. In March 1973 an indictment was returned against defendant charging violation of G.S. 14-415.1, the bill of indictment containing the allegations required by G.S. 14-415.1(c) and expressly referring to the previous sentence imposed on 30 September 1957 upon defendant's plea of guilty to armed robbery. On the charge contained in the indictment, defendant was brought to trial in June 1973, pled not guilty, was found guilty by the jury, and from judgment on the verdict imposing a prison sentence, appealed.

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

Brown, Fox & Deaver by Bobby G. Deaver for defendant appellant.

PARKER, Judge.

The judgment must be arrested. G.S. 13-1, as amended and rewritten by Ch. 251 of the 1973 Session Laws, provides that "[a]ny person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights restored upon the occurrence" of certain specified conditions. Included among these is the unconditional discharge of a parolee by the Board of Paroles. Though the 1973 amendment was enacted after defendant was indicted, it is applicable in this case. *State v. Currie,* 284 N.C. 562, 202 S.E. 2d 153 (opinion filed 25 January 1974), affirming 19 N.C. App. 241, 198 S.E. 2d 491; *State v. Cobb,* 284 N.C. 573, 201 S.E. 2d 878 (opinion filed 25 January 1974), reversing 18 N.C. App. 221, 196 S.E. 2d 521.

Judgment arrested.

Judges BRITT and VAUGHN concur.

DOROTHY J. MORGAN v. ROBERT K. MORGAN

No. 7328DC697

(Filed 6 February 1974)

1. **Divorce and Alimony §§ 16, 23— alimony and child support — reasonable needs — insufficiency of findings**

   Order awarding alimony and child custody and support to plaintiff wife must be set aside where the trial court failed to make findings of fact as to the reasonable needs of the wife and child to maintain a standard of living commensurate with that to which they had become accustomed while living with defendant and as to the ability of defendant to make the payments decreed.

2. **Divorce and Alimony § 24— visitation privileges — discretion of child**

   The trial court erred in making the visitation privileges granted the father subject to the discretion of the child.

APPEAL by defendant from *Weaver, District Court Judge,* 1 May 1973 Session of District Court held in BUNCOMBE County. Argued in the Court of Appeals 31 October 1973.

Plaintiff seeks alimony without divorce on the grounds of abandonment. She also seeks custody of, and support for, their 14 year old daughter. The case was tried before Judge Weaver, by consent sitting without a jury, upon its merits. Defendant stipulated that all issues be answered in favor of the plaintiff with the exception of the issues as to which of the parties was the dependent spouse and which was the supporting spouse.

The trial judge found that plaintiff abandoned defendant; that plaintiff was the dependent spouse and defendant was the supporting spouse; that defendant had an annual net taxable income of $35,000.00; and that both parties are fit and proper persons to have custody of their 14 year old daughter. Thereafter the trial judge decreed that defendant pay a total of approximately $22,800.00 annually to and for the benefit of plaintiff and their daughter. Defendant was granted specific visitation rights subject to the discretion of the daughter.

Defendant appealed.

Morris, Golding, Blue and Phillips, by James N. Golding, for plaintiff.

Wade Hall, for the defendant.

BROCK, Chief Judge.

Plaintiff filed in this Court a separate motion to dismiss the appeal. Consideration of the motion was postponed until after arguments. Plaintiff's motion to dismiss is now denied.

We do not comment upon the evidence offered at trial because there must be a new trial.

[1] The trial judge failed to make findings of fact to establish the reasonable needs of the plaintiff or the reasonable needs of the daughter to maintain a standard of living commensurate with that to which they had become accustomed while living with defendant. There must also be a full consideration of the ability of the supporting spouse to make the payments decreed. We make no comment concerning the amount of the payments required of defendant because we are unable to determine what evidence or facts were considered by the trial judge.

It is not necessary for the trial judge to make detailed findings of fact upon each item of evidence offered at trial. It is necessary, however, that he make the material findings of fact which resolve the issues raised. In each case the findings of fact must be sufficient to allow an appellate court to determine upon what facts the trial judge predicated his judgment.

[2] With regard to visitation rights granted defendant by the trial judge, the decree provides: "That said visitations shall be subject to the consent of Peggy Morgan and shall be discretionary with said child." Regardless of the specificity of the visitation privileges which preceded the above quoted provision, the latter provision renders the decree nugatory at the discretion of the daughter. While we realize that the preferences of a 14 year old are entitled to some weight in determining custody and visitation rights, it is error to allow the minor to dictate, at will from time to time, whether the judgment of the court is to be honored.

The judgment is vacated and a new trial is ordered.

New trial.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JOHN PRESTON HARRIS

No. 747SC138

(Filed 6 February 1974)

1. **Criminal Law § 23— guilty plea — promise of leniency — insufficiency of evidence**

   Evidence that defendant hoped he would receive a suspended rather than an active sentence was insufficient to support defendent's contention that his guilty plea should be stricken because it was induced by promise of leniency.

2. **Constitutional Law § 32— waiver of counsel — voluntariness**

   Defendant's waiver of counsel was voluntary where he was thoroughly examined by the trial court on that point and he executed a written waiver of counsel.

3. **Rape § 3— assault with intent to rape — sufficiency of indictment**

   Indictment charging defendant with the felony of assault with intent to rape fully and sufficiently charged the crime.

APPEAL by defendant from *James, Judge,* 26 March 1973 Session of Superior Court held in NASH County. Argued in the Court of Appeals 23 January 1974.

Defendant was charged in a bill of indictment with the felony of assault with intent to rape. Upon his plea of guilty, defendant was sentenced to a term of four to six years imprisonment.

Defendant appealed.

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

W. O. Rosser, for the defendant.

BROCK, Chief Judge.

Defendant appeared in the trial court without counsel. He insisted that he was able to employ counsel but did not want one because he felt counsel could do him no good. He tendered a plea of guilty and was fully examined by the trial court touching upon his understanding and the voluntariness of his plea. Defendant stated in the written inquiry that he understood he was charged with assault with intent to commit rape; that the charge had been explained to him; that he was in fact guilty; that no one had made any promise or threat to influence him to plead guilty;

and that he freely, understandingly, and voluntarily authorized entry of a plea of guilty. The trial judge who questioned and observed the defendant adjudicated that the plea of guilty was freely, understandingly, and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency.

[1] Defendant now argues that the plea should be stricken because he was induced to plead guilty by promises. Obviously, defendant was hoping for a suspended sentence, and he now wants to strike his plea because he received an active sentence. The sheriff of Nash County testified that the prosecutrix and other members of defendant's family told the sheriff that they hoped defendant would receive a suspended sentence. However, this is far from evidence of a promise by anyone that defendant would in fact receive a suspended sentence.

[2] Defendant argues that his waiver of counsel was not executed voluntarily. The thorough examination of defendant by the trial court on this point and defendant's execution of a written waiver of counsel nullify this argument.

[3] Defendant moves to arrest judgment because the bill of indictment fails to allege all of the essential elements of the crime. The motion is denied. The indictment fully and sufficiently charged the crime in pertinent part as follows: that the defendant on the 27th day of January 1973, "did unlawfully, wilfully, and feloniously assault Rosie H. Harris, a female, with the intent to unlawfully, wilfully and feloniously ravish and carnally know the said Rosie H. Harris by force and against her will."

No error.

Judges MORRIS and CARSON concur.

JOHNNY SLATE v. CLAVIS SHELTON

No. 7417DC62

(Filed 6 February 1974)

Rules of Civil Procedure § 51— jury instructions — no expression of opinion

The trial judge did not violate Rule 51(a) of the Rules of Civil Procedure by expressing an opinion on the facts during his jury in-

structions where the court used the phrases "as I understand it" and "I think he meant" in referring to his own understanding of certain testimony, since he cautioned the jury not to take the facts or evidence from the court but only from their own recollection of the evidence.

APPEAL by defendant from *Clark, Judge,* 5 June 1973 Session of District Court held in STOKES County.

This is an action to recover damages for breach of contract.

Plaintiff testified that he and defendant entered into a contract under the terms of which he was to cut certain lumber to specifications and deliver to defendant at an agreed price of $175.00 per thousand board feet; that he delivered the lumber in accordance with the agreement, but defendant refused to pay for it.

Defendant denied that the lumber was cut to specifications as agreed and declined to accept it.

The court submitted these issues to the jury: (1) "Did the Plaintiff and Defendant enter into a contract for purchase of lumber cut to certain specifications and delivered to defendant at $175.00 per thousand feet?" (2) "If so, did Plaintiff perform his part of the contract?" (3) "What amount, if any, is the plaintiff entitled to recover of the defendant?" The jury answered the first two issues Yes, and found that plaintiff was entitled to $2,033.85 in damages. Judgment was entered accordingly, and defendant appealed.

Frank C. Ausband for plaintiff appellee.

Marshall and Hughes, by William F. Marshall, Jr., for defendant appellant.

BALEY, Judge.

The sole contention on this appeal is that the trial court violated Rule 51(a) of the North Carolina Rules of Civil Procedure by expressing an opinion on the facts during its instructions to the jury.

Rule 51(a) provides:

"(a) *Judge to explain law but give no opinion on facts.* —In charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and prov-

> ince of the jury, but he shall declare and explain the law arising on the evidence given in the case. The judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the various parties."

Upon one occasion in his charge the court used the phrases "as I understand it" and "I think he meant" in referring to his own understanding of certain testimony, but he cautioned the jury not to take the facts or evidence from the court but only from their own recollection of the evidence. He explained what he thought the plaintiff had meant by his testimony, but he did not say or imply in any way that plaintiff's testimony was true, or that defendant's evidence should be rejected. The court was simply interpreting and summarizing the evidence in order to declare and explain the law arising thereon as required by Rule 51(a).

Considered as a whole, the charge complied with Rule 51(a) and contained no expression of opinion which could have been prejudicial to the defendant.

Upon conflicting evidence the jury has found for the plaintiff.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHNNY RAY LUSTER

No. 7421SC117

(Filed 6 February 1974)

Criminal Law § 113— alibi instruction proper

Trial court's instruction on alibi which placed no burden of proof on defendant to prove an alibi but did require the State to satisfy the jury beyond a reasonable doubt that defendant was present and participated in the crime was proper.

APPEAL by defendant from *McConnell, Judge,* 20 August 1973 Session of Superior Court held in FORSYTH County.

Defendant was charged in a bill of indictment, proper in form, with distributing marijuana to Robert Edwards on 5 April 1973 at 800 Lockland Avenue, Winston-Salem. He was tried before a jury upon a plea of not guilty.

The State's evidence tended to show that the principal of Dalton Junior High School saw Robert Edwards, a student, passing an object, later determined to be a marijuana cigarette, to another student. Edwards testified that he had purchased the cigarette from defendant while visiting him at his home on the afternoon of 5 April 1973.

Defendant denied the sale of the marijuana and presented evidence tending to show that he was away from home at the time of the alleged sale seeking employment.

The jury returned a verdict of guilty. From sentence imposed by the court, defendant appealed.

Attorney General Morgan, by Associate Attorney John R. Morgan, for the State.

B. R. Browder for defendant appellant.

BALEY, Judge.

Defendant contends that the trial court erred in its charge to the jury on the issue of alibi. This contention is without merit.

In *State v. Hunt*, 283 N.C. 617, 619, 197 S.E. 2d 513, 515, the North Carolina Supreme Court approved the following charge on alibi:

> "An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an aquittal."

The charge approved in the *Hunt* case and the one given by Judge McConnell differ in their wording, but in substance they are identical. No burden of proof was placed on the defend-

ant to prove an alibi, but the State was required to satisfy the jury beyond a reasonable doubt that defendant was present and participated in the crime. In part the court stated:

> "Therefore, as to the alibi, I charge you that, if upon considering all the evidence, including the evidence about the alibi, you have a reasonable doubt as to the defendant's presence or participation in the crime, you would have a reasonable doubt and would find him not guilty."

There was no error in the charge, and it is approved.

Upon conflicting evidence the jury accepted the State's version of the facts. Defendant has received a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

BULOVA WATCH COMPANY, INC., A CORPORATION v. BRAND DISTRIBUTORS OF NORTH WILKESBORO, INC., A CORPORATION, AND ROBERT YALE

BULOVA WATCH COMPANY, INC., A CORPORATION v. MOTOR MARKET, INC., A CORPORATION d/b/a BOB'S JEWELRY & LOAN, AND ROBERT YALE

No. 7423SC142

(Filed 6 February 1974)

Monopolies § 1— Fair Trade Act — validity and constitutionality

The Fair Trade Act is valid and constitutional, and the trial court properly entered judgment enjoining defendants from selling plaintiff's product at prices less than the minimum prices established by plaintiff's fair trade agreements and from otherwise violating plaintiff's system under the Fair Trade Act.

APPEAL by defendants from *Rousseau, Judge,* 10 September 1973 Session of Superior Court held in WILKES County.

Plaintiff seeks to enjoin defendants from violating plaintiff's fair trade agreements in North Carolina. Defendants have not signed any agreement with plaintiff and have not

purchased merchandise from plaintiff. The relevant facts were stipulated and are sufficient to establish a violation of the plaintiff's fair trade agreements.

Defendants appealed from a judgment enjoining them from selling plaintiff's product at prices less than minimum prices established by plaintiff's fair trade agreements and from otherwise violating plaintiff's system under the Fair Trade Act.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston by Mark R. Bernstein and W. Samuel Woodard for plaintiff appellee.

W. G. Mitchell and McElwee & Hall by John E. Hall, attorneys for defendant appellants.

VAUGHN, Judge.

Defendants' appeal has merit only if G.S. Chapter 66, Art. 10, the "Fair Trade Act," is invalid as to them. The case directly involves a substantial question arising under the constitution. *See* G.S. 7A-30.

More than thirty-four years ago, our Supreme Court, Justice Barnhill dissenting, held that the "Fair Trade Act" was valid and constitutional. *Lilly & Co. v. Saunders,* 216 N.C. 163, 4 S.E. 2d 528. Until that opinion is modified or superseded by the Supreme Court, we are bound by it, although we consider much of defendants' argument to be sound. The judgment, therefore, must be affirmed.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. BENJAMIN FRANKLIN BLACK

No. 7419SC133

(Filed 6 February 1974)

APPEAL by defendant from *Seay, Judge,* 27 August 1973 Session of Superior Court held in RANDOLPH County.

Attorney General Robert Morgan by Archie W. Anders, Associate Attorney, for the State.

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

VAUGHN, Judge.

Defendant does not bring forward any assignment of error from his trial for and conviction of the felonies of breaking and entering and larceny. Counsel asks that we examine the record for possible errors of law. We have done so and find no prejudicial error.

No error.

Judges BRITT and PARKER concur.

BURT E. RUCKER v. HIGH POINT MEMORIAL HOSPITAL, INC., AND HORACE HENRY STOVALL, M.D.

No. 7418SC20

(Filed 20 February 1974)

1. **Evidence § 50; Physicians and Surgeons, Etc. § 15— malpractice action — medical testimony — practice in community**

   The trial court in a medical malpractice case properly refused to allow testimony of plaintiff's expert witness into evidence where the injury complained of occurred in High Point, the witness was a physician from New Orleans specializing in surgery, the witness did not testify to any knowledge which would qualify him to compare the treatment and diagnosis afforded by defendant to the community of High Point or any similar community, and the witness did not qualify himself to testify with respect to the standard of care in High Point.

2. **Evidence § 50; Physicians and Surgeons, Etc. § 11— malpractice action — expert testimony improperly excluded**

   Where the trial court in a medical malpractice case properly refused to let the testimony of plaintiff's expert witness be submitted to the jury, the trial court should have allowed plaintiff to bring in another witness to testify, though the proposed witness was not listed as a witness for plaintiff on the pretrial order, conditioned upon defendants' examining the jury with respect to the witness and plaintiff's submitting to a mistrial if prejudice to defendants appeared.

3. Master and Servant § 3; Physicians and Surgeons, Etc. § 16— doctor in hospital emergency room — employment relationship

Trial court erred in directing a verdict against plaintiff in favor of defendant hospital on the basis that plaintiff had failed to show that the individual defendant was the agent or employee of the hospital where plaintiff introduced a contract between defendants which stated working hours, benefits, salary, duties, and restrictions with respect to outside employment, and thus created an employment relationship and not an independent contractor.

APPEAL by plaintiff from *Lupton, Judge,* 26 March 1973, Civil Session Superior Court, GUILFORD County. Argued in the Court of Appeals 22 January 1974.

This action was instituted on 13 November 1970; and by it plaintiff seeks damages for loss of use of his left leg, medical expense, and loss of work all of which he alleges resulted from medical malpractice of defendant Stovall in the emergency room of defendant Hospital. Plaintiff alleges that defendant Stovall was an employee of defendant Hospital.

Plaintiff was accidentally shot in his left leg by a friend with whom he was rabbit hunting. The shot was from a distance of about 50 feet. The incident occurred about 10 o'clock a.m. on 22 November 1969. The outer aspect of plaintiff's lower left leg was peppered with a load of number four shotgun pellets in an area about the size of a man's hand. Plaintiff was immediately carried by his friend to Dr. Armstrong, a general practitioner in Mount Gilead. Dr. Armstrong cleansed the wound with Phisohex and applied pressure dressings and administered Demerol for pain and a tetanus toxoid. He advised plaintiff to go to the hospital in Troy. Plaintiff professed a preference to go to his home town, High Point. Dr. Armstrong instructed plaintiff to receive immediate medical care when he got to High Point.

Plaintiff was taken from Mount Gilead directly to High Point Memorial Hospital, arriving at the emergency room at approximately 1:30 p.m. At this time, plaintiff was in severe pain and unable to walk. A secretary took basic information from plaintiff, and one of the emergency room nurses took his blood pressure and removed the dressing. Defendant was an emergency room staff physician and was on duty that day. He looked at the wound, ordered an injection of an antibiotic and pain medication, told plaintiff to apply heat to the wound, to go home, and that he would be all right. Defendant never touched the leg or otherwise examined it other than by looking at it. No

X-rays were taken or ordered. Defendant did not have admitting privileges but did not refer plaintiff to a surgeon with admitting privileges. He did tell plaintiff to see his family doctor, but plaintiff was unable to see his family doctor until Monday morning, this being a Saturday.

Plaintiff went home, arriving there about 2:30 p.m. The pain become more severe and plaintiff became nauseated. He was unable to stay in bed because of the pain and, with his wife's help, hopped around a bit from one room to another. Plaintiff's wife contacted her employer, who arranged for her family physician to meet plaintiff at the emergency room in order that he might give plaintiff something for the nausea and the pain.

At approximately 5:30, plaintiff's wife and their older daughter arrived at the emergency room. Defendant was still on duty. Dr. Auman, a doctor of internal medicine, met plaintiff there and discussed the situation with defendant who told Dr. Auman what he had already given plaintiff. He ordered medication for pain (75 milligrams of Demerol) and nausea (25 milligrams of Thorazin), but did not remove the dressing or administer any other treatment. Dr. Auman did not profess to be a surgeon. The pain medication put plaintiff to sleep, and he rested until early Sunday morning.

During Sunday the pain became more intense, plaintiff more nauseated, and his leg began to swell, drain, and a foul odor was noticed coming from the wound. One of plaintiff's daughters, a registered nurse, came from Winston-Salem and cared for plaintiff during Sunday. Both she and plaintiff's wife tried to reach their family doctor, Dr. Jones, and a surgeon. They were not successful. The daughter continued to apply heat to the wound and changed the dressing sterilely.

On Monday morning, 24 November 1969, plaintiff was taken to his family physician, Dr. Jones, who immediately sent him to the hospital and referred him to Dr. Parham, a surgeon. Dr. Parham immediately had plaintiff admitted to the hospital and ordered X-rays, lab studies and other examinations. A culture of the drainage from the wound revealed that some species of clostridium were present, and X-rays were consistent with a diagnosis of gas gangrene.

On Wednesday, 26 November 1969, plaintiff, at the direction of Dr. Parham, was moved to Duke Hospital for treat-

ment in the hyperbaric chamber. Plaintiff remained at Duke approximately one month. During that time, several operative procedures were performed removing dead tissue in an attempt to salvage the leg from the gangrene infection. Plaintiff was returned to High Point Hospital where, over a period of several months, skin grafts were done to cover the exposed bone and flesh.

The leg was, of course, deformed and disfigured. Plaintiff lost the entire outer muscle chamber in the lateral portion of the left lower leg. The left leg had atrophied, and the ankle had turned inward, limiting it severely in side-to-side and up-and-down movement. The muscles left in the left leg were weak. The perineal nerve in that leg was totally lost. The evidence was that plaintiff had lost 75% of the functional use of the leg. He was required to wear a type of brace which makes the foot move when he walks, but because of the ankle turning inward, he walked on the side of the foot which had become calloused.

At trial plaintiff offered the testimony of Dr. Julius L. Levy. He was found by the court to be an expert physician specializing in surgery. Dr. Levy is from New Orleans. Over defendants' objection he was not allowed to testify as to standards for treatment of gunshot wounds nor to testify concerning whether defendant Stovall's actions in his treatment of plaintiff constituted good medical or surgical procedure or conformed to the standards for treatment.

After plaintiff learned that the expert witness would not be allowed to testify before the jury, he asked for early adjournment in order to reassess his position. He had listed his witnesses on a pretrial order. Dr. Thomas Wood was not listed thereon. Plaintiff asked permission to call him. Defendants objected and the court refused to allow Dr. Wood to testify. Defendants' motion for a directed verdict was allowed and plaintiff appealed.

Schoch, Schoch, Schoch and Schoch, by Arch Schoch, Jr., for plaintiff appellant.

Henson, Donahue and Elrod, by Perry C. Henson, for defendant Stovall appellee.

Sapp and Sapp, by Armistead W. Sapp, Jr., for defendant High Point Memorial Hospital, Inc., appellee.

MORRIS, Judge.

[1] Plaintiff argues, by his assignment of error No. 2, that the trial court committed reversible error in excluding the testimony of Dr. Levy.

There is certainly no question but that Dr. Levy is eminently qualified. He is certified by the American Board of Surgery, a Fellow of the American College of Surgeons, the International College of Surgeons, and the American College of Gastroenterology. He was visiting surgeon at Charity Hospital in New Orleans, and consultant at Alexandria, Louisiana, Veterans' Memorial Hospital, Charity Hospital in Alexandria, Louisiana, Lallie Kemp Charity Hospital in Independence, Louisiana, and Keesler Air Force Base Hospital in Biloxi, Mississippi. At the time of the trial he practiced at Touro Infirmary, East Jefferson General Hospital, and Sara Mayo Hospital, all in New Orleans. He had written 12 papers on various aspects of surgery which had appeared in the American Journal of Surgery, Southern Medical Association Journal, Journal of Louisiana State Medical Association, and Journal of Surgery. He was an Associate Professor of Surgery on a part-time basis at Tulane University Medical School and since 1965 had continued his private practice in New Orleans and his association with the University.

Dr. Levy testified, on the qualified examination of defendants, that he had no knowledge with respect to High Point; that he did not know whether Memorial Hospital was accredited; that he had never been there; did not know how many Board certified surgeons practiced in High Point; did not know how many surgeons, doctors, or residents practiced in High Point; knew nothing of the nature and extent of the library in High Point Memorial Hospital or the nature and extent of a medical library available to surgeons practicing in High Point within a 25-mile radius; that he did not know whether High Point Memorial Hospital was approved for medical care.

During his testimony out of the presence of the jury, Dr. Levy testified that he came to High Point to testify as to his observations from some facts concerning one patient and was not prepared to discuss standards of medical practice until the night before he took the stand. He testified: "To the best of my knowledge, the treatment of gunshot wounds of the extremities is standard throughout the United States, among quali-

fied surgeons," and "The standards for the treatment of gunshot wounds are dictated not by local custom, but by national publications and national organizations, and by training in medical schools and residency programs, which are standardized by various agencies throughout the Country." Further, "I do not know of any variations of the standards of the management of gunshot wounds of the lower extremities from any one community to another, not within the United States. To the best of my knowledge, the standards of care are the same from one community to the other."

Dr. Levy unequivocally testified that when plaintiff first came to the emergency room he should have been referred to a surgeon with admitting privileges and that if a physician without admitting privileges undertook to care for the wound as described, "if that circumstance existed, then I would say that he was not living up to the standards demanded by the medical profession in this Country. I am saying if the medical staff of that hospital said that is all right, then they were not living up to the standards all over this Country. Just to clarify that . . . I don't think the medical staff of a hospital sets the medical standards in a community. It is set by a much greater area than one tiny locality. In a community of this size, with qualified people in it, qualified surgeons in it, if the doctors who serve the community don't live up to the standards I have described, then they shouldn't be practicing medicine." He further testified: "I am saying a standard for the metropolitan community of this sort; and I again reiterate in a community of this size, this sort, in a hospital with a qualified medical staff, they should live up to the standards dictated around the Country; and if everyone doesn't live up to those standards, then everyone in that group is guilty."

It is obvious that Dr. Levy has set very high standards for himself and would like for all practicing physicians to set high standards for themselves. We cannot disagree with this desire. Practically, however, this is a theoretical optimum impossible of achievement.

In *Dickens v. Everhart,* 284 N.C. 95, 100, 199 S.E. 2d 440 (1973), Justice Lake, quoting from *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762, and citing other cases to the same effect, set out the basis of liability of a physician or surgeon for negligence in the care of his patients as follows:

> "A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case, and (3) he must use his best judgment in the treatment and care of his patient. [Citations omitted.] If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable."

Justice Lake, writing for a unanimous Court, continued:

> "In *Wiggins v. Piver,* 276 N.C. 134, 171 S.E. 2d 393, this Court rejected the 'locality rule' to the effect that, in order to recover on the ground of failure to possess or use the requisite professional skill and ability, the injured patient must prove that the defendant failed to possess or use the skill and ability customary in the community in which the service was rendered. We there reaffirmed the rule that the physician or surgeon must possess the degree of learning, skill and ability which other *similarly situated* ordinarily possess. Thus, the general practitioner is not liable by reason of his failure to possess the degree of knowledge and skill ordinarily possessed by a specialist in the field of his specialty. Similarly, the character of the community in which the defendant practices is a circumstance to be considered in determining the degree of skill and ability to be required of him. Prosser on Torts, 3rd ed., Negligence, p. 166. He is, however, held to the standard of professional competence and care customary in similar communities among physicians engaged in his field of practice. Thus, in *Wiggins v. Piver,* we held that an expert witness, otherwise qualified, may state his opinion as to whether the treatment and care given by the defendant to the particular patient came up to the standard prevailing in similar communities, with which the witness is familiar, even though the witness be not actually acquainted with actual medical practices in the particular community in which the service was rendered at the time it was performed."

It is obvious that Dr. Levy testified with respect to national standards. Plaintiff asked a hypothetical question in the absence of the jury and asked Dr. Levy whether he had an opinion satisfactory to himself and to a reasonable medical certainty as to whether the "diagnosis and treatment afforded by Dr. Stovall to the plaintiff were in conformity with the approved practice and principles of the medical profession *in this community or similar communities.*" Dr. Levy answered that he had an opinion which was "That the diagnosis and treatment as afforded by Dr. Stovall were not in conformity with the usual practice of this community or similar communities."

We agree with the trial court that Dr. Levy had not testified to any knowledge which would qualify him to compare the treatment and diagnosis afforded by defendant Stovall to the community of High Point or any similar community, nor had he qualified himself to testify with respect to the standard of care in High Point or any similar community.

We think that what was said in *Lockhart v. MacLean,* 77 Nev. 210, 361 P. 2d 670 (1961), is applicable. There an operation took place in Reno, Nevada. Infection of the bone developed. A malpractice suit was brought and, in support of motion for summary judgment, plaintiff sought to use the deposition of a surgeon from Oakland, California. The trial court refused to consider it; and on appeal, the Court said:

> "We are in accord with the views expressed by the trial court that, in the instant case, there was no sufficient showing in Dr. Tepper's affidavit to qualify him to give an opinion admissible in evidence that the diagnosis, preoperative, operative and post-operative procedures taken and followed by defendants were not in accordance with the standard of conduct of surgeons and orthopedic surgeons practicing in Reno, Nevada. Dr. Tepper's affidavit showed that such procedures on the part of respondents were not in accordance with those standards throughout the United States in the particulars mentioned in his affidavit. His affidavit shows that, with the exception of training had by him in Denver, Colorado in 1943 and in Kansas City the following year, the affiant had received all of his other education and training and had conducted his practice solely within the State of California. Under the argument advanced by appellants, based upon the background referred to, Dr. Tepper would be competent to testify concerning the

standards of surgeons in communities of all sizes, urban or rural, accessible or isolated, without regard to the relative medical facilities of the same or how widely separated from each other, so long as within the United States. Neither practice nor presence at any time in the community would be a prerequisite to the competency of the witness.

Under the present facts we consider that the liberalizing of the rule pertaining to competency, based upon knowledge of standards of surgeons and orthopedic surgeons, to the extent of making the locality the entire geographic United States would, in effect, constitute such an extensive and unjustifiable relaxation of the locality rule as to amount to an abandonment of the same. Even though under certain circumstances and in the furtherance of justice the trial court might, in the exercise of its discretion relax the locality rule so as to permit competency of an expert witness to be established by a showing of knowledge of standards in a similar rather than the same locality, this would in no way constitute a recognition of the principle here contended for by the appellant." 361 P. 2d, at 673-674.

In oral argument, plaintiff advanced the theory that Dr. Levy was competent to express his opinion as he did in the absence of the jury because he and defendant Stovall were *similarly situated.* This, he argued, meant medical education, preparation for specialty, size and type of medical school attended, size and type of hospitals with which each was associated, etc. Even if we were to agree with plaintiff's interpretation of the meaning of the phrase "similarly situated" as used in *Dickens v. Everhart, supra,* and we do not, it is obvious from the record that Dr. Levy and Dr. Stovall were not similarly situated. We do not deem it necessary to list the dissimilarities; suffice it to say, they are numerous. The trial court properly refused to allow Dr. Levy's testimony to be heard by the jury.

Plaintiff next asisgns as error the court's refusal to admit into evidence certain exhibits. The court excluded plaintiff's exhibit 4 as to defendant Hospital, but admitted it as to defendant Stovall. This was the emergency room record. For reasons discussed hereinafter, the court should have admitted the exhibit as to defendant Hospital. The court also admitted one page of

exhibit No. 7 as to defendant Stovall but not as to defendant Hospital. This page was the laboratory reports. For the same reasons, the court erred in refusing to admit this exhibit as to defendant Hospital. The remainder of the exhibits tendered and refused were in patient records at High Point Hospital. Plaintiff introduced the records as primary substantive evidence for use in framing a proper hypothetical question. He relies on *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962). There the records were used for impeachment purposes. Plaintiff here did not, technically, adhere to the rules laid down in *Sims* for laying the foundation for the introduction of hospital records. We think the court properly excluded the exhibits. We note, however, that plaintiff was able to frame a proper and adequate hypothetical question without the use of the exhibits. That his hypothetical question was proper and adequate is conceded by defendant Stovall in his brief.

[2] Plaintiff's assignment of error No. 4 is addressed to the court's refusal to allow plaintiff to call Dr. Thomas Wood as a witness. We think plaintiff's position is well taken. We do not know what Dr. Wood's testimony would have been because the court refused to allow plaintiff to put it in the record. We cannot know, therefore, whether Dr. Wood's evidence would have been sufficient to carry plaintiff's case to the jury. Although he was not listed as a witness for plaintiff on the pretrial order, defendants' argument that they were not prepared to cross-examine him on just overnight notice is fallacious in view of their expert cross-examination of other medical witnesses for plaintiff. Their argument that the jury had not been examined as to this witness also fails in view of plaintiff's offer at trial to agree for defendants to examine the jury with respect to this witness before he testified and further, if it appeared to defendants that one or more should be excused, the court could declare a mistrial. Dr. Wood was a partner of a witness who had testified for plaintiff and about whom the jury had been questioned. The witness's evidence could not have been merely cumulative. Plaintiff informed the court that the witness would testify with respect to standards of care in High Point. No evidence as to this had been elicited at that time as the court had properly refused to allow Dr. Levy to testify as to standards and defendant Stovall's violation of them. Plaintiff was taken by surprise when it appeared that the testimony of his expert witness would not be submitted to the jury. We are of the opinion that, under the circumstances of this case, the trial court should have exer-

cised his discretion in favor of allowing plaintiff to bring in another witness to testify conditioned upon defendants' examining the jury with respect to the witness and plaintiff's submitting to a mistrial if prejudice to defendants appeared.

One further question must be discussed. The court in its order directed a verdict for defendant Hospital on the basis that plaintiff had failed to show that defendant Stovall was the agent, servant, or employee of defendant Hospital, but, on the contrary, all the evidence showed that defendant Stovall was an independent contractor. We disagree.

[3] Plaintiff's exhibit 11, introduced into evidence without objection by defendants (with the exception of objection to an insurance provision), is a contract between defendant Hospital and defendant Stovall. Under the contract, defendant Stovall is employed at a guaranteed salary of $24,000 per year as a member of a four-man team to work in the emergency room. The 12-hour shifts seven days per week were to be worked out by Stovall and the other three. The hospital was to collect all fees; and, in the event of collection of fees exceeding the guaranteed salaries, any excess would be divided among the emergency room doctors. They were to see all patients coming to the emergency room. When services of a specialist were required, the emergency room doctor was to call a specialist on backup call. The contract specifically provided: "All services of the Emergency Department Physicians are to be performed in a manner as to further the best interest of the hospital including the best possible care and treatment of the patient with special emphasis on the maintenance of good public relations." The contract further provided for one month's vacation for each year of service with the hospital responsible for securing temporary replacement. Further, each physician was allowed three days per year to attend scientific meetings and 12 days per year sick leave which could be cumulative for a period of three years or a total of 36 days. The hospital was to arrange for replacement in event of illness but reserved the right to compensate the group for doubling up. The physicians were allowed one year to phase out their private practice, and they agreed that they would not accept other work in their off duty hours which would amount to going into private practice in competition with the members of the active medical staff. It appears to us that this clearly creates an employment relationship and not an independent contractor. We,

therefore, hold that the court erred in directing a verdict against plaintiff in favor of defendant Hospital.

For the reasons stated, there must be a

New trial.

Chief Judge BROCK and Judge CARSON concur.

STATE OF NORTH CAROLINA v. JAMES FRANKLIN O'KELLY III

No. 7420SC177

(Filed 20 February 1974)

1. **Constitutional Law § 30— speedy trial — delay between arrest and trial — delay not purposeful or oppressive**

Defendant was not denied his right to a speedy trial by the delay between his arrest on 4 August 1972 and his trial on 30 July 1973, although defendant made numerous requests beginning in September 1972 that his case be promptly tried because four witnesses who could prove his innocence were planning to leave the State, defendant presented evidence that the witnesses had left the State prior to the trial and could not be located, and defendant had been in Central Prison serving a sentence for an unrelated offense since before his first request for a speedy trial, where defendant failed to show that the delay in bringing him to trial was due to the neglect or willfulness of the prosecution or that the delay was purposeful or oppressive.

2. **Larceny § 8— possession of recently stolen property — instructions**

In a prosecution for breaking and entering and larceny, the trial court did not err in charging that in order to apply the doctrine of possession of recently stolen property the jury must find that defendant had possession of the item so soon after it was stolen and under such circumstances as to make it unlikely that he had obtained possession "honestly."

Judge PARKER *dissenting.*

APPEAL from *Chess, Judge,* 30 July 1973 Special Criminal Session, UNION Superior Court.

Defendant was tried upon a bill of indictment, in proper form, charging the felonies of breaking and entering, larceny, and receiving stolen goods. The last charge was dismissed upon motion by defendant and the jury returned a verdict of guilty of the other two charges. From judgment imposing prison sentence of five years for each charge, the sentences to run consecu-

tively and to begin at the expiration of any sentence defendant was then serving, defendant appeals.

Attorney General Robert Morgan, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin, for the State.

Craighill, Rendleman & Clarkson, by L. Stanley Brown, for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error, defendant contends the trial court erred in denying his motion to dismiss on the ground that his constitutional right to speedy trial had been violated. On 6 June 1973, Judge Chess conducted an evidentiary hearing on defendant's motion at which time defendant presented evidence tending to show:

He was arrested on account of the charges involved here on or about 4 August 1972. At the time of the hearing, he was serving a 26-30 years sentence at Central Prison pursuant to conviction (evidently in 1972) on another charge and had been in Central Prison continuously since late August or early September of 1972. In September of 1972, defendant wrote a letter to the solicitor of the Twentieth Judicial District, advising that witnesses were available who would prove his innocence in the pending cases but some of them were planning to leave North Carolina; he requested that he be given a trial at the 16 October 1972 session of the court. Around 15 October 1972, defendant prepared and mailed to the solicitor a motion asking for a speedy trial or a dismissal of the charges. On 12 February 1973, he wrote a letter to the Clerk of Superior Court of Union County (with copies to the resident judge, solicitor, and defendant's attorneys) calling attention to his previous communications and stating that, since that time, material defense witnesses had moved to Florida; he further requested a trial at the 16 February 1973 session of the court. On 20 February 1973, Resident Judge McConnell wrote defendant and advised that he was informed that the solicitor expected to call defendant's cases for trial in March or April. On 7 May 1973, defendant obtained subpoenas for four witnesses, ordering them to appear in Union Superior Court on 9 May 1973; defendant provided Charlotte addresses for the witnesses but the subpoenas were returned

unserved. Defendant was not given a trial at the May Session and on 5 June 1973, filed a motion setting forth the foregoing facts and asking that the charges against him be dismissed for the reason that his constitutional rights to a speedy trial had been violated.

A witness (identified as defendant's fiancee) testified that during 1972 she talked with the four witnesses named in the subpoenas; that two of them stated they were with defendant on the day of the alleged crimes; that the other two stated they saw defendant purchase from a third party the gun allegedly stolen; that neither of the witnesses is now available; and she had been advised that the witnesses were in Florida but that she was unable to obtain their addresses.

The court made findings of fact and concluded that the delay complained of was not violative of defendant's rights and denied the motion.

In the recent case of *State v. Frank,* 284 N.C. 137, 141, 200 S.E. 2d 169, 172-173 (1973), the Supreme Court said:

> "Of course the right to a speedy trial is an integral part of the fundamental law of this State, and the fact that an accused is in prison for other offenses does not mitigate against his right to a speedy and impartial trial. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969); *Smith v. Hooey,* 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969). Even so, the burden is on an accused who asserts denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. *State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972); *State v. Johnson, supra; State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309 (1965).
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> " 'The word "speedy" cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed.' *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659 (1972). Here, the record is silent as to the cause of the eight to ten months delay in the trial of these cases. The

length of the delay itself is not *per se* determinative, and there is no showing that the delay was purposeful or oppressive or by reasonable effort could have been avoided by the State. *See Pollard v. United States,* 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957)."

In the instant case, defendant failed to show that the delay in bringing him to trial was due to the neglect or willfulness of the prosecution. There was no showing that the delay was purposeful or oppressive. We hold that the court did not err in denying defendant's motion to dismiss and the assignment of error is overruled. We feel constrained to add, however, that while the burden is on an accused who asserts denial of his right to a speedy trial, there are those instances when the State would be well advised to present evidence explaining the delay.

[2] Defendant assigns as error an instruction the court gave the jury with respect to the doctrine of possession of recently stolen property. The court instructed as follows (the portion challenged being in brackets):

> "[Under the doctrine of recent possession, if you find beyond a reasonable doubt that the shotgun was stolen, and two, the defendant had possession of this same shotgun, and three, that he had possession so soon after it was stolen that under such circumstances and under such circumstances as to make it unlikely that he had obtained possession honestly,] you may consider this together with all other facts and circumstances in deciding whether or not the defendant is guilty of breaking or entering or larceny."

Defendant argues that the court's use of the word "honestly" was error.

In *State v. Jackson,* 274 N.C. 594, 597, 164 S.E. 2d 369, 370 (1968), we find: "The inference arising from the possession of recently stolen property is described as 'the recent possession doctrine.' Possession may be recent, but the theft may have occurred long before. In that event, no inference of guilt whatever arises. Actually, the possession of *recently stolen goods* gives rise to the inference. The possession, in point of time, should be so close to the theft as to render it unlikely that the possessor could have acquired the property honestly. *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62; *State v. Jones,* 227 N.C.

47, 40 S.E. 2d 458; *State v. Patterson,* 78 N.C. 470; *State v. Kent,* 65 N.C. 311."

The evidence presented by the State in the case at bar tended to show: On 12 July 1972, Gary Penninger, his wife and 11 year old son, resided in a brick home at Route 1, Marshville, N. C. On that date, Mr. Penninger left home around 7:50 a.m., his wife left around 8:15 a.m., and his son left around 11:00 a.m. All windows and doors in the home were closed and locked when the son left and defendant had no permission to enter the house. Mr. Penninger was the first member of the family to return home and that was around 3:00 p.m. that afternoon. At that time, he found the home had been broken into and numerous articles, including a .12 gauge Remington 870 Wing Master shotgun, had been taken. Around 4:00 p.m. that same day, Boyd Simmons, who worked at a barbershop in Charlotte but lived in, and was a part-time special deputy sheriff of, Union County, and who knew defendant, saw defendant in Charlotte with a shotgun. Simmons tried to purchase the gun from defendant that afternoon but they could not agree on the price. Defendant told Simmons that his uncle had died and his aunt had given him the gun. Simmons and defendant continued to negotiate and some six days later defendant sold the gun to Simmons for $60.00. Some two weeks later, the sheriff of Union County saw the gun in Simmons' possession and suspected that it was the same gun Mr. Penninger had reported stolen. Penninger positively identified the gun by its serial number and other markings. (We take judicial notice of the fact that Marshville, N. C., is in Union County, that Charlotte is in Mecklenburg County, and the two counties adjoin.)

Defendant offered no evidence.

Considering the evidence presented, particularly the brief period of not more than five hours between the time the shotgun was taken from the Penninger home and the time it was seen in defendant's possession in an adjoining county, together with defendant's statement as to how he acquired the gun, we perceive no prejudicial error in the challenged instruction and the assignment relating thereto is overruled.

We have considered the other assignments of error brought forward and argued in defendant's brief but fail to find merit in either of them.

No error.

Judge VAUGHN concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

Because in my opinion the record establishes that defendant was denied his right to a speedy trial, I dissent.

The record shows the following: On 4 August 1972 defendant was arrested on the charges in this case and since that date he has continuously remained in the State's custody. Since 20 August 1972 he has been in Central Prison in Raleigh, serving a sentence imposed on his conviction for an unrelated offense, On 21 August 1972 the grand jury returned the indictment against him in this case.

In September 1972 defendant wrote a letter to the solicitor, sending copies to the resident judge and to his own attorney, asking that this case be tried at the term of court scheduled to begin on 16 October 1972. As the reason for this request, defendant stated that certain witnesses who could clear him were then available but were planning to move out of the State. Prior to 16 October 1972 defendant prepared, evidently on his own, a written "Motion and Request for a Speedy Trial Upon Pending Charge or for a Dismissal for Failure to Prosecute," which he mailed to the clerk of superior court of Union County, who received it on 16 October 1972 and who, on the same date, delivered it to the solicitor.

On 12 February 1973 defendant again wrote to the clerk, sending copies of his letter to the resident judge, to the solicitor, and to his own attorney, referring to his previous requests for trial and to the fact that he had previously advised the court of the impending plans of his witnesses to leave the State. In this letter defendant stated that he had received no response to his previous requests for trial, that his witnesses had relocated in Florida, seriously injuring his defense, but that since he understood that a term of court was to begin on 16 February 1973, he would like his case to be placed on the docket and tried. On 20 February 1973 the resident judge wrote to defendant in Central Prison a letter in which the judge stated that he

was informed that the solicitor expected to try this case "in March or April."

In May 1973, this case was for the first time placed on the calendar for trial. However, by order dated 9 May 1973 the presiding judge on his own motion continued the case due to the fact that he was related by marriage to a close relative of defendant with whom he had discussed the case.

The case next appeared on the calendar for trial at the special session of superior court in Union County which commenced on 4 June 1973. On 5 June 1973 defendant's counsel filed a written motion to dismiss on the ground that defendant had been prejudiced by the delay in that four witnesses who could have presented "substantive and valid defenses" and who had been available when defendant made his request for trial in the fall of 1972 had since moved to points unknown. An evidentiary hearing was held on this motion on 6 June 1973 before Judge Sammie Chess, Jr. At this hearing defendant testified that two of his witnesses, William Cook and Freddie McCrorie, would testify, if available, that defendant had been working with them, painting, at the time the crimes charged were alleged to have been committed. He testified that the other two witnesses, Shirley Hoglen and Phillis Deaton, had been barmaids in a lounge, and that these witnesses would testify, if available, that they had seen defendant purchase the gun from a man who came into the bar. Also at the evidentiary hearing, Ann Green, identified as defendant's fiancee, testified concerning her efforts to keep in contact with these four witnesses during the fall and early winter of 1972. She testified that these witnesses had then been available and had told her that they were willing to testify to present these defenses, that none of the four were any longer available, that she had been told that all four had moved to Florida, but that she did not know how to get an address for any of them. Following the evidentiary hearing, Judge Chess denied the motion for dismissal, but, due to his illness, continued the trial of the case. Subsequently, on defendant's motion, Judge Chess did enter a written order making findings of fact from the testimony presented to him at the evidentiary hearing. Included among these findings of fact are the following:

> "7. That sometime in late January or early February of 1973 witnesses moved out of the State of North Carolina and their whereabouts are no longer known by the defend-

ant. That the defendant's mother and one Miss Ann Green have continuously looked for witnesses since they left the State of North Carolina and have exhausted all possible means of finding their present whereabouts and are unable to ascertain their present whereabouts.

"8. That subpoenas issued by the Clerk of Superior Court of Union County for four witnesses were returned unserved by the Sheriff of Mecklenburg County, such subpoenas being issued on the 7th day of May, 1973, and returned on the 9th day of May, 1973, and such subpoenas being marked 'Moved New Address Unknown' or 'Not Found Within Mecklenburg County.' That such witnesses lived within Mecklenburg County from the period of August, 1972, to January, 1973."

* * * * *

"11. That the defendant has been incarcerated in Central Prison since approximately August 20, 1972, and has not been able to make contact with the four witnesses personally."

On his findings of fact, Judge Chess made conclusions of law, including the following:

"2. That the delay occasioned by the failure of the State to bring the defendant to trial until the week of June 4, 1973, did not prejudice the defendant's ability to present defenses in his behalf."

* * * * *

"4. That the delay is not violative of the defendant's right to a speedy trial under the Sixth and Fourteenth Amendments to the U. S. Constitution."

The case was next calendared for trial at the 18 June 1973 criminal session of superior court, but was again continued, this time in the discretion of the court when it appeared that trial of other cases would make it impossible to try defendant's case. Defendant was finally tried before Judge Chess at the special session of superior court which began 30 July 1973. No witnesses were presented for the defense. The State presented only three witnesses. One of these was the victim of the crimes charged, one was the barber and part-time special deputy sheriff who purchased the gun from defendant, and the third was the sheriff of Union County who investigated the case. The

entire testimony presented by the State is narrated on less than twelve pages of the record on this appeal.

While courts must of necessity apply a balancing test in deciding each speedy trial case, *Barker v. Wingo,* 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182, on review of this record I am compelled to the conclusion that defendant's constitutional right to a speedy trial was here violated. Defendant made timely and repeated requests that his case be promptly tried. He put the State on notice of the reason for his requests, pointing out the precise prejudice which might result to him from any delay. This prejudice did in fact occur. (The trial court's conclusion of law to the contrary is simply not supported by the facts which the court found.) During the entire time from defendant's arrest to the day of his trial, both defendant's person and the timing of his trial were within the exclusive control of the State. The State's case was short and simple to present, and no contention has been made that its witnesses were not at all times quickly available.

It was not incumbent on defendant to show willful mala fides on the part of the State in delaying his trial. His right to a speedy trial and the values which that right is designed to protect could be, and in my opinion were, as effectively denied by mere inaction on the part of the State.

I vote to vacate the judgment appealed from and remand this case with direction that defendant's motion to dismiss for denial of his right to a speedy trial be granted.

AGNES HODGES WILLIAMSON v. WILLIAM HARVEY WILLIAMSON, JR.

No. 732DC675

(Filed 20 February 1974)

1. Divorce and Alimony §§ 16, 23— alimony and child support order — insufficiency of findings of fact

The trial court's order requiring defendant to pay alimony in an amount equal to 40% of all income received by defendant and child support in an amount equal to 20% of all income received by defendant was not supported by proper findings of fact where the evidence tended to show that two businesses were the principal source of income for the parties but there was some question as to whether the parties were partners in the operation of the businesses.

2. **Divorce and Alimony §§ 16, 23— alimony and child support order — effect of parties' consent**

In an action for alimony without divorce and child custody and support, the parties cannot, by their consent, enable a trial judge to enter an order not based upon consideration of the several factors listed in G.S. 50-13.4(c) and G.S. 50-16.5(a).

APPEAL by plaintiff and defendant from *Ward, Judge,* 16 May 1973 Session of District Court held in BEAUFORT County.

This is a civil action instituted by the plaintiff, Agnes Hodges Williamson, in which she seeks from defendant, William Harvey Williamson, Jr., alimony without divorce and custody and support of their minor child. Plaintiff alleged in her complaint, among other things, that defendant had offered her such indignities as to make her life with him intolerable, that he had committed adultery, that the parties had been separated since 5 February 1972, and that defendant was engaged in a course of conduct designed to destroy the mobile home business which the plaintiff and defendant had worked so hard to develop into a thriving and prosperous enterprise. Plaintiff, in her prayer for relief, also sought an order (1) forbidding the defendant to go upon their businesses (Mimosa Mobile Home Sales and Mimosa Mobile Manor) and (2) providing for an "equitable division of the property owned by the plaintiff and defendant and acquired through their joint efforts . . . including a division of all real estate, stocks, bonds, and cash."

The defendant filed an answer and counterclaim in which he admitted that he had embarked upon a course of conduct in which he increasingly consumed substantial quantities of alcoholic beverages and began staying away from home until late at night and that by this and other conduct defendant had offered such indignities to the plaintiff as to render her life with him burdensome and intolerable. Defendant further admitted that the parties had been separated since 5 February 1972; however, he denied the allegations that he had committed adultery and that he was disrupting the businesses. Defendant also admitted in his answer that Mimosa Mobile Home Sales and Mimosa Mobile Manor had been his principal source of income for several years, but he denied that he and his wife were partners in the business and had employed their joint efforts to produce a successful operation. In fact, the defendant alleged that "[p]laintiff installed herself in Defendant's place of business, refused to leave, interfered with Defendant's operation of

the business, and provoked Defendant to such an extent that it was necessary for Defendant to leave in order to avoid a fracas . . . . " In his prayer for relief defendant requested an order for an accounting and that the following measures also be taken:

"3. That the Court issue an order herein requiring the Plaintiff to surrender all of Defendant's personal property, all of the real property of Defendant, and held by Defendant and Plaintiff by the entireties, except the home formerly occupied by the Plaintiff and Defendant and now occupied by the Plaintiff alone, and that Plaintiff be granted a writ of possession for said home if she so desires.

"4. That after said accounting shall be submitted and said property shall be surrendered, that the Court enter an order herein allotting to the Plaintiff reasonable alimony pendente lite and counsel fees, if it shall appear that Plaintiff has not sufficient means whereon to subsist during the prosecution and defense of this suit . . . .

"5. That the Court enter an order herein allotting to the Plaintiff alimony in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of this particular case."

By agreement of the parties this case was heard by the court without a jury; and on 21 October 1972, the court heard the evidence of the plaintiff and defendant, at which time counsel for both parties requested the opportunity to submit to the court proposed findings of fact and conclusions of law and a memorandum of authorities. This request was granted by the court.

On 10 April 1973, the court entered an interim order which provided the parties the further opportunity to present evidence to the trial court on 11 May 1973. On 20 April 1973 the defendant made a motion pursuant to G.S. 1A-1, Rule 52(b) of the Rules of Civil Procedure to amend and supplement the findings of fact and conclusions of law and judgment contained in the Order of 10 April 1973.

The scheduled 11 May 1973 hearing was not held as the court was informed by attorneys for the plaintiff that all parties " . . . want something entered in this case so that either one or

both of us can appeal from a final order if it is *anywhere near similar* (their emphasis) to the interim order which you have already entered."

On 16 May 1973, the court entered an Order denying the defendant's motion of 20 April 1973 to amend and supplement the findings of fact and conclusions of law and judgment contained in the order previously entered on 10 April 1973, and on this same date the court also entered its final order.

This final order contained findings of fact and conclusions of law which, except where quoted, are summarized as follows:

Defendant and plaintiff were lawfully married on 2 February 1945 and five children were born of the marriage. Beginning in July 1971, the defendant indulged excessively in the consumption of alcoholic beverages, assaulted the plaintiff, offered such indignities to the plaintiff as to render the condition of the plaintiff intolerable and her life burdensome, and committed adultery with one Betty Ward. These events culminated in the separation of plaintiff and defendant in February 1972.

"[P]rior to the separation between the Plaintiff and the Defendant, Plaintiff and Defendant operated Mimosa Mobile Manor and Mimosa Mobile Homes . . . . [B]oth Plaintiff and Defendant contributed their energies and talents towards the management of these unincorporated businesses [and these businesses] . . . constituted the principal sources of income of Plaintiff and Defendant."

"[S]ince the separation between Plaintiff and Defendant . . . the businesses formerly managed by Plaintiff and Defendant have been managed by the Plaintiff [and] . . . the Plaintiff has forced the Defendant to abandon his operation of said businesses and has managed said businesses contrary to the wishes of the Defendant."

Findings as to the real estate owned individually by defendant and by plaintiff and defendant as tenants by the entirety were also made by the court; however, the court made no finding as to the value of this land as no evidence had been introduced to establish the fair market value of the real estate. The court also found as a fact that defendant owned certain stock certificates, bonds, and insurancs policies which had a fair market value of $12,154.75.

Finally, the court concluded that the plaintiff was a dependent spouse; that the defendant was a supporting spouse; that the defendant had constructively abandoned plaintiff and her minor child; that defendant was required to pay child support to the minor child and alimony; that the defendant is entitled to manage the two businesses (Mimosa Mobile Manor and Mimosa Mobile Home Sales) without interference from the plaintiff.

After making the foregoing findings of fact and conclusions of law the court entered an order requiring (1) that plaintiff relinquish her control of Mimosa Mobile Manor and Mimosa Mobile Home Sales and "refrain from molesting or interfering with said defendant in his operation of . . . said businesses"; (2) that defendant pay plaintiff the sum of $200.00 per week as compensation for her management of said businesses from February to September 1972; (3) that defendant pay alimony to the plaintiff in an amount "equal to forty percent (40%) of all income received by the Defendant of whatever kind or character"; (4) that defendant pay child support in an amount "equal to twenty percent (20%) of all income received by Defendant of whatever kind or character."

Both plaintiff and defendant appealed from the final order.

Wilkinson, Vosburgh & Thompson by James R. Vosburgh and Leroy Scott for plaintiff appellant.

McMullan, Knott & Carter by Lee E. Knott, Jr., for defendant as appellant and appellee.

HEDRICK, Judge.

Both parties, among other things, contend that the trial court erred in ordering the defendant to pay (1) alimony in an amount equal to forty percent (40%) of all income received by defendant and (2) child support in an amount equal to twenty percent (20%) of all income received by defendant. An order awarding alimony payments to a dependent spouse and support payments to a minor child must be founded upon proper consideration of "the estates, earnings, earning capacity, conditions, accustomed standard of living of the parties (or child), and other facts of the particular case. G.S. 50-13.4(c) and G.S. 50-16.5(a).

The trial court in the instant case found as a fact, and both parties concede, that the principal source of income for plaintiff

and defendant has been from the operation of Mimosa Mobile Home Sales and Mimosa Mobile Manor; however, the parties disagree as to the form of ownership and the right to manage and operate these businesses. Plaintiff maintains that the businesses were owned and operated as a partnership and that she is entitled to an order "forbidding the defendant to go upon the premises of the Mimosa Mobile Homes or Mimosa Mobile Manor and otherwise engage in any activites which would be harmful to the businesses . . . . " Defendant contends that he is the owner of the businesses and is entitled to manage and operate the businesses free from the interference of plaintiff.

[1] While the trial court in its findings of fact appeared to adopt plaintiff's partnership position, it nevertheless concluded that the two businesses should be placed in the control of defendant and "that [plaintiff] should refrain from molesting or interfering with said Defendant in his operation of any of said businesses . . . . " Obviously, the answer to the question of which party is entitled to operate, manage, and receive profits from the businesses is critical in determining the relative needs and abilities of the parties with respect to the payment of alimony and child support to the dependent spouse. If the parties are in fact partners in the businesses which are the principal source of income for the parties, the trial judge clearly did not take this fact into consideration in ordering defendant to pay alimony in an amount equal to 40% of all income received by defendant and child support in an amount equal to 20% of all income received by defendant. Therefore, the trial court's order with respect to the amount of alimony and child support is not supported by proper findings of fact. Furthermore, this error was compounded by a complete absence of evidence or findings of fact as to any other income of the parties or as to the value of the home and other property owned by the plaintiff and defendant.

[2] Lacking the basic information detailed in G.S. 50-13.4(c) and G.S. 50-16.5(a), the trial court could not properly enter an order for child support or alimony; nevertheless, we must hasten to point out that the precarious position in which the trial court found itself and the order granting child support and alimony which it rendered were the direct result of noncompliance by both parties in failing to adhere to the court's request that all parties appear before it "for the sole purpose of introducing evidence, if any they care to offer, regarding the

estates, earnings, earning capacity, conditions, and accustomed standard of living of the parties . . . ." In fact, the parties informed the trial judge that "[both parties] want something entered in this case so that either one or both of us can appeal from a Final Order if it is *anywhere near similar* (their emphasis) to the interim order which you have already entered . . . ." The parties, by their consent, cannot enable a trial judge to enter an order not based upon consideration of the several factors listed in G.S. 50-13.4(c) and G.S. 50-16.5(a).

For the reasons stated, the Final Order entered in this cause is vacated and the case is remanded to the district court for a

New trial.

Judges MORRIS and VAUGHN concur.

HUMBLE OIL & REFINING COMPANY, PETITIONER v. BOARD OF ALDERMEN OF THE TOWN OF CHAPEL HILL, JOSEPH L. NASSIF, ALICE WELSH, REGINALD D. SMITH, ROSS F. SCROGGS, GEORGE L. COXHEAD, AND JAMES C. WALLACE, RESPONDENTS

No. 7315SC228

(Filed 20 February 1974)

1. **Municipal Corporations § 30— zoning — denial of special use permit — standing of optionee to appeal**

An optionee who has not exercised its option has no standing to appeal from the denial of a special use permit.

2. **Municipal Corporations § 30— special use permit — danger to public health and safety — applicant's failure of proof**

Municipal board of aldermen did not err in the denial of a special use permit to allow construction of a service station on the ground that the use would endanger public health and safety where the applicant failed to offer evidence that the service station would not have such effect.

3. **Municipal Corporations § 31— application for special use permit — exhibits obtained by board before hearing**

In an appeal from a board of aldermen's denial of a special use permit to allow construction of a service station, the superior court did not err in refusing to delete from the record a Highway Commission letter and a gasoline dealers' publication relating to zoning which

were obtained by the board prior to the public hearing on the application since they were relevant to the board's inquiry.

4. **Municipal Corporations § 30— zoning ordinance — special use permit — guiding standards**

Provision of a municipal zoning ordinance requiring the board of aldermen to find, in order to grant a special use permit, that "the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved" gives the board sufficient guiding standards and is not unconstitutionally vague.

APPEAL by petitioner from *McKinnon, Judge,* 30 October 1972 Session of ORANGE County Superior Court.

Petitioner holds an option to purchase a tract of land containing approximately four acres located at the southeast intersection of N. C. Highway 54 and U. S. Highway 15-501 in Chapel Hill. The owner of this tract is Flagler System, Inc.

On 28 October 1971, petitioner filed with the Board of Aldermen of Chapel Hill an application for a special use permit to allow construction of a service station on the tract of land. The portion of the tract on which the proposed station was to be built was zoned S.C. (Suburban Commercial), and service stations are permitted upon the granting of a special use permit by the Board of Aldermen.

Petitioner met with the Chapel Hill Appearance Commission on 15 November 1971, and after reviewing the plans for the station, the Commission recommended several stipulations to be attached to a special use permit.

After advertising as required by the Chapel Hill Zoning Ordinance (Ordinance), the Board of Aldermen conducted a public hearing on 22 November 1971. At this hearing petitioner presented its arguments in favor of granting the special use permit, and no one appeared to present arguments contra. The Board of Aldermen, in accordance with the ordinance, referred the application to the Planning Board who recommended that it be affirmed subject to the stipulations of the Appearance Commission.

At their 13 December meeting, the Board of Aldermen considered the recommendations of the Planning Board and by a vote of four to two denied it "on grounds that it would materially endanger the public health and safety if located where proposed and developed according to the plans as submitted."

Humble's petition that the Superior Court of Orange County issue a writ of certiorari to the Board of Aldermen was granted on 12 January 1972. The Superior Court reviewed the record consisting of some 29 exhibits including zoning maps, topographical maps, blueprints, and minutes of the various board meetings. After making extensive findings of fact based on the foregoing exhibits, the court concluded:

"1. That the special use permit provision of the Ordinance Providing for the Zoning of Chapel Hill and Surrouding Areas are not invalid.

2. That all proceedings prescribed in connection with special use permits were followed by the Board of Aldermen of the Town of Chapel Hill in this case.

3. That the petitioners were afforded an opportunity to present evidence that the danger of public health and safety would not be materially increased if the permit were granted.

4. That the finding of the Board of Aldermen in connection with the denial of the special use permit is based upon competent evidence. Res. Ex. 20.

5. That the action of the Board of Aldermen of the Town of Chapel Hill was discretionary and is presumed to be valid.

6. That petitioners have the burden of proving that the action of the Board of Aldermen of the Town of Chapel Hill was arbitrary, capricious, unreasonable and unlawful.

7. That the petitioners have presented no evidence to sustain this burden.

8. That there is no evidence that this action of the Board of Aldermen of the Town of Chapel Hill was arbitrary, capricious, and unreasonable or in violation of law."

From the entry and signing of judgment affirming the ruling of the Board of Aldermen, petitioner appealed.

Flagler System, Inc., the owner of the subject property, moved that the Court of Appeals allow it to intervene as a party petitioner. The motion was allowed.

Bryant, Lipton, Bryant and Battle, by F. Gordon Battle, for petitioner appellant Humble Oil and Refining Company and Intervenor Flagler System, Inc.

Newsom, Graham, Strayhorn, Hedrick and Murray, by K. Byron McCoy, for petitioner appellant.

Haywood, Denny and Miller, by Emery B. Denny, Jr., for respondent appellee.

MORRIS, Judge.

[1] As an optionee, petitioner has no standing to appeal from the order of the Superior Court. Appellate review of the order of a municipal board of adjustment is available only to the owner of the property affected by the ruling, and this right does not extend to a mere optionee. *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128 (1946). The holding of the Supreme Court in *Refining Co. v. Board of Aldermen,* 284 N.C. 458, 202 S.E. 2d 129 (1974), does not preclude the application of this rule in the case *sub judice.* In *Refining Co., supra,* the petitioner had conditionally exercised its option, thereby becoming a prospective vendee. In the case before us, there has been no such exercise.

We have, however, allowed the motion of the owner of the subject property—Flagler System, Inc.—to intervene, and we shall proceed to review the case on the merits.

[2] This appeal presents three assignments of error for consideration. The first assignment of error is to the trial court's ruling that the action of the Chapel Hill Board of Aldermen was not arbitrary, capricious, unreasonable and unlawful. With this contention we cannot agree.

The Ordinance Providing for the Zoning of Chapel Hill and Surrounding Areas provides that an automobile service station is a permitted use in the areas zoned Suburban Commercial. Ordinance, § 3. However, a special use permit is required for the construction of a drive-in business. Id. § 4-D-6. § 4-B of the Ordinance provides that an application for a special use permit shall be reviewed by the Board of Adjustment at a public hearing. If the Board grants the permit it shall find:

> "(1) That the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved;
>
> (2) That the use meets all required conditions and specifications;

(3) That the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity, and

(4) That the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the plan of development of Chapel Hill and its Environs."

The ordinance requires that certain conditions be met before a special use permit can be granted. Petitioner has the burden of satisfying the Board that these conditions have been met. *Kenan v. Board of Adjustment,* 13 N.C. App. 688, 187 S.E. 2d 496 (1972); *Craver v. Zoning Board of Adjustment,* 267 N.C. 40, 147 S.E. 2d 599 (1966).

The Board's reason for denying the permit was that "it would materially endanger the public health and safety if located where proposed and developed according to the plans as submitted." While it is true that no evidence was presented that could establish that the station would endanger public health and safety, petitioner has offered no evidence that its service station would *not* have such an effect. Thus, it has failed to satisfy its burden of proof, and there was no error in the Board's denial of the application.

[3] Petitioner's second assignment of error is to the Superior Court's denial of petitioner's motion that two items be deleted from the record. The two items in question are a letter from the State Highway Commission regarding access to the ramp to U.S. 15-501 and a publication from the Mid-American Gasoline Dealers Association entitled "MAGDA's Model Zoning Recommendation." These items were obtained by the Board itself before the public hearing, but petitioner had ample opportunity to present its own evidence at the public hearing. Municipal Boards of Adjustment are not required to comply strictly with the rules of evidence. *Carter v. Town of Chapel Hill,* 14 N.C. App. 93, 187 S.E. 2d 588 (1972). The evidence that petitioner would have excluded was relevant to the Board's inquiry, and there was no error in the Superior Court's denial of the motion to have it deleted from the record.

[4] Petitioner's final assignment of error is to the court's finding that the applicable portions of the ordinance were not unconstitutional as applied to the facts in the case. Specifically,

petitioner contends that the requirement that the Board find "(1) That the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved" is so vague that it affords no reasonable standard for judgment.

There is no doubt that the Legislature may delegate to a municipality the authority to administer a zoning ordinance. *Kenan v. Board of Adjustment, supra.* This delegation has withstood constitutional attack based on the consistently recognized distinction between the delegation of the power to make a law and the conferring of authority to administer a law.

> "Here we pause to note the distinction generally recognized between a 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.
>
> * * *
>
> In short, while the Legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence, it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion. 11 Am. Jur., Constitutional Law, Sec. 234." *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 60-61, 74 S.E. 2d 310 (1953).

In *Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78 (1969), the Supreme Court held that the Legislature may not delegate to a municipal board of adjustment the authority to issue or refuse a permit to build a structure of a specified type based on whether said structure will be conducive to or adverse to the public interest or welfare. There is, however, a basic distinction between the ordinance invalidated in *Jackson v. Board of Adjustment, supra,* and the ordinance before us. While the former called upon the Board of Adjustment to pass upon questions of public policy, the latter requires only that

the Board determine whether the special use would endanger public health and safety.

> " '[B]y the decided weight of authority, the rule is that "if the statute requires or authorizes the court or other agency to pass upon questions of public policy involved, * * * there is an attempted delegation of legislative power and the statute is invalid." 37 Am. Jur., Municipal Corporations, Sec. 8.' " *Jackson v. Board of Adjustment, supra,* at 165.

The aforementioned findings required by the Board in denying or allowing an application for a special use permit are sufficient to distinguish the ordinance from the ordinance in *Jackson.* We hold that the Board of Adjustment has not been empowered to rule upon matters of public policy, and that the Board is given sufficient guiding standards. Therefore, the ordinance is not unconstitutional.

No error.

Judges BRITT and VAUGHN concur.

SPENCER OIL COMPANY, INC. v. AUSTIN WELBORN AND WIFE, RUTH WELBORN

No. 7418DC4

(Filed 20 February 1974)

Guaranty— wife's signature on guaranty agreement — conditions and restrictions — absence of knowledge by creditor

In an action to recover upon a guaranty agreement executed by a husband and wife, plaintiff creditor is entitled to recover against the wife even if she never authorized delivery of the guaranty agreement to plaintiff and signed only on the condition that the agreement would also be signed by the husband's partner and the partner's wife where plaintiff did not have actual or constructive notice of the restrictions and conditions and extended credit to the husband in reliance upon the wife's signature on the guaranty agreement.

APPEAL by plaintiff from *Clark, District Court Judge,* 8 May 1973 Session of District Court held in GUILFORD County (High Point Division). Argued in the Court of Appeals 22 January 1974.

Plaintiff seeks to recover $10,000.00 from defendants jointly and severally upon their guaranty agreement whereby they guaranteed payment to plaintiff by defendant Welborn for rent, and merchandise and accessories sold by plaintiff to defendant Austin Welborn in the operation of a filling station located at the intersection of Highway 62 and Trinity Road.

Defendant Austin Welborn and one Buren Andrews entered into a lease agreement with plaintiff for the rental of plaintiff's filling station located at the intersection of Highway 62 and Trinity Road. Defendant Austin Welborn and Buren Andrews proposed to operate the filling station together as a partnership. The agreement with plaintiff provided for periodic payments of rent for the premises, the payment for the personal property and inventory on the premises, and the payment for merchandise and accessories thereafter sold by plaintiff to Welborn and Andrews. In addition to the agreement above referred to, plaintiff required of Welborn and Andrews that they and their wives sign a guaranty agreement guaranteeing payment in an amount not to exceed $10,000.00. Defendant Ruth Welborn discussed the guaranty agreement with plaintiff, and later she and Austin Welborn signed the guaranty. Thereafter, Austin Welborn delivered the guaranty agreement to plaintiff, and plaintiff asked Welborn to take it to Andrews and wife for their signatures. Andrews and his wife refused to sign the guaranty, because Andrews had decided not to remain in the partnership arrangement with defendant Welborn. Welborn asked plaintiff to continue the credit arrangement with him as a sole proprietorship. Plaintiff, relying upon the guaranty agreement signed by Mr. and Mrs. Welborn, agreed. Welborn operated the filling station from February, 1969, until December, 1971, under the credit arrangement with plaintiff. During part of this time, defendant Ruth Welborn worked as bookkeeper for defendant Austin Welborn. The lease and credit arrangement was terminated in December, 1971, at which time Austin Welborn was indebted to plaintiff in the sum of $14,996.20.

Defendant Ruth Welborn testified and contended that although she signed the guaranty agreement, she did not authorize anyone to deliver it. Also, she testified and contended that she signed the guaranty agreement only on condition that Mr. and Mrs. Andrews would also sign it, and they did not. Ruth Welborn never communicated these restrictions or conditions to plaintiff.

Certain pertinent findings of fact by the trial court, which are fully supported by the evidence, are set out below:

"(7) That Austin Welborn took the bond and guaranty agreement to his home where he asked Mrs. Welborn to sign it; that she signed it, placed it in a dresser drawer, and never thereafter authorized anyone to deliver it; that her signature on the document was with the understanding that Buren Andrews and his wife, Mrs. Buren Andrews, would sign the agreement; that upon their refusal to sign the agreement she at no time intended for the instrument to be delivered to the plaintiff or to anyone else; and that defendant, Ruth Welborn, never at any time informed plaintiff that she never authorized delivery of said bond and guaranty agreement to plaintiff, nor that her signature on the document was with the understanding that Buren Andrews and his wife would sign the agreement, and if they refused to sign the agreement she did not intend that the instrument be delivered to plaintiff; that all times in question, Austin Welborn and wife, Ruth Welborn were husband and wife and lived together.

"(8) That thereafter defendant, Austin Welborn, returned to plaintiff with the bond and guaranty agreement signed by himself and his wife, but not signed by Mr. and Mrs. Buren Andrews, and delivered said bond and guaranty agreement, along with the contract, to plaintiff. Mr. Spencer requested that defendant, Austin Welborn, take the instrument back and obtain the signatures of Mr. and Mrs. Andrews because defendant, Austin Welborn, was returning to his place of business and it would be more convenient for him to obtain said signatures than plaintiff.

"(9) That Buren Andrews and his wife refused to sign the agreement for the reason that Mr. Andrews anticipated going into another business, and that the bond and guaranty agreement has never since that time been seen by or been in the possession of Mr. Spencer.

"(11) That Buren Andrews left the business known as Spencer Esso Service in December of 1969, and at that time the defendant Austin Welborn talked with Mr. Spencer as to whether he would continue him with credit without Andrews being involved in the business. Mr. Spencer had seen the signature of Mrs. Austin Welborn and Austin Welborn on the bond and guaranty, and on the reliance that

the instrument was executed by her he continued to provide credit and continued the lease arrangement for the defendant Austin Welborn.

"(15) That the bond and guaranty agreement delivered by defendant, Austin Welborn, to plaintiff, provided that the obligor would be legally responsible for attorney's fees that may be incurred in the event that plaintiff was required to proceed legally against him (them) and enforcement of any claim that plaintiff is entitled to in an amount of 15 per cent of the principal balance. That the plaintiff, being the holder of said writing, on or about August 25, 1972, after maturity of the obligation, notified Mr. and Mrs. Welborn that the provisions relative to the payment of attorney's fees in addition to the outstanding balance shall be enforced and that they have five days from the mailing of such notice to pay the outstanding balance without attorney's fees, and further that if they did pay the outstanding balance in full before the expiration of such time, then the obligation to pay attorney's fees shall be void; and no court would enforce such provisions; that notwithstanding said notice the obligation was not paid and has not been paid to the present date and is still outstanding."

Based upon its findings of fact, the trial court rendered judgment against defendant Austin Welborn for the sum of $14,996.20. The trial court further concluded "that the plaintiff has shown no right to recover against the defendant, Ruth Welborn."

Plaintiff appealed.

Stephen E. Lawing for the plaintiff.

Bell, Ogburn and Redding, by J. Howard Redding, for the defendants.

BROCK, Chief Judge.

It appears to us that the findings of fact by the trial judge do not support his conclusion "that the plaintiff has shown no right to recover against the defendant, Ruth Welborn."

The trial court found from competent evidence the following facts, among others:

"(8) That thereafter defendant, Austin Welborn, returned to plaintiff with the bond and guaranty agreement signed by himself and his wife, . . . and delivered said bond and guaranty agreement, along with the contract to plaintiff."

"(7) ' . . . [T]hat defendant, Ruth Welborn, never at any time informed plaintiff that she never authorized delivery of said bond and guaranty agreement to plaintiff, nor that her signature on the document was with the understanding that Buren Andrews and his wife would sign the agreement, and if they refused to sign the agreement, she did not intend that the instrument be delivered to plaintiff; that all times in question, Austin Welborn and wife, Ruth Welborn were husband and wife and lived together.' "

"(11) . . . Mr. Spencer had seen the signature of Mrs. Austin Welborn and Austin Welborn on the bond and guaranty, and on the reliance that the instrument was executed by her he continued to provide credit and continued the lease arrangement for the defendant Austin Welborn."

The evidence discloses that defendant Ruth Welborn was at the filling station almost every day; that defendant Austin Welborn referred plaintiff to defendant Ruth Welborn to talk about how much could be paid on his account and when it could be paid; that plaintiff at times would negotiate with defendant Ruth Welborn pertaining to the account of defendant Austin Welborn; that defendant Ruth Welborn kept the checkbooks, made deposits, kept up with the money, and knew how much and when she could make payments.

The defendant Ruth Welborn testified that she knew that in order for defendant Austin Welborn to continue doing business with plaintiff, and to continue obtaining goods, gas and supplies for his business from plaintiff, she had to sign the guaranty agreement.

The findings by the trial court that defendant Ruth Welborn never authorized delivery of the guaranty agreement to plaintiff, and signed only on condition that Mr. and Mrs. Andrews signed, do not relieve her of liability. She placed the guaranty agreement within the possession of defendant Austin Welborn, the principal debtor, with restrictions and conditions which were not communicated to the creditor. Plaintiff creditor did not have actual or constructive notice of the restrictions

and conditions, and extended credit in reliance upon the signature of defendant Ruth Welborn. " . . . [I]f the creditor did not participate therein or have knowledge thereof, recovery by him is not defeated by the fact that the debtor induced the guarantor to execute the contract by false representations or other misconduct." 38 Am. Jur. 2d, Guaranty, § 58, p. 1061.

It is questionable whether the testimony of defendant Ruth Welborn concerning restrictions and conditions on the delivery and use of the guaranty agreement was admissible over objection. The answer of defendant Ruth Welborn to the amended complaint is a general denial. It seems that where a party intends to rely upon the failure of the occurrence of a necessary condition, it should be specially pleaded in the answer. *See* G.S. 1A-1, Rule 9(c).

In our opinion, the evidence and the facts found require a conclusion that defendant Ruth Welborn is liable on the guaranty agreement, and that judgment should be entered against both defendants on the guaranty agreement.

The findings of fact are fully supported by the evidence and will not be disturbed.

That portion of the judgment which concludes "that the plaintiff has shown no right to recover against the defendant, Ruth Welborn" is reversed.

The complaint, as amended, specifically seeks recovery from defendants, jointly and severally, on their guaranty agreement. Although plaintiff alleged that defendants were indebted in the sum of $14,996.20 (the full amount of the account owed by defendant Austin Welborn), the guaranty agreement was for an amount not to exceed $10,000.00. Therefore, entry of judgment against Austin Welborn for more than the guaranty agreement sued upon was error. That portion of the judgment which allows recovery against defendant Austin Welborn in the sum of $14,996.20 plus interest and attorney fees is reversed.

The cause will be remanded to the District Court for entry of judgment against Austin Welborn and Ruth Welborn in accordance with the terms of the guaranty agreement.

Reversed in part and remanded.

Judges MORRIS and CARSON concur.

STATE OF NORTH CAROLINA v. H. D. LENDERMAN, JR.

No. 7423SC68

(Filed 20 February 1974)

1. **Abortion § 3— prescription of drug to induce miscarriage — sufficiency of evidence**

The trial court did not err in failing to direct a verdict for acquittal at the conclusion of State's evidence and in failing to set the verdict aside in a prosecution charging defendant with prescribing and administering to the prosecuting witness a drug known as Provera with the intent to cause her to have a miscarriage, in violation of G.S. 14-45.

2. **Criminal Law § 87— leading question to restore credibility — no abuse of discretion**

The trial court did not abuse its discretion in allowing into evidence a leading question put to a witness by the District Attorney for the purpose of restoring credibility in the prosecuting witness and in allowing the witness's answer thereto.

3. **Abortion § 3— prescription of drug to induce miscarriage — intent required**

Since it is the intent with which a drug is administered and not the properties of the administered drug which makes the violation of G.S. 14-45 a felony, it was not error for the trial court in this prosecution for administration of a drug with the intent to produce a miscarriage to exclude testimony to the effect that the pills, if taken as directed, would not cause an abortion and would have no effect upon the prosecuting witness, where there was no evidence that defendant was aware that the drug was ineffective as a means to induce a miscarriage and that defendant therefore lacked the intent required by G.S. 14-45.

4. **Criminal Law § 112— presumption of defendant's innocence — sufficiency of instructions**

Trial court's instructions to the jury that defendant had entered a plea of not guilty, that being charged was no evidence of defendant's guilt, that defendant was not required to prove his innocence and was presumed to be innocent, and that the State had to prove to the jury that defendant was guilty beyond a reasonable doubt were sufficient instructions with respect to the presumption of defendant's innocence.

APPEAL by defendant from *Rousseau, Judge,* 6 August 1973 Session of Superior Court held in WILKES County.

Defendant was charged in a bill of indictment with prescribing and administering to Kathy Elizabeth Lovette a drug known as Provera with the intent to cause her to have a miscarriage, in violation of G.S. 14-45.

On 15 March 1973, Jimmy Lovette, father of 17-year-old Kathy Lovette, obtained a warrant charging defendant with prescribing and administering the drug Provera to Kathy Lovette with the intent and for the purpose of causing an abortion.

The State's evidence tended to show that on or about 19 February 1973, the prosecuting witness Kathy Lovette went to see the defendant, believing herself at that time to be pregnant. The State's evidence also tended to show that the prosecuting witness became pregnant when she was raped by one G. T. Johnson on 24 January 1973.

Further testimony revealed that defendant gave the prosecuting witness five pills with the following instructions: "There is five of them. Take them one a day every night at the same time, and, Kathy, if you think you are pregnant, this will cause you to lose it, bring on abortion."

The defendant elicited on cross-examination that the drug in question, Provera, was used as a female regulator of the period, as a pregnancy test, and that such drug was given to pregnant women for the purpose of preventing abortion.

The prosecuting witness later obtained an abortion at Wilkes General Hospital, on or about 12 or 14 March 1973.

Defendant offered no evidence.

The jury found defendant guilty as charged.

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

W. G. Mitchell for the defendant.

BROCK, Chief Judge.

[1] Defendant contends that the trial court erred in failing to direct a verdict for acquittal at the conclusion of State's evidence and in failing to set the verdict aside. Defendant argues that the State has failed to sustain the burden of proof in proving that (1) a pregnancy existed, and (2) that the defendant gave the drug with the intent to induce a miscarriage.

The evidence shows that Kathy Lovette believed she was pregnant on 19 February 1973, when she obtained the pills from defendant. Corroborative testimony of her father and Deputy Sheriff Jerry Garris of the Wilkes County Sheriff's

Department indicates that Kathy Lovette believed she was pregnant on 19 February 1973.

The record reveals that the prosecuting witness was not sure of the date of the rape. She testified first that she was raped on about 27 February 1973. On continued cross-examination the prosecuting witness testified that she could not remember whether she had testified at the preliminary hearing that she had been raped and became pregnant on 24 January 1973. However, another witness for the State testified that the rape occurred 24 January 1973.

"Motion to nonsuit in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of the warrant or bill of indictment, considering the evidence in the light most favorable to the state, and giving it the benefit of every reasonable inference fairly deducible therefrom." 2 Strong, N. C. Index 2d, Criminal Law, § 106, p. 654.

"A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and its refusal to grant the motion is not reviewable on appeal." 3 Strong, N. C. Index 2d, Criminal Law, § 132, pp. 55-56.

This assignment of error is overruled.

[2] Defendant contends that the trial court committed error in allowing the District Attorney to ask a leading question of the State's witness, Carmen Chastain. Specifically, the defendant objects to the following question during redirect examination by the State.

> "Q. You may state if you were with Kathy Lovette as of 24 January 1973, when the alleged rape took place?
>
> Defendant objects. Overruled.
>
> "A. Yes, I was."

The allowance of leading questions is a matter within the discretion of the trial judge, and his rulings will not be disturbed on appeal, absent an abuse of discretion. *State v. Painter*, 265 N.C. 277, 144 S.E. 2d 6.

This question was propounded by the District Attorney during redirect examination of the witness Chastain. It would seem

that the District Attorney, through this form of question, was attempting to restore credibility in the prosecuting witness who had displayed uncertainty as to the date of the alleged rape.

"In whatever way the credit of the witness may be impeached, it may be restored or strengthened by [proof of prior consistent statements] or any other proper evidence tending to restore confidence in his veracity and in the truthfulness of his testimony." Stansbury, North Carolina Evidence, Brandis Revision, § 50, p. 145.

This assignment of error is overruled.

[3] Defendant contends that the trial court committed error in excluding evidence concerning the properties of the drug Provera and in instructing the jury to find defendant guilty if they were satisfied beyond a reasonable doubt that he prescribed Provera for Kathy, at a time when she was pregnant, with intent to procure a miscarriage.

G.S. 14-45 proscribes the administering of ANY drug with the INTENT to produce a miscarriage (emphasis supplied). It is the intent which is made requisite within the statute, and not the properties of the the administered drug, which makes the violation of this statute a felony. Therefore, it was not error for the trial court to exclude testimony to the effect that the pills, if taken as directed, would not cause an abortion and would have no effect upon the prosecuting witness. There is no evidence in the record that defendant was aware the drug was ineffective as a means to induce a miscarriage, and that defendant thereby lacked the intent required in G.S. 14-45. Indeed, testimony reveals that the defendant gave the prosecuting witness five pills with the following instructions:

"Take them one a day every night at the same time, and, Kathy, if you think you are pregnant, this will cause you to lose it, bring on abortion."

This assignment of error is overruled.

[4] Defendant contends that the trial court committed prejudicial error in failing to instruct the jury that the defendant was presumed to be innocent throughout the trial. The trial court instructed the jury that defendant had entered a plea of not guilty; that being charged was no evidence of defendant's guilt; that defendant was not required to prove his innocence,

and is presumed to be innocent; and that the State had to prove to the jury that defendant was guilty beyond a reasonable doubt.

This assignment of error is without merit and is overruled.

For the reasons stated, we find that defendant had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and CARSON concur.

JOB SANDERS v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 7421DC12

(Filed 20 February 1974)

Insurance § 142— theft insurance — temporarily residing at apartment

Where insured's permanent residence was in Winston-Salem, insured maintained an apartment in Philadelphia, Pennsylvania, while working there, and property was stolen from insured's Philadelphia apartment while he was in Pittsburgh for a period of five days in connection with his work, insured was temporarily residing at the Philadelphia apartment at the time of the theft within the meaning of a policy provision excluding coverage for theft of property at any location owned, rented or occupied by insured "except while an Insured is temporarily residing thereat" and coverage for the loss was therefore not excluded by such provision.

APPEAL by plaintiff from *Alexander, J.*, 26 March 1973 of FORSYTH District Court. Argued in the Court of Appeals 15 January 1974.

The plaintiff in this case filed a claim with his homeowners insurance carrier for items stolen from his apartment. The carrier denied liability and suit was instituted. All facts were stipulated to by each party. From summary judgment in favor of the defendant, the plaintiff appealed.

The plaintiff and his family were domiciled in Winston-Salem where the plaintiff had been employed by the North Carolina School of the Arts. In 1970, the plaintiff left his employment and started doing free-lance work with several com-

panies as a choreographer. The plaintiff commenced working as assistant artistic director of the Pennsylvania Ballet Company and in September, 1970, rented an apartment in Philadelphia where he lived during the course of his work. He retained his home in Winston-Salem, and his wife and family remained there while the plaintiff was in Philadelphia. In January, 1971, the plaintiff rented another apartment in Philadelphia where he moved his belongings but continued to keep his domicile in Winston-Salem. On 8 April 1971, the plaintiff left Philadelphia and went to Pittsburgh with the Philadelphia Ballet for a five day period. He returned to his apartment in Philadelphia at the end of the five days and discovered the theft. The plaintiff continued to rent his apartment for approximately three months following the theft.

The plaintiff duly filed with his insurance carrier a claim for the loss. Coverage was denied on the grounds that the plaintiff was not temporarily residing at the Philadelphia apartment at the time of the theft. The general exclusionary clause relied on by the defendant reads as follows:

> C. Theft exclusion applicable to property away from the described premises: This policy does not apply to loss away from the described premises of: (1) property at any location owned, rented or occupied by an Insured, except while an Insured is temporarily residing thereat . . . .

William G. Pfefferkorn and Charles O. Peed attorneys for plaintiff-appellant.

Hudson, Petree, Stockton, Stockton & Robinson by James H. Kelly, Jr., attorneys for defendant-appellee.

CARSON, Judge.

All issues of fact having been stipulated to by the parties involved, the only question presented to us is whether or not the trial court correctly applied the law to the exclusionary clause in granting summary judgment for the defendant. Although this is a case of first impression in North Carolina, we are guided by cases construing other provisions of insurance policies. It is a general rule in construction of such policies that ambiguities are to be resolved against the carrier and in favor of the insured. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172

S.E. 2d 518 (1970); *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967); 4 Strong's N. C. Index 2d, Insurance, § 6. The reason for this is that the policies are prepared by the carrier. The insurer does not stand in an equal bargaining position. Since the language of the policy is that of the carrier, it is construed in favor of the insured to resolve the ambiguities. *White v. Mote*, 270 N.C. 544, 155 S.E. 2d 75 (1967); *Dildy v. Insurance Co.*, 13 N.C. App. 66, 185 S.E. 2d 272 (1971).

It seems clear from the evidence that the plaintiff was domiciled in Winston-Salem at the time the theft occurred. It seems equally clear that the plaintiff had established a temporary residence in Philadelphia. The question becomes, therefore, whether the plainitff had abandoned his temporary residence in Philadelphia at the time the theft occurred. The defendant concedes that the plaintiff need not be present at the time the actual theft occurs for the policy to provide coverage. The defendant cites and relies on the case of *Bryan v. Granite State Insurance Co.*, 185 So. 2d 310 (La. App. 1966). There, the insured was domiciled in Lacombe, Louisiana, but maintained an apartment in New Orleans where he and his wife stayed overnight when visiting the city for business or social functions. A theft occurred while the insured and his wife were at their home in Lacombe. The Louisiana Court of Appeals denied coverage, stating that the insured was a resident of Lacombe rather than New Orleans at the time the theft occurred. It pointed out that had the theft occurred while the insured and his wife were spending the night in New Orleans, coverage would have applied. Actual physical presence was unnecessary, but coverage was denied where the insured was at his regular home at the time the theft occurred.

Of similar import are the cases of *Reiner v. Insurance Co.*, 106 Ill. App. 2d 210, 245 N.E. 2d 655 (1969), and *Springman v. Insurance Co.*, 5 Ill. App. 3d 604, 283 N.E. 2d 716 (1972). In the *Reiner* case, the plaintiff was a college student who had leased an apartment for 12 months. She did not enroll in summer school and was home with her parents during the summer. When she returned to school in the fall the theft was discovered. In the *Springman* case the plaintiffs owned a vacational, seasonal dwelling. The theft occurred during the winter months when the plaintiffs were at their regular residence. In both cases coverage was denied under a similar exclusionary clause. The court held that the plaintiffs in each case were at their regular

residence rather than their temporary residence and thus there was no coverage.

The facts in the instant case are clearly distinguishable from the holdings in the cited cases. Here, the insured was not at his permanent residence at the time the theft occurred. Rather, he had left his temporary residence for a short period of time and returned at the end of the five days to Philadelphia. At the time the theft occurred, the plaintiff was occupying a room in Pittsburgh, was temporarily residing in Philadelphia, and was permanently residing in Winston-Salem. We therefore hold that the insurance policy provided coverage for the theft in question and that summary judgment should have been granted for the plaintiff. Reversed.

Chief Judge BROCK and Judge MORRIS concur.

MOUNTAIN TOP YOUTH CAMP, INC. v. GALE W. LYON AND WIFE; NANCY H. LYON; AND MARTHA G. LYON

No. 7417SC13

(Filed 20 February 1974)

1. **Corporations § 12— deed from corporation to officer — determination of validity**

The determination of the validity of a deed made by a corporation to its officers or directors is governed by the following principles: (1) the conveyance must be authorized by the corporation or ratified by it; (2) the law presumes that such conveyances are invalid and imposes upon the purchaser the burden of establishing that the purchase is fair, open, and free from imposition, undue advantage, actual or constructive fraud; and (3) such conveyance will not be declared void as a matter of law, but it is a question for the jury to determine upon all the evidence as to whether the vitiating elements enter into the particular transaction.

2. **Corporations § 12— deed from corporation to officer — secret transaction — deed delared null and void**

Where the evidence tended to show that male defendant, who was president of plaintiff corporation at the time of the transaction complained of, was not authorized by the corporate plaintiff, its board of directors, or any other party to transfer the parcel of land in question to himself, the board of directors had no knowledge of the transaction until the same was discovered by chance more than three years after it occurred, the transaction was not thereafter ratified by the board of directors of the corporation, there was no believable evidence

that adequate consideration passed from defendants to plaintiff, and the execution of the deed was done and maintained in secrecy and with the intention of concealment of the entire transaction, such evidence was sufficient to support the trial court's conclusions that the conveyance was unauthorized and unratified and that it must be declared null and void.

APPEAL by defendant from *Godwin, Judge,* 30 April 1973 Session of Superior Court held in STOKES County.

This is a civil action filed by the plaintiff, Mountain Top Youth Camp, Inc. (a non-profit corporation), against defendants, Gale W. Lyon, his wife Nancy, and their minor daughter Martha, wherein the plaintiff seeks to have certain deeds set aside and declared void and of no effect. The controversy centers around a deed conveying a ten acre tract of land allegedly made by plaintiff to defendants Gale and Nancy Lyon and a subsequent deed executed by defendants Gale and Nancy Lyon to their minor daughter Martha transferring the same real property.

All parties waived a jury trial and agreed that the Presiding Judge might find the facts, reach conclusions of law, and enter judgment accordingly.

The findings of fact of the trial court are summarized below, except where quoted:

Plaintiff is a non-profit corporation involved in the operation of a recreational summer camp program and defendant (Gale W. Lyon) is a past President and Director of this non-profit corporation. On 4 January 1968 the plaintiff was the record title owner of a ten acre tract of land and on this same date, Gale W. Lyon, as President of plaintiff corporation, executed a deed in the name of the plaintiff to himself and his wife which deed purported to convey the above-mentioned ten acre tract of land. This instrument was attested to by Thomas E. Steele, Sr., as Secretary of the plaintiff corporation. Approximately three years later Gale W. Lyon and his wife executed an instrument purporting to be a deed to the same ten acre tract to their minor daughter and this minor daughter paid no valuable consideration for this conveyance.

"[N]o authority for the execution and delivery of the instrument from the Plaintiff corporation to G. W. Lyon and wife purporting to convey said ten-acre tract of land was ever given by the Plaintiff, its Board of Directors, or any other body or

persons authorized to grant such authority, and . . . [this] execution and delivery was not thereafter ratified by the Board of Directors of the Corporation as its act and deed."

Furthermore, the trial court found as a fact (1) that no valuable consideration passed from defendants Gale and Nancy Lyon to plaintiff to support the transfer of the ten acre tract of land to them; (2) that the attestation by the Secretary of the plaintiff corporation of the instruments purporting to convey the ten acre tract of land was made "at the request of, and in reliance upon his confidence in Gale W. Lyon without knowledge of their contents or legal effect . . . " ; (3) that none of the officers or directors, other than Gale W. Lyon, or any other persons connected with the plaintiff corporation had any knowledge of the execution and purported conveyance of the ten acre tract described in the complaint to Gale W. Lyon and wife, Nancy H. Lyon, until the same was discovered by chance, after these instruments had been recorded in the Stokes County Public Registry in 1971; and that said execution of said instrument was done and maintained in secrecy, and with the intention of concealment of the entire transaction; and (4) that no ratification, recognition of or acquiescence in the action of Gale W. Lyon in executing the instruments purporting to convey the said ten acre tract of land described in the complaint, has ever been made by the directors, officers, or any other body or persons authorized to act for the plaintiff corporation.

Based upon the foregoing findings of fact, the trial court concluded "[t]hat the defendants Gale W. Lyon and Nancy H. Lyon have failed to show that the conveyance to them was fairly and openly authorized, that it was executed for an adequate consideration and that it is fair and free from oppression, imposition and actual or constructive fraud, and have failed to show a full disclosure and fair dealing in respect of the transaction of conveyance, and have failed to overcome and rebut the presumption against the validity of the conveyance . . . . "

From the judgment entered setting aside the deeds in question and declaring them null and void, the defendants appealed.

Harry Rockwell and John R. Hughes for plaintiff appellee.

William L. Nelson for defendant appellant.

HEDRICK, Judge.

By their three assignments of error, defendants contend the court erred in its findings and conclusions that the defendants had failed to show that a valuable consideration passed from defendants and that the defendant Gale Lyon had no implied or inherent authority as President of the plaintiff corporation to convey the property of the plaintiff corporation to himself. We do not agree.

The purchase or lease of the property of a corporation by an officer or director of a corporation renders the transaction voidable, not void, and such transaction will be upheld only when open, fair, and for sufficient consideration. 19 C.J.S., Corporations, § 775, p. 137. "The presumption is against the validity of such contract and when it is attacked the purchaser or lessee must show that it is fair and free from oppression, imposition, and actual or constructive fraud. Firmly established in our jurisprudence is the doctrine that a person occupying a place of trust should not put himself in a position in which self-interest conflicts with any duty he owes to those for whom he acts; and as a general rule he will not be permitted to make a profit by purchasing or leasing the property of those toward whom he occupies a fiduciary relation without affirmatively showing full disclosure and fair dealing." *Hospital v. Nicholson,* 189 N.C. 44, 49, 126 S.E. 94, 97 (1924). See also, *Underwood v. Stafford,* 270 N.C. 700, 155 S.E. 2d 211 (1967); *Mfg. Co. v. Bell,* 193 N.C. 367, 137 S.E. 132 (1927).

[1] In *Mfg. Co. v. Bell, supra,* at p. 371, our Supreme Court succinctly stated several principles of law which govern the determination of the validity/invalidity of a deed made by a corporation to its officers or directors. These principles are as follows:

"1. The conveyance of the property must be authorized by the corporation or ratified by it.

2. The law presumes that such conveyances are invalid and imposes upon the purchaser the burden of establishing that the purchase is fair, open, and free from imposition, undue advantage, actual or constructive fraud.

3. Such conveyances will not be declared void as a matter of law, but it is a question for the jury to determine upon all

the evidence as to whether the vitiating elements enter into the particular transaction."

[2] In the instant case the record reveals that the trial court made findings of fact (1) that defendant Gale Lyon was not authorized by the corporate plaintiff, its board of directors, or any other party to transfer the parcel of land in question to himself and his wife; (2) that the board of directors had no knowledge of this transaction until the same was discovered by chance more than three years after it occurred; (3) that the transaction was not thereafter ratified by the board of directors of the corporation; (4) that there was no believable evidence that adequate consideration had passed from defendants to the corporate plaintiff; (5) "that said execution of said instrument was done and maintained in secrecy and with the intention of concealment of the entire transaction." A careful review of the evidence presented in this case discloses that these findings are supported by plenary, competent evidence and thus, are binding upon this court. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *Nichols v. Insurance Co.*, 12 N.C. App. 116, 182 S.E. 2d 585 (1971).

These findings, when viewed in light of the principles enunciated in *Hospital v. Nicholson, supra,* and *Mfg. Co. v. Bell, supra,* are sufficient to support the conclusions of the trial court that the transfer from plaintiff to defendants Gale and Nancy Lyon was unauthorized and unratified and that this conveyance from plaintiff to defendants Gale and Nancy Lyon and the subsequent conveyance to their minor daughter Martha must be declared null and void and set aside.

The judgment of the trial court is

Affirmed.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. CARL JOHNSON

No. 738SC678

(Filed 20 February 1974)

1. **Criminal Law § 99— belittling witness — expression of opinion by court**

In a prosecution for disseminating obscenity in a public place the trial court committed prejudicial error in ridiculing and belittling a witness of defendant by questioning him with respect to his knowledge of literature, asking him questions concerning his high school education, and commenting that, "He [the witness] really doesn't know anything and he thinks that he does."

2. **Obscenity— constitutionality of statute**

G.S. 14-190.1 prohibiting the intentional dissemination of obscenity in a public place is constitutional.

APPEAL by defendant from *Martin (Perry), Judge,* 9 April 1973 Session of Superior Court held in WAYNE County.

This is a criminal action wherein the defendant, Carl Johnson, was charged in two warrants, proper in form, with intentional dissemination of obscenity in a public place in violation of G.S. 14-190.1. Upon a verdict of guilty in the district court, the defendant appealed and received a trial *de novo* in Superior Court.

At the completion of the State's evidence, one of the charges against the defendant was dismissed and a verdict of guilty was returned by the jury as to the other offense. Defendant was sentenced to a term of imprisonment of two years; however, the sentence was suspended contingent upon defendant's compliance with certain conditions specified by the court. The defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General John R. B. Matthis for the State.

Smith, Carrington, Patterson, Follin & Curtis by Michael K. Curtis and J. David James for defendant appellant.

HEDRICK, Judge.

[1] Defendant maintains that the trial court committed error by ridiculing and casting aspersions on the testimony of a witness for the defendant. The specific remarks of the court complained of involve comments made by the trial judge during the

course of the testimony of Lewis Price, a student at Wayne Community College. The record discloses the following colloquy:

> (COURT: Mr. Price, you have been asked questions about great works of literature; can you name three great works of literature?
>
> A. My three favorites I can name are Dostoevski and his Crime and Punishment, and I can name Dickens and Tale of Two Cities, and I guess my other favorite would be Steinbeck and The Grapes of Wrath.
>
> COURT: I assume many years ago you read Paradise Lost?
>
> A. I'm not versed in that.
>
> COURT: You haven't?
>
> A. I've read excerpts here and there.
>
> COURT: You did go to high school?
>
> EXCEPTION 84
>
> A. Yes, sir.)
>
> (COURT: Where on earth did you go to?
>
> A. To a very good high school in Pittsburgh.
>
> COURT: Where?
>
> A. In the suburbs of Pittsburgh.
>
> EXCEPTION 85
>
> COURT: You don't know who wrote Paradise Lost?
>
> A. Yes, sir, Milton.)
>
> (COURT: Have you ever read Pilgram's Progress?
>
> A. No, sir, I have read excerpts as well. I have read other works of contemporary literature that I compare more favorably and that I think are more important to myself.
>
> COURT: You say you read something more important than Pilgrim's Progress and Paradise Lost?
>
> A. Since Paradise Lost, a lot of—

COURT: You all get an objection to anything that I ask. He really doesn't know anything and he thinks that he does. Do you know what century Henry Thoreau lived?

EXCEPTION 86

A. Yes, sir, he lived in the, a time of, what is his philosophy? Henry Thoreau lived in the early Nineteenth Century, and Thoreau wrote Walden, and Thoreau lived in the hills of New England. He grew beans and he talked about the good, simple life, sir.)

It is not only the right but the duty of the trial judge to control the examination and cross-examination of witnesses, *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971); *State v. Mansell*, 192 N.C. 20, 133 S.E. 190 (1926); and "[i]t has been the immemorial custom for the trial judge to examine witnsses who are tendered by either side whenever he sees fit to do so . . . ", *State v. Horne*, 171 N.C. 787, 88 S.E. 433 (1916); however, "[h]e should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. 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. This right can neither be denied nor abridged." *Withers v. Lane*, 144 N.C. 184, 56 S.E. 855 (1907).

Whether there has been a breach of the "cold neutrality of the impartial judge" is determined by the probable effect on the jury of the improper comments and not the motive of the court in making such statements. *State v. Lea*, 259 N.C. 398, 130 S.E. 2d 688 (1963). "Jurors respect the Judge and are easily influenced by suggestions, whether intentional or otherwise, emanating from the bench." *State v. Holden*, 280 N.C. 426, 185 S.E. 2d 889 (1972). Regardless of the motive or intent of the trial judge in making his comments in the instant case, these remarks tend to ridicule and belittle the witness of defendant, impair his credibility, and prejudice defendant's case. *State v. Frazier*, *supra*. For error in making such remarks the defendant must be awarded a new trial.

[2] Defendant's assignment of error to the trial judge's denial of his motion to quash the warrant presents the question of

the constitutionality of G.S. 14-190.1. On the authority of *State v. Bryant* and *State v. Floyd,* 20 N.C. App. 223, 201 S.E. 2d 211 (Filed 19 December 1973) holding G.S. 14-190.1 to be constitutional, this assignment of error is overruled. Furthermore, we hold there was sufficient, competent evidence to require the submission of this case to the jury on the charge set out in the warrant.

We do not discuss defendant's other assignments of error since they are not likely to occur on a new trial.

For the reasons stated above, the defendant is entitled to a

New trial.

Chief Judge BROCK and Judge BALEY concur.

LOIS G. LEA AND FRANK D. CUMMINGS v. GARLAND (GARFIELD) WALTER DUDLEY AND WIFE LOYCE GEORGIA DUDLEY, J. LEON DUDLEY AND WIFE MARGARET WATERFIELD DUDLEY, O. A. DUDLEY AND WIFE DOWE DUDLEY

No. 731SC738

(Filed 20 February 1974)

1. **Judgments § 39— foreign decree determining title to N. C. property**

   Portion of a Virginia decree which attempted to determine ultimate title to real property located in North Carolina is void since the courts of one state cannot determine title to real property located in another state.

2. **Corporations § 28; Judgments § 39— corporate dissolution — conveyance of property in another state to shareholders**

   In an action for dissolution of a corporation, a court of competent jurisdiction in the state of incorporation with all necessary parties properly before it generally has the authority to order the execution and delivery of a deed to property in another state to the shareholders of the corporation as successors in title to the assets of the corporation.

3. **Corporations § 28; Courts § 21— foreign decree — acceptance as matter of comity**

   In this action to quiet title to realty located partly in this State, a Virginia decree finding plaintiffs to be the successors to a corporation and entitled to the corporation's property will be accepted by the courts of this State as a matter of comity.

4. Trespass to Try Title § 4— sufficiency of evidence of title

In this action to quiet title to realty located partly in North Carolina, plaintiffs made a *prima facie* showing of title sufficient to go to the jury where they introduced in evidence (1) a stipulation that a Virginia corporation was owner of the land in question as of 30 June 1914, (2) a Virginia decree dissolving the corporation, finding plaintiffs to be shareholders of and successors to the corporation, and directing a receiver to convey the land in question to plaintiffs, and (3) the receiver's deed conveying the land to plaintiffs.

APPEAL by plaintiffs from *Hobgood, Judge,* at the 16 April 1973 Special Civil Session of CURRITUCK Superior Court.

This is an action to quiet title to certain property located partly in Princess Anne County, Virginia, (now City of Virginia Beach) and partly in Currituck County, North Carolina known as Little Island, Hammock Island, and part of Deal's Island. This property originally belonged to the Deal's Island Ducking Club, a Virginia corporation. The corporation's charter was revoked by the State of Virginia in 1931 for failure to pay registration fees and franchise taxes. In July of 1970 the plaintiffs instituted a legal proceeding before the Circuit Court for the City of Hampton, Virginia, to determine the assets of the defunct corporation, if any, and to distribute the assets to the persons entitled thereto. The Virginia court determined Frank D. Cummings and Lois G. Lea, shareholders of the corporation (plaintiffs in this action) to be the successors to the corporation and appointed a receiver and directed him to convey the land in question, the only asset of the corporation, to the plaintiffs. The receiver's deed was recorded in Currituck County, North Carolina.

On 24 September 1971 the plaintiffs filed this action to quiet title. The matter was tried before Judge Hobgood on 16 April 1973. At the close of the plaintiffs' evidence, the defendants moved under Rule 50(a) for a directed verdict on the grounds that the deed of the receiver appointed by a Virginia court was ineffective to convey land in North Carolina and that therefore the plaintiffs have no standing to bring this suit in North Carolina and have no right to the relief prayed for in their complaint. The trial court found that as a matter of law the plaintiffs' evidence did not make out a *prima facie* case, granted the defendants' motion, and dismissed the action. From this order the plaintiffs appealed.

J. Kenyon Wilson, Jr., for the plaintiff appellants.

Leroy, Wells, Shaw, Hornthal & Riley by Dewey W. Wells for defendant appellees.

CAMPBELL, Judge.

[1] It is accepted law in North Carolina that the courts of one state cannot determine title to real property located in another state. *McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27 (1948); *Noble v. Pittman,* 241 N.C. 601, 86 S.E. 2d 89 (1955); *Fall v. Eastin,* 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 (1909). Therefore, any part of the Virginia decree which attempted to determine ultimate title to North Carolina real estate is void.

[2, 3] However, a court of competent jurisdiction in the state of incorporation with all necessary parties properly before it in an action for the dissolution of a corporation generally has the power and authority to render a decree ordering the execution and delivery of a deed to property in another state to the shareholders of the corporation as successors in title to the assets of the corporation. Such an order must be considered to be *in personam* in character as the Virginia court could not have *in rem* jurisdiction over a *res* located in North Carolina. As between the parties to the Virginia litigation the decree is *res judicata.* There is, therefore, no necessity to relitigate in North Carolina the question of rights to the assets of the corporation as between the corporation and the shareholders. It is possible that full faith and credit should be given the Virginia decree finding the plaintiffs in this action to be the successors to the corporation and endowed with all the rights and privileges to which this determination entitles them. See generally Wurfel, "Recognition of Foreign Judgments," 50 N.C.L. Rev. 21 (1971); Currie, "Full Faith and Credit to Foreign Land Decrees," 21 U. Chi. L. Rev. 620 (1954); Lorenzen, "Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land," 34 Yale L.J. 591 (1925); Barbour, "The Extra-Territorial Effect of the Equitable Decree," 17 Mich. L. Rev. 527 (1919); Leflar, *American Conflicts Law,* § 83 (1968); Ehrenzweig, *On Conflict of Laws,* § 58 (1962); Restatement 2d, Conflict of Laws, § 102 (1971). However, we choose to hold that as a matter of comity the Virginia decree will be accepted and that the plaintiffs stand in the shoes of the corporation. *McElreath v. McElreath,* 162 Tex. 190, 345 S.W. 2d 722 (1961). See also, *Tolley*

v. Tolley, 210 Ark. 144, 194 S.W. 2d 687 (1946); *Redwood Investment Co. v. Exley,* 64 Cal. App. 455, 221 P. 973 (1923); *Rozan v. Rozan,* 49 Cal. 2d 322, 317 P. 2d 11 (1957); *Matson v. Matson,* 186 Iowa 607, 173 N.W. 127 (1919); *Putnam & Norman v. Conner,* 144 La. 231, 80 So. 265 (1918); *Dunlap v. Byers,* 110 Mich. 109, 67 N.W. 1067 (1896); *Lyle Cashion Co. v. McKendrick,* 227 Miss. 894, 87 So. 2d 289 (1956); *McCune v. Goodwillie,* 204 Mo. 306, 102 S.W. 997 (1907); *Burnley, et al v. Stevenson,* 24 Ohio St. 474, 15 Am. Rep. 621 (1873); *Beebe v. Brownlee,* 63 Abs. 377, 110 N.E. 2d 64 (1951); *Weesner v. Weesner,* 168 Neb. 346, 95 N.W. 2d 682 (1959); *Sharp v. Sharp,* 65 Okla. 76, 166 P. 175 (1916); *Mallette v. Scheerer,* 164 Wis. 415, 160 N.W. 182 (1916); *Bailey v. Tully,* 242 Wis. 226, 7 N.W. 2d 837 (1943). The Virginia decree, of course, did not decide any issue of title as between the defendants in this action and the corporation or as between the defendants and the plaintiff shareholders as successors to the interest of the corporation.

[4] The trial court, at the close of the plaintiffs' evidence, found as a matter of law that the plaintiffs had not made out a *prima facie* case and granted the defendants' motion for a directed verdict. We find this determination to be in error in that the trial court should have given effect to the Virginia decree. We note that the plaintiff introduced into evidence a stipulation that the corporation, Deal's Island Ducking Club, was the owner of the land in question as of 30 June 1914, as well as the Virginia proceedings, decree and deed. The plaintiffs also put forward record proof of a conveyance of the land in question by defendant Garland W. Dudley, et al to W. L. Cogswell dated 1 October 1964 and a conveyance of the same land back to Garland W. Dudley, et al, dated 15 October 1964. The plaintiffs' evidence would seem to satisfy at least the first of the possible methods of establishing a *prima facie* showing of title enumerated in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142 (1889). See also, *Allen v. Hunting Club,* 14 N.C. App. 697, 189 S.E. 2d 532 (1972), since the common source doctrine, which would also satisfy *Mobley v. Griffin, supra,* might be applicable. See also Marketable Title Act, G.S. Chapter 47B.

Reversed.

Chief Judge BROCK and Judge PARKER concur.

GEORGE W. SHIPP TRAVEL AGENCY, INCORPORATED v. NANCY W. DUNN, WARD W. DUNN, JR., CAROLYN BENNETT AND ALADDIN TRAVEL SERVICE, INCORPORATED

No. 7421SC82

(Filed 20 February 1974)

1. **Rules of Civil Procedure § 33— burdensome interrogatories — objections properly sustained**

Where some interrogatories submitted to defendants by plaintiff were quite broad and other interrogatories dealt with matters completely irrelevant to the matter at hand, the trial court acted within its discretion in sustaining defendants' objections to the interrogatories.

2. **Rules of Civil Procedure §§ 33, 56— objections to interrogatories — ruling amounting to summary judgment — error**

In a motion for an order merely limiting the scope of discovery by declaring certain interrogatories too broad and burdensome to be answered, it is improper for a trial court to make findings of fact and conclusions of law which are not limited to the nature of the particular motion before the trial court at that time and which in essence grant summary judgment without a proper hearing; therefore, that portion of the trial court's order which went beyond a finding that plaintiff's interrogatories were burdensome and concluded that defendants have the right to compete with plaintiff and to use any information obtained during their employment with plaintiff is vacated.

APPEAL by plaintiff from *Wood, Judge,* at the 23 July 1973 Session of FORSYTH Superior Court.

This is a civil action to restrain the defendants, two of whom were former employees of plaintiff travel agency who have set up their own travel agency, from dealing with any of plaintiff's clients, from receiving any commissions from plaintiff's clients, and also to recover compensatory and punitive damages. Plaintiff's application for a temporary restraining order was denied by Judge Wood in an order issued 22 June 1973. Plaintiff then served interrogatories upon defendants to which the defendants objected, moved to strike and asked the trial court to excuse them from answering said interrogatories pursuant to G.S. 1A-1, Rule 33. From an order dated 21 August 1973 granting defendants' motion and making extensive findings of fact and conclusions of law, the plaintiff appealed.

Randolph & Randolph by Clyde C. Randolph, Jr., for the plaintiff appellant.

Hatfield and Allman by R. Bradford Leggett for the defendant appellees.

CAMPBELL, Judge.

The order of the trial court reads:

"THIS MATTER, coming on to be heard before the undersigned judge presiding upon the objections by the defendants made pursuant to N.C. G.S. Section 1A-1, Rule 33, to certain of the interrogatories filed by the plaintiff on June 22, 1973, and the court having considered the interrogatories, the timely objections made thereto, and the argument of counsel, and the court having taken judicial notice of the proceedings in reference to the plaintiff's motion for a preliminary injunction and the order entered thereon by the undersigned judge presiding on June 22, 1973, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The individual defendants, Nancy Dunn and Carolyn Bennett, were former employees of the plaintiff and in the course of that employment made arrangements for clients in regard to reservations for travel accommodations and transportation.

2. The defendants, Nancy Dunn and Carolyn Bennett at no time entered into a contract not to compete with the plaintiff.

3. The individual defendants left the employ of the plaintiff: Carolyn Bennett on March 16, 1973, and Nancy Dunn on April 3, 1973.

4. On March 22, 1973, the defendant, Nancy W. Dunn, informed the plaintiff that she desired to resign and informed the plaintiff of her intentions in regard to starting another travel agency as is more particularly set forth in Paragraph 5, *infra*. The plaintiff requested that she stay an additional two weeks and Nancy Dunn did so.

5. On March 26, 1973, the defendant Aladdin Travel Service was formed and Carolyn Bennett began to work for same. The defendants Nancy Dunn and Ward Dunn are officers, directors, and shareholders of the defendant Aladdin Travel Service, Incorporated.

6. Since the defendant Aladdin Travel Service, Incorporated has begun business, certain clients of the plaintiff

have transferred or had transferred their business from the plaintiff to the defendants. Included in this business are certain trips of which part or substantially all the work was done by the defendants, Nancy W. Dunn and Carolyn Bennett while they were employed by the plaintiff.

7. On June 22, 1973, the plaintiff, pursuant to N. C. G.S. Section 1A-1, Rule 33, submitted interrogatories to the defendants. On June 29, 1973, the defendants filed objections to the aforesaid interrogatories and objections thereto are incorporated herein by reference as though set out fully.

CONCLUSIONS OF LAW

1. The aforesaid interrogatories numbers 1 through 4 are not reasonably calculated to lead to the discovery of admissible evidence and they are furthermore extremely general in nature. To require the defendants to answer the same would be burdensome.

2. The defendants are entitled to solicit future business from clients with whom they had contact while employed by the plaintiff, there being no written contract not to compete made between the individual defendants, Nancy Dunn and Carolyn Bennett, and the plaintiff.

3. The defendants have a right to take with them any information which was obtained while they were employed by the plaintiff which they could retain in their memories. While using this information, they may construct their own mailing list and formulate methods of contacting members of the general public, including former clients of the plaintiff, in order to solicit future business. Interrogatories numbers 1 through 4 are general in nature and delve into areas which are not within the proper scope of the present lawsuit.

4. Interrogatories numbers 6 through 10 relate to the financial situation of the corporate defendant, and in particular the financial relationship between the corporate defendant and the individual defendant, Ward W. Dunn, Jr. The court concludes that these questions are not reasonably calculated to lead to the discovery of admissible evidence.

ACCORDINGLY, IT IS ORDERED that the defendants' objections to the plaintiff's Interrogatories Nos. 1 through 4 and 6 through 10 be, and the same hereby are, sustained.

This the 17th day of August, 1973.

s/ WILLIAM Z. WOOD
Judge Presiding"

[1] The trial court acts within its discretion in making and refusing discovery orders. See generally G.S. 1A-1, Rule 33; Wright and Miller, Federal Practice and Procedure § 2176 (1970). The interrogatories submitted by the plaintiff were quite broad in some instances and in other instances dealt with matters completely irrelevant to the matter at hand. The order of the trial court as it pertains to the interrogatories is affirmed.

[2] Any questions as to whether this appeal is interlocutory and should be raised by certiorari rather than appeal will not be discussed since paragraphs 2 and 3 of the Conclusions of Law contained in the trial court's order in effect terminated the proceedings and gave a summary judgment for the defendants. See G.S. 1-277(a). See also Burns, Use of Discovery Under North Carolina Rules of Civil Procedure, §§ 13-1 and 13-2 (1971). In a motion for an order merely limiting the scope of discovery by declaring certain interrogatories too broad and burdensome to be answered, it is improper for a trial court to make findings of fact and conclusions of law which are not limited to the nature of the particular motion before the trial court at that time, and which in essence grant summary judgment without a proper hearing. G.S. 1A-1, Rule 56.

The portion of the trial court's order which goes beyond a finding that the interrogatories requested are burdensome and which concludes that defendants have the right to compete with the plaintiff and to use any information obtained during their employment with plaintiff is vacated.

Affirmed in part.

Reversed in part.

Judges HEDRICK and BALEY concur.

LYNDA M. WALLER (NOW MOORE) v. DONALD R. WALLER

No. 7421DC16

(Filed 20 February 1974)

Divorce and Alimony § 23— child support — no finding of changed circumstances or defendant's ability to pay — increase error

The trial court erred in granting plaintiff's motion to increase child support payments where there was no finding as to plaintiff's original child-oriented expenses and no finding that the needs of the children had increased, other than the unsupported finding that the children were older and thus their needs had substantially increased and no finding was made as to the defendant's expenses regarding his present family and his ability to pay the increased amount of child support.

APPEAL by defendant respondent from *Leonard, District Judge,* at the 18 May 1973 Session of FORSYTH District Court.

The plaintiff was granted an absolute divorce on 3 October 1966 and filed this motion in the cause for an increase in child support payments on 9 October 1972.

The plaintiff, Lynda M. Waller, (now Moore) and defendant, Donald R. Waller, were previously married for approximately one and one-half years during which time the defendant adopted two minor children: Randall Dwayne Waller, now 15 years of age, and Robin Denise Waller, now 12 years of age, who were born to plaintiff in a previous marriage. Subsequent to the divorce, defendant remarried. Subsequent to the divorce from the defendant, the plaintiff remarried twice, and is currently separated from her present husband.

The plaintiff, claiming an increase in the children's needs, made a motion to increase the support payments of the father's two adopted children from $108.00 to $300.00 per month. An order granting an increase to $45.00 per week was signed March 9, 1973. Upon the motion of defendant, a new trial on the motion was granted. Before the new trial, a memorandum to defendant's attorney was received from the Honorable Robert K. Leonard, Judge, stating he had tentatively decided to award $150.00 support per month, plus 12½ per cent of the annual bonus, if any. Upon objection by plaintiff's attorney, hearing was held on the 18th day of May, 1973. Eleven days later, Judge Leonard signed an order dated the 29th day of May, 1973, granting an award

for child support of $185.00 per month plus payment of $140.00 to cover an outstanding medical bill.

The defendant excepted to the second order signed on May 29, 1973 and gave notice of appeal.

Pettyjohn and Frenck by H. Glenn Pettyjohn for plaintiff appellee.

Goodale and Daetwyler by David A. Daetwyler for defendant appellant.

CAMPBELL, Judge.

The order of the trial court entered 29 May 1973 reads:

"THIS CAUSE, Coming on to be heard and being heard before the undersigned Judge of the District Court of Forsyth County, Twenty-First Judicial District, upon motion of the plaintiff for an increase in the support being paid for the two minor children of the plaintiff and defendant; and the court, having heard all of the evidence of the plaintiff and all of the evidence of the defendant, and finding that both parties are represented by counsel, finds that the defendant, Donald R. Waller, did adopt the two minor children, namely, Randall Dwayne Waller, born July 30, 1958 and Robin Denise Waller, born April 13, 1961, thereby relieving the natural father of the obligation to support said children; that the plaintiff and defendant are now divorced and that both parties have now remarried; and the court further finding that at the time of the previous agreement to pay $107.00 [sic] per month for the support of the two children the children have grown from ages seven and four to fifteen and twelve respectively, and that their needs have thereby substantially increased; that the children's share of the plaintiff's monthly expenses are as follows: Rent $125, Groceries $80, Transportation $10, Medical and Dental Expenses $12.00, Clothing $25, School Fees and Lunches $15.00, Medical and Life Insurance $20.00, and allowances for the children $25.00, a total of $312.00 expenses for said children per month. That said necessities for the children have substantially increased since the previous agreement eight years ago; that the children also have medical problems which require payment of medical expenses from time to time, and that

$140.00 outstanding medical bill is now owing for the son, Randy; that the plaintiff needs additional support for said children on account of their substantially increased needs.

The court further finds that at the time of the previous agreement to pay $107.00 [sic] per month the defendant's income has increased from $400.00 per month to his present income of $15,711.00 gross in 1971, and $16,800.00 in 1972, the court finding that defendant's ability to support said children has increased substantially.

NOW, THEREFORE, IT IS ORDERED That the defendant pay into the office of the Clerk of Superior Court of Forsyth County for the support of the two minor children, namely, Randall Dwayne Waller, and Robin Denise Waller, the sum of $185.00 per month, $92.50 per child, beginning on the 1st day of June, 1973, and continuing thereafter until the children are emancipated, or until further orders of this court. IT IS FURTHER ORDERED That the defendant pay the $140.00 medical expense for the son Randy's allergy tests, payable directly to the wife.

IT IS FURTHER ORDERED That this award of support for said children supersedes and suspends all previous agreements and orders for support heretofore made or entered respecting said children.

This 29 day of May, 1973.

s/ ROBERT K. LEONARD
Judge Presiding "

The defendant's contention that there was no evidence and no finding of a "change in circumstances" must be sustained. By statute, G.S. 50-13.7(a), in order for a court to modify a support order, a change in circumstances must be shown. The only evidence presented by the plaintiff and found by the court was that the children had grown from ages seven and four to fifteen and twelve respectively, that the defendant's income had increased, and also included a skeleton list of the plaintiff's current child-oriented expenses. There was no finding of the plaintiff's original child-oriented expenses and no finding that the needs of the children had increased other than the unsupported finding that the children were older and thus their needs had substantially increased. No finding was made as to the defendant's expenses regarding his present family and no con-

sideration given to his ability to pay. Nor was any consideration given to the fact that part of defendant's income was a bonus which fluctuated from year to year.

We hold that this case is controlled by *Childers v. Childers*, 19 N.C. App. 220, 198 S.E. 2d 485 (1973) and by *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963). In *Fuchs v. Fuchs, supra*, the court stated:

> "[W]e hold that where parties to a separation agreement agree upon the amount for 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. We further hold that the court upon motion for an increase in such allowance, is not warranted in ordering an increase in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase is awarded solely on the ground that the father's income has increased, therefore, he is able to pay a larger amount."

This case is remanded for further proceedings in accordance with this decision. We have reviewed defendant's other assignments of error and find them without merit.

Remanded.

Judges HEDRICK and BALEY concur.

THOMAS HARVEY v. CRITCHFIELD MARINE, INC.

No. 7418SC10

(Filed 20 February 1974)

Bankruptcy § 4— attachment of property — secured creditors — bankruptcy proceedings — res judicata

When plaintiff attached property of defendant prior to the time defendant petitioned a federal district court for an arrangement under Chapter XI of the Bankruptcy Act, plaintiff became a secured creditor to the extent of the amount of the bond given to obtain release of the attached property; therefore, the federal court in the bankruptcy proceeding had no jurisdiction over plaintiff's claim against defendant up to the amount secured by the bond, and its decree denying plaintiff's claim is *res judicata* only to the extent that plaintiff's claim exceeds the amount of the bond.

APPEAL by plaintiff from *Crissman, Judge,* 14 May 1973 Session of Superior Court held in GUILFORD County. Argued in the Court of Appeals 22 January 1974.

This action arises as a result of an alleged indebtedness owing by defendant, a corporation organized under the laws of the State of Florida, to plaintiff, former district sales agent and salesman for defendant, for commissions, expenses, salary and bonuses allegedly earned by plaintiff. Defendant denied indebtedness and counterclaimed for overdraft on plaintiff's drawing account.

On 16 January 1970, plaintiff obtained the issuance of an order attaching a single engine, 23-foot boat which belonged to defendant. Defendant, with Ohio Casualty Insurance Company as surety, gave bond in the amount of $6,000.00 to recover possession of the attached property. Bond was later increased to $8,000.00.

On 22 June 1970, defendant filed a petition in the United States District Court for the Southern District of Florida requesting an arrangement under Chapter XI of the Bankruptcy Act. Upon motion of defendant, the Superior Court restrained and enjoined further prosecution of this action pending the outcome of defendant's Chapter XI arrangement.

On 24 November 1970, plaintiff filed a proof of claim based on facts contained in the complaint in this action in the bankruptcy proceeding; defendant objected to the claim.

On 19 April 1971, a hearing was held on the objection to plaintiff's claim. Plaintiff did not appear to present his claim. On 20 April 1971, a default order was entered denying plaintiff's claim.

On 5 November 1971, an order was entered confirming defendant's arrangement. On 15 November 1971, a Final Decree in the Chapter XI proceeding was entered, consummating the arrangement, and permanently enjoining all creditors of defendant-debtor, excepting those not dischargeable in bankruptcy.

On 18 April 1973, defendant filed a motion to amend his answer along with a motion for summary judgment. Defendant's motion to amend was allowed. On 23 May 1973, summary judgment was granted for defendant.

Stephen E. Lawing for plaintiff-appellant.

Bencini, Wyatt, Early and Harris, by Frank B. Wyatt and William P. Harris, for defendant-appellee.

BROCK, Chief Judge.

Plaintiff contends that the trial court erred in allowing defendant's motion for summary judgment. Specifically, plaintiff contends that the United States District Court for the Southern District of Florida in defendant's Chapter XI arrangement proceeding had no jurisdiction to determine the merits of plaintiff's claim, and therefore, the decision is not *res judicata.*

Plaintiff contends that his status is that of a secured creditor and, as such, is not bound by confirmation of a Chapter XI arrangement proceeding and denial of his claim under the Bankruptcy Act. No provision of the Bankruptcy Act permits an arrangement proposed under Chapter XI to deal with the rights of secured creditors. *See* 8 Collier on Bankruptcy, Para. 7.05[4], at 29 (14th ed. 1972).

For the reasons hereinafter stated, plaintiff's contentions are partly meritorious but partly without merit.

Under the Bankruptcy Act, a creditor may occupy the position of a secured creditor for a part of his claim and occupy the position of an unsecured creditor for the balance of his claim. 9 Collier on Bankruptcy, Para. 7.05[4], p. 29-30 (14th ed. 1972). When the plaintiff obtained an attachment of defendant's property, plaintiff became a secured creditor to the extent of the value of the property attached. In this case defendant's property was attached 16 January 1970. Defendant's petition in bankruptcy was filed 22 June 1970. Therefore, plaintiff's security was over four months old at the time the petition in bankruptcy was filed. The posting of bond by defendant, with Ohio Casualty Insurance Company as surety, did not interrupt plaintiff's security. The bond merely substituted promissory security to obtain release of the property. "[A]n attachment lien remains invulnerable if over four months old although the suit in which it was issued has not resulted in judgment." 4 Collier on Bankruptcy, Para. 67.07, p. 111 (14th ed. 1972). Therefore, the United States District Court in the bankruptcy proceeding had no jurisdiction over plaintiff's claim up to the amount secured by the bond. Plaintiff's claim in excess of the

amount secured by the bond was within the jurisdiction of the United States District Court, and its decree denying plaintiff's claim is *res judicata* to the extent that plaintiff's claim exceeds the amount protected by the bond. An order confirming an arrangement is a judgment *in rem*, a final determination of the rights and liabilities created by the arrangement, binding upon all parties in interest, whether or not they appeared. 9 Collier on Bankruptcy, Para. 9.25[2], at 336-337 (14th ed. 1972).

Plaintiff was a secured creditor to the extent of the value of the property attached; therefore, plaintiff's claim to that extent was not discharged in the bankruptcy proceeding. Plaintiff is entitled to prosecute this action to judgment although execution thereon shall not be issued against defendant. It is only by prosecuting this action to judgment that plaintiff will be enabled to bring an action against the surety on the bond which was posted to release the defendant's attached property. *See* 4 Collier on Bankruptcy, Para. 67.07, pp. 114-115 (14th ed. 1972).

Upon a new trial, plaintiff should be permitted to offer such competent evidence as he may have to establish his entire claim. The verdict should be in the full amount determined by the finder of facts to be the amount owed by defendant to plaintiff. If the verdict exceeds the value of the property at the time it was attached, the trial judge should enter judgment only for an amount not exceeding the value of the property at the time it was attached. The judgment should contain a perpetual stay of execution against the defendant.

New trial.

Judges MORRIS and CARSON concur.

MIRIAM GAITHER THOMPSON, RUTH LITAKER HAYDEN, SALLY M. LITAKER AND HELEN BAILEY v. HAROLD L. WATKINS, SR., EXECUTOR OF THE ESTATE OF ANNA L. LITAKER; HAROLD L. WATKINS, SR., INDIVIDUALLY, AND WIFE JUANITA WATKINS; SADIE W. CARR AND HUSBAND FRANK CARR; MILDRED W. BOST BLACK AND HUSBAND FLORENCE BLACK; AND WALTER C. LITAKER, INCOMPETENT, BY HIS GUARDIAN AD LITEM, WESLEY B. GRANT

No. 7419SC42

(Filed 20 February 1974)

Mortgages and Deeds of Trust § 28; Estates § 4— life estate — foreclosure sale — purchase by life tenant

Where testator devised the property in question to his widow for her lifetime with the remainder to his children, the plaintiffs, and the widow purchased the property at a foreclosure sale subsequent to testator's death, the widow held the property as trustee for the remaindermen, and, at her death, the property passed to them by operation of law rather than to devisees named in the will of the widow.

APPEAL from *Armstrong, Judge,* March 1973 Session, CABARRUS County Superior Court. Argued in the Court of Appeals 22 January 1974.

This action was instituted to have plaintiffs declared the owners and entitled to possession of a parcel of land in Cabarrus County.

The record reveals that Anna L. Litaker acquired title to the property through the following set of circumstances: Walter R. Litaker was the owner of the property prior to his death in 1949. By his will, he devised the property to his widow, Anna L. Litaker, for her lifetime, with the remainder to his children—plaintiffs, defendant Walter C. Litaker, and Edgar Litaker, who died without issue.

At his death, Walter R. Litaker was indebted to Cabarrus County Savings and Loan Association, and the indebtedness was secured by a deed of trust on the property. Since the assets of the estate were insufficient to satisfy the debts existing at the time of Walter R. Litaker's death, the property was sold at foreclosure under the power of sale in the deed of trust. It was purchased by Anna L. Litaker on 25 July 1950.

Anna L. Litaker died testate on 6 October 1969. By her will, she devised the property to defendants Sadie W. Carr, Mildred W. Bost and Harold L. Watkins, Sr.

Plaintiffs instituted this action on 24 April 1970, and on 3 November 1971, the trial court dismissed the action on the ground that plaintiffs failed to state a claim against defendants for which relief can be granted. The dismissal was reversed by the Court of Appeals in *Thompson v. Watkins,* 15 N.C. App. 208, 189 S.E. 2d 615 (1972).

Following the reversal of the dismissal, the case was heard by Judge Armstrong, sitting without a jury. The court found that the interest of defendant Walter C. Litaker was the same as that of plaintiffs and made the following findings of fact:

"1. That Walter R. Litaker died on March 6, 1949, seized of the real property deeded to him by Deed recorded in Deed Book No. 77, page 236, Cabarrus County Registry, more particularly described hereinafter; that by his Will, which is recorded in Will Book No. 9, page 253, in the office of the Clerk of Superior Court of Cabarrus County the said Walter R. Litaker devised said property to his wife, Anna L. Litaker, for her lifetime with the remainder to plaintiffs, Miriam Gaither Thompson, Ruth Litaker Hayden, Sally M. Litaker, Helen Bailey, and defendant, Walter C. Litaker, and to Edgar E. Litaker, who died having never married and not being survived by issue in 1965; that prior to his death Walter R. Litaker had executed and delivered a Deed of Trust to Cabarrus County Savings & Loan Association, which Deed of Trust is recorded in Mortgage Book No. 132, page 97, Cabarrus County Registry, conveying a lien on said property to the said Savings & Loan Association; that after his death the Savings and Loan Association instituted foreclosure proceedings under the terms of said Deed of Trust and at the foreclosure sale the said Anna L. Litaker, life tenant of the property under the terms of the Will of Walter R. Litaker, purchased said property and that as the life tenant, held the remainder of said property in trust for the remaindermen under the terms of the Will of Walter R. Litaker; that Anna L. Litaker, life tenant, died October 6, 1969, that she attempted to devise said property to the defendants, Sadie W. Carr, Mildred W. Bost Black, and Harold L. Watkins, Sr., but that the title of Anna L. Litaker ceased at her death and her Will was not operative as an attempt to pass title to the property which is the subject of this action."

The court thereupon concluded:

> "That the plaintiffs and the defendant, Walter C. Litaker, are the owners of the property hereinafter described as remaindermen under the terms of the Will of Walter R. Litaker and that the defendants own no interest in said real property."

From the entry and signing of judgment, defendants appealed.

Williams, Williford, Boger and Grady, by John R. Boger, Jr., for plaintiff appellees.

Hartsell, Hartsell, and Mills, P.A., by W. Erwin Spainhour, for defendant appellants.

MORRIS, Judge.

The sole issue presented by this appeal is whether Anna L. Litaker, predecessor in title to defendants, took a fee simple interest or whether she held the property as trustee for the plaintiffs when she, as life tenant, purchased the property at a foreclosure sale. We hold that she held the property as trustee for plaintiffs, and at her death, the title to the property passed to plaintiffs by operation of law. Thus, the purported devise of the property to defendants is invalid.

> "If a life tenant purchases the property at a sale to satisfy an encumbrance, he cannot hold such property to his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner. If the life tenant pays more than his proportionate share, he simply becomes a creditor of the estate for that amount. *Creech v. Wilder*, 212 N.C. 162, 193 S.E. 281. Dower is a life estate. If the doweress, life tenant, purchases at a sale to satisfy an encumbrance, she cannot hold the property to her exclusive benefit, but will be deemed to have purchased for the benefit of herself and the remaindermen. *Farabow v. Perry*, 223 N.C. 21, 25 S.E. 2d 173." *Morehead v. Harris*, 262 N.C. 330, at 336, 137 S.E. 2d 174 (1964).

When this case was before this Court on the dismissal pursuant to Rule 12(b)(6), *Thompson v. Watkins*, 15 N.C. App. 208, 189 S.E. 2d 615 (1972), we reaffirmed this principle, and

we see no reason to abandon it now. The judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge CARSON concur.

DUKE POWER COMPANY v. J. W. GADDY, JR. AND WIFE CORNELIA S. GADDY, AND PHIL GADDY AND WIFE JOHNNIE P. GADDY

No. 7420SC92

(Filed 20 February 1974)

1. **Eminent Domain § 6— value after the taking — knowledge of rights included in easement**

In a proceeding to condemn an easement for an electric power transmission line, there is no merit in plaintiff's contention that the court erred in the admission of testimony by two of defendants' witnesses concerning the fair market value of defendants' property after the taking on the ground that the witnesses did not know what rights were or were not included in the easement since plaintiff's argument relates primarily to the weight to be given the testimony.

2. **Eminent Domain § 6— value — amount offered for part of tract**

In a proceeding to condemn a right of way for an electric power transmission line, the trial court did not err in allowing one defendant to testify that he had been offered $20,000 for four acres of land where the witness thereafter testified that the four acres were part of the tract of land in controversy.

APPEAL by plaintiff from *Webb, Judge,* 6 August 1973 Session of Superior Court held in UNION County. Argued in the Court of Appeals 22 January 1974.

Plaintiff instituted this proceeding to condemn a right of way across a tract of land in Marshville Township, Union County, for the construction and maintenance of a transmission line.

All matters in controversy were disposed of by pre-trial order except the issue of damages. The case was tried before the jury solely upon the following issue: "What amount of damages are the respondents [defendants] entitled to recover of the petitioner [plaintiff]?" The jury answered the issue in the sum of $15,000.00. Judgment was entered upon the verdict. Plaintiff appealed.

C. Frank Griffin, for the plaintiff.

Griffin and Humphries, by James E. Griffin, for the defendants.

BROCK, Chief Judge.

[1] Plaintiff assigns as error the admission of the testimony of defendant's witnesses J. W. Gaddy and J. B. Brantley concerning the fair market value of defendants' property after the taking of the easement. Plaintiff argues that neither of these witnesses knew what rights were or were not included in the easement and, therefore, could not have an opinion of the value of the land after the taking of the easement.

At the time of trial, the steel towers had been erected along the right of way. The evidence tended to show that the highest and best use of the property was for residential purposes. The witnesses were aware that the right of way was 68 feet in width and there could be no construction within the right of way. The witnesses were aware that the property immediately affected lay within the municipal limits of the town of Marshville and that water and sewer lines were already in existence along the border of the property. Each of the witnesses was familiar with values of residential property in the area; each had viewed the property with the steel towers in place; and each expressed the opinion that lots in proximity to the steel towers and transmission lines would not be desirable for residences. Whether the witnesses clearly understood to what extent yards or gardens could be cultivated under the transmission lines and within the right of way seems to have very little effect upon their appraisals of the value for residential lots. In any event, appellant did not object to the testimony of the witness Gaddy, and the opinion of the witness Brantley would tend to establish less damages than the opinions of the landowners' other witnesses. Primarily, the argument made here by appellant relates to the weight to be given the testimony of the witnesses. The weight is for jury determination, and we are confident that counsel for appellant pursued these same arguments with the jury. We find no error in the admission of the testimony.

[2] Plaintiff assigns as error that the witness Phil Gaddy, one of the defendants, was allowed to testify that he had been offered $20,000.00 for four acres of land. Plaintiff argues that the testimony was improper because "no information was received

relative to the comparison of this property with the property in question." Counsel for plaintiff closely cross-examined the witness concerning his opinion of the value of the entire tract of land, and, on redirect, the witness stated that an agent of plaintiff offered him $20,000.00 for four acres of this tract of land. Since it was a part of the same tract, there was no comparison to be made. This assignment of error is overruled.

Plaintiff assigns as error that the trial judge did not sufficiently elaborate upon the things the jury might consider as affecting the fair market value of the property. We have reviewed the instructions as a whole and find them to be fair and sufficient.

In our opinion plaintiff had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and CARSON concur.

STANTON J. PRESNELL AND WIFE, HELEN A. PRESNELL AND MAYBERRY PAYNE, EXECUTOR OF THE ESTATE OF ETHEL L. SIKES v. TROLLINGER INVESTMENT COMPANY

No. 7419SC18

(Filed 20 February 1974)

1. **Parties § 1; Rules of Civil Procedure §§ 21, 56— absence of necessary parties — summary judgment**

The trial court erred in granting summary judgment for defendant based on the absence of necessary parties plaintiff. G.S. 1A-1, Rule 21.

2. **Parties § 1; Rules of Civil Procedure § 21— absence of necessary parties — mistrial**

In an action involving location of the boundaries of three separate tracts of land, the trial court erred in declaring a mistrial when the evidence disclosed that plaintiffs named as owners of a one-half undivided interest in one of the tracts were not actually the owners and that the true owners of such interest were not parties to the action; rather, the court should have proceeded under G.S. 1A-1, Rule 21, to determine if parties could have been dropped or added on terms which would have been just to the parties and should have at least proceeded with trial as to the two other tracts.

3. Parties § 2; Rules of Civil Procedure § 17— absence of real party in interest — dismissal of action

The trial court erred in dismissing an action for failure to prosecute in the name of the real party in interest where the court's order was not founded upon a determination that such failure had lasted beyond a reasonable time. G.S. 1A-1, Rule 17(a).

APPEAL by plaintiffs from *Seay, Judge,* 28 May 1973 Session of Superior Court held in RANDOLPH County.

In this civil action, instituted on 13 April 1972, plaintiffs seek injunctive relief and recovery for injury to their real estate. They allege in pertinent part: Plaintiffs Presnell are are the owners of two tracts of land, one tract containing 1.4 acres and the other containing 11 acres. Plaintiffs Presnell and the estate of Ethel L. Sikes are the owners of a third tract of land, containing 3.02 acres, the Presnells owning a one-half interest and the Sikes estate owning a one-half interest in said tract. The executor of the E. L. Sikes estate is a party plaintiff. Defendant is engaged in the business of developing real estate. On or about 10 April 1972, defendant's agents went upon plaintiffs' lands, cut and removed trees, and otherwise trespassed upon plaintiffs' lands; plaintiffs are informed and believe defendant proposes to do further irreparable damage to their property. Plaintiffs asked for a temporary and permanent injunction and for $5,000 damages.

Defendant filed answer denying any trespass on plaintiffs' land. By a further answer, defendant alleged that it owned a 70.16 acre tract of land and that "plaintiffs question the boundary between the plaintiffs and the defendant and the plaintiffs have created a dispute as to said boundaries." Defendant asked that the line dividing its lands from plaintiffs' lands be established.

A temporary order restraining defendant from going upon plaintiffs' lands was entered and, by consent, upon the posting of a substantial bond by plaintiffs, the order was continued in full force and effect pending a determination of the issues.

On 14 September 1972, defendant filed a motion asking that the restraining order be dissolved. Following a hearing, Judge Armstrong entered an order on 28 September 1972 denying the motion but on the same day entered a second order in which, among other things, he appointed surveyors to survey the lands involved in the litigation.

On 11 May 1973, defendant filed motion pursuant to Rule 56 asking for summary judgment as to the 3.02 acre tract and that the restraining order as to it be dissolved for that (1) the survey made by court appointed surveyors shows that the disputed line of that tract is as contended by defendant, and (2) proper parties have not been made as ordered by the court on 4 April 1973.

On 31 May 1973, following a hearing on defendant's motion for summary judgment, Judge Seay entered a "judgment" which included the following:

(1) Findings that this action came on for trial before Judge Crissman at the 2 April 1973 Session of Randolph Superior Court; that plaintiffs' evidence at the trial disclosed that the heirs at law of J. A. Sikes (rather than Ethel L. Sikes) were co-owners with plaintiffs Presnell of the 3.02 acre tract; that Judge Crissman declared a mistrial for reason that the J. A. Sikes heirs were not parties to the action and instructed counsel for plaintiffs to make said heirs parties to the action within 30 days from 5 April 1973; that said heirs have not been made parties and they are necessary parties to a final determination of the issues in this action.

(2) Concluded that this action can be tried in a more orderly manner by a trial as to the lands owned by plaintiffs Presnell separately from a trial involving the 3.02 acre tract in which the J. A. Sikes heirs own an interest.

(3) Ordered that this action be dismissed as to the 3.02 acre tract, and the restraining order as to it be dissolved, all "without prejudice," and this action shall remain in full force and effect as to the other two tracts.

(There were other proceedings and orders entered prior to Judge Seay's order but they are not considered pertinent to the questions presented on this appeal.)

Plaintiffs appealed from Judge Seay's judgment.

Ottway Burton for plaintiff appellants.

Moser and Moser, P.A., by Thad T. Moser, for defendant appellees.

BRITT, Judge.

Plaintiffs assign as error the entry of summary judgment in favor of defendant as to the 3.02 acre tract for the reason that plaintffs were not given notice of the time and place of the hearing of the motion for summary judgment. We think the court erred in entering summary judgment but for reasons more substantial than that given by plaintiffs, therefore, we do not reach the question of notice.

[1] Summary judgment is provided for by G.S. 1A-1, Rule 56. Subsection (c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." It appears that the granting of summary judgment in the instant case was based on the lack of necessary parties and that question appears to be covered by G.S. 1A-1, Rule 21, which provides: "Neither misjoinder of parties nor misjoinder of parties and claims is ground for dismissal of an action; but on such terms as are just parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action. Any claim against a party may be severed and proceeded with separately."

[2] The question of joinder also arises and G.S. 1A-1, Rule 20(a) provides: "Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action." G.S. 1A-1, Rule 19(a) provides that " . . . those who are united in interest must be joined as plaintiffs or defendants . . . . " In this action there are three separate tracts of land; plaintiffs Presnell allegedly own two of the tracts in fee simple; they, together with the heirs of J. A. Sikes, allegedly own the third tract. As to the claims relating to the separate tracts of land, there was permissive joinder. With respect to parties, plaintiffs Presnell *and* the heirs of J. A. Sikes would be necessary parties as to the claim involving the 3.02 acre tract.

Under Rule 21 it would appear that the action of Judge Crissman in ordering a mistrial was not appropriate. An order

severing the claims and proceeding with trial as to the two tracts owned by plaintiffs Presnell would have been appropriate. Under the prior procedure there was a misjoinder of parties and causes if any plaintiff or defendant, though interested in one or more tracts, was not interested in all tracts. See 1 McIntosh N. C. Practice and Procedure, § 647, at 346 (2nd ed. 1956), citing *Burleson v. Burleson,* 217 N.C. 336, 7 S.E. 2d 706 (1940), and also *Insurance Co. v. Waters,* 255 N.C. 553, 122 S.E. 2d 387 (1961). Where there was a misjoinder of both parties and causes of action, generally a severance was not permissible; usually there would be a dismissal. For a full discussion of the consequences of a "dual misjoinder" under prior procedure, see Brandis, Permissive Joinder of Parties and Causes in North Carolina, 25 N.C. L. Rev. 1, 49-53 (1946).

It is quite clear from G.S. 1A-1, Rule 21, Comment, that Rule 21 was designed to cover the situation presented by the case at hand. As the Comment points out, Rule 21 is an exact counterpart to federal Rule 21 except for the addition of the phrase "nor misjoinder of parties and claims," which was inserted because of the prior procedure upon "dual misjoinder." Judge Crissman should have proceeded under Rule 21 to determine if parties could have been dropped or added on terms which would have been just to the parties. One of the purposes of Rule 21 is to insure that parties properly before the court may litigate their differences without being penalized by delay due to those who are not properly before the court.

[3] G.S. 1A-1, Rule 17(a), provides: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest . . . . " Judge Seay's order worked to dismiss the action for failure to prosecute in the name of the real party in interest. However, his order was not founded upon a determination that such failure had lasted beyond a reasonable time.

For the reasons stated, the judgment appealed from is vacated and this cause is remanded to the superior court for further proceedings consistent with this opinion.

Error and remanded.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROBERT LEE VALENTINE

No. 7421SC78

(Filed 20 February 1974)

1. **Narcotics § 4— possession of heroin in motel room — sufficiency of evidence**

   The State's evidence was sufficient for the jury in a prosecution for possession of heroin found in a motel room where it tended to show that the heroin was found next to a bed on which defendant was lying in the motel room, the room was registered in defendant's name, the registration card contained defendant's driver's license number, and another occupant of the room stated he was staying there with defendant.

2. **Narcotics § 3— heroin in motel room — testimony that room was defendant's**

   Error, if any, in the admission of an officer's testimony that the motel room in which heroin was found was defendant's room was cured when the motel manager testified that her business records showed the room was registered to defendant.

3. **Constitutional Law § 33; Criminal Law § 58— self-incrimination — handwriting sample**

   Defendant's privilege against self-incrimination was not violated when the State was allowed to obtain defendant's signature in court for the purpose of comparing it with the signature on a motel registration card.

4. **Criminal Law § 58— handwriting comparisons by defendant — prejudice to State**

   Admission of testimony by defendant regarding differences between a signature sample given by defendant in court and the alleged signature of defendant on a motel registration card, if erroneous, was prejudicial to the State and not to defendant.

APPEAL by defendant from *McLelland, Judge,* 11 June 1973 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals 15 January 1974.

Defendant was charged in a bill of indictment with possession of heroin and charged in a warrant with possession of marijuana.

The State's evidence tended to show that on 5 January 1973, four members of the Winston-Salem Police Department entered Room 203 of the Winkler Motel in Winston-Salem, armed with a search warrant. Upon entering the room registered in defendant's name, the policemen found the defendant, along with one Curt Wiley, and one Donald Wallace. Defendant, who

was lying upon a bed when the officers entered, was asked to stand. A foil packet of heroin was discovered adjacent to the bed, between defendant and the wall. Remains of marijuana were found in an ashtray within the room.

The defendant's evidence tended to show that in December 1972 he saw Curt Wiley (Wiley) at the home of Donald Wallace; that defendant loaned Wiley his mother's car; that Wiley possibly had access to defendant's driver's license; that defendant had never registered at the Winkler Motel; and that the signature on the motel registration was similar to defendant's, but contained a number of discrepancies.

The jury found defendant not guilty of possession of marijuana, but guilty of possession of heroin. Defendant appealed.

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

R. Lewis Ray for the defendant.

BROCK, Chief Judge.

[1] Defendant contends that the trial court committed error in denying defendant's motion for nonsuit at the close of State's evidence and at the conclusion of all the evidence. Defendant contends that the evidence was insufficient to carry the case to the jury.

"Motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. (Citations omitted.) Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. *State v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533." *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469.

The evidence presented by the State placed the heroin within a foot of where the defendant was standing; the motel room was registered in defendant's name; the registration card contained the defendant's driver's license number; and another occupant of the room had stated he was staying there with defendant.

This assignment of error is overruled.

[2] Defendant argues that the trial court erred in allowing Officer Kavenaugh to testify, over defendant's objection, that Room 203 of the Winkler Motor Lodge was defendant's room.

The testimony of Officer Kavenaugh was based upon his knowledge gathered by his surveillance beginning 4 January 1973, and his subsequent entry with other officers into Room 203 on 5 January 1973.

Ann Mennick, manager of the Winkler Motor Lodge on 5 January 1973, testified that defendant, according to business records, was the person registered in Room 203 on 4 January 1973 and 5 January 1973.

Even if Officer Kavenaugh's testimony was error, it was harmless, technical error, cured by testimony to the same effect by a subsequent witness. This assignment of error is overruled.

[3] Defendant contends that the trial court committed error in allowing the State to obtain defendant's signature, and in allowing the defendant to testify as to the differences in handwriting between the alleged signature of defendant on the registration card and the signature sample given in court.

"Handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and are outside the protection of the Fifth Amendment privilege against self incrimination. (Citations omitted.)" *State v. Greene,* 12 N.C. App. 687, 184 S.E. 2d 523.

[4] As to the testimony of defendant regarding the differences in the two signatures, if this is error, it is prejudicial to the State and not the defendant. In order to entitle defendant to a new trial, the error complained of must be prejudicial to him. The defendant will not be granted a new trial upon error prejudicial to the State. *See* 3 Strong, N. C. Index 2d, Criminal Law, § 167. This assignment of error is overruled.

In our opinion the defendant received a fair trial, free from prejudicial error.

No error.

Judges MORRIS and CARSON concur.

DUKE POWER COMPANY, A CORPORATION, PETITIONER v. SALISBURY ZONING BOARD OF ADJUSTMENT: CARROLL EARNHARDT, FANNIE BUTLER, JOHN RINK, W. E. JOHNSON, ALEXANDER MONROE, RODNEY CALLOWAY, E. G. SAFRIT, KEN WAGONER, KELLY PEEPLES AND JOHN HIPP, EDWARD POE, JAMES KLUTTZ, RESPONDENTS

No. 7419SC91

(Filed 20 February 1974)

Appeal and Error § 7— right to appeal — persons not parties to action

Persons who were not parties to the action had no right to appeal from an order of the superior court setting aside a zoning board of adjustment's denial of a power company's application for a variance to allow construction of a power line through a residential neighborhood. G.S. 1-271.

APPEAL from *Exum, Judge,* 6 August 1973 Session of the ROWAN County Superior Court.

The Petitioner Duke Power Company applied to the defendant Salisbury Zoning Board of Adjustment for a variance to allow the construction of a power line through a residential neighborhood. The application was considered by the defendants at a duly held meeting. Members of the general public attended and expressed their opinions as to the advisability of granting the variance. Eight of the twelve members of the Board were present at the hearing, and seven voted in favor of issuing the variance to Duke Power Company. However, the eighth voted in the negative and the application failed, the city ordinance requiring eight affirmative votes before a variance could be granted. Following the denial of the application for the variance, Duke Power Company, following the appropriate municipal ordinances, petitioned the General Court of Justice, Superior Court Division, of Rowan County for review and certiorari.

Thomas G. Thurston (Thurston), Loyd D. Crayton (Crayton), and Ola R. Rutledge (Rutledge), own homes within 600 feet of the proposed course of the planned power line. Crayton, Rutledge, and Thurston were present at the hearing before the Board of Adjustment and spoke in opposition to the granting of the variance. When the matter was scheduled for hearing in Superior Court, the attorney representing Thurston was furnished with courtesy copies of the record and petition; and he attended the hearing. There is no showing that Rutledge or Crayton were notified of the hearing. Thurston did not apply to the

court to intervene or be made a party to the action. Neither did he present evidence or participate in the hearing.

At the hearing the trial court held that the Board of Adjustment had acted arbitrarily in refusing to allow the variance to the petitioner without setting forth any restrictions or other conditions with which the petitioner might comply. The court directed the Board of Adjustment to grant the requested permit and special exception upon the imposition of reasonable restrictions as the Board might determine. No objection or exceptions were made to the court's ruling. Nine days after the hearing and the order, Thurston, Crayton, and Rutledge attempted to give notice of appeal. The petitioner moved to dismiss the appeal on the grounds that the complaining persons were not parties to the controversy.

William I. Ward, Richard R. Reamer, and Kluttz and Hamlin, by Clarence Kluttz for petitioner-appellee.

Carlton, Rhodes, and Thurston by Richard F. Thurston and Linda A. Thurston for appellants.

CARSON, Judge.

At common law the right to appeal was limited to parties in the action who were aggrieved by the ruling of the court. 4 Am. Jur. 2d, Appeal and Error, § 173. This common law rule has been codified in North Carolina under G.S. 1-271 which states as follows:

> Who may appeal.—Any party aggrieved may appeal in the cases prescribed in this chapter. A party who cross assigns error in the grant or denial of a motion under the Rules of Civil Procedure is a party aggrieved.

While the persons complaining of the court's ruling may have been aggrieved by the proximity of their land to the proposed power line of the petitioner, it does not necessarily follow that they have the right to appeal. In addition to being aggrieved, they must have been parties to the suit from which they wish to appeal. No attempt was made to keep the complaining persons from becoming parties to the controversy. Quite to the contrary, courtesy copies of the petition for certiorari were furnished to the attorney for Thurston. The complaining persons were present at the meeting before the Board of Adjustment and had an attorney present at the Superior Court Session at

which the hearing was held and the order was entered. They did not petition the court to allow them to become parties of record to the action. Since they were not parties, they have no right to appeal or otherwise complain of the ruling of the court. *Siler v. Blake*, 20 N.C. 90 (1838) ; *In re Coleman*, 11 N.C. App. 124, 180 S.E. 2d 439 (1971). The motion to dismiss the appeal is allowed.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM OSCAR WILEY

No. 7418SC120

(Filed 20 February 1974)

Automobiles § 131— leaving accident scene — insufficient warrant

Warrant was insufficient to charge the offense of leaving the scene of an accident, G.S. 20-166, where it did not charge defendant with operating the motor vehicle involved in the accident and did not charge that he failed to give his name and address and driver's license number before leaving the scene of the accident.

APPEAL by defendant from *Long, J.*, at the 11 June 1973 Session of the General Court of Justice, Superior Court Division, of GUILFORD County.

The defendant was tried on a warrant charging him with leaving the scene of an accident. From a jury verdict of guilty and judgment pronounced thereon, the defendant made a motion in arrest of judgment. From the denial of his motion, the defendant appealed.

The pertinent part of the warrant upon which the defendant was tried reads as follows:

> The affiant, being duly sworn, says that the above-named defendant, on or about Friday, 7:30 p.m., the 6 day of April 1973 in the above named county, did unlawfully and willfully operate a motor vehicle on a public street or public highway: By leaving the scene of a collision (property damage only) in violation of and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

The State's evidence tended to show that the defendant was operating his vehicle when the accident occurred. The defendant offered evidence that he was not operating the truck and that he was not involved in a collision. There was no dispute that the driver of the truck fled the scene of the accident.

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

Booth, Fish, Adams, Simpson, and Harrison, by A. Wayne Harrison for the defendant.

CARSON, Judge.

The only question presented on appeal is whether the trial court erred in failing to allow the motion in arrest of judgment. If the warrant was not valid, the motion should have been allowed.

It is well established in this State that a bill of indictment or a warrant is insufficient to confer jurisdiction unless it charges all essential elements of a criminal offense. *State v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166 (1946); 4 Strong's N. C. Index 2d, Indictment and Warrant, § 9. While the warrant apparently attempted to charge a violation of G.S. 20-166, it has failed in two vital respects. In the first instance, it does not charge the defendant with operating the motor vehicle which was involved in the accident. This, of course, is essential to the offense. It furthermore does not charge that he failed to give his name and address and driver's license number before leaving the scene of the accident. Both of these are essential elements of the crime, and the lack of either causes the warrant to be a nullity. *State v. Overman,* 257 N.C. 464, 125 S.E. 2d 920 (1962); *State v. Chavis,* 9 N.C. App. 430, 176 S.E. 2d 388 (1970); 1 Strong's N. C. Index 2d, Automobiles, § 131.

A motion to quash by counsel for the defendant made before trial in District Court or before the jury trial in Superior Court would have resulted in saving the State a great deal of time and expense. Because of the invalid warrant, jeopardy did not attach. A new warrant may be issued, and the defendant may be tried again at the option of the Solicitor.

Judgment arrested.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. MELVIN HARRISON

No. 7413SC77

(Filed 20 February 1974)

Criminal Law § 124; Homicide § 31— verdict—correction of mistake by foreman — acceptance

Where the jury foreman stated that the verdict was "Guilty of voluntary—of murder in the second degree" and, upon inquiry by the clerk, the jurors all indicated that they assented to a verdict of guilty of murder in the second degree, the trial court properly accepted the verdict as a verdict of murder in the second degree, since a mistake in announcing the verdict may be corrected by the foreman or any other juror up until the time it is ordered recorded by the judge.

APPEAL by defendant from *Brewer, Judge,* 13 August 1973 Session of Superior Court held in BLADEN County.

Defendant was indicted for first-degree murder. On arraignment, the solicitor announced that the State would not proceed on the charge of first-degree murder but would place defendant on trial on charges of murder in the second degree or manslaughter as the evidence might warrant. Defendant pled not guilty. At the conclusion of the evidence the court submitted the case to the jury on instructions that they might return one of four possible verdicts, to-wit: guilty of murder in the second degree, guilty of voluntary manslaughter, guilty of involuntary manslaughter, or not guilty. When the jury returned into court to announce its verdict, the record shows that the following occurred:

"THE COURT: Has the jury reached a verdict in this case?

"FOREMAN: Yes, sir, we have.

"THE COURT: Listen to what the Clerk has to say; do not answer until she has finished stating the verdicts.

"CLERK: Ladies and gentlemen of the jury, do you find the defendant, Melvin Harrison, guilty of murder in the second degree; or, voluntary manslaughter; or, involuntary manslaughter or, not guilty?

"FOREMAN: Guilty of voluntary—of murder in the second degree.

"CLERK: Guilty of murder in the second degree . . . . .

"FOREMAN: As it was stated by the Court.

"CLERK: So say you all, guilty of murder in the second degree?

"JURORS: (ALL AGREE.)

"(THE COURT INSTRUCTS THE JURORS TO HAVE A SEAT IN THE COURTROOM.)

"THE COURT: Does the Solicitor pray judgment?

"MR. GREER: Yes, sir.

"(THE COURT HEARS MR. HESTER IN MITIGATION OF PUNISHMENT.)

"THE COURT: All right. You may stand. (THE DEFENDANT STANDS.) In Case 73CR2162, entitled State of North Carolina versus Melvin Harrison, let the record show that the jury returned a verdict of guilty of murder in the second degree. The judgment of the Court is the defendant be imprisoned for a term of not less than twenty-five nor more than thirty years in the State Prison. The defendant is to be given credit for the time spent in jail."

Defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General R. Bruce White, Jr. and Assistant Attorney General Alfred N. Salley for the State.

Worth H. Hester for defendant appellant.

PARKER, Judge.

The sole assignment of error brought forward on this appeal is directed to the court's acceptance of the verdict as a verdict of guilty of second-degree murder. Appellant contends that the verdict as originally announced by the jury foreman found him guilty of voluntary manslaughter and that the court erred in accepting the verdict of guilty of second-degree murder. There is no merit in this contention.

Dealing with a similar contention in *State v. Webb*, 265 N.C. 546, 144 S.E. 2d 619, our Supreme Court said:

"A jury has full control of its verdict up until the time it is finally delivered to the court and ordered recorded by

the judge. Accordingly, if the foreman makes a mistake in announcing it, he may correct himself or any one of the jurors may correct him. To preclude mistake, the Clerk's inquiry 'So say you all?' is directed to the panel immediately after their spokesman has declared the verdict. *State v. Young,* 77 N.C. 498. Even if all 12 jurors nod their assent, either the solicitor or counsel for defendant may then and there require that the jury be polled. The dissent of any juror at that time would be effectual. *State v. Dow,* 246 N.C. 644, 99 S.E. 2d 860; *State v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70."

In the present case, as in *State v. Webb, supra,* the foreman suffered a slip of the tongue which she recognized and immediately corrected. To remove all doubt, the clerk, addressing all of the jurors, then inquired: "So say you all, guilty of murder in the second degree?" The record shows that all jurors then agreed. There was simply no possibility that there was any mistake in this verdict. Had there been any doubt, the defendant had the right to have the jury polled. *State v. Best,* 280 N.C. 413, 186 S.E. 2d 1.

In the trial and judgment appealed from we find

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES W. MARKHAM

No. 7414SC167

(Filed 20 February 1974)

1. **Witnesses § 1; Rape § 18— assault with intent to commit rape — competency of nine-year-old to testify**

The trial court in a prosecution for assault with intent to commit rape did not err in finding the nine-year-old victim of the assault competent to testify.

2. **Rape § 18— assault with intent to commit rape — examination of victim — testimony admissible**

The solicitor's question, "What was he trying to do?" put to the victim while she was testifying concerning defendant's conduct at the time of the assault did not call for an answer which constituted

an invasion of the province of the jury or require the witness to express an opinion as to defendant's intent, an essential element of the offense charged.

3. **Rape § 18— assault with intent to commit rape — failure to submit lesser included offenses**

In a prosecution for assault with intent to commit rape where the State's evidence, if believed, showed that defendant gave his nine-year-old stepdaughter wine to drink until she became dizzy, then took her into his bedroom, partially disrobed her, and attempted to have sexual intercourse with her, and where the defendant's evidence, if believed, showed that none of these events occurred, the trial court did not err in failing to submit any lesser included offense to the jury.

APPEAL by defendant from *Clark, Judge,* 1 October 1973 Session of Superior Court held in DURHAM County.

Defendant, indicted for assault with intent to commit rape on a nine-year-old girl, pled not guilty, was found guilty by the jury, and from judgment imposing a prison sentence, appealed.

Attorney General Robert Morgan by Associate Attorney Norman L. Sloan for the State.

Loflin, Anderson & Loflin by Thomas B. Anderson, Jr. for defendant appellant.

PARKER, Judge.

[1] There was no error in the trial court's ruling finding the nine-year-old victim of the assault competent to testify. This was a matter resting within the sound discretion of the trial court, *State v. Cooke,* 278 N.C. 288, 179 S.E. 2d 365; *State v. Bowden,* 272 N.C. 481, 158 S.E. 2d 493; *State v. Roberts,* 18 N.C. App. 388, 197 S.E. 2d 54; *State v. Williams,* 13 N.C. App. 619, 186 S.E. 2d 628; and no abuse of discretion has been shown. Prior to making its ruling, the trial court dismissed the jury and the child was examined and cross-examined with reference to her schooling, general understanding, and her religious belief concerning the telling of a falsehood. Her responses support the court's finding that she was intelligent, had an understanding of the sanctity of an oath, and that she was competent to testify. The trial judge, through his personal observation of the child while she was being questioned, was in the best position to make an accurate determination of these matters, and his ruling thereon will not be disturbed on this appeal.

[2] While the child was testifying concerning defendant's conduct at the time of assault, the solicitor asked her, "What was he trying to do?" Defendant's objection to this question was overruled, which he now assigns as error. He contends that by answering the question the witness was permitted to invade the province of the jury and to express an opinion as to defendant's intent, an essential element of the offense charged. This contention is without merit. The witness answered the question in a straightforward factual manner by relating to the jury the physical events, which, according to her testimony, occurred. The jury was free to believe or to reject this testimony, as they might any other part of her testimony, and to make their own determination from such portions of the testimony as they found to be true as to what defendant's intent had been. This assignment of error is overruled.

[3] Finally, defendant contends that the court committed error in instructing the jury that they could return one of two verdicts, guilty as charged or not guilty, and in failing to submit issues as to defendant's guilt or innocence of lesser included offenses. "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, 84 S.E. 2d 545. In the present case, the State's evidence, if believed, showed that defendant gave his nine-year-old stepdaughter wine to drink until she became dizzy, then took her into his bedroom, partially disrobed her, and attempted to have sexual intercourse with her. Defendant's evidence, if believed, showed that none of these events occurred. There being no evidence from which the jury could find that any lesser included offense might have been committed, the court's instruction to the jury was without error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. AARON DAVIS, JERALD WILSON AND CHARLES B. HOUSTON

No. 7422SC144

(Filed 20 February 1974)

Searches and Seizures § 3— search warrant — sufficiency of affidavit

Affidavit describing the property to be seized, giving defendant's name and address, making reference to a confidential informer and his reliability, and stating the information given affiant by the informer was sufficient to establish probable cause to issue a search warrant as required by G.S. 15-26(b).

APPEAL by defendants from *Winner, Special Judge,* 26 July 1973 Session of IREDELL Superior Court.

Defendants Davis and Houston were charged and convicted of possession of cocaine and of possession with the intent to distribute marijuana. Defendant Wilson was charged and convicted of possession with the intent to distribute marijuana. From said convictions, the defendants appealed.

Attorney General Robert Morgan by Assistant Attorney General George W. Boylan and Associate Attorney General William A. Raney for the State.

Pope, McMillan & Bender by Harold J. Bender for the defendant appellants.

CAMPBELL, Judge.

The defendants assign as error the denial of the trial court of their motion to suppress the evidence for that the search warrant was improper as the affidavit was inadequate.

The affidavit on which the search warrant was issued reads:

"AFFIDAVIT TO OBTAIN A SEARCH WARRANT (Wilson)

S-1 voir dire only

STATE

v.

Jerald Wendell Wilson

520 So. Tradd Street, Statesville, NC

H. G. Patterson, Sergeant, Vice Control, Statesville Police Department; being duly sworn and examined under oath, says under oath that he has probable cause to believe that Jerald Wendell Wilson has on his premises on his person certain property, to wit: Marijuana, Hashish and othrer [sic] controlled substances, the possession of which is a crime, to wit: Possession of a Controlled Substance for the Purp. of Distribution.

The property described above is located on the premises on his person described as follows: 520 South Tradd Street, Statesville, North Carolina—the upstairs south apartment of a dwelling color green. Jerald Wendell Wilson, C/M, 23; 6 Ft. 1 In. in height; 180 lbs in weight. The facts which establish probable cause for the issuance of a search warrant are as follows: The affiant has recieved [sic] information from a confidential informer, known to be reliable as that in the past said informer has given information which has lead [sic] to the arrest and conviction of narcotic law violators. [sic] two such occasions being on 4-7-73 and 9-28-72. Information recieved [sic] from said informer is that Jerald Wendell Wilson has in his possession a quantity of marijuana and hashhish [sic] and other controlled substances and that the said Jerald Wendell Wilson has said drugs at his apartment, 520 South Tradd St. Statesville, N.C. and that he is in the business of selling said drugs. The affiant has conducted surveillance at this location, app. 4 hrs. on different occasions and has observed a large crowd in and around the said 520 s. [sic] Tradd St. at all hours of the night and the affiant has observed known narcotic violators entering these premises and these activities are continueing. [sic].

H. G. PATTERSON
Signature of Affiant

Sworn and subscribed to before me
this 25 day of May, 1973.

R. E. RITCHIE
Magistrate

NOTE: The issuing official should swear the affiant twice, once to the affidavit and once before beginning the oral examination of the affiant."

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), *State v. Ellington*, 18 N.C. App. 273, 196 S.E. 2d 629 (1973), *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972), *State v. Howell*, 18 N.C. App. 610, 197 S.E. 2d 616 (1973), and *State v. Elam*, 19 N.C. App. 451, 199 S.E. 2d 45 (1973), we conclude the affidavit was sufficient to establish probable cause to issue a search warrant as required by G.S. 15-26(b).

There was no error in admitting the evidence obtained by the search. The evidence was sufficient to sustain the jury verdict.

The purported assignment of error to the charge of the trial judge was broadside and requires no review.

The defendants received a fair trial free of any prejudicial error.

No error.

Judges HEDRICK and BALEY concur.

ARLENE POLLY EASTER MANNS RICHARDSON McINTOSH, PETITIONER FOR THE ADOPTION OF KENITH LEE McINTOSH AND KEITH ALLEN McINTOSH v. JANET RAE McINTOSH

No. 7421DC48

(Filed 20 February 1974)

Adoption § 2— abandonment of child — insufficiency of instructions

In this adoption proceeding seeking a determination of abandonment, the trial court's instruction as to abandonment alone without an instruction that abandonment had to be found to have occurred continuously for a period of six months immediately prior to the filing of the action was an insufficient explanation of the law arising from the facts. G.S. 48-2(3a).

APPEAL by respondent from *Henderson, District Judge,* at the 16 July 1973 Session of FORSYTH County, the General Court of Justice, District Court Division.

This is a civil action pursuant to adoption proceedings for a determination of abandonment within the meaning of G.S. Chapter 48, and for the appointment of a guardian ad litem.

Respondent appellant Janet Rae McIntosh was divorced from Kenith W. McIntosh in October of 1967 in Seattle, Washington. Custody of the two children, Kenith Lee McIntosh and Keith Allen McIntosh, was awarded to the father, Kenith W. McIntosh. At Christmas 1968, Mr. McIntosh and the children met the respondent in downtown Seattle, and thereupon she went shopping with the children. Apparently, this was the last time the respondent communicated with the children until the filing of this petition in August of 1971. Mr. McIntosh and the children, in February of 1969, made a short visit to Oregon, then subsequently moved to Denver, Colorado, Memphis, Tennessee and finally to Winston-Salem, North Carolina. In the meantime, Mr. McIntosh had married the petitioner, Arlene McIntosh.

The petition alleges that respondent willfully abandoned the children on or about 25 December 1968 and that said condition continued for more than six months next preceding the institution of this action.

Respondent contends that at no time after February 1969 did she know the whereabouts of the children and thus could not be held to have willfully abandoned them. From a verdict in favor of the petitioner, finding abandonment, the respondent appealed.

White & Crumpler by Michael J. Lewis for petitioner appellee.

Randolph and Randolph by Clyde C. Randolph, Jr., for respondent appellant.

CAMPBELL, Judge.

The respondent's primary exception is to the failure of the trial judge to instruct the jury that the willful abandonment must have existed for at least six months immediately preceding the institution of the action.

The respondent concedes that the definition of "abandonment" in the charge is acceptable except on one point. There was no instruction that abandonment had to be found to have occurred continuously for a period of six months immediately prior to the filing of this action. G.S. 48-2(3a) reads:

> "For the purpose of this Chapter, an abandoned child shall be any child who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child. . . . "

The respondent's assignment of error must be sustained. An instruction as to abandonment alone without an instruction as to the time period over which the abandonment must exist is an insufficient explanation of the law arising from the facts. G.S. 1A-1, Rule 51(a). See generally *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597 (1962); *Boring v. Mitchell,* 5 N.C. App. 550, 169 S.E. 2d 79 (1969); Annotation, "What Constitutes Abandonment or Desertion of Child by its Parent or Parents Within Purview of Adoption Laws," 35 A.L.R. 2d 662, 675 (1954).

We therefore grant a new trial. A discussion of respondent's other assignments of error is not necessary as they may not recur upon retrial.

New trial.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. GLENN EDWARD CURRIN

No. 7416SC57

(Filed 20 February 1974)

Rape § 5— sufficiency of evidence

Testimony by the prosecuting witness in a rape case that she allowed defendant into her apartment when he came to collect insurance premiums on a policy he had sold her and that defendant tore her clothes off and proceeded to have sexual intercourse with her by force and against her will was sufficient to require submission of the case to the jury.

APPEAL by defendant from *Martin (Robert M.), Judge,* 13 November 1972 Session of the ROBESON County Superior Court. Argued in the Court of Appeals 23 January 1974.

The defendant was charged by bill of indictment with the capital offense of rape. From a conviction by the jury of the lesser included offense of assault with intent to commit rape and an active sentence pronounced thereon, the defendant gave notice of appeal. Being unable to perfect his appeal within the statutory time, the defendant applied for a writ of certiorari which was granted.

Darlene Locklear testified that she lived on Halsey Drive in Lumberton and shared an apartment with a girl friend. On 4 August 1972, the defendant came to her apartment for the purpose of selling insurance. She purchased a policy from the defendant and made the initial payment for the policy. On 21 August 1972, at approximately 3:45 in the afternoon, the defendant returned to Darlene Locklear's apartment. He told her that he needed to collect additional premiums for the insurance policy. He also asked if he could have a drink of water. Knowing the defendant, she admitted him into the apartment. The defendant assaulted the prosecuting witness, tore her clothes off and proceeded to have sexual intercourse with her by force and against her will.

Following the attack the prosecuting witness reported the crime to the police. She was taken to the hospital where she remained overnight.

The defendant admitted knowing the prosecuting witness and admitted having been to her home on August 4. He stated that he had not seen her since that time. He denied being at

her home on the 21st, but he did admit that he was in the vicinity of her apartment at that time on the date in question. He denied having intercourse with her at that time or any other time.

Attorney General Robert Morgan by Assistant Attorney General William F. O'Connell for the State.

L. J. Britt and Son by Bruce W. Huggins for the defendant.

CARSON, Judge.

The defendant moved for judgment as of nonsuit at the close of the State's evidence and again at the close of all the evidence. The only assignment of error brought forward on this appeal is whether the court committed error in not allowing the nonsuit.

In considering the evidence on the question of nonsuit, we have repeatedly held that the evidence must be construed in the light most favorable to the State. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Bronson,* 10 N.C. App. 638, 179 S.E. 2d 823 (1971). Without regard for the corroborating and conflicting evidence presented by the State and by the defendant, the statement of the prosecuting witness, if believed, is sufficient to establish all the elements of rape and the lesser included offenses. Considering her testimony in the light most favorable to the State and giving the State the benefit of all the logical inferences therefrom, it is abundantly clear that the matter should have been presented to the jury. The jury obviously believed the prosecuting witness and disbelieved the defendant.

No error.

Chief Judge BROCK and Judge MORRIS concur.

G. L. JONES, T/A JACKSON PARK SUPPLY COMPANY v. M. F. MURDOCK, CONTRACTOR, AND J. C. PARKS

No. 7419DC30

(Filed 20 February 1974)

Rules of Civil Procedure § 52 —failure to make findings and conclusions

In an action to recover for materials furnished for use in the construction of defendant's house wherein the evidence was conflicting as to whether plaintiff had extended credit to the contractor or to defendant owner, the trial court failed to make sufficient findings of fact and conclusions of law where the only finding or conclusion was that defendant was indebted to plaintiff in a specified amount. G.S. 1A-1, Rule 52(a)(1).

APPEAL by defendant J. C. Parks from *Warren, District Court Judge,* CABARRUS County District Court. Argued in the Court of Appeals 22 January 1974.

The plaintiff's evidence tended to show that he was the owner of Jackson Park Supply Company in Cabarrus County and that he supplied during 1969, certain materials used to construct a house for the defendant Parks. He testified that prior to delivering any supplies for the construction of the house, he told the defendant Murdock and the defendant Parks that he would not extend credit for Murdock, the contractor, but would extend credit to Parks to be used for the materials and would expect Parks to pay for them. He further testified that he had advanced materials in the amount of $1,484.85 to be used on the Parks job between February and June, 1969, and had not been paid any amount on this account. The defendant Murdock testified for the plaintiff. He testified that he had not been paid by the defendant Parks for the materials supplied by the plaintiff Jones to be used in the construction of the house and had not paid for them himself. He further testified that he had heard the plaintiff tell the defendant Parks that Parks would be liable for materials furnished.

The defendant Parks testified that he had contracted with the defendant Murdock for Murdock to be the contractor for the construction of the Parks house at an agreed price. He further testified that he had paid Murdock in full the agreed price and that Murdock had walked off of the job and had refused to complete it for him. He further testified that Murdock was the only person who had dealt with the subcontractors or suppliers

and that Parks knew nothing of the arrangements Murdock had made with them.

Robert H. Irvin and Williams, Willeford, Boger and Grady by Samuel F. Davis, Jr. for plaintiff-appellee.

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

CARSON, Judge.

The only assignment of error presented on appeal is in the failure of the trial court to make findings of fact and conclusions of law to support judgment. The only finding or conclusion is that the defendant Parks is indebted to the plaintiff in the amount of $1,484.85 plus interest. Rule 52(a)(1) of the Rules of Civil Procedure dictates the necessary ingredients for the judgment when the matter is heard without an jury. It states:

> (a) Findings—(1) 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 and direct the entry of the appropriate judgment.

The plaintiff, while conceding that the trial court did not comply with provisions above stated, maintains that the error was a mere technical one which would not warrant a new trial. The deficiency, however, is more than a technical one. The necessity for the finding of facts and entry thereof, and for the conclusions of law to be drawn from the facts, is to allow review by the appellate courts. Without such findings and conclusions, we are unable to determine whether or not the judge correctly found the facts or applied the law thereto. *Morehead v. Harris*, 255 N.C. 130, 120 S.E. 2d 425 (1961); *Jamison v. Charlotte*, 239 N.C. 423, 79 S.E. 2d 797 (1954); *Watts v. Supt. of Building Inspection*, 1 N.C. App. 292, 161 S.E. 2d 210 (1968). Without such findings we may only surmise what the trial court found. Hence, a new trial must be awarded.

New trial.

Chief Judge BROCK and Judge MORRIS concur.

CITY OF WINSTON-SALEM v. RAYMOND S. SUTCLIFFE, JR., AND WIFE, KATIE SUTCLIFFE; FRANK M. BELL, JR., SUBSTITUTE TRUSTEE, AND FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION

No. 7421SC35

(Filed 20 February 1974)

Eminent Domain § 6— before and after value — erroneous assumption by witness

In an action by a city to condemn a 20-foot wide permanent easement and a 20-foot wide construction easement across defendants' land for installation of a sewer pipeline, the trial court erred in refusing to strike the testimony of defendants' expert as to the difference in value of defendants' property before and after the taking where his testimony was based on the erroneous assumption that the city was taking a 60-foot wide permanent easement.

APPEAL by plaintiff from *Wood, Judge,* 28 May 1973 Civil Session, FORSYTH Superior Court.

This is a civil action instituted by the City of Winston-Salem for the condemnation of land belonging to Mr. and Mrs. Sutcliffe and subject to an outstanding deed of trust held by First Federal Savings and Loan Association (Frank M. Bell, Jr., Substitute Trustee). The land is located at the junction of the rights of way of I-40 and Old Vineyard Road. The City of Winston-Salem proposed to take a 20-foot wide permanent easement and an additional 20-foot wide construction easement from the northwest corner of the property bordering the I-40 right of way to install a sewer pipeline. From a judgment awarding the defendants $4,723.00 in compensation, the plaintiff appealed.

Womble, Carlyle, Sandridge & Rice by Donald A. Donadio for plaintiff appellant.

White and Crumpler by James G. White for defendant appellees.

CAMPBELL, Judge.

The plaintiff assigns as error the failure of the trial court to grant the plaintiff's motion to strike the testimony of the defendants' expert, Mr. L. C. McClenny. Mr. McClenny based his testimony as to the value of the property before and after the taking apparently on the erroneous assumptions that the City was taking a 60-foot easement, and that the interest taken was

one 60-foot wide permanent easement rather than a 20-foot wide permanent easement plus a 20-foot wide construction easement. Mr. McClenny testified that the difference in the value of the property before and after the taking was $4,723.00. The jury found that the difference in value was $4,720.00. The plaintiff's expert testified that the difference in value was $625.00. The plaintiff was clearly prejudiced by the testimony of Mr. McClenny, and the testimony should have been stricken. *Highway Commission v. Matthis,* 2 N.C. App. 233, 163 S.E. 2d 35 (1968); *Elsevier v. Machine Shop,* 9. N.C. App. 539, 176 S.E. 2d 875 (1970); *Morrison v. Walker,* 179 N.C. 587, 103 S.E. 139 (1920); and *Robbins v. Trading Post, Inc.,* 251 N.C. 663, 111 S.E. 2d 884 (1960). Furthermore, the trial judge did nothing to correct the erroneous assumption in his instructions to the jury. We therefore grant a new trial.

We do not deem it necessary to consider the plaintiff's other assignments of error as they may not occur on retrial.

New trial.

Judges HEDRICK and BALEY concur.

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ABORTION

§ 3. Offense of Causing Miscarriage of Pregnant Woman

In a prosecution for prescription of a drug with intent to induce miscarriage, trial court did not err in excluding testimony with respect to the effects of the administered drug. *S. v. Lenderman,* 687.

Evidence was sufficient to withstand motion for nonsuit in a prosecution for prescribing and administering a drug with the intent to induce miscarriage. *Ibid.*

ADOPTION

§ 2. Parties and Procedure

Trial court's instructions on abandonment of a child were insufficient. *McIntosh v. McIntosh,* 742.

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Plaintiff could properly appeal from the trial court's dismissal of her claims for relief based on breach of contract to repair and negligence, and the original vendor of a brake assembly could appeal from the trial court's dismissal of his cross-action for contribution or indemnity. *Wilson v. Auto Service,* 47.

§ 7. Parties Who May Appeal

Persons who were not parties to the action had no right to appeal from an order of the superior court setting aside decision by the zoning board of adjustment. *Power Co. v. Board of Adjustment,* 730.

§ 8. Death and Substitution of Parties

Appeal is dismissed because not prosecuted by the real party in interest where the incompetent plaintiff had died and the appeal was undertaken by the next friend rather than by an administrator. *Ginn v. Smith,* 526.

§ 30. Objections, Exceptions and Assignments of Error to Evidence

Although the answer of a witness exceeded the scope of the question, the answer was properly admitted where it contained facts relevant to the inquiry. *Kohler v. Construction Co.,* 486.

§ 49. Harmless and Prejudicial Error in Exclusion of Evidence

Exclusion of testimony cannot be held prejudicial where the record fails to show what the testimony would have been. *Ward v. Wentz,* 229.

§ 58. Injunction Proceedings

Trial court's findings in an order granting or denying injunctive relief are binding if supported by the evidence when the appeal is from a judgment which is a final determination of the rights of the parties. *Higgins v. Builders and Finance, Inc.,* 1.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

Defendant's warrantless arrest was lawful where officers had reasonable ground to believe that defendant had committed a felony and his escape was imminent. *S. v. Kennon,* 195.

ARREST AND BAIL—Continued

Officers had reasonable grounds to believe that defendant had heroin on his person and to arrest him without a warrant. *S. v. Wooten,* 499.

§ 6. Resisting Arrest

Defendant's firing of a shotgun at an officer did not constitute reasonable force in resisting an unlawful arrest. *S. v. King,* 390.

ARSON

§ 3. Competency of Evidence

Trial court in an arson case properly permitted an experienced fireman and an SBI investigator to give opinion testimony as to the point of origin of the fire. *S. v. Harrell,* 352.

Testimony concerning defendant's financial obligations and lawsuits pending against him was competent to show motive in an arson case. *Ibid.*

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in a prosecution for feloniously burning defendant's own store building. *S. v. Harrell,* 352.

ASSAULT AND BATTERY

§ 13. Competency of Evidence

In a felonious assault prosecution testimony by the prosecutrix that defendant had shot her on four previous occasions was competent to show defendant's intent. *S. v. Benthall,* 167.

Victim's testimony concerning contacts defendant had made with her and her son subsequent to the shooting was not prejudicial error. *Ibid.*

§ 15. Instructions Generally

Trial court erred in instructing the jury that there was evidence that defendant admitted some of the facts related to the crime. *S. v. Clanton,* 275.

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

Trial court erred in using a contingent fee contract between landowners and their attorneys as the sole guide for determining reasonable counsel fees to be taxed as part of the costs to be paid by a redevelopment commission in a condemnation proceeding. *Redevelopment Comm. v. Hyder,* 241.

AUTOMOBILES

§ 1. Authority to License Drivers and to Revoke Licenses

The habitual offender statute relating to motor vehicle violations is a valid constitutional exercise of the police power of the State. *S. v. Carlisle,* 358.

§ 2. Grounds and Procedures for Revocation of License

In a proceeding to have defendant declared a habitual offender of the traffic laws and to bar him from operating a vehicle on the highways of

AUTOMOBILES—Continued

the State, defendant was not subjected to double jeopardy. *S. v. Carlisle,* 358.

§ 3. Driving After Revocation of License

State's evidence was sufficient for the jury in a prosecution for driving after license had been permanently revoked. *S. v. Long,* 91.

§ 45. Relevancy and Competency of Evidence in Action for Negligent Operation of Auto

Blood test results were admissible in plaintiff's action to recover for personal injuries sustained in an automobile accident where the intoxication of the driver was at issue. *Wood v. Brown,* 307.

§ 53. Failing to Stay on Right Side of Highway in Passing Vehicle Traveling in Opposite Direction

Plaintiff's evidence was sufficient for the jury on the issue of defendant driver's negligence where it tended to show that the driver crossed a double yellow line and was traveling in the left lane of the street when his vehicle struck plaintiff. *Simmons v. Williams,* 402.

§ 55. Parking Without Lights

Plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence in parking or leaving her vehicle standing on the highway. *Wilson v. Miller,* 156.

§ 56. Hitting Vehicle Stopped or Parked on Highway

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in striking a car that had stopped partly on the highway. *Wilson v. Miller,* 156.

Evidence was insufficient to support a finding that defendant's negligence was a proximate cause of plaintiff's property damage and third party defendant's personal injuries sustained when the third party defendant collided with a stopped vehicle. *Burkhimer v. Harrold,* 174.

Plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence in striking a parked car after defendant was allegedly blinded by the lights of an oncoming car. *Mingo v. Taylor,* 416.

§ 62. Striking Pedestrian

Plaintiff's evidence was insufficient to show negligence on the part of defendant in striking plaintiff's intestate who was walking along the side of the highway. *Bank v. Dairy,* 101.

§ 63. Striking Children

Plaintiff's evidence was sufficient for the jury in an action to recover for the wrongful death of a 10-year-old child struck by defendant's motorcycle. *Bray v. Dail,* 442.

§ 83. Pedestrian's Contributory Negligence

Plaintiff's evidence did not disclose contributory negligence as a matter of law when he was struck by defendant's truck traveling southward while he was standing a foot or two in the northbound lane at a point where there was no crosswalk. *Simmons v. Williams,* 402.

AUTOMOBILES—Continued

§ 90. Instructions in Auto Accident Cases

Instruction on proximate cause was erroneous in failing to include foreseeability as an element thereof. *Cooper-Harris, Inc. v. Escalle,* 58.

Trial court erred in instructing with respect to the statutory presumption as to intoxication in a civil action. *Wood v. Brown,* 307.

Failure of trial court to instruct on burden of proof requires a new trial. *Foy v. Bremson,* 440.

Trial court erred in instructing jury as to when violation of a statute constitutes negligence per se. *Petty v. Aldridge,* 514.

Trial court's instructions in a wrongful death action were sufficient. *Broadnax v. Deloatch,* 430.

Trial court's instructions on negligence as the proximate cause of a collision and on "the negligent act of defendant" were improper in a personal injury action. *Petty v. Aldridge,* 514.

Trial court erred in instructing the jury that plaintiff would be negligent if she followed another vehicle more closely than was reasonable and prudent where there was no evidence that would support the inference that plaintiff was following another vehicle immediately prior to the collision. *Clark v. Barber,* 603.

§ 92. Liability of Driver to Guest

Plaintiff wife was her husband's "guest" within the meaning of S. C. automobile guest statute while accompanying him in a truck to buy produce for his store, and evidence that the husband continued the operation of his vehicle after he knew one of his tires was slick was insufficient to support a verdict that defendant was guilty of wanton misconduct. *Chewning v. Chewning,* 283.

§ 117. Prosecutions for Speeding

In a prosecution for speeding, defendant was not prejudiced by the admission of testimony by a highway patrolman regarding the odor of alcohol on defendant's breath and his staggering condition. *S. v. Willis,* 43.

Defendant was not prejudiced by the court's remark that the pattern jury instruction given by the court on the offense of excessive speed "doesn't make one bit of sense on earth." *S. v. Willis,* 43.

§ 125. Warrant for Operating Vehicle While Under Influence of Intoxicating Liquor

In a prosecution for drunken driving and operating a vehicle without a license, there was no fatal variance between the warrants and the proof. *S. v. Davis,* 252.

§ 126. Competency and Relevancy of Evidence in Prosecution Under G.S. 20-138

An accused subjected to a breathalyzer test must be permitted to call an attorney and to select a witness to observe testing procedures. *S. v. Sykes,* 467.

Trial court in a drunken driving case properly permitted two policemen to give opinions that defendant was under the influence of an intoxicating liquor on the occasion in question. *S. v. Huff,* 630.

AUTOMOBILES—Continued

§ 127. Sufficiency of Evidence in Prosecution Under G.S. 20-138

Evidence was sufficient to be submitted to the jury in a drunken driving case. *S. v. Lawson,* 171.

§ 129. Instructions in Prosecutions Under G.S. 20-138

Trial court in a drunken driving case did not assume defendant's guilt when the court stated during the trial that "the statute provides that everyone who operates a motor vehicle on the highways of this State consents to take a breathalyzer test when driving under the influence." *S. v. Strider,* 112.

In a drunken driving case, the court's inadvertence in referring to the evidence as showing ".17 percent or more" by weight of alcohol in defendant's blood was not prejudicial. *Ibid.*

§ 131. Failing to Stop After Accident

Warrant was insufficient to charge the offense of leaving the scene of an accident. *S. v. Wiley,* 732.

BANKRUPTCY

§ 4. Effect of Bankruptcy on Actions Pending Against Bankrupt

When plaintiff attached property of defendant prior to the time defendant petitioned a federal court under the Bankruptcy Act, plaintiff became a secured creditor to the extent of the amount of the bond given to obtain release of the attached property, and the federal court's decree denying plaintiff's claim is res judicata only to the extent that plaintiff's claim exceeds the amount of the bond. *Harvey v. Critchfield Marine,* 713.

BASTARDS

§ 7. Instructions

Trial court in a non-support of illegitimate child case erred in instructing the jury that a finding that the prosecuting witness demanded support from defendant "at any time from the time she became aware that she was pregnant" would be sufficient upon the question of notice or request. *S. v. Ingle,* 50.

§ 8. Verdict and Findings

Where error in the charge related only to the issue of wilful neglect or refusal to support an illegitimate child, issue of paternity will not be disturbed and may not be relitigated in retrial. *S. v. Ingle,* 50.

§ 10.5. Action to Establish Paternity

Trial court in an action to establish paternity erred in charging the jury that the person who had intercourse with plaintiff ten lunar months before the birth of her child would be the father of her child. *Searcy v. Justice,* 559.

Trial judge in a paternity action expressed an opinion on the evidence in his charge on reasonable doubt when he instructed the jury it should not go outside the evidence to render a verdict in favor of defendant and that defendant could be the father of plaintiff's child even if plaintiff were of bad character and defendant of good character. *Ibid.*

BASTARDS—Continued

Trial court expressed an opinion on the evidence in instructing the jurors that plaintiff could be awarded payments for support of the child only if they found defendant to be the father. *Ibid.*

BROKERS AND FACTORS

§ 6. Right to Commissions

Where a contract gave a real estate agent the exclusive right to sell the owner's property, the owner who sold the property in competition with the real estate agent to the agent's prospect is liable for the brokerage commission called for in the contract. *Insurance & Realty, Inc. v. Harmon,* 39.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury where it tended to show that defendant and an accomplice broke into the home of accomplice's grandmother. *S. v. Lowe,* 186.

State's evidence was sufficient for the jury in a prosecution for breaking and entering a mobile home whose owner was out of the State. *S. v. Parker,* 146.

Evidence consisting of uncorroborated testimony was sufficient to be submitted to the jury in a felonious breaking and entering case. *S. v. Wood,* 267.

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of unlawfully opening a coin operated vending machine by the unauthorized use of a key. *S. v. Oxendine,* 458.

State's evidence that the car which defendant broke into contained papers, a shoe bag and cigarettes was sufficient to establish the essential element of G.S. 14-56 that the vehicle contain items of value. *S. v. Quick,* 589.

State's evidence was sufficient for the jury in a prosecution of two defendants for housebreaking. *S. v. Gunter,* 627.

§ 6. Instructions

Trial court's instructions were proper in a prosecution for felonious breaking and entering an automobile with intent to commit larceny. *S. v. Quick,* 589.

Trial court did not err in allowing the jury to take with them to the jury room written elements of the offense charged. *Ibid.*

§ 8. Sentence and Punishment

Remarks of the assistant solicitor to the trial judge made prior to sentencing did not prejudice defendant. *S. v. Quick,* 589.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10. Sufficiency of Evidence in Action to Rescind Instrument

Summary judgment was inappropriate where defendants sold plaintiff a parcel of land with its use restricted to a single family residence and plaintiff sought to rescind the contract. *Hinson v. Jefferson,* 204.

CLERKS OF COURT

§ 2. Jurisdiction to Enter Judgment

Where a respondent filed answer raising issues of fact as to the ownership of money on deposit with the clerk, the proceeding should have been transferred to the civil issue docket of superior court for trial. *In re Foreclosure of Deed of Trust,* 610.

CONSTITUTIONAL LAW

§ 13. Police Power; Safety

The habitual offender statute relating to motor vehicle violations is a valid constitutional exercise of the police power of the State. *S. v. Carlisle,* 358.

§ 24. Requisites of Due Process

Statute providing for license revocation of habitual offender of traffic laws is not void for failure to allow trial by jury. *S. v. Carlisle,* 358.

§ 30. Due Process in Trial

Defendant's right to a speedy trial was not abridged despite a two year delay between the offense and trial. *S. v. Hardin,* 193.

Defendant was not denied her right to a speedy trial by her trial on 10 June 1973 after her arrest on 18 June 1972 and her indictment in October 1972. *S. v. Boyd,* 475.

Defendant was not denied his right to a speedy trial by delay between his arrest on 4 August 1972 and trial on 30 July 1973, although defendant made numerous requests for a prompt trial. *S. v. O'Kelly,* 661.

§ 31. Right of Confrontation and Access to Evidence

Defendant was not prejudiced by admission of codefendant's in-custody statements implicating defendant where the codefendant took the stand and was cross-examined by defendant, but the court erred in admission of nontestifying defendant's in-custody statements which implicated the codefendant. *S. v. Heard,* 124.

Where defense counsel discovered the existence of notes in the shirt pocket of a deputy sheriff during cross-examination of the deputy, motion by defense counsel that he be allowed to inspect the notes was properly denied on the ground that the notes were the work product of the police. *S. v. Blue,* 386.

§ 32. Right to Counsel

Trial court erred in requiring defendant to go to trial without benefit of counsel where court's implied finding that defendant was not indigent was unsupported by evidence and defendant was not informed of his right to counsel. *S. v. Pickens,* 63.

A suspect has no constitutional right to the presence of counsel at a photographic identification. *S. v. Briggs,* 61.

Defendant's waiver of counsel was voluntary where he was thoroughly examined by the trial court on that point and he executed a written waiver of counsel. *S. v. Harris,* 643.

§ 33. Self-incrimination

Statements by the solicitor in his jury argument did not amount to comments on defendant's failure to testify. *S. v. Brandon,* 262.

CONSTITUTIONAL LAW—Continued

Defendant's privilege against self-incrimination was not violated when the State was allowed to obtain defendant's signature during the trial. *S. v. Valentine,* 727.

Trial court did not err in allowing defendant to be recalled for further cross-examination. *S. v. Austin,* 539.

§ 34. Double Jeopardy

In a proceeding to have defendant declared a habitual offender of the traffic laws and to bar him from operating a vehicle on the highways of the State, defendant was not subjected to double jeopardy. *S. v. Carlisle,* 358.

CONTEMPT OF COURT

§ 6. Hearings on Orders to Show Cause, Findings and Judgment

Where defendants were ordered to remove construction designed to enlarge private airport facilities, stipulations by defendants that the construction was not removed but was altered to provide living quarters were sufficient to show that defendants failed to comply with the trial court's order. *City of Brevard v. Ritter,* 380.

CONTRACTS

§ 4. Consideration

Contract for sale of land which was contingent upon the ability of vendee to obtain a loan was supported by consideration. *Mezzanotte v. Freeland,* 11.

§ 6. Contracts Against Public Policy

Where the general contractor for construction of a shopping center executed a new contract with the owners containing a maximum cost figure in order for the owners to obtain a loan, written agreement by the owners that the maximum cost provision in the reexecuted contract was not binding on the contractor was not void as against public policy by reason of the contractor's failure to disclose the existence of the agreement to the lender and to the surety on the contractor's performance bond. *Loving Co. v. Latham,* 318.

§ 12. Construction and Operation of Contracts

Agreement that plaintiff would be "entitled to 5% of all cash monies recovered" on a dam project in a foreign country included indirect payments received from the sale of recouped equipment and an award by the foreign government used by defendant to pay vendors and subcontractors of the project. *Kohler v. Construction Co.,* 486.

§ 16. Conditions Precedent

Where plaintiff executed a new contract containing a maximum cost figure in order for defendants to obtain a loan, defendant's evidence was insufficient to require submission to the jury of an issue as to whether there were conditions precedent to the effectiveness of an agreement signed by defendants that the cost figure was not binding on plaintiff. *Loving Co. v. Latham,* 318.

CONTRACTS—Continued

§ 18. **Waiver**

Mutual agreement on closing date three months later than specified in the contract constituted a waiver of any prior contractual deadline for performance. *Mezzanotte v. Freeland,* 11.

§ 20. **Impossibility of Performance**

Defendants were not relieved from performance of contract for sale of land where their failure to furnish information required by the contract prevented plaintiffs from tendering performance within the time specified in the contract. *Mezzanotte v. Freeland,* 11.

§ 27. **Sufficiency of Evidence and Nonsuit**

Plaintiff's evidence was insufficient to establish an employment contract for plaintiff's continued employment as a regional manager for an insurance company. *Stewart v. Insurance Co.,* 25.

Plaintiff's evidence was sufficient for the jury in an action to recover under an agreement that plaintiff would receive 5% of all monies recovered on a foreign dam project. *Kohler v. Construction Co.,* 486.

§ 29. **Measure of Damages for Breach of Contract**

Trial court in a breach of contract action properly instructed the jury that they might award no more than nominal damages to plaintiffs. *Goforth v. Jim Walter, Inc.,* 79.

CORPORATIONS

§ 12. **Transactions Between Corporation and its Officers or Agents**

Evidence was sufficient to support the trial court's conclusions that a deed from a corporation to its president was unauthorized and unratified by the corporation and therefore was null and void. *Youth Camp v. Lyon,* 694.

§ 28. **Dissolution**

Court in the state of incorporation has authority to order execution and delivery of a deed to property in another state to the shareholders of the corporation as successors in title to the assets of the corporation. *Lea v. Dudley,* 702.

Virginia decree finding plaintiffs to be the successors to a corporation and entitled to the corporation's property will be accepted by the courts of this State as a matter of comity. *Ibid.*

COSTS

§ 4. **Items of Costs and Amount of Allowances**

Trial court erred in using a contingent fee contract between landowners and their attorneys as the sole guide for determining reasonable counsel fees to be taxed as part of the costs to be paid by a redevelopment commission in a condemnation proceeding. *Redevelopment Comm. v. Hyder,* 241.

COURTS

§ 6. Appeals to Superior Court from the Clerk

The superior court upon appeal from the clerk had jurisdiction to proceed to hear and determine all matters in controversy. *In re Foreclosure of Deed of Trust,* 610.

§ 21. What Law Governs; As Between Laws of This State and of Other States

Substantive rights and liabilities of the parties are to be determined by the laws of S. C. in wife's action against her husband to recover damages for personal injuries sustained in an accident in that state. *Chewning v. Chewning,* 283.

Virginia decree finding plaintiffs to be the successors to a corporation and entitled to the corporation's property will be accepted by the courts of this State as a matter of comity. *Lea v. Dudley,* 702.

CRIMINAL LAW

§ 5. Mental Capacity in General

Trial court properly refused to instruct on the defense of insanity where there was no evidence that defendant lacked the capacity to distinguish between right and wrong. *S. v. Clark,* 197.

Trial court did not err in failing to grant defendant's motion for nonsuit on the ground of insanity. *S. v. Potter,* 292.

§ 6. Mental Capacity as Affected by Intoxicating Liquor

Trial court was not required to instruct on the defense of intoxication. *S. v. Clark,* 197.

§ 7. Entrapment

Defendant was not entrapped where a State's witness allowed law enforcement officers to hide inside a box on his truck while he purchased whiskey from defendant. *S. v. Pridgen,* 116.

§ 9. Aiding and Abetting

Trial court's instructions on aiding and abetting in a common law robbery case were insufficient. *S. v. Vample,* 518.

Trial court properly instructed the jury on aiders and abettors where there was evidence defendant drove the getaway car to and from the crime scene. *S. v. Oxendine,* 458.

§ 15. Venue

Trial court did not err in refusing to grant motion for change of venue based on a newspaper article about defendant's trial. *S. v. Willis,* 365.

Trial court in a narcotics case did not err in denial of defendant's motion for change of venue on the ground of unfavorable publicity. *S. v. Boyd,* 475.

§ 18. Jurisdiction on Appeals to Superior Court

The superior court has jurisdiction to try an accused for a misdemeanor upon a warrant of the district court only after trial and conviction in the district court. *S. v. Parks,* 207.

CRIMINAL LAW—Continued

§ 23. Plea of Guilty

Where the record showed no plea bargaining with respect to the length of defendant's sentence, the court could not grant defendant relief for the alleged violation of such plea bargaining. *S. v. Martin*, 477.

Evidence that defendant hoped he would receive a suspended sentence rather than an active sentence was insufficient to require that his guilty plea be stricken. *S. v. Harris*, 643.

§ 29. Suggestion of Mental Incapacity to Plead

Trial court in an armed robbery case did not err in finding defendant mentally competent to stand trial. *S. v. Potter*, 292.

§ 30. Pleas of the State

Defendant was not prejudiced by the solicitor's announcement and the court's instruction that the State would not seek a conviction of first degree murder but would seek a conviction of second degree murder or manslaughter. *S. v. McLamb*, 164.

§ 33. Facts Relevant to Issues

Defendant was not prejudiced by an officer's testimony as to the reasons he did not bring charges against a 15-year-old boy. *S. v. Pridgen*, 116.

§ 34. Evidence of Defendant's Guilt of Other Offenses

In trial on eight charges of obtaining telephone service by use of a fictitious telephone credit number, erroneous admission of testimony that defendant had made 285 calls by use of the same fictitious number was not prejudicial. *S. v. Franks*, 160.

In a prosecution for homicide committed with a hammer, the court properly admitted evidence that defendant had been convicted for beating deceased with a hammer on another occasion. *S. v. Fulcher*, 259.

Trial court in an arson case did not err in permitting the solicitor to ask defendant whether he had taken any tax advantage in the burning of another building he owned. *S. v. Harrell*, 352.

Although testimony by defendant charged with robbery that he had found the prosecuting witness performing a deviate sexual act with a child may have been admissible to demonstrate the witness's bias against defendant, exclusion of such testimony did not result in prejudicial error. *S. v. Scarborough*, 571.

Robbery victim's testimony that a voice he heard on the night in question was the same voice he had heard on previous occasions, when considered in conjunction with the victim's previous unresponsive testimony that defendant had "hijacked" him twice, did not constitute impermissible evidence of an unrelated crime. *Ibid.*

§ 40. Evidence at Former Proceeding

Defendant who fled from the courtroom during a recess following a voir dire to determine admissibility of his confession was not entitled to have his voir dire testimony read into the evidence. *S. v. Small*, 423.

§ 42. Articles and Clothing Connected With the Crime

The State sufficiently connected heroin identified at trial with white powder purchased by an undercover agent from defendant for the heroin to be admitted in evidence. *S. v. Williams*, 310.

CRIMINAL LAW—Continued

State's evidence showed a sufficient chain of custody of fibers and gloves tested by an SBI chemist to permit their admission in evidence, although there was no showing as to what happened to the two exhibits between the time they were analyzed and the time they appeared at trial. *S. v. Coble,* 575.

§ 43. Photographs

Photographs shown to eyewitnesses of a robbery were properly admitted into evidence. *S. v. Potter,* 292.

§ 50. Opinion Testimony

Trial court in an arson case properly permitted an experienced fireman and an SBI investigator to give opinion testimony as to the point of origin of a fire. *S. v. Harrell,* 352.

§ 51. Qualification of Experts

Ruling by the trial court admitting testimony that tablets were LSD amounted to a finding by the court that the witness testifying was an expert. *S. v. Reisch,* 481.

§ 58. Evidence in Regard to Handwriting

Defendant's privilege against self-incrimination was not violated when the State was allowed to obtain defendant's signature during the trial. *S. v. Valentine,* 727.

Admission of testimony by defendant regarding differences between a signature sample and signature on a motel registration card, if erroneous, was not prejudicial to defendant. *Ibid.*

§ 60. Fingerprint Evidence

Trial court properly admitted testimony by an officer who lifted fingerprints without finding that the officer was an expert in lifting fingerprints. *S. v. Shore,* 510.

State's evidence established a sufficient chain of custody of lifted fingerprints to permit a fingerprint expert to give testimony concerning them. *Ibid.*

§ 64. Evidence as to Intoxication

Trial court in a drunken driving case properly permitted two policemen to give opinions that defendant was under the influence of an intoxicating liquor on the occasion in question. *S. v. Huff,* 630.

§ 66. Evidence of Identity by Sight

Robbery victim's in-court identification was of independent origin and not tainted by photographic identification in which the victim was shown three photographs and told the photographs were of persons then in custody for similar offenses or by seeing the defendant in the courthouse accompanied by a police officer. *S. v. Russell,* 120.

Trial court erred in failing to make sufficient findings as to whether the victim's in-court identification of defendant was tainted by the illegality of pretrial photographic and lineup identifications. *S. v. Ingram,* 35.

A suspect has no constitutional right to the presence of counsel at a photographic identification. *S. v. Briggs,* 61.

Trial court did not err in failing immediately to hold a voir dire regarding identification of defendant upon testimony that a witness saw

CRIMINAL LAW—Continued

defendant on a certain date where the court thereafter held such hearing. *Ibid.*

Witnesses' in-court identification of defendant was based on their observations of him for 15 minutes at the crime scene. *S. v. Johnson,* 53.

Evidence of out of court photographic identification of defendant was properly admitted. *Ibid.*

In-court identification of defendant based on observations at the crime scene was properly admitted. *S. v. Holland,* 235.

Detention of defendant was not illegal and evidence of identification from fingerprints and photographs taken during the detention was admissible. *S. v. Shore,* 510.

Identification of defendants based on observation for five minutes at the crime scene was proper. *S. v. Willis,* 365.

§ 67. Evidence of Identity by Voice

Robbery victim's testimony that a voice he heard on the night in question was the same voice he had heard on previous occasions, when considered in conjunction with the victim's previous unresponsive testimony that defendant had "hijacked" him twice, did not constitute impermissible evidence of an unrelated crime. *S. v. Scarborough,* 571.

§ 70. Tape Recordings

A tape recording should not be excluded merely because parts of it are inaudible if there are other parts that can be heard, nor should it be excluded on the ground that it cannot be heard by all 12 jurors at the same time. *Searcy v. Justice,* 559.

§ 71. Shorthand Statement of Facts

A detective's testimony with respect to defendant's vehicle constituted a shorthand statement of fact and was properly admitted. *S. v. Carr,* 619.

§ 75. Test of Voluntariness of Confession; Admissibility

Inculpatory statements made by defendant after he had been given the Miranda warnings were voluntary. *S. v. Dooley,* 85.

Evidence on voir dire supported the court's determination that defendant's written confession was admissible. *S. v. Russell,* 120.

Incriminating statements by defendant in a drunken driving case were voluntary. *S. v. Lawson,* 171; *S. v. Brandon,* 262.

Miranda rules had no application where an officer asked defendant if he had been drinking. *S. v. Sykes,* 467.

Statements made by defendant to a police officer were properly admitted into evidence. *S. v. Blue,* 386.

Defendant's admission on voir dire that he was afforded Miranda warnings prior to making any statements and that the signature on a written waiver form was his supported the trial court's findings that the statement was voluntary. *S. v. Ratchford,* 427.

§ 76. Determination and Effect of Admissibility of Confession

The voluntariness of defendant's confession was determined upon a proper voir dire hearing. *S. v. Dunn,* 143.

CRIMINAL LAW—Continued

Trial court did not err in admitting into evidence an officer's uncorroborated testimony with respect to defendant's in-custody statements. *S. v. Ratchford,* 427.

§ 77. Admissions and Declarations

Self-serving declarations made by defendant were properly excluded. *S. v. Dooley,* 85.

The trial court erred in allowing evidence with respect to defendant's silence and in instructing the jury that they could consider defendant's silence as evidence of his guilt, but such error was not prejudicial. *S. v. Castor,* 565.

§ 80. Books, Records and Private Writings

A certified copy of an automobile registration certificate was properly admitted in housebreaking and larceny trial. *S. v. Parker,* 146.

In a prosecution for obtaining telephone service by use of a fictitious credit card number, court properly admitted testimony that charges for the telephone calls were rejected by the company's computer because they would not match up with an assigned credit number. *S. v. Franks,* 160.

Where defense counsel discovered the existence of notes in the shirt pocket of a deputy sheriff during cross-examination of the deputy, motion by defense counsel that he be allowed to inspect the notes was properly denied on the ground that the notes were the work product of the police. *S. v. Blue,* 386.

A motel registration card bearing the names of defendant and his daughter was admissible in an incest prosecution for corroboration though there was no evidence as to the genuineness of defendant's signature. *S. v. Austin,* 539.

§ 84. Evidence Obtained by Unlawful Means

Court's failure to make findings of fact following a voir dire to determine the legality of a search was not error where the State's evidence was uncontradicted. *S. v. Franks,* 160.

Defendant was not prejudiced by trial court's failure to hold a voir dire at the time defendant requested it to determine the legality of a search of defendant where a hearing was thereafter held. *Ibid.*

Vial of cocaine placed by defendant in plain view of officers was admissible in defendant's trial for possession of cocaine. *S. v. McQueary,* 472.

Evidence obtained as the result of a search of an impounded vehicle by a private detective was properly admitted. *S. v. Carr,* 619.

§ 86. Credibility of Defendant

Trial court did not err in failing to instruct the jury that evidence of defendant's previous convictions for violations of motor vehicle laws was not competent as substantive evidence where no request for such instruction was made until the jury had begun its deliberations. *S. v. Long,* 91.

In a prosecution for speeding in excess of 80 mph, the court properly allowed the solicitor to ask defendant whether he saw a highway patrolman who clocked him traveling 94 mph in a 65 mph zone on another occasion. *S. v. Willis,* 43.

CRIMINAL LAW—Continued

The solicitor was properly allowed to cross-examine defendant about specific prior convictions without first inquiring as to whether there had been any prior convictions. *S. v. Campbell,* 281.

Although testimony by defendant charged with robbery that he had found the prosecuting witness performing a deviate sexual act with a child may have been admissible to demonstrate the witness's bias against defendant, exclusion of such testimony did not result in prejudicial error. *S. v. Scarborough,* 571.

§ 87. Direct Examination of Witness

Trial court did not abuse its discretion in allowing a leading question for the purpose of restoring credibility in the prosecuting witness. *S. v. Lenderman,* 687.

A question of the district attorney based upon prior testimony which had been admitted without objection was proper. *S. v. Carr,* 619.

§ 88. Cross-examination

Trial court did not err in allowing defendant to be recalled for further cross-examination. *S. v. Austin,* 539.

§ 89. Credibility of Witnesses; Corroboration

The trial court in a rape case erred in striking defense testimony by a deputy sheriff that, based on his investigation of the case, he was of the opinion that the alleged victim's reputation in the community "wasn't any good." *S. v. Cole,* 137.

A police officer's testimony which substantially corroborated that of other witnesses was competent though it differed slightly from the others' testimony. *S. v. Bynum,* 177.

§ 90. Rule that Party May Not Discredit His Own Witness

Trial court did not err in failing to permit defendant to cross-examine a defense witness. *S. v. Potter,* 292.

§ 91. Continuance

Trial court properly denied defendant's motion for continuance to obtain witnesses where defendant did not know the names or whereabouts of the witnesses or the substance of their testimony. *S. v. Robinson,* 279.

Trial court did not err in refusing to grant motion for continuance based on a newspaper article about defendant's trial. *S. v. Willis,* 365.

Trial court did not err in denial of defendant's motion for continuance made on the ground other narcotics cases were being tried at the same term. *S. v. Boyd,* 475.

Trial court did not err in denial of defendants' motions for continuance and for separate trials made on the ground that the solicitor, in the presence of the panel from which the jury was selected, inquired as to whether one defendant was ready to comply with a lower court judgment "which is a monetary compliance." *S. v. Coble,* 575.

§ 92. Consolidation of Counts

Consolidation of defendant's trial with co-defendant's trial for armed robbery was proper. *S. v. Bynum,* 177.

CRIMINAL LAW—Continued

Where cases against two defendants were consolidated for trial, the court properly submitted separate issues as to defendants' guilt to the jury. *S. v. Holland,* 235.

Charges for possession of heroin and amphetamines were properly consolidated for trial. *S. v. Wooten,* 499.

§ 95. Admission of Evidence Competent for Restricted Purpose

Defendant was not prejudiced by admission of codefendant's in-custody statements implicating defendant where the codefendant took the stand and was cross-examined by defendant, but the court erred in admission of nontestifying defendant's in-custody statements which implicated codefendant. *S. v. Heard,* 124.

A confession made by a codefendant in defendant's presence in a jail cell was admissible even though the declarant did not testify. *S. v. Matthews,* 297.

Defendants were not prejudiced where they objected to the admission of corroborating evidence but did not request limiting instruction. *S. v. Wood,* 267.

§ 97. Introduction of Additional Evidence

Trial court did not err in allowing the State to present additional evidence after it had closed its case. *S. v. Holland,* 235.

§ 99. Expression of Opinion by Court on Evidence During Trial

Trial court in a drunken driving case did not assume defendant's guilt when the court stated during the trial that "the statute provides that everyone who operates a motor vehicle on the highways of this State consents to take a breathalyzer test when driving under the influence." *S. v. Strider,* 112.

Trial court expressed an opinion by asking defendant and his witnesses questions which tended to impeach them. *S. v. Bond,* 128.

Trial court expressed an opinion and committed prejudicial error in belittling defendant's witness. *S. v. Johnson,* 699.

Trial court in a breaking and entering case did not express an opinion on the evidence in asking the owner whether he had authorized any of the defendants "to enter" his building. *S. v. Coble,* 575.

§ 101. Conduct of Jury and Misconduct Affecting Jury

In a prosecution for possession and sale of nontaxpaid whiskey, defendant was not prejudiced when, during a recess, a juror got into a box in which officers had hidden while whiskey was bought from defendant. *S. v. Pridgen,* 116.

Defendant was not prejudiced when the trial judge permitted the bailiff to relay an instruction to the jury to continue to deliberate to see if they could reach a verdict. *S. v. Harrell,* 352.

§ 102. Argument and Conduct of Solicitor

Defendant was not prejudiced by the court's failure to instruct the jury to disregard any reference to a diagram drawn by the solicitor on a blackboard during his jury argument. *S. v. Long,* 91.

Statements by the solicitor in his jury argument did not amount to comments on defendant's failure to testify. *S. v. Brandon,* 262.

CRIMINAL LAW—Continued

Trial court did not err in failing to declare a mistrial following the court's instruction to the solicitor not to "say anything which would tend to prompt the witness as to what he said or to be noticeable to the jury." *S. v. Mitchell,* 437.

Remarks of solicitor in his jury argument which did not go outside the record did not constitute prejudicial error. *S. v. Wooten,* 499.

§ 112. Instructions on Burden of Proof and Presumptions

Although the desired form of instruction on alibi was not offered, defendant received the benefit of an instruction on alibi when the court twice instructed the jury that witnesses had testified that defendant was not at the scene of the crime. *S. v. Shore,* 510.

Court's instruction that a reasonable doubt is not a "doubt suggested by the ingenuity of counsel or your own ingenuity" was not erroneous. *S. v. Briggs,* 368.

Instructions as to the presumption of defendant's innocence were sufficient. *S. v. Lenderman,* 687.

§ 113. Statement of Evidence and Application of Law Thereto

Where cases against two defendants were consolidated for trial, the court properly submitted separate issues as to defendants' guilt to the jury. *S. v. Holland,* 235.

Defendant was not prejudiced by the court's instruction that defendant made conflicting statements on the witness stand. *S. v. Briggs,* 368.

Trial court erred in failing to instruct the jury that defendant did not have the burden of proving an alibi. *S. v. Garner,* 484.

The right of three defendants to have their guilt or innocence determined separately was not violated when the court read only one indictment to the jury and instructed them that each of the three defendants was charged in an identical bill. *S. v. Mitchell,* 437.

Trial court's alibi instruction was proper. *S. v. Luster,* 646.

§ 114. Expression of Opinion by Court on the Evidence in the Charge

Defendant was not prejudiced by the court's remark that the pattern jury instruction given by the court on the offense of excessive speed "doesn't make one bit of sense on earth." *S. v. Willis,* 43.

Trial court erred in instructing the jury that there was evidence that defendant admitted some of the facts related to the crime. *S. v. Clanton,* 275.

Trial judge in a prosecution for assault with intent to rape expressed an opinion on the evidence when he stated in the charge that three witnesses had corroborated the testimony of the prosecutrix. *S. v. Henson,* 282.

Trial judge did not assume in his instructions that heroin tested by a chemist was the same substance sold by defendant. *S. v. Williams,* 310.

§ 116. Charge on Failure of Defendant to Testify

Trial court was not required to instruct on credibility of witnesses and defendant's failure to testify absent a request for such instructions. *S. v. Nettles,* 74.

Trial court's instruction on defendant's failure to testify was not error. *S. v. Penland,* 73.

CRIMINAL LAW—Continued

Trial court's statement that defendant did not offer any evidence did not amount to a comment by the court on defendant's failure to testify. *S. v. Carter,* 461.

§ 117. Charge on Character Evidence and Credibility of Witness

Trial court's instructions as to the scrutiny to be given defendant's testimony were proper. *S. v. Dunn,* 143.

Trial court properly instructed the jury on treatment of defendant's testimony. *S. v. Davis,* 252.

Trial court did not err in instructing the jury that, when evaluating defendant's testimony, it "ought to take in consideration the interest that the defendant has in the result of the action." *S. v. Scarborough,* 571.

§ 118. Charge on Contentions of the Parties

Trial court's instructions on the contentions of the parties were proper. *S. v. Reisch,* 481.

§ 119. Requests for Instructions

Defendants were not prejudiced where they objected to the admission of corroborating evidence but did not request limiting instruction. *S. v. Wood,* 267.

§ 122. Additional Instructions After Retirement of Jury

Additional instructions given the jury after it had announced its failure to agree were proper. *S. v. Teel,* 398.

Trial court's additional instructions urging the jury to try to reach a verdict were proper. *S. v. Huff,* 630.

§ 123. Form of Issues

Trial court did not err in allowing the jury to take with them to the jury room written elements of the offense charged. *S. v. Quick,* 589.

§ 124. Sufficiency of Verdict

Trial court properly accepted verdict of guilty of murder in the second degree where the jury foreman stated the verdict was "Guilty of voluntary—of murder in the second degree." *S. v. Harrison,* 734.

§ 126. Polling of Jury and Acceptance of Verdict

Any error in the jury polling procedure in defendants' trial for armed robbery was cured when all the jurors assented to the verdict. *S. v. Holland,* 235.

§ 128. Discretionary Power of Judge to Set Aside Verdict and Order Mistrial

Trial court did not err in failing to declare a mistrial when the solicitor asked defendant whether a codefendant "came home when the police were searching there and found 12 packs of heroin under your house." *S. v. Young,* 316.

§ 131. New Trial for Newly Discovered Evidence

Trial court properly denied defendant's motion for a new trial for newly discovered evidence where that evidence consisted of a codefendant's statement that he alone was guilty of the crime charged. *S. v. Bynum,* 177.

CRIMINAL LAW—Continued

§ 137. Conformity of Judgment to Plea

Defendant was entitled to have judgment and commitment corrected to conform to defendant's plea of guilty to possession of heroin. *S. v. Byrum*, 265.

§ 138. Severity of Sentence

Crime of safecracking committed in 1971 is punishable by imprisonment for a term ranging from ten years to life imprisonment. *S. v. Martin*, 477.

§ 150. Right of Defendant to Appeal

Defendant was denied his right to appeal when the court informed defendant that sentence would be suspended unless he decided to appeal, in which case an active sentence would be imposed. *S. v. Reynolds*, 479.

§ 155.5. Docketing of Appeal in Court of Appeals

Appeal which was not docketed within 90 days after the judgment appealed from is treated as a petition for certiorari. *S. v. Small*, 423.

§ 157. Necessary Parts of Record

Appeal is dismissed where the record failed to show jurisdiction of misdemeanor cases in the superior court and did not contain the warrants upon which defendant was tried and the judgment from which the appeal was taken. *S. v. Parks*, 207.

§ 158. Presumptions as to Matters Omitted From Record

Where the record showed no plea bargaining with respect to the length of defendant's sentence, the court could not grant defendant relief for the alleged violation of such plea bargaining. *S. v. Martin*, 477.

§ 161. Necessity for and Requisites of Exceptions

An appeal is an exception to the judgment and presents the face of the record proper for review. *S. v. Brown*, 483.

§ 162. Objections, Exceptions and Assignments of Error to Evidence

Trial court did not abuse its discretion in denial of defendant's motion made at the close of the evidence to place excluded testimony in the record on the ground that no request was made at the time of the court's ruling on the testimony. *S. v. Willis*, 43.

Defendant was not prejudiced by the admission of certain testimony where he failed to make timely objection and testimony of the same import was thereafter introduced without objecton. *S. v. Blount*, 448.

§ 167. Harmless and Prejudicial Error in General

There is no statutory or constitutional proscription in this State against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge. *S. v. Brown*, 413.

§ 168. Harmless and Prejudicial Error in Instructions

Trial court's charge on possession of a pistol without a permit was harmless error after nonsuit had been granted on that charge. *S. v. Brown*, 413.

CRIMINAL LAW—Continued

§ 169. Harmless and Prejudicial Error in Admission of Evidence

Evidence of threats made to defendant's co-conspirator and statements made by the co-conspirator to police were not prejudicial to defendant. *S. v. Sneed,* 555.

Defendant was not prejudiced where he objected to evidence but subsequently allowed similar evidence to be admitted without objection. *S. v. Austin,* 539.

§ 172. Error Cured by Verdict

Defendant's conviction of voluntary manslaughter rendered harmless error in submitting the question of second degree murder. *S. v. McLamb,* 164.

§ 180. Writ of Error Coram Nobis

Though the writ of error coram nobis has been superseded by the Post-Conviction Hearing Act, it is still available to defendants who have been convicted but not imprisoned. *S. v. Toms,* 56.

Superior court properly refused to consider defendant's petition for a writ of error coram nobis since that petition should have been addressed to the district court in which defendant was tried. *Ibid.*

§ 181. Post-Conviction Hearing

Review of a post-conviction proceeding is by writ of certiorari. *S. v. Johnson,* 141.

DAMAGES

§ 13. Competency of Evidence on Issue of Compensatory Damages

Trial court properly excluded evidence concerning certain medical expenses where plaintiff failed to show connection between accident and necessity for medical treatment and reasonableness of medical expenses. *Ward v. Wentz,* 229.

DEATH

§ 9. Distribution of Recovery

Where the jury found negligence by defendant and by intestate's surviving spouse, but intestate died from causes not related to the accident, defendant was not entitled to have the judgment against her reduced by the amount the surviving spouse would receive through the estate of his deceased spouse. *Wilson v. Miller,* 156.

DEEDS

§ 20. Restrictive Covenants as Applied to Subdivision Developments

The cutting of a 3-foot wide opening between two portions of each of two duplex houses and the finishing of but one complete kitchen in each house did not conform the duplexes to a restrictive covenant prohibiting use of land for other than single family residential dwellings. *Higgins v. Builders and Finance, Inc.,* 1.

DIVORCE AND ALIMONY

§ 14. Adultery

A property settlement agreement signed by the parties did not bar the wife from asserting the defense of adultery to the husband's action for divorce and did not bar the wife's cross-action for alimony. *Robuck v. Robuck,* 374.

§ 16. Alimony Without Divorce

Order awarding alimony and child custody and support is set aside where the court failed to make findings as to reasonable needs of the wife and child and as to the ability of defendant to make the payments decreed. *Morgan v. Morgan,* 641.

Statutory provision stating, "A husband is deemed to be the supporting spouse unless he is incapable of supporting the wife" created a rebuttable presumption. *Rayle v. Rayle,* 594.

Instruction that the jury should not consider testimony of plaintiff's private detective to show any indignity offered plaintiff because his testimony related to occurrences after the date of the separation of the parties, if erroneous, was not prejudicial to plaintiff. *Boyer v. Boyer,* 637.

§ 18. Alimony and Subsistence Pendente Lite

Findings of the trial court were insufficient to support award of alimony pendente lite and counsel fees. *Manning v. Manning,* 149.

Plaintiff's complaint in an action for alimony pendente lite, counsel fees and child custody and support was insufficient where it did not allege any specific act of cruelty or indignity committed by defendant. *Ibid.*

Trial court erred in awarding defendant wife alimony pendente lite and counsel fees where defendant failed to show that she was a dependent spouse. *Cabe v. Cabe,* 273.

Where defendant's pleadings indicated that she had subsisted for a number of years without financial assistance of plaintiff, the trial court did not err in denying defendant's motion for counsel fees and alimony pendente lite after having found that defendant was the dependent spouse. *Hogue v. Hogue,* 583.

§ 20. Decree of Divorce as Affecting Right to Alimony

Where the wife was awarded alimony in an action in which the husband was granted absolute divorce and the matter of alimony has been remanded for a rehearing, the alimony will be considered as having been awarded at the time of the rendering of the judgment of absolute divorce if alimony is awarded at the rehearing. *Darden v. Darden,* 433.

§ 22. Jurisdiction and Procedure in Child Custody and Support Proceeding

Separation agreement providing for child custody and support did not bar the court in a divorce action from making different provisions with respect to custody and support. *Jones v. Jones,* 607.

§ 23. Child Support

Where the trial court did not make appropriate findings based on competent evidence as to what were the reasonable needs of the parties' children for health, education and maintenance, it was error for the court to direct defendant to make payments for their support. *Manning v. Manning,* 149.

DIVORCE AND ALIMONY—Continued

Trial court's order requiring defendant to pay 40% of his income as alimony and 20% of his income as child support was unsupported by proper findings of fact. *Williamson v. Williamson,* 669.

The trial court erred in granting plaintiff's motion to increase child support payments without first making findings as to changed circumstances or defendant's ability to pay. *Waller v. Waller,* 710.

Trial court erred in increasing the amount of child support for two children over 18 and for a third child whose needs had decreased. *Nolan v. Nolan,* 550.

Trial court erred in awarding defense counsel attorney's fees without making a finding of fact with respect to defendant's ability to defray the expenses of the suit. *Ibid.*

§ 24. Child Custody

Trial court in a child custody proceeding erred in refusing to allow plaintiff to introduce evidence of defendant's adultery. *Darden v. Darden,* 433.

Evidence was insufficient to support a finding that the best interests of a minor child would be served by putting her in custody of the mother where the evidence showed the mother had made no plans for the child while she worked. *Ibid.*

Trial court erred in making visitation privileges granted the father subject to the discretion of the child. *Morgan v. Morgan,* 641.

EASEMENTS

§ 2. *Creation of Easement by Agreement*

Defendant who entered plaintiff's intestate's land to remove sand and gravel cannot rely on an oral agreement to take his action from the realm of trespass, nor can defendant rely on having a license not revoked. *Sanders v. Wilkerson,* 331.

ELECTRICITY

§ 2. *Service to Customers*

Statute prevents a municipality from providing electricity to new customers in a territory assigned by the Utilities Commission to an electric utility company. *Electric Service v. City of Rocky Mount,* 347.

EMINENT DOMAIN

§ 5. Amount of Compensation

Jury argument by defense counsel with respect to measure of damages in an eminent domain proceeding was prejudicial. *City of Winston-Salem v. Parker,* 634.

§ 6. Evidence of Value

Cumulative errors of the trial court in admitting evidence as to the value of land taken were so prejudicial as to require a new trial. *Highway Comm. v. Helderman,* 394.

In condemnation proceedings, trial court properly allowed one defendant to testify he had been offered $20,000 for four acres of the land in question. *Power Co. v. Gaddy,* 720.

EMINENT DOMAIN—Continued

There was no merit in contention that defendants' witnesses should not have been allowed to give testimony concerning value of the property after the taking on the ground that the witnesses did not know what rights were included in the easement that had been condemned. *Ibid.*

In an action to condemn an easement, trial court improperly admitted testimony by defendants' expert as to before and after value of the property where his testimony was based on erroneous assumption as to the amount of property the city was condemning. *City of Winston-Salem v. Sutcliffe*, 748.

§ 7. Proceedings to Take Land and Assess Compensation

In a proceeding to condemn land for relocating an abutting road and for construction of a controlled-access highway, trial court did not err in failing to instruct on the statute relating to the consideration of lack of access to a new controlled-access highway or on the statute relating to compensation for loss of access when an existing highway is included within a controlled-access facility. *Highway Comm. v. English*, 20.

Plaintiff has shown no prejudice though the attorney during the jury selection was not the trial counsel. *Highway Comm. v. Helderman*, 394.

ESCAPE

§ 1. Elements of and Prosecution for Escape

In a prosecution for escape, fifth offense, the use of only the commitments issued as a result of prior convictions of escape for the purpose of establishing prior convictions was error. *S. v. Chapman*, 456.

ESTATES

§ 4. Termination of Life Estate

Life tenant who purchased the property in question at a foreclosure sale held the property as trustee for the remaindermen, and at the life tenant's death the property passed to them rather than to devisees named in the life tenant's will. *Thompson v. Watkins*, 717.

EVIDENCE

§ 27. Tape Recordings

A tape recording should not be excluded merely because parts of it are inaudible if there are other parts that can be heard, nor should it be excluded on the ground that it cannot be heard by all 12 jurors at the same time. *Searcy v. Justice*, 559.

§ 28. Public Records and Documents

A certified copy of an automobile registration certificate was properly admitted in housebreaking and larceny trial. *S. v. Parker*, 146.

§ 29. Accounts

In a prosecution for obtaining telephone service by use of a fictitious credit card number, court properly admitted testimony that charges for the telephone calls were rejected by the company's computer because they would not match up with an assigned credit number. *S. v. Franks*, 160.

EVIDENCE—Continued

§ 32. Parol Evidence Affecting Writings

Parol evidence rule did not render inadmissible a letter executed and delivered simultaneously with a reexecuted construction contract, although the reexecuted contract was on a printed form containing an express merger clause. *Loving Co. v. Latham,* 318.

§ 50. Medical Testimony

Trial court in a medical malpractice case properly excluded testimony of an expert witness which did not relate to community standards of practice. *Rucker v. Hospital,* 650.

Where the trial court in a medical malpractice case properly refused to let the testimony of plaintiff's expert witness be submitted to the jury, the trial court should have allowed plaintiff to bring in another expert witness to testify. *Ibid.*

§ 51. Blood Tests

Blood test results were admissible in plaintiff's action to recover for personal injuries sustained in an automobile accident where the intoxication of the driver was at issue. *Wood v. Brown,* 307.

FORGERY

§ 2. Prosecution and Punishment

Trial court erred in its instructions on the crime of uttering a forged check when the court in one portion of the charge failed to include intent to defraud as an element of the crime and in another portion instructed that fraudulent intent was immaterial. *S. v. Jones,* 454.

FRAUDS, STATUTE OF

§ 2. Sufficiency of Writing

A contract for sale of land was sufficient to satisfy the statute of frauds where the land was described in another writing delivered contemporaneously with the execution of the contract. *Mezzanotte v. Freeland,* 11.

GUARANTY

Creditor is entitled to recover against wife who signed a guaranty agreement where he had no knowledge of the conditions and restrictions placed by the wife on the effectiveness of her signature. *Oil Co. v. Welborne,* 681.

HABEAS CORPUS

§ 4. Review

Review of a habeas corpus proceeding is by writ of certiorari. *S. v. Johnson,* 141.

HIGHWAYS AND CARTWAYS

§ 5. Rights of Way

Statute authorizing the Highway Commission to acquire right of "view" does not create a right of view or sight distance to and from

HIGHWAYS AND CARTWAYS—Continued

landowner's property for which compensation must be paid if the view is obstructed. *Highway Comm. v. English*, 20.

Trial court in condemnation proceeding did not err in failing to instruct the jury specifically that it should consider loss of view and sight looking toward and away from defendant's property. *Ibid.*

HOMICIDE

§ 9. Self-defense

Evidence that defendant shot the victim while the victim was beating him with a pistol did not show defendant acted in self-defense as a matter of law where there was also evidence the victim had been shot four or five times and that the victim had tried to run when he was shot. *S. v. Barrett*, 419.

§ 14. Presumptions and Burden of Proof

Use of a deadly weapon in a homicide raises a presumption of malice which renders the killing at least murder in the second degree. *S. v. Barrett*, 419.

§ 15. Relevancy and Competency of Evidence

The trial court erred in allowing evidence with respect to defendant's silence and in instructing the jury that they could consider defendant's silence as evidence of his guilt, but such error was not prejudicial. *S. v. Castor*, 565.

§ 20. Demonstrative Evidence

Trial court properly admitted seven color slides for the purpose of illustrating testimony of the medical examiner. *S. v. Fulcher*, 259.

A hammer found at the scene of a homicide was properly admitted in evidence in defendant's murder trial. *Ibid.*

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in a second degree murder case. *S. v. McLamb*, 164.

Evidence that defendant intentionally fired a pistol at the victim and that the victim died as a proximate result thereof was sufficient to be submitted to the jury in a second degree murder case. *S. v. Briggs*, 368.

§ 23. Instructions in General

Defendant was not prejudiced by the solicitor's announcement and the court's instruction that the State would not seek a conviction of first degree murder but would seek a conviction of second degeee murder or manslaughter. *S. v. McLamb*, 164.

§ 24. Instructions on Presumptions

Trial court did not comment on the evidence in instructing the jury that the law raises two presumptions if the State proves that defendant "intentionally killed" the victim. *S. v. Briggs*, 368.

§ 26. Instructions on Second Degree Murder

Defendant's conviction of voluntary manslaughter rendered harmless error in submitting the question of second degree murder. *S. v. McLamb*, 164.

HOMICIDE—Continued

§ 27. **Instructions on Manslaughter**

Trial court's instruction on unintentional shooting as manslaughter was proper. *S. v. Blanton,* 66.

Trial court did not err in failing to instruct on the lesser included offense of involuntary manslaughter, where the uncontradicted testimony showed the shooting was intentional. *S. v. Harrell,* 352.

There was ample evidence to support the court's instruction on "heat of passion." *S. v. Briggs,* 368.

§ 28. **Instructions on Defenses**

Failure to instruct on defense of home in a first degree murder case was not error. *S. v. Pearson,* 203.

Trial court properly instructed the jury on defendant's contention that the shooting was accidental. *S. v. McLamb,* 164.

§ 31. **Verdict and Sentence**

Imposition of punishment within statutory limits is discretionary and not reviewable on appeal. *S. v. Pearson,* 203.

Trial court properly accepted verdict of guilty of murder in the second degree where the jury foreman stated the verdict was "Guilty of voluntary—of murder in the second degree." *S. v. Harrison,* 734.

HUSBAND AND WIFE

§ 3. **Agency of One Spouse for Another**

In an action to set aside a deed conveying property to a husband and wife, trial court failed to resolve a material issue where the court found the husband had actual knowledge of the pendency of a lawsuit by plaintiff against the original owners to enforce an option contract but the court failed to find whether the husband had authority to act for the wife and whether notice to him was notice to her. *Lawing v. Jaynes,* 528.

INCEST

A motel registration card bearing the names of defendant and his daughter was admissible in an incest prosecution for corroboration though there was no evidence as to the genuineness of defendant's signature. *S. v. Austin,* 539.

INDICTMENT AND WARRANT

§ 17. **Variance Between Averment and Proof**

In a prosecution for drunken driving and operating a vehicle without a license, there was no fatal variance between the warrants and the proof. *S. v. Davis,* 252.

In a prosecution of the manager of a massage parlor for allowing a female to massage a male in violation of a city ordinance applying specifically to a "person holding a license under this article," nonsuit should have been allowed when the evidence showed defendant was not a licensed operator. *S. v. Flynn,* 277.

Defendant's conviction for distribution of heroin is set aside for variance where the indictment alleged that defendant sold heroin to one person and the evidence tended to show only a sale to a different person. *S. v. Ingram,* 464.

INFANTS

§ 8. Jurisdiction to Award Custody of Minor

The N. C. courts properly dismissed a child custody proceeding where the courts found that an Illinois court had assumed jurisdiction over the matter. *Taylor v. Taylor,* 188.

§ 10. Commitment of Minor for Delinquency

Trial court is not required to make detailed findings in its order disposing of a delinquent child petition. *In re Steele,* 522.

INJUNCTIONS

§ 4. Injunction for Particular Purpose

When a restraining order provides that it is issued by consent of the parties, it sufficiently sets forth the reason for its issuance within the purview of Rule 65(d). *Manufacturing Co. v. Union,* 544.

INSURANCE

§ 2. Brokers and Agents

An insurance agency had apparent authority to bind the insurer to coverage of insured's buses in a renewal policy and to waive provisions of a rider limiting coverage of the buses. *Transit, Inc. v. Casualty Co.,* 215.

§ 10. Reformation of Policies

Trial court properly reformed a renewal insurance contract covering insured's buses by deleting an endorsement limiting coverage of the buses to a specified radius from their principal place of garaging where the limitation was added by the insurer to the renewal contract without notice to the insured. *Transit, Inc. v. Casualty Co.,* 215.

§ 44. Actions to Recover Hospital Insurance Benefits

Evidence was sufficient to support a finding that injuries sustained by plaintiff in a plane crash did not arise out of and in the course of his employment and that they were covered by a group hospital policy issued by defendant. *Deal v. Insurance Co.,* 30.

§ 45. Accident Insurance

Death from asphyxiation when insured, who had been drinking, regurgitated gastric contents and aspirated the vomitus did not result from external means within the purview of a double indemnity life insurance policy. *Weaver v. Insurance Co.,* 135.

§ 142. Actions on Burglary and Theft Policies

Where insured, whose permanent residence was in this State, maintained an apartment in Philadelphia, Pennsylvania, while working there, and property was stolen from insured's Philadelphia apartment when he was in Pittsburgh five days in connection with his work, insured was temporarily residing in Philadelphia within the meaning of a theft policy. *Sanders v. Insurance Co.,* 691.

INTOXICATING LIQUOR

§ 19. Instructions

Defendant was not prejudiced by the court's charge requiring the State to prove both possession and sale of non-taxpaid liquor in order for

INTOXICATING LIQUOR—Continued

defendant to be found guilty under the warrant in this case. *S. v. Reynolds*, 479.

JUDGMENTS

§ 9. Jurisdiction to Enter Consent Judgment

When a restraining order provides that it is issued by consent of the parties, it sufficiently sets forth the reason for its issuance within the purview of Rule 65(d). *Manufacturing Co. v. Union*, 544.

A consent judgment need not be signed by the parties in order to become effective. *Ibid.*

§ 37. Matters Concluded in General

Trial court's judgment requiring partition of lands held by tenants in common was res judicata in determining the parties' interests. *Williams v. Herring*, 183.

§ 39. Judgments of Courts of Other States

Court in the state of incorporation has authority to order execution and delivery of a deed to property in another state to the shareholders of the corporation as successors in title to the assets of the corporation. *Lea v. Dudley*, 702.

Portion of a Virginia decree which attempted to determine title to real property located in N. C. is void. *Ibid.*

JURY

§ 1. Right to Trial by Jury

Statute providing for license revocation of habitual offender of traffic laws is not void for failure to allow trial by jury. *S. v. Carlisle*, 358.

§ 6. Examination

Trial court did not err in limiting defendant's examination of prospective jurors where the questions related to reasonable doubt. *S. v. Wood*, 267.

LARCENY

§ 7. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to support finding that value of an automobile exceeded $200 on the date it was stolen where the owner had purchased it only a few months previously for $1800. *S. v. Dickerson*, 169.

State's evidence was sufficient for the jury in a prosecution for larceny from a mobile home whose owner was out of the State. *S. v. Parker*, 146.

State's evidence was sufficient for the jury in a prosecution of two defendants for larceny committed as a result of housebreaking. *S. v. Gunter*, 627.

§ 8. Instructions

Trial court did not err in charging that in order to apply the doctrine of possession of recently stolen property the jury must find that defendant

LARCENY—Continued

had possession of the item under such circumstances as to make it unlikely that he had obtained possession "honestly." *S. v. O'Kelly,* 661.

§ 9. Verdict

Where the jury was not instructed as to its duty to fix the value of the property taken, the verdict must be considered as a verdict of guilty of misdemeanor larceny. *S. v. Teel,* 398.

§ 10. Judgment and Sentence

Judgment of imprisonment for a period of not less than three nor more than five years imposed upon defendant is greater than the maximum allowed for a misdemeanor and is vacated. *S. v. Teel,* 398.

LIBEL AND SLANDER

§ 9. Qualified Privilege

A publication is libelous per se if, when considered alone without innuendo, it tends to impeach one in his trade or profession; however, liability for such a statement can be avoided if the remark is privileged, that is, made in good faith on any subject matter in which the person communicating has an interest. *Alpar v. Weyerhaeuser Co.,* 340.

§ 10. Particular Applications of Qualified Privilege

Statement by defendant who was employed by corporate defendant as plaintiff's supervisor that plaintiff was clinically paranoid was qualifiedly privileged. *Alpar v. Weyerhaeuser Co.,* 340.

LIMITATION OF ACTIONS

§ 12. Institution of Action and Discontinuance

Where respondent's claim was not barred when the action was commenced or when she filed her counterclaim, failure of respondent to serve her counterclaim on the guardian ad litem for another respondent did not cause the statute of limitations to continue to run so as to bar her claim. *In re Foreclosure of Deed of Trust,* 610.

LIS PENDENS

Where notice of lis pendens had not been indexed in the clerk's office, record of plaintiffs' pending action against defendants for specific performance of an option contract did not constitute constructive notice to subsequent purchasers. *Lawing v. Jaynes,* 528.

MALICIOUS PROSECUTION

§ 10. Competency of Evidence; Malice

In a malicious prosecution action based on charge that plaintiff embezzled funds, trial court erred in admitting testimony by a witness that the individual defendant had asked her to visit motels and meet men. *Barbour v. Lewpage Corp.,* 271.

MASTER AND SERVANT

§ 3. Distinction Between Employee and Independent Contractor

Trial court erred in directing a verdict against plaintiff in favor of defendant hospital on the basis that plaintiff had failed to show that defendant physician was the agent or employee of the hospital. *Rucker v. Hospital,* 650.

§ 60. Workmen's Compensation: Personal Missions

Evidence was sufficient to support a finding that injuries sustained by plaintiff in a plane crash did not arise out of and in the course of his employment. *Deal v. Insurance Co.,* 30.

§ 61. Acts Performed by Injured Employee for Third Person

Injury sustained by plaintiff while he was performing an act for a third person was compensable under the Workmen's Compensation Act since the injury arose out of and in the course of his employment. *Lewis v. Insurance Co.,* 247.

§ 75. Medical and Hospital Expenses

The Industrial Commission erred in ordering defendants to reimburse claimant's father for medical and related expenses where no itemized bills were submitted. *Morse v. Curtis,* 96.

§ 99. Costs and Attorney's Fees in Workmen's Compensation Proceeding

District court had no jurisdiction to award attorney's fees in an action to recover under the Workmen's Compensation Act. *Westmoreland v. Safe Bus, Inc.,* 632.

MONOPOLIES

§ 1. Validity and Construction of Statutes

The Fair Trade Act is valid and constitutional. *Watch Co. v. Brand Distributors,* 648.

MORTGAGES AND DEEDS OF TRUST

§ 28. Parties Who May Bid In and Purchase Property

Life tenant who purchased the property in question at a foreclosure sale held the property as trustee for the remaindermen, and at the life tenant's death the property passed to them rather than to devisees named in the life tenant's will. *Thompson v. Watkins,* 717.

§ 33. Disposition of Proceeds and Surplus

Where a respondent filed answer raising issues of fact as to the ownership of money on deposit with the clerk, the proceeding should have been transferred to the civil issue docket of superior court for trial. *In re Foreclosure of Deed of Trust,* 610.

§ 39. Actions for Damages for Wrongful Foreclosure

Trial court properly directed verdict for defendant in plaintiff's action for wrongful foreclosure on a deed of trust where a stipulation entered into by the parties established that defendant did not cause the deed of trust to be foreclosed. *Goforth v. Jim Walter, Inc.,* 79.

MUNICIPAL CORPORATIONS

§ 30. Zoning Ordinances and Building Permits

It was not necessary for a municipal zoning ordinance adopted prior to 1 January 1972 to be recorded in the office of the register of deeds in order to become effective. *Town of Mount Olive v. Price,* 302.

Board of aldermen properly denied special use permit to allow construction of a service station on the ground the use would endanger public health and safety. *Refining Co. v. Board of Aldermen,* 675.

Where defendants were ordered to remove construction designed to enlarge private airport facilities, stipulations by defendants that the construction was not removed but was altered to provide living quarters were sufficient to show that defendants failed to comply with the trial court's order. *City of Brevard v. Ritter,* 380.

§ 31. Review of Orders of Municipal Zoning Boards

In an appeal from a board of aldermen's denial of a special use permit to allow construction of a service station, the superior court did not err in refusing to delete from the record a Highway Commission letter and a gasoline dealers' publication relating to zoning which were obtained by the board prior to the public hearing on the application. *Refining Co. v. Board of Aldermen,* 675.

§ 32. Regulations Relating to Public Morals

In a prosecution of the manager of a massage parlor for allowing a female to massage a male in violation of a city ordinance applying specifically to a "person holding a license under this article," nonsuit should have been allowed where the evidence showed defendant was not a licensed operator. *S. v. Flynn,* 277.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses

Unlawful possession of codeine is not a lesser included offense of unlawful distribution of codeine. *S. v. Brown,* 71.

§ 2. Indictment

Defendant's conviction for distribution of heroin is set aside for variance where the indictment alleged that defendant sold heroin to one person and the evidence tended to show only a sale to a different person. *S. v. Ingram,* 464.

§ 3. Competency and Relevancy of Evidence

Evidence of access to codeine was relevant in a prosecution for distribution of tablets containing codeine. *S. v. Brown,* 71.

Trial court did not err in requiring defendant to take off his jacket and exhibit his arms to the jury to determine the presence of "track marks." *S. v. Thomas,* 255.

The State sufficiently connected heroin identified at trial with white powder purchased by an undercover agent from defendant for the heroin to be admitted in evidence. *S. v. Williams,* 310.

Testimony with respect to similarities in analyzed and unanalyzed bags of heroin was relevant. *S. v. Wooten,* 499.

NARCOTICS—Continued

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in a prosecution of defendant for possession of LSD that had been delivered to a friend for safekeeping, *S. v. Hultman,* 201; for possession of LSD found in a refrigerator, *S. v. Juan,* 208; for possession of heroin in bathroom of defendant's house, *S. v. Davis,* 191.

Evidence was sufficient to withstand defendant's motions for nonsuit in a prosecution for the manufacture of marijuana where it tended to show that defendant grew marijuana in a cornfield. *S. v. May,* 179.

Evidence that defendant had possession of a bottle cap containing a heroin residue was sufficient to support conviction for possession of heroin. *S. v. Thomas,* 255.

Possession of even a minute amount of heroin constitutes a crime. *S. v. Young,* 316.

Evidence was sufficient to support a finding that defendants were in constructive possession of marijuana found in their apartment. *S. v. Cockman,* 409.

State's evidence was sufficient for jury in a prosecution for possession of heroin found in a motel room. *S. v. Valentine,* 727.

§ 4.5. Instructions

Trial court was not required to instruct on credibility of witnesses and defendant's failure to testify absent a request for such instructions. *S. v. Nettles,* 74.

Instructions as to defendant's intent were not required in a prosecution for the manufacture of marijuana. *S. v. May,* 179.

Trial court properly refused to instruct jury they must find defendant not guilty of possession of heroin if he "merely possessed useless traces or residue of narcotics." *S. v. Thomas,* 255.

Trial judge did not assume in his instructions that heroin tested by a chemist was the same substance sold by defendant. *S. v. Williams,* 310.

Trial court did not err in failing to instruct jury that defendant's guilt or innocence of possession of heroin could not be determined by testimony of expert witness as to scientific measurement or detection. *S. v. Wooten,* 499.

NEGLIGENCE

§ 7. Wilful or Wanton Negligence

Evidence that defendant continued the operation of his vehicle after he knew one of his tires was slick was insufficient to support a verdict that defendant was guilty of wanton misconduct. *Chewning v. Chewning,* 283.

§ 29. Sufficiency of Evidence of Negligence

Evidence of defendant's negligence was insufficient for submission to the jury in plaintiff's action to recover for injuries sustained when a rim and tire separated from a hub of defendant's trailer. *Auman v. Dairy Products,* 599.

§ 40. Instruction on Proximate Cause

Instruction on proximate cause was erroneous in failing to include foreseeability as an element thereof. *Cooper-Harris, Inc. v. Escalle,* 58.

NEGLIGENCE—Continued

§ 44. Verdict and Judgment

Where the jury found negligence by defendant and by intestate's surviving spouse, but intestate died from causes not related to the accident, defendant was not entitled to have the judgment against her reduced by the amount the surviving spouse would receive through the estate of his deceased spouse. *Wilson v. Miller,* 156.

§ 59. Duties and Liabilities to Invitees

Plaintiff, a basketball player in an industrial league, was a licensee and not an invitee while playing a practice game on a court in a gymnasium owned by defendant church, and defendant would not be liable for injuries received by plaintiff when he crashed through a glass door at the end of the court. *Turpin v. Church,* 580.

OBSCENITY

The statute proscribing the dissemination of obscenity in a public place is not unconstitutional on its face and is not unconstitutional as applied to defendant who exhibited certain motion pictures. *S. v. Bryant,* 223.

The indecent exposure statute does not apply to dancers in a night club who exposed their private parts to willing viewers. *S. v. King,* 505.

G.S. 14-190.1 prohibiting the intentional dissemination of obscenity in a public place is constitutional. *S. v. Johnson,* 699.

OBSTRUCTING JUSTICE

There was no variance between warrant charging defendant with obstructing an officer while the officer was attempting to arrest defendant and evidence that defendant obstructed the officer both when defendant's companion was arrested and when an attempt was made to arrest defendant. *S. v. King,* 505.

PARTIES

§ 1. Necessary Parties

Trial court erred in granting summary judgment for defendant based on the absence of necessary parties plaintiff. *Presnell v. Investment Co.,* 722.

Where evidence disclosed that plaintiffs named as owners of a one-half undivided interest in one of three tracts involved in the action were not actually the owners and that the true owners of such interest were not parties to the action, trial court should not have declared a mistrial but should have determined if parties could have been dropped or added on terms which would have been just to the parties and should have at least proceeded with trial as to the two other tracts. *Ibid.*

§ 2. Parties Plaintiff

Trial court erred in dismissing an action for failure to prosecute in the name of the real party in interest where the court did not determine that such failure had lasted beyond a reasonable time. *Presnell v. Investment Co.,* 722.

PARTNERSHIP

§ 5. Liabilities of Partners for Torts Committed by One Partner

All partners in a law firm are not liable for a malicious prosecution instituted upon the advice of one of the partners without the participation, authorization, knowledge or approval of the other partners. *Jackson v. Jackson,* 406.

PHYSICIANS AND SURGEONS

§ 11. Malpractice Generally

Where the trial court in a medical malpractice case properly refused to let the testimony of plaintiff's expert witness be submitted to the jury, the trial court should have allowed plaintiff to bring in another expert witness to testify. *Rucker v. Hospital,* 650.

§ 15. Competency and Relevancy of Evidence

Trial court in a medical malpractice case properly excluded testimony of an expert witness which did not relate to community standards of practice. *Rucker v. Hospital,* 650.

§ 16. Sufficiency of Evidence

Trial court erred in directing a verdict against plaintiff in favor of defendant hospital on the basis that plaintiff had failed to show that defendant physician was the agent or employee of the hospital. *Rucker v. Hospital,* 650.

PLEADINGS

§ 32. Motions to be Allowed to Amend

Court's denial of plaintiff's motion to strike defendant's amended answer filed after the case was remanded from an appellate court was tantamount to permitting plaintiff to file the amended answer. *Motors, Inc. v. Allen,* 445.

Trial court properly permitted defendant to amend his pleadings after the conclusion of plaintiff's evidence in order to allege contributory negligence. *Clark v. Barber,* 603.

PRINCIPAL AND AGENT

§ 5. Scope of Authority

An insurance agency had apparent authority to bind the insurer to coverage of insured's buses in a renewal policy and to waive provisions of a rider limiting coverage of the buses. *Transit, Inc. v. Casualty Co.,* 215.

QUASI CONTRACTS

Trial court in an action for breach of an employment contract did not err in failing to submit an issue of quantum meruit where plaintiff's evidence showed that defendant had paid him in excess of $80,000 for services rendered during the year. *Stewart v. Insurance Co.,* 25.

RAPE

§ 3. Indictment and Lesser Degrees of the Crime

Indictment charging defendant with assault with intent to rape was sufficient. *S. v. Harris,* 643.

§ 4. Relevancy and Competency of Evidence

Trial court in a rape case erred in striking defense testimony by a deputy sheriff that the alleged victim's reputation in the community "wasn't any good." *S. v. Cole,* 137.

§ 5. Sufficiency of Evidence

Testimony by the prosecuting witness in a rape case was sufficient to require submission of the case to the jury. *S. v. Currin,* 744.

§ 18. Prosecution for Assault with Intent to Rape

Trial court in a prosecution for assault with intent to commit rape did not err in finding nine-year-old victim competent to testify. *S. v. Markham,* 736.

In a prosecution for assault with intent to commit rape, trial court did not err in failing to submit lesser included offense. *Ibid.*

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence and Nonsuit

There was no fatal variance between the indictment and proof where the indictment charged the stolen property belonged to the Asheville City Board of Education and the evidence showed the property had been stolen from a certain school but failed to show it belonged to the Board of Education. *S. v. Golden,* 451.

Evidence was sufficient to withstand nonsuit in a prosecution charging defendant with receiving stolen furniture. *S. v. Carter,* 461.

Defendants' motion for nonsuit on the charge of receiving stolen pigs should have been granted. *S. v. Strickland,* 470.

REGISTRATION

§ 3. Registration as Notice

Recorded option showing expiration date of 1 March 1966 did not constitute constructive notice of the optionees' claim to the property in 1971. *Lawing v. Jaynes,* 528.

ROBBERY

§ 2. Indictment

Indictment charging defendant with armed robbery of a named individual was sufficient to show the crime though the evidence indicated that the money taken actually belonged to the Charlotte Housing Authority. *S. v. Johnson,* 53.

§ 3. Competency of Evidence

Evidence of defendant's ability to post bond was relevant in an armed robbery prosecution. *S. v. Holland,* 235.

ROBBERY—Continued

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient upon issue of defendant's guilt of armed robbery where it tended to show he was the driver of the getaway car. *S. v. Torain,* 69.

Evidence was sufficient to be submitted to the jury in an armed robbery case. *S. v. Holland,* 235.

Evidence was sufficient to be submitted to the jury in a common law robbery case. *S. v. Matthews,* 297; *S. v. Vample,* 518.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Trial court's instruction on felonious intent in an armed robbery case was proper. *S. v. Potter,* 292.

Trial court's instructions on aiding and abetting in a common law robbery case were insufficient. *S. v. Vample,* 518.

Although trial court in a prosecution for common law robbery failed to label the requisite state of mind as "felonious intent," the court adequately instructed the jury on such element. *S. v. Scarborough,* 571.

RULES OF CIVIL PROCEDURE

§ 8. General Rules of Pleadings

Plaintiff's complaint in an action for alimony pendente lite, counsel fees and child custody and support was insufficient where it did not allege any specific act of cruelty or indignity committed by defendant. *Manning v. Manning,* 149.

Defendants in a libel and slander action could plead the defenses of privilege and nonutterance without being required to elect between them prior to trial. *Alpar v. Weyerhaeuser Co.,* 340.

§ 13. Counterclaim and Crossclaim

Where plaintiff brought an action for injuries sustained by her in an accident which occurred when brakes installed in her vehicle by defendant failed, the original vendor who rebuilt the brake assembly and sold it to a parts company who in turn sold it to defendant could properly maintain a cross-action against defendant in this lawsuit. *Wilson v. Auto Service,* 47.

Where respondent's claim was not barred when the action was commenced or when she filed her counterclaim, failure of respondent to serve her counterclaim on the guardian ad litem for another respondent did not cause the statute of limitations to continue to run so as to bar her claim. *In re Foreclosure of Deed of Trust,* 610.

§ 15. Amended and Supplemental Pleadings

Court's denial of plaintiff's motion to strike defendant's amended answer filed after the case was remanded from an appellate court was tantamount to permitting plaintiff to file the amended answer. *Motors, Inc. v. Allen,* 445.

Trial court properly permitted defendant to amend his pleadings after the conclusion of plaintiff's evidence in order to allege contributory negligence. *Clark v. Barber,* 603.

§ 17. Parties Plaintiff and Defendant

Trial court erred in dismissing an action for failure to prosecute in the name of the real party in interest where the court did not determine

RULES OF CIVIL PROCEDURE—Continued

that such failure had lasted beyond a reasonable time. *Presnell v. Investment Co.*, 722.

§ 21. **Procedure Upon Misjoinder of Parties**

Where evidence disclosed that plaintiffs named as owners of a one-half undivided interest in one of three tracts involved in the action were not actually the owners and that the true owners of such interest were not parties to the action, trial court should not have declared a mistrial but should have determined if parties could have been dropped or added on terms which would have been just to the parties and should have at least proceeded with trial as to the two other tracts. *Presnell v. Investment Co.*, 722.

§ 33. **Interrogatories to Parties**

Trial court properly sustained defendant's objections to plaintiffs' interrogatories where the information sought was not pertinent to the litigation. *Goforth v. Jim Walter, Inc.*, 79.

Though the trial court acted within its discretion in sustaining defendants' objections to interrogatories, it was improper for the court to make findings of fact and conclusions of law that defendants had the right to compete with plaintiff and to use information obtained during their employment with plaintiff. *Travel Agency v. Dunn*, 706.

Trial court properly dismissed plaintiff's action where plaintiff refused to answer interrogatories without good cause. *Hammer v. Allison*, 623.

§ 51. **Instructions**

Use of the phrases "as I understand it" and "I think he meant" by the judge in his jury instructions did not constitute an expression of opinion. *Slate v. Shelton*, 644.

§ 52. **Findings by the Court**

Trial judge erred in failing to make findings of fact and conclusions of law in an action heard by the court without a jury. *Jones v. Murdock*, 746.

§ 56. **Summary Judgment**

Summary judgment was inappropriate where defendants sold plaintiff a parcel of land with its use restricted to a single family residence and plaintiff sought to rescind the contract. *Hinson v. Jefferson*, 204.

Trial court erred in granting summary judgment for defendant based on the absence of necessary parties plaintiff. *Presnell v. Investment Co.*, 722.

§ 65. **Injunctions**

When a restraining order provides that it is issued by consent of the parties, it sufficiently sets forth the reason for its issuance within the purview of Rule 65(d). *Manufacturing Co. v. Union*, 544.

SAFECRACKING

Crime of safecracking committed in 1971 is punishable by imprisonment for a term ranging from ten years to life imprisonment. *S. v. Martin*, 477.

SAFECRACKING—Continued

Indictment stating that the safe was opened "by the use of chopping tools" was sufficient. *Ibid.*

SALES

§ 6. Implied Warranty

In the sale of a house by the builder-vendor, there is an implied warranty of habitability and fitness. *Hartley v. Ballou,* 493.

§ 19. Measure of Damages for Breach of Warranty

In an action based on breach of warranty, plaintiff was entitled to the cost of repairs caused by water leakage in his basement. *Hartley v. Ballou,* 493.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant Generally

Trial court did not err in refusing to hold a voir dire to determine the legality of impoundment of defendant's vehicle. *S. v. Carr,* 619.

§ 2. Consent to Search Without Warrant

Though the trial court did not conduct a voir dire and make specific findings as to whether defendant's consent to a search of his premises was voluntarily given, evidence in the record was sufficient to sustain a finding of voluntariness. *S. v. Dooley,* 85.

§ 3. Requisites and Validity of Search Warrant

There is no statutory or constitutional proscription in this State against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge. *S. v. Brown,* 413.

General allegation in an affidavit as to the reliability of an informer was sufficient to support issuance of a search warrant. *Ibid.*

Affidavit was sufficient to support search warrant for narcotics. *S. v. Davis.,* 739.

§ 4. Search Under the Warrant

Officer's search of defendant's apartment pursuant to a warrant was legal, although officers failed to knock and demand admittance before entering, where officers entered through an open door. *S. v. Rudisill,* 313.

SPECIFIC PERFORMANCE

Where the court orders specific performance of a contract to convey land which has been conveyed by the vendor to, and paid for by, a third person, judgment should require a conveyance by the third person and entitle him to the purchase money. *Lawing v. Jaynes,* 528.

Trial court erred in directing that an option contract be performed in a manner other than that provided in the contract itself. *Ibid.*

TORTS

§ 4. Right of One Defendant to Have Others Joined for Contribution

Where plaintiff brought an action for injuries sustained by her in an accident which occurred when brakes installed in her vehicle by defendant

TORTS—Continued

failed, the original vendor who rebuilt the brake assembly and sold it to a parts company who in turn sold it to defendant could properly maintain a cross-action against defendant in this lawsuit. *Wilson v. Auto Service,* 47.

§ 6. Judgment Against Tortfeasors

Where the jury found negligence by defendant and by intestate's surviving spouse, but intestate died from causes not related to the accident, defendant was not entitled to have the judgment against her reduced by the amount the surviving spouse would receive through the estate of his deceased spouse. *Wilson v. Miller,* 156.

TRESPASS

§ 8. Damages in General

A trespasser was not entitled to reimbursement for costs incurred incident to preparing land for the taking of sand and gravel notwithstanding his honest belief that he had title to the sand and gravel *Sanders v. Wilkerson,* 331.

Trial court acted within its discretion in failing to award plaintiff interest from the date of the wrongful taking of sand and gravel from his intestate's property. *Ibid.*

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence and Nonsuit

In this action to quiet title to realty located partly in North Carolina, plaintiffs made a prima facie showing of title sufficient to go to the jury. *Lea v. Dudley,* 702.

TRIAL

§ 6. Stipulations

Where defendants were ordered to remove construction designed to enlarge private airport facilities, stipulations by defendants that the construction was not removed but was altered to provide living quarters were sufficient to show that defendants failed to comply with the trial court's order. *City of Brevard v. Ritter,* 380.

§ 11. Argument of Counsel

Jury argument by defense counsel with respect to measure of damages in an eminent domain proceeding was prejudicial. *City of Winston-Salem v. Parker,* 634.

§ 30. Effect of Nonsuit

Plaintiff could properly appeal from the trial court's dismissal of her claims for relief based on breach of contract to repair and negligence, and the original vendor of a brake assembly could appeal from the trial court's dismissal of his cross-action for contribution or indemnity. *Wilson v. Auto Service,* 47.

§ 36. Expression of Opinion on Evidence in Instructions

Trial judge in a paternity action expressed an opinion on the evidence in his charge on reasonable doubt when he instructed the jury that it

TRIAL—Continued

should not go outside the evidence to render a verdict in favor of defendant and in instructing the jury that defendant could be the father of plaintiff's child even if plaintiff were of bad character and defendant of good character. *Searcy v. Justice,* 559.

Trial court expressed an opinion on the evidence in instructing the jurors that if they found defendant to be the father of plaintiff's child, plaintiff could be awarded payments for support of the child, whereas if they returned a verdict for defendant, plaintiff would be entitled to nothing. *Ibid.*

§ 42. **Form and Sufficiency of Verdict**

Trial court was not required to instruct the jury that its verdict had to be unanimous absent a request for such instruction. *Boyer v. Boyer,* 637.

§ 57. **Trial by the Court**

In a trial before the judge without a jury the presumption arises that incompetent evidence was disregarded and did not influence the judge's findings. *Alpar v. Weyerhaeuser Co.,* 340.

UNIFORM COMMERCIAL CODE

§ 13. **Form and Formation of Contract**

Documents signed by defendant in which defendant promised to be responsible for payment for materials furnished a builder who was constructing a home for defendant did not constitute an enforceable contract under the U.C.C. *Lowe's v. Lipe,* 106.

UTILITIES COMMISSION

§ 4. **Electric Companies**

Statute prevents a municipality from providing electricity to new customers in a territory assigned by the Utilities Commission to an electric utility company. *Electric Service v. City of Rocky Mount,* 347.

VENDOR AND PURCHASER

§ 2. **Duration of Option or Contract; Performance**

In an action for specific performance of an option contract, trial court properly allowed plaintiffs to testify that they had been ready, willing and able to perform the contract since a time prior to its expiration. *Lawing v. Jaynes,* 528.

§ 5. **Specific Performance**

Trial court erred in directing that an option contract be performed in a manner other than that provided in the contract itself. *Lawing v. Jaynes,* 528.

§ 10. **Actions Involving and Interests of Third Persons**

In an action to set aside a deed conveying property to a husband and wife, trial court failed to resolve a material issue where the court found the husband had actual knowledge of the pendency of a lawsuit by plaintiff against the original owners to enforce an option contract but the court failed to find whether the husband had authority to act

VENDOR AND PURCHASER—Continued

for the wife and whether notice to him was notice to her. *Lawing v. Jaynes*, 528.

Where the court orders specific performance of a contract to convey land which has been conveyed by the vendor to, and paid for by, a third person, judgment should require a conveyance by the third person and entitle him to the purchase money. *Ibid.*

WEAPONS AND FIREARMS

Defendant's conviction of possession of a firearm by a felon must be set aside where defendant's citizenship rights had been restored by statute enacted after defendant's indictment upon the charge of possession of a firearm. *S. v. Williams*, 639.

WITNESSES

§ 1. Competency of Witness

Trial court in a prosecution for assault with intent to commit rape did not err in finding nine-year-old victim competent to testify. *S. v. Markham*, 736.

§ 6. Evidence Competent to Discredit Witness

In a malicious prosecution action based on charge that plaintiff embezzled funds, trial court erred in admitting testimony by a witness that the individual defendant had asked her to visit motels and meet men. *Barbour v. Lewpage Corp.*, 271.

§ 7. Direct Examination

Although the answer of a witness exceeded the scope of the question, the answer was properly admitted where it contained facts relevant to the inquiry. *Kohler v. Construction Co.*, 486.

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