NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THE POOLE & KENT CORPORATION v. C. E. THURSTON & SONS, INC.

No. 7321SC31

(Filed 6 March 1974)

1. **Master and Servant § 17— reason for terminating contract — non-union employees**

In a contractor's action against a subcontractor for breach of contract, there was sufficient evidence to support findings by the trial court that the reason union representatives sought to have defendant removed from the construction project, and the reason for plaintiff's action in obtaining an *ex parte* restraining order removing defendant from the project and its later action in canceling its agreement of subcontract with defendant, was because defendant's employees were not members of the local union.

2. **Contracts § 21; Master and Servant § 15— harmony clause — requiring union membership — Right to Work Law**

Clause of a subcontract in which the subcontractor agreed that all labor used by it throughout the work would be acceptable to the contractor "and of a standing or affiliation that will permit the work to be carried on harmoniously and without delay" may not be enforced against the subcontractor on the ground that the subcontractor's employees are not union members because such enforcement of the harmony clause would constitute a violation of the North Carolina Right to Work Law. G.S. 95-78; G.S. 95-80.

3. **Master and Servant § 16— termination of subcontract — collective bargaining agreements of contractor and general contractor**

Whether plaintiff contractor or the general contractor had collective bargaining agreements with unions representing their employees and, if so, what rights and remedies those agreements provided was

immaterial to a determination of whether the contractor had a right to terminate its contract with a subcontractor, and the court's findings as to such agreements were mere surplusage.

APPEAL by plaintiff from *Gambill, Judge,* 5 June 1972 Session of Superior Court held in FORSYTH County.

Civil action to recover damages for breach of contract and to restrain defendant from performing further work under the contract. Defendant denied any breach on its part and counterclaimed to recover damages resulting from plaintiff's breach.

Robert E. McKee General Contractor, Inc. (McKee) was the general contractor, plaintiff was a subcontractor under McKee, and defendant was a second tier subcontractor under plaintiff performing insulation work on the North Carolina Baptist Hospital construction project in Winston-Salem, N. C. Paragraph 12 of plaintiff's contract with defendant, which was dated 27 March 1969 and in which plaintiff was designated the "Contractor" and defendant the "Subcontractor," contained the following:

> "12. At all times Subcontractor shall provide competent supervision, a sufficient number of skilled workmen, and adequate and proper materials to maintain the progress required by Contractor. All labor used throughout the work shall be acceptable to the Contractor and of a standing or affiliation that will permit the work to be carried on harmoniously and without delay, and that will in no case or under any circumstances cause any disturbance or delay to the progress of the building, structure of facilities or any other work being carried on by the Contractor, Owner and/or General Contractor."

In its complaint, filed 15 December 1970, plaintiff alleged: When its contract with defendant was executed on 27 March 1969, defendant was a party to a collective bargaining agreement with a local Asbestos Workers Union affiliated with the American Federation of Labor; during the progress of defendant's work on its subcontract with plaintiff, this collective bargaining agreement expired and has not been renewed; no subsequent collective bargaining agreement has been entered into between defendant and the Asbestos Workers Local Union "or any other recognized collective bargaining unit recognized by the National Labor Relations Board"; because of a labor dispute existing between defendant and the Asbestos Workers Local

Union, representatives of the Union began picketing defendant's entrance at the Baptist Hospital construction project on 10 December 1970; as a result of this picketing, employees of plaintiff, of other subcontractors, and of the general contractor "refuse to report to work until such time as defendant either negotiates a collective bargaining agreement or desists the employment of non-union labor"; as a consequence, the construction work on the entire Baptist Hospital project has been closed down. Plaintiff alleged that defendant breached the terms of its subcontract with plaintiff "in that it has used a labor force not acceptable to the plaintiff and has not used a labor force of a standing or affiliation that will permit the work to be carried on harmoniously and without delay." Plaintiff asked that it recover of defendant "such damages for the breach of the aforesaid contract as may be assessed by the Court."

In its complaint plaintiff also alleged: On 13 December 1970 plaintiff notified defendant that "defendant's labor force was in violation of Paragraph 12 of the contract between plaintiff and defendant," and plaintiff directed defendant not to send its personnel to the construction project on the following day; plaintiff further advised defendant that "[a]ny noncompliance of this directive will cause immediate termination of contract"; defendant sent its personnel to the construction site on 14 December 1970 and refused to withdraw them; unless defendant is restrained from placing its personnel on the construction site during the continuation of its labor dispute with Asbestos Workers Local Union, the entire construction project will remain closed for an indefinite period of time; defendant's breach of contract with plaintiff, as alleged, may cause plaintiff to default under the terms of its subcontract with McKee; plaintiff will suffer irreparable damage for which it has no adequate remedy at law. On these allegations plaintiff prayed for an order restraining defendant from maintaining its personnel and equipment on the construction site.

On 15 December 1970, the court entered an *ex parte* order, finding facts from the verified complaint, directing defendant to remove immediately all of its personnel and equipment from the construction site, and restraining defendant from placing any of its personnel or equipmpent on the site pending further orders of the court. On 31 March 1971 the parties consented to a dismissal of the temporary restraining order, the judgment of dismissal expressly providing that by consenting thereto the

parties did not "waive any right they may have to assert a claim arising out of the contract between the parties."

On 26 April 1971 defendant filed answer and a counterclaim in which it alleged: On or about 24 November 1970 certain labor union agents contacted plaintiff and on 27 November 1970 plaintiff sent defendant the following telegram:

> "It has been brought to our attention that the men which you have working on the hospital additions and alterations for the North Carolina Baptist Hospital, Inc. project are not working under the terms of a union collective bargaining agreement.
>
> "If this situation causes disruption of our work on the aforementioned project it will be necessary to take immediate steps to remedy the same."

In its counterclaim defendant also alleged: Certain labor union agents procured other insulation contractors to contact plaintiff for the purpose of taking over the work that plaintiff had contracted with defendant for defendant to perform; on 15 December 1970 plaintiff wrongfully caused the injunction to issue, the effect of which was to prevent defendant from performing its part of the contract; after plaintiff had made defendant's further performance impossible, plaintiff contracted with one Starr-Davis Company to perform defendant's work; plaintiff willfully made further performance by defendant impossible and thereby breached its contract with defendant; by the acts complained of, defendant has been damaged in the sum of $95,000.00. Defendant prayed for judgment against plaintiff in that amount.

On 19 May 1971 plaintiff filed reply to the counterclaim, admitting it had sent the telegram to defendant on 27 November 1970, that on 14 December 1970 it had directed defendant not to send its employees back to the job, that the effect of the restraining order issued on 15 December 1970 was to require defendant to temporarily discontinue its work on the job, and that plaintiff had contracted with Starr-Davis Company to perform certain work on the hospital construction project. Plaintiff denied other material allegations in the counterclaim.

The parties stipulated that the issues of liability and damages be tried separately and waived jury trial on the issue of liability. Accordingly, the court, sitting without a jury, heard

evidence and entered judgment making detailed findings of fact. In addition to findings concerning the making of the contract between plaintiff and defendant dated 27 March 1969 and the inclusion of paragraph 12 therein, the court's findings of fact included the following:

"11. At various times prior to December 10, 1970, representatives of various labor unions advised representatives of Robert E. McKee, General Contractor, Incorporated and plaintiff to have the defendant removed from the construction project because its employees were not members of the local union of the Asbestos Workers Union. These union representatives went on to say that unless union members were used to perform the work of the defendant, the construction project would be shut down by the unions.

"In pursuit of this purpose, the union established a picket line at the entrance to the construction project which was reserved for the defendant's exclusive use. The picket carried a sign upon which was lettered:

" 'Notice to the public. The C. E. Thurston & Sons Co. does not meet the standard wages, economic benefits established by the Asbestos Workers Local Union No. 72.'

"12. Other entrances to the site used by the employees of plaintiff and Robert E. McKee, General Contractor, Incorporated, were not picketed. No trades other than defendant's employees worked on the site on December 10, 11, 14 and 15, 1970.

"13. At all times material, the defendant paid wages and fringe benefits to its employees on the said construction project in accordance with the schedule of wages and benefits specified in its agreement of subcontract with plaintiff.

"14. At the time of the execution of its agreement of subcontract with plaintiff, defendant was a party to a collective bargaining agreement with the local union of the Asbestos Workers Union. On or about May 1, 1969, defendant's collective bargaining agreement expired by mutual agreement and was never renewed or renegotiated. At no time after defendant began work on the said construction project in August, 1969, did it have a signed collective bargaining agreement.

"15. At no time material did the plaintiff or any labor union or other organization or person request or demand that the defendant pay higher or different wages or benefits than it was paying on the said construction project. Likewise, at no material time did the plaintiff or any labor organization or other organization or person request or demand that the defendant enter into a collective bargaining agreement with any labor union. On the contrary, the testimony established that the Asbestos Workers Union did not sign collective bargaining agreements with contractors, such as the defendant, who did not maintain a permanent place of business within the local union's geographic jurisdiction.

"16. At all times material, defendant provided competent supervision, a sufficient number of skilled workmen, and adequate and proper materials to maintain the progress required by plaintiff on the said construction project.

"17. The defendant did not follow a policy of refusing to hire employees who belonged to a labor union. On the contrary, the evidence showed that the defendant hired employees to work on the said construction project irrespective of their membership or non-membership in a labor union."

* * * * *

"20. On December 13, 1970, plaintiff caused the following telegram to be sent to the defendant:

" 'Your present labor force is in violation of paragraph 12 of standard terms of our agreement. You are therefore directed not to send such personnel to the job tomorrow. Any non-compliance with this directive will cause immediate termination of contract.'

"21. At approximately 8 A.M. on the morning of December 14, 1970, plaintiff received a telegram from defendant (plaintiff's Exhibit 6) which reads as follows:

" 'Contents of your telegram dated 12-13 is not sufficient reason to cancel our contract. Therefore we will man the job today per our contractual obligation.' "

* * * * *

"23. Defendant continued to work and on December 15, 1970, plaintiff obtained an ex parte injunction in the Gen-

eral Court of Justice, Superior Court Division of North Carolina, enjoining and restraining defendant's employees from remaining on or returning to the job site. In compliance with said order, defendant's employees left the job site and have not returned.

"24. On December 16, 1970, when defendant was no longer on the job, all trades which had failed to report for work beginning on December 10, returned to work promptly en masse.

"25. On February 11, 1971, plaintiff wrote to defendant (plaintiff's Exhibit 9):

" 'Under the provisions of Item 4 (Standard Terms and Conditions) of our Contract with you dated March 27, 1960, [sic] to perform work on the above referenced structure, you are hereby notified that said Contract is hereby cancelled.'

"26. The reason for the plaintiff's actions in issuing its telegram to the defendant on December 13, 1970, in obtaining an ex parte restraining order removing the defendant from the said construction project, and its later cancellation of its agreement of subcontract with defendant was because defendant's employees were not members of the local union of the Asbestos Workers Union.

"The plaintiff contends that it was within its rights to take such actions against the defendant under the provisions of paragraph 12 of the agreement of subcontract between the plaintiff and the defendant. The court disagrees and finds that such actions by the plaintiff were in violation of G.S. 95-79. The court finds that plaintiff breached its agreement of subcontract with defendant by ordering the defendant off the project and subsequently cancelling its agreement of subcontract because the defendant's employees were not members of a labor organization.

"If the defendant had required such membership of its employees, the defendant would have violated G.S. 95-81, and the actions of plaintiff which were predicated upon such reasons were in direct violation of the public policy of the State of North Carolina as expressed in G.S. 95-79."

As conclusions of law, the court concluded that defendant "at all times complied with the terms of its agreement of sub-

contract with the plaintiff until it was prohibited from further compliance by the plaintiff"; that plaintiff wrongfully terminated its agreement with defendant; that defendant is entitled to recover damages from plaintiff for breach of contract, the amount to be ascertained at a subsequent trial; and that plaintiff is entitled to recover nothing of defendant. On these findings and conclusions, the court adjudged that plaintiff recover nothing and that its action be dismissed, and that defendant recover from plaintiff such amount as defendant shall at a subsequent trial prove it has been damaged by plaintiff's wrongful breach of contract. Plaintiff appealed.

Randolph & Randolph by Clyde C. Randolph, Jr. for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by Norwood Robinson; and Thompson, Ogletree, Deakins & Vogt by Guy F. Driver, Jr. for defendant appellee.

PARKER, Judge.

[1] By assignments of error 4, 5, 6 and 7, plaintiff attacks the findings of fact made by the trial court in paragraphs 11, 15 and 26 of the judgment appealed from as not being supported by the evidence. While conceding that the evidence was sufficient to support a finding that members of the Asbestos Workers Union actively sought to persuade plaintiff to remove defendant from the construction project and that plaintiff had canceled its subcontract with defendant and ordered defendant off the project, plaintiff contends that this is as far as the evidence goes. In particular, plaintiff contends that there was no evidence to support the court's findings in paragraphs 11 and 26 that the reason representatives of the union sought to have defendant removed from the project, and the reason for plaintiff's action in obtaining the *ex parte* restraining order removing defendant from the project and its later action in canceling its agreement of subcontract with defendant, was because defendant's employees were not members of the local union. A review of the record, however, reveals evidence sufficient to support the challenged findings.

At the outset we note that plaintiff alleged in its complaint, filed 15 December 1970, that as a result of the picket line established by the union on 10 December 1970, employees of plaintiff, of other subcontractors, and of the general contractor,

refused to report for work "until such time as defendant either negotiates a collective bargaining agreement *or desists the employment of nonunion labor.*" (Emphasis added.) From this allegation, which was made by plaintiff at the very time the events complained of were taking place, it would appear that plaintiff then understood that one reason motivating the union's activities was that defendant's employees were not members of the union. That this understanding was correct was borne out by the evidence submitted at the trial.

Plaintiff's branch manager, Brian Miller, testified to a meeting which he had with union representatives on 1 December 1970 at which the union spokesman "made it clear that he wanted to see C. E. Thurston removed from the job," and expressed the hope to Mr. Miller that plaintiff "would find some way of using union personnel to do the insulation work." Mr. Miller also testified that the union representatives had "suggested that there were three contractors in the State of North Carolina who would be acceptable to them," that it was his understanding that all three had union agreements and that "the union made that clear to us when they told us that these three were acceptable to them." On recross examination, Mr. Miller testified:

> "The union told me that they wanted Thurston off the job because their people weren't union. We terminated Thurston because of the job stoppage which put us in violation of our contract with the general contractor."

Defendant's witnesses gave even stronger support to the court's findings. P. A. Winchester, general superintendent for McKee, the general contractor on the project, testifying concerning a meeting which he had about 1 December 1970 with certain union representatives, said:

> "The union representatives in that meeting made stateents to us about the possibility of a work stoppage. The best I recall, if there couldn't be some agreement reached where—I believe, to the best of my knowledge, that if C. E. Thurston non-union employees continued working that there was a possibility of a work stoppage. . . . I'm sure I reported this conversation to Mr. Miller of Poole & Kent."

Joseph W. Hoffman, an official of defendant, testified to a meeting he had on 30 November 1970 with Brian Miller, plaintiff's representative, as follows:

"I told Mr. Miller the reason I was down here and he told me that he had at least one conversation with his Business Agent and Mr. Barber, who was the Business Agent of the Asbestos Workers, and that they wanted to have a meeting with him because we were working non-union people on the job. . . . "

* * * * *

"Miller said that he had also discussed with Thomas and Barber the fact that—asked what did they propose, and they proposed that he get another contractor, and Mr. Barber said that he would have his union contractors contact Mr. Miller concerning doing the work if he could get us off. . . .

"The only other point that we discussed, he asked me could I possibly use Mr. Barber's men, and I told him at that time that I didn't see how in the world I could do that; we had capable people on the job doing work, and it was my understanding that it would be illegal to push those people out and put somebody else's people in because of the union membership. . . . "

* * * * *

"In my meeting with Mr. Miller he told me that the union representatives said that our people weren't union people, they weren't Mr. Barber's people."

We find that the evidence sufficiently supports the trial court's findings of fact challenged by plaintiff's assignments of error 4, 5, 6 and 7, and these assignments are overruled.

[2] Plaintiff contends that in any event the judgment against it is erroneous as a matter of law. In this connection plaintiff points to paragraph 12 of the contract by which defendant agreed that all labor used by it throughout the work would be acceptable to plaintiff "and of a standing or affiliation that will permit the work to be carried on harmoniously and without delay." Plaintiff contends that all of the evidence establishes that defendant breached this paragraph of the contract. To this, defendant responds that there is no evidence that its employees were in anywise unacceptable to plaintiff, saving only that they were not members of the union, and that under the laws of this State, particularly the North Carolina Right to Work Law, G.S. 95-78 et seq., paragraph 12 of the contract may not be lawfully

enforced against it under the circumstances of this case, since the only purpose and effect would be to require that defendant employ only union members on the project. We agree with the defendant.

No evidence was presented and plaintiff does not here contend that defendant's employees lacked appropriate skills, were not properly supervised, or that they failed in any manner to perform the work assigned to them diligently and efficiently. There was no evidence or contention that defendant and its employees failed to perform in a satisfactory manner that portion of the building project called for by defendant's subcontract with the plaintiff. There was no evidence or contention that defendant's employees failed to work harmoniously or that any delay was caused by the manner in which they performed their duties. All of the evidence shows that they were not acceptable to the plaintiff solely because they were not "of a standing or affiliation," i.e., union members, which would "permit the work to be carried on harmoniously and without delay." The question presented is whether, under these circumstances, the harmony clause contained in paragraph 12 may be lawfully invoked by plaintiff to establish a breach of contract by defendant sufficient to justify plaintiff's actions in removing defendant from the project and canceling the contract between them. We hold that under the laws of this State it may not.

G.S. 95-78 and G.S. 95-80 are respectively as follows:

> "§95-78. DECLARATION OF PUBLIC POLICY.—The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association."
>
> "§95-80. MEMERSHIP IN LABOR ORGANIZATION AS CONDITION OF EMPLOYMENT PROHIBITED.—No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer."

Enforcement of paragraph 12 of the contract by requiring that defendant remove its nonunion members from the project

and replace them with union members would result in a direct violation of the public policy declared in G.S. 95-78 and of the express prohibition contained in G.S. 95-80. Plaintiff's contention that the Right to Work Law is not applicable because the contract between the parties is not of the type declared illegal by G.S. 95-79, simply ignores the other sections of the statute noted above and involves a too restrictive application of the public policy declared by the Legislature. We hold that under the laws of this State paragraph 12 of the contract may not be lawfully enforced against defendant for the purpose which plaintiff has sought to enforce it in this case, since to do so requires a violation of our statutes. Under the facts found by the trial court and under all of the evidence in the record, there has been no showing that defendant breached paragraph 12 in any respect in which the language of that paragraph may be lawfully applied.

[3] Plaintiff has also assigned as error the admission of oral testimony as to the contents of written collective bargaining agreements between plaintiff and the unions representing its employees and between the general contractor and unions representing its employees. Plaintiff contends that admission of this testimony violated the best evidence rule, was hearsay, and allowed nonexpert witnesses to testify to their opinion as to the legal question involved. We do not pass upon this assignment of error, since in our view the testimony in question and the trial court's findings of fact related thereto were not necessary to support the judgment appealed from. The testimony to which plaintiff objects was to the effect that the collective bargaining agreements in question limited the unions' right to strike and required them to provide personnel on the employers' request, in default of which the employers had the right to hire men from the outside. The court made no findings of fact as to the contents or legal effect of the collective bargaining agreements in question, but did find as facts that "the plaintiff did not choose to institute any legal proceedings against the labor unions which represented its employees to require the unions to abide by their collective bargaining agreements with the plaintiff" (Finding of Fact No. 19), and that "if the plaintiff's employees refused to work because of any labor disputes involving the defendant, the plaintiff had remedies available to require its employees to return to work or to hire other employees" (Finding of Fact No. 27), though the court did not specify what those remedies were. In our view, whether plaintiff or the general

contractor had collective bargaining agreements with unions representing their employees and, if so, what rights and remedies those agreements provided, was immaterial to any issue in this litigation between plaintiff and defendant. Unquestionably the refusal of the union employees to continue to work on the building project while defendant's nonunion employees were also present, placed plaintiff in a difficult position. However, whether plaintiff had, or had not, effective remedies against the unions or against its own or other union employees, and if it had such remedies, whether it did, or did not, resort thereto, simply has no bearing upon whether plaintiff had a lawful right to terminate its contract with defendant. In this view of the case, error, if any occurred, in admitting testimony as to the collective bargaining agreements in question was immaterial to any issue determinative of this case, and the court's factual findings in Findings 19 and 27 were merely surplusage.

We also find no error in the court's refusal to find as a fact, as requested by plaintiff, that "[o]n December 14, 1970, plaintiff reasonably believed it was in imminent danger of suffering cancellation of its contract with McKee." Even had this been so, it furnished no legal justification for plaintiff terminating its contract with defendant.

The judgment appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES ELLIS LUTHER

No. 7420SC173

(Filed 6 March 1974)

1. **Homicide § 15— cause of death — absence of expert testimony**

The cause of death in a prosecution for homicide may be established without the introduction of expert medical testimony if the wound inflicted by defendant is of such nature that a person of ordinary intelligence would know that it caused death.

2. **Homicide §§ 15, 21— cause of death — sufficiency of evidence**

In a prosecution for first degree murder where the evidence tended to show that defendant intentionally struck deceased in the face with

an iron pipe, the blow was so forceful that deceased's eyes came out of their sockets, deceased fell to the ground, and by the time deceased's wife and a neighbor carried him into the house he was dead, such evidence was sufficient to withstand defendant's motion for nonsuit, even though none of the State's witnesses testified as to the cause of death, since it tended to show a causal relationship between the intentionally inflicted injury and the death.

Judge CARSON dissenting.

APPEAL from *Braswell, Judge,* 13 August 1973 Session of MOORE County Superior Court.

Defendant was charged in a valid bill of indictment with the first-degree murder of Baxter McKenzie. At trial the solicitor announced that the State would seek a verdict of second-degree murder or any lesser included offense.

The State presented evidence which tended to show that defendant entered the yard in front of McKenzie's house and began arguing with McKenzie, who was sitting on the front porch. McKenzie's wife heard defendant threaten to kill McKenzie if he came into the front yard. McKenzie, nevertheless, picked up a large rubber boot, went into the front yard and struck defendant with the boot. Defendant thereupon hit McKenzie in the face with an iron pipe he had picked up from the front porch. McKenzie's eyes came out of their sockets, he fell to the ground; and he had ceased breathing when Mrs. McKenzie and a neighbor carried him into the house. At the time of the altercation, McKenzie was recovering from the flu, he was weak, and he had heart trouble.

At the close of State's evidence, defendant's motion for nonsuit was denied.

Defendant's evidence consisted of the testimony of Dr. C. Harold Steffee who performed the autopsy on the body of McKenzie. He found a severe degree of hardening of the arteries. Although there was no evidence of a recent clot, the arteries were markedly thickened, and there was calcium in them. There was no evidence of a skull fracture or bleeding inside the brain. In his opinion, the cause of death was hardening of the arteries.

In the original death certificate, Dr. Steffee did not indicate a cause of death. On the first report he prepared for the Office of the Chief Medical Examiner, Dr. Steffee indicated that the probable cause of death was either blunt trauma to the head

or cerebral hemorrhage. In his second report, Dr. Steffee listed the probable cause of death as coronary artery disease, but in his final autopsy report he used the words "It is possible that the increased cardiac demand occasioned by an altercation might have precipitated death."

At the close of all the evidence, defendant renewed his motion for nonsuit, and it was again denied. From the entry and signing of judgment, defendant appealed.

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

Seawell, Pollock, Fullenwider, Van Camp and Robbins, P.A., by P. Wayne Robbins, for defendant appellant.

MORRIS, Judge.

Defendant contends that the denial of his motion for nonsuit was error inasmuch as the State failed to produce evidence showing beyond a suspicion or conjecture that decedent's death was proximately caused by acts of the defendant. With this contention we cannot agree.

The test for the sufficiency of the evidence to withstand motion for nonsuit is whether the evidence, when taken 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 that all elements of the offense have been committed. *State v. McNeill*, 280 N.C. 159, 185 S.E. 2d 156 (1971).

The defendant's assignment of error is based on his position that the causal connection between the assault and the death has not been established. Specifically, he contends that the testimony of the medical expert that "*It is possible* that the increased cardiac demand occasioned by altercation might have precipated death" does not sufficiently establish the causal relationship to warrant submission of the case to the jury.

Without deciding whether the medical testimony, standing alone, would be sufficient to establish causation, we hold that there was sufficient evidence of causal connection for the case to be submitted to the jury.

[1] A person is legally accountable if the direct cause of a person's death is the natural result of his criminal act. *State*

v. Knight, 247 N.C. 754, 102 S.E. 2d 259 (1958); *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844 (1952). The act of the accused need not be the immediate cause of death. *Id.* It is well established that the State can establish causation without the introduction of expert medical testimony if the wound inflicted by defendant is of such nature that a person of ordinary intelligence would know that it caused death. *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972); *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968); *State v. Cole,* 270 N.C. 382, 154 S.E. 2d 506 (1967). The cases cited above held specifically that in cases where deceased's wound is of an obviously mortal nature, a non-expert witness is competent to offer evidence as to the cause of death. Such is not the case before us.

[2] None of the State's witnesses testified as to the cause of death. However, the evidence tended to show that defendant intentionally struck deceased in the face with an iron pipe, and that the blow was with such force that it caused deceased's eyes to come out of their sockets. Deceased fell to the ground; and by the time his wife and a neighbor had carried him into the house, he was dead. This evidence standing alone is sufficient to withstand the motion for nonsuit, for it tends to show a causal relationship between the intentionally inflicted injury and the death. *State v. Thompson,* 3 N.C. App. 193, 164 S.E. 2d 402 (1968). While there was no opinion offered as to the cause of death, the rule of *Wilson, Howard,* and *Cole, supra,* is nevertheless applicable. Non-expert testimony—even without an opinion as to the cause of death—can establish a causal connection between an assault and death sufficient to take the State's case to the jury.

No error.

Chief Judge BROCK concurs.

Judge CARSON dissents.

Judge CARSON, dissenting:

I agree with the principles of law enunciated by the majority opinion in this matter, but I feel that they have incorrectly applied the law to the facts in question. As the majority opinion points out, it is well established in this jurisdiction that a layman may testify as to the cause of death when the

facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wounds were mortal in character. The majority further states that the wound in this matter was not of such character, but they nevertheless feel that the matter should be submitted to the jury, relying on the case of *State v. Thompson*, 3 N.C. App. 193, 164 S.E. 2d 402 (1968). In the Thompson case the deceased was a healthy man about 40 years of age, standing six feet tall and weighing approximately 180 pounds. He was shot in the chest at close range with a 32 caliber pistol by the defendant. He was immediately taken to the hospital and was pronounced dead on arrival five minutes after the shooting. In that case, of course, expert witnesses would not be needed to establish the cause of the death.

The evidence presented by the State in the instant matter is much less compelling than that of the Thompson case. Only two witnesses testified for the State. The first witness, Alma Mae McKenzie, lived with the deceased and was present when the fight took place preceding the death. She testified, "He looked, his eyes had fell, the pipe had hit him. His eyes had fell out of their place." I suspect that this was a colloquial expression, not to be taken literally. In any event the deputy sheriff who testified next made no mention of the eyes bulging or protruding. His testimony merely corroborated that of Alma Mae McKenzie relating to the affray and added no new facts concerning the death. He did witness the body shortly after the death and made pictures of the body which were introduced into evidence. A motion for nonsuit was made at the close of the State's evidence but was overruled.

The only witness for the defense was Dr. C. Harold Steffee, a physician specializing in pathology. He testified that he had been a physician for 24 years and was the medical examiner for Moore County. He testified that the injury on the head of the deceased was a triangular cut or laceration, about an inch in each limb of the triangle, and of the order of an eighth of an inch in depth. He prepared several reports concerning the death of Baxter McKenzie. When he first viewed the body, he formed a preliminary opinion that the death may have been caused by a cerebral hemorrhage or blunt trauma to the head. This opinion was based on a superficial examination. An autopsy was performed as was customarily done when the death was of a suspicious nature. The autopsy revealed no evidence of skull

fracture. Neither was there any evidence of bleeding inside of the brain. The deceased had some bleeding in the intestinal tract, the origin of which was not immediately apparent. A later miscroscopic study proved that he actually had beginning death of a part of his intestinal tract. The cause of the death was determined to be a severe degree of hardening of the arteries. The deceased had hardening of the arteries of one of the two main branches of the left artery and the entire right. They had calcium in them as well as being markedly thickened. The doctor stated that after conducting the autopsy, he formed an opinion that the cause of death was, in lay terms, hardening of the arteries of the heart. He further stated, "I found no relation between the blow to the head and the death of Baxter McKenzie." He explained that his preliminary diagnosis of blunt trauma or cerebral hemorrhage was based on his initial observations of the body and was made before the autopsy was performed. Following the autopsy he gave the opinion heretofore stated. He testified that an autopsy is customarily performed when foul play is suspected.

It should be further noted that the statement relied on by the majority, "It is possible that the increased cardiac demand occasioned by an altercation might have precipitated death," was not introduced as substantive evidence. The witness stated on cross examination that he had used those words in the final autopsy report. He did not testify on the witness stand that this was a fact; and the final autopsy report, which was in possession of the State, was not introduced into evidence. This statement was not admissible as substantive evidence, but it should have been restricted to a prior inconsistent statement if admissible for any purpose. It should also be noted that defense counsel subsequently made a motion for a mistrial because of the reading by the solicitor of this portion of the final autopsy. Defense counsel stated that the statement "It is possible that the increased cardiac demand occasioned by an altercation might have precipitated death," was followed by a comma and the restrictive clause, "But this is entirely conjecture." While we do not have the final autopsy report in the record, this illustrates the danger of considering the prior statement as substantive evidence. We are unable to determine if the charge to the jury restricted this statement to a prior inconsistent statement, as the judge's charge to the jury is not included in the record.

On rebuttal, the State introduced into evidence two preliminary reports of the medical examiner. They showed that the injury in question occurred at 9:29 a.m. and that death occurred at 10:10 a.m. The 41 minute time lapse between injury and death further compels medical testimony to establish the cause of death.

The defendant renewed his motion for nonsuit at the conclusion of all the evidence. A thorough discussion of the law pertaining to this factual situation, as well as the reasons for the law, can be found in the case of *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844 (1952). There Justice Ervin stated at pages 721 and 722:

> The State did not undertake to show any causal relation between the wound and the death by a medical expert. For this reason, the question arises whether the cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony. The law is realistic when it fashions rules of evidence for use in the search for truth. The cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character. (Citations omitted.) There is no proper foundation, however, for a finding by the jury as to the cause of death without expert medical testimony where the cause of death is obscure and an average layman could have no well grounded opinion as to the cause.

Justice Ervin further held at page 722:

> In passing from this phase of the appeal, we indulge the observation that good legal craftsmanship will undoubtedly prompt solicitors to offer expert medical testimony as to the cause of death in all prosecutions for unlawful homicide where such testimony is available.

If we concede that the rules of evidence must be realistic as far as establishing the cause of death is concerned, I feel that it is not reasonable to submit this matter to the jury when the undisputed medical evidence shows that the cause of death was hardening of the arteries and was not caused by the blow to the head of the deceased. Not only has the State failed entirely in its burden of proof, the defendant, carrying the bur-

den improperly cast upon him, has proved to the contrary. I further note in passing that the "good legal craftsmanship" and the "search for truth" referred to by Justice Ervin were certainly not present in the instant case where the State's examiner was present and available to testify, but was not called to do so by the State. Apparently, the autopsy and medical reports were also in possession of the State. In fact, this case clearly illustrates the necessity for medical testimony when the cause of death is not readily apparent.

CLEO N. BLACKBURN, MYRTLE N. SOLES, RUTH N. BRICE, CLOTEAL N. GORE, BLANCHE BERNICE N. DAVENPORT, MARJORIE N. EYRE, AND HARVEY FLOYD NORRIS v. EARL DUNCAN, ADMINISTRATOR OF THE ESTATE OF RAY TATE NORRIS, ILA PEARL NORRIS, JENNIFER NORRIS, A MINOR, BURDON NORRIS AND WIFE, ANNIE PEARL NORRIS

No. 7413SC22

(Filed 6 March 1974)

Fiduciaries; Fraud §§ 10, 12— conveyance of property to fiduciary — presumption of fraud

In an action to set aside a deed on ground of fraud, impose a constructive trust on certain lands, and recover rents, profits and other sums, the trial court erred in directing a verdict for defendants since the evidence tended to show that grantees of the deed looked after the grantor's affairs, including the operation of her farm which was the subject of the deed in question, for some four or five years prior to her death, and such evidence was sufficient to show a fiduciary relationship between grantor and the defendants.

APPEAL by plaintiffs from *Clark, Judge,* March 1973 Civil Session of Superior Court held in COLUMBUS County.

This is an action to set aside a deed on ground of fraud, impose a constructive trust on certain lands, and recover rents, profits and other sums.

Plaintiffs are six of the daughters and one of the sons of Mary F. Norris, deceased (Mrs. Norris). Defendant Burdon Norris (Burdon) is a son of said decedent. Defendant Duncan is the administrator of the estate of Ray Tate Norris (Tate), a deceased son of Mrs. Norris. Defendant Ila Pearl Norris is the widow, and defendant Jennifer Norris is the only surviving child of Tate. Two other daughters of Mrs. Norris are not parties to the action.

In their complaint, filed 26 October 1971, plaintiffs allege: At the time of her death on 23 May 1969, Mrs. Norris was seized and possessed of a valuable farm in Columbus County containing approximately 110 acres. In the spring and summer of 1966, Burdon and Tate assisted Mrs. Norris, their mother, in the management of her affairs and enjoyed a close association with her. In May of 1966, Burdon and Tate, through fraud and deceit, procured the signature of their mother to a paper-writing purporting to be a deed conveying said lands to them. Plaintiffs pray for the relief indicated above.

At the conclusion of plaintiffs' evidence, defendants' motion for directed verdict was allowed and from judgment entered thereon, plaintiffs appeal.

Williamson & Walton, by Edward Williamson, for plaintiff appellants.

McGougan and Wright, by D. F. McGougan, Jr., for defendant appellees.

BRITT, Judge.

We hold that the court erred in allowing defendants' motion for directed verdict.

Admissions and evidence presented at trial, viewed in the light most favorable to plaintiffs, tended to show:

In May of 1966, Mrs. Norris was living on her 110 acre farm near Tabor City in Columbus County. The farm was worth $60,000. At that time, she was approximately 78 years of age and was confined to a wheel chair due to a previously broken hip; a lady "caretaker" lived with and helped look after her. Mrs. Norris had three sons and eight daughters, most of whom lived in the Tabor City area. At that time, Burdon was 37 and resided in a house just across the road from his mother and saw her at least weekly. Tate also lived close by.

Beginning in 1965, Burdon and Tate took over the operation of Mrs. Norris' farm which had a tobacco allotment of approximately 3½ acres. Burdon consolidated her tobacco allotment with his and tended the tobacco while Tate tended the other crops. They continued this arrangement until her death. In 1965, Burdon paid Mrs. Norris either $1,600 or $1,800 cash rent and paid the annual installment due on a Federal Land

Bank debt, the installment being approximately $500. After 1965, Burdon did not pay any rent but paid the Land Bank installments and gave Mrs. Norris cash "whenever she asked for it." He paid some bills for her and went to the grocery and drug stores for her. Although Mrs. Norris was receiving Social Security benefits and her other children contributed to her upkeep, Burdon was "sort of looking after it" and if there was any "shortage" he would make it up. Certain members of the family testified that Burdon and Tate looked after Mrs. Norris' farming operations and business affairs for four or five years prior to her death. Called as an adverse witness, Burdon testified, among other things, "Whenever my mother needed anything or whenever she needed advice on any matters, I would say the majority of the time she called on me."

In May of 1966, Burdon and Tate went to Conway, South Carolina, where they conferred with a lawyer about preparing a deed from Mrs. Norris to them. The Conway attorney recommended that they employ a North Carolina attorney and they went to Southport, in Brunswick County, where they conferred with Attorney E. J. Prevatte. At their request, Attorney Prevatte prepared a deed from Mrs. Norris which would convey title to the 110 acre farm to Burdon and Tate, subject to Mrs. Norris' life estate. Attorney Prevatte also prepared a note from Burdon and Tate and their wives payable to the other nine children of Mrs. Norris for $5,000, payable within two years after Mrs. Norris' death; he also prepared a deed of trust to D. F. McGougan, Trustee, embracing said lands and securing said note. The prepared deed, note and deed of trust were mailed to Burdon and he and Tate took the deed to their mother for her to sign. They were accompanied by Tate's brother-in-law, Earl Duncan, and Shirley Hardin, a notary public who worked for Duncan. After the deed was signed, Burdon took possession of it. Burdon, Tate, their wives, Duncan and Shirley Hardin were the only ones that knew about Mrs. Norris signing the deed until after Mrs. Norris' death.

In June of 1967, by telephone, Mrs. Norris contacted Attorney R. C. Soles, Jr., her grandson, and advised him that she wanted some legal work done. Soles went to see her and she informed him that she wanted to make a deed for her farm to her eleven children. Soles explained to her the difference between a deed and a will and, at her request, prepared both, which were executed. Soles did not record the deed but placed

it and the will in his safe where the documents remained until after Mrs. Norris' death.

Burdon and Tate learned that Mrs. Norris had signed some papers that Soles had prepared. Thereupon, on 19 June 1967, they went to the Register of Deeds Office in Whiteville, told the register of deeds that they had some papers they wanted recorded but they wanted "it kept out of the newspapers." The register of deeds agreed to keep the information from the newspapers, whereupon the deed that Mrs. Norris had signed for Burdon and Tate in May of 1966, together with the deed of trust mentioned above, were filed for registration. Following registration, the deed and deed of trust were returned to Burdon who kept them until after his mother's death.

Mrs. Norris died on 23 May 1969. Following her funeral, Burdon informed other members of the family about the deed which he held. Tate died on 23 June 1969 and his administrator, his wife and daughter, were made parties to the action.

We think this case is quite similar to *McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615 (1943). The evidence in that case tended to show: In December 1938, the decedent, Mrs. Hall, was a widow and the owner of a 200 acre farm. She made her cousin, Johnnie L. McNeill, her "supervisor" or agent and invested him with authority to look after the renting and management of her farm. In January 1939, Mrs. Hall executed a paperwriting in the form of a deed purporting to convey to McNeill 75 acres of her land, subject to her life estate. In April 1939, she executed another writing in the form of a deed purporting to convey to McNeill and his wife 105 acres of her land, subject to her life estate and a specified lease. Also in April 1939, Mrs. Hall executed a purported will naming McNeill her executor and principal beneficiary. Mrs. Hall died in April 1942 at age 80. The Supreme Court held that the trial court erred in not instructing the jury with respect to the fiduciary relation existing between Mrs. Hall and McNeill and the presumption arising from that relationship. We quote from the opinion (p. 181):

> "The law is well settled that in certain known and definite 'fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which

annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted.' *Lee v. Pearce,* 68 N.C., 76. Among these, are, . . . (5) principal and agent, where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant. (Citations omitted.)

" 'When one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them where in the agent is benefited, and the burden of proof is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest.' *Smith v. Moore* (7th syllabus), 149 N.C., 185, 62 S.E., 892.

* * *

"Wigmore puts it this way: 'Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted, or advised the terms of the instruments, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied.' Evidence (3rd Ed.), sec. 2503, and cases cited in note.

"The doctrine rests on the idea, not that there *is* fraud, but that there *may be* fraud, and gives an artificial effect to the relation beyond its natural tendency to produce belief. *Peedin v. Oliver,* 222 N.C., 665; *Harris v. Hilliard,* 221 N.C., 329, 20 S.E. (2d), 278."

It is true that in *McNeill* there was a power of attorney from Mrs. Hall to McNeill, but it was executed in November 1941 whereas the purported deeds and will were executed in January and April of 1939. We think the evidence in the case at bar was sufficient to show a fiduciary relationship, that of principal and agent, between Mrs. Norris and Burdon and Tate. One of the definitions for agent is found in Black's Law Dictionary, Deluxe Fourth Edition, page 85, as follows: "A person authorized by another to act for him, one intrusted with another's business. *Downs v. Delco-Light Co.,* 175 La. 242, 143 So. 227." There was evidence tending to show that Burdon and Tate,

for some four or five years prior to her death, were looking after Mrs. Norris' affairs, including the operation of her farm.

Defendants argue that this case is controlled by *Willetts v. Willetts,* 254 N.C. 136, 118 S.E. 2d 548 (1961). We think the cases are clearly distinguishable. Among other things in *Willetts* there was no contention that the execution of the deed was *obtained* by fraud or deceit; the gist of the action was that defendant son refused to reconvey the land to his father after the reason for the transfer of title had been removed. Furthermore, there was considerably less evidence of agency and a fiduciary relationship in *Willetts* than was presented in the instant case.

For the reasons stated, the judgment appealed from is

Reversed.

Judges PARKER and VAUGHN concur.

WILBUR B. GOFF, JR., AND ELIZABETH M. GOFF v. FRANK A WARD REALTY AND INSURANCE COMPANY, INC., FRANK A. WARD, DAN WEAVER, CHARLES J. POCHE, AND JAMES T. HEDRICK, TRUSTEE

No. 7414SC56

(Filed 6 March 1974)

Fraud § 12— conveyance of property — septic tank problems — insufficient evidence of fraud

In an action to recover actual and punitive damages based upon alleged fraud on the part of defendants in the sale of a house and lot to plaintiffs, the trial court properly entered directed verdict for defendants where the evidence tended to show that the parties were dealing at arms length in the negotiation of the sale and purchase of the property, plaintiffs had full opportunity to view the topography of the lot in question and to see that it was lower than the lots adjoining on the north and west, plaintiffs had full opportunity to inquire of other residents of the area as to any septic tank problems in the area but they neglected to do so, and defendants resorted to no artifice which was calculated to induce plaintiffs to forego investigation.

APPEAL by plaintiffs from *Lanier, Judge,* 11 June 1973 Session of Superior Court held in DURHAM County.

In this action, plaintiffs seek to recover actual and punitive damages and other relief based upon alleged fraud on the part of defendants in the sale of a house and lot to plaintiffs. Pertinent allegations of the amended complaint, filed 13 May 1970, are summarized as follows:

On or about 6 June 1969, plaintiffs contracted to purchase from defendants Poche a house and lot on Pinafore Drive in the Westglen Subdivision in Durham County. At the time of negotiating and executing the contract, and at other times pertinent to this action, the corporate defendant, through its agents, defendants Ward and Weaver, was acting as sales agent for defendants Poche. The purchase price of the property was $37,500, $4,000 of which was financed by a note and second deed of trust to defendant Hedrick as trustee for defendants Poche. After closing the transaction and moving into the house, plaintiffs discovered that the property "had a long history of sewer and septic tank problems"; that in wet weather raw sewage from neighboring houses behind plaintiffs' property flows across plaintiffs' backyard and the resulting odor and slime rendered the backyard useless and constituted a serious health problem; that raw sewage sometimes bubbled up from plaintiffs' septic tank into their yard; and raw sewage from other houses flowed into a ditch in front of plaintiffs' house. Plaintiffs were advised and believed that all defendants, except defendant Hedrick, prior to and at the time of the sale, had knowledge of the existence of the septic tank and sewer problems relating to the subject property; that the misrepresentation and "fraudulent concealment" of said problems by defendants (except Hedrick) "were deliberately intended to deceive" plaintiffs and induced them to purchase the property. Plaintiffs prayed for actual and punitive damages, that foreclosure of the deed of trust be enjoined, and that the deed of trust and obligation secured thereby be discharged.

At the conclusion of plaintiffs' evidence, defendants' motion for directed verdict was allowed. From judgment entered thereon in favor of defendants, plaintiffs appeal, assigning as error the exclusion of certain evidence and the entry of judgment.

John C. Randall and Eugene C. Brooks III for plaintiff appellants.

R. Roy Mitchell, Jr., Richard M. Hutson II, and J. Michael Correll for defendant appellees.

BRITT, Judge.

Plaintiffs assign as error the allowance of defendants' motions for directed verdict. We hold that the trial court did not err in allowing the motion.

Evidence introduced by plaintiffs tended to show:

On or about 12 June 1968, defendants Poche purchased Lot No. 18 of Block C Extension of Westglen Subdivision, Section 3, in Durham County, and moved into the recently constructed house thereon. Said lot is located on the western side of Pinafore Drive and west of the lot are adjoining lots which front Cromwell Drive to their west. A Strauss family occupied the house on the lot immediately north of Lot 18 and a Person family occupied the house on a lot north of the Strauss residence. The lot south of No. 18 was vacant and the James Smith family occupied the house on the lot south of the vacant lot. At least two or three residences were located on the lots west of Lot 18, those residences facing Cromwell Road.

All of the residences in the area used individual septic tanks for disposal of waste. Lot No. 18 was topographically lower than the lots located on its north and west, and was lower on the back than on the front. The vacant lot on the south was slightly lower than No. 18. On the west side of Pinafore Drive, on the street right-of-way, was a ditch which ran in front of the Person, Strauss, Poche, vacant and Smith lots and crossed the road through a culvert near the Smith lot.

In late May of 1969, Mr. Poche's employer transferred him to New Orleans. He proceeded to list his home for sale with the corporate defendant after which he and Mrs. Poche went to New Orleans to locate a residence there. They returned to Durham the latter part of the first week in June. About that time, plaintiffs Goff were looking for a home in the Durham area and first saw the Poche property on or about 4 June 1969. The next morning, Mr. Goff was contacted by Mr. Wiley, an employee of Allenton Realty Company of Durham. On the same day, plaintiffs and Mr. Wiley visited the Poche property. On the next day, Mr. Goff requested Mr. Hessee, a partner of Comfort Engineers (Mr. Goff's employer) and a "lay engineer experienced in construction" to go with him and Mr. Wiley to inspect the Poche property. After looking under the house and in the yard, Mr. Hessee inquired of Mr. Wiley with respect to

any septic tank problems; Mr. Wiley replied that he knew of none but would check into it. Later that day, plaintiffs executed a purchase and sale agreement which defendants Poche had theretofore executed, and the transaction was closed on or about 15 July 1969. This constituted the fourth house plaintiffs had owned and they were familiar with homes requiring septic tanks.

Around 15 June 1969, Mr. Goff inquired of his realtor, Mr. Wiley, if he had learned of any septic tank or drainage problems on the Poche property. Mr. Wiley reported that he had talked with defendant Weaver and there were no such problems. Plaintiffs moved into their new home around 25 July 1969 and some time during September following, they noticed a foul odor coming from the ditch in front of the house. Around the last week in August of 1969, plaintiffs began having trouble with their septic tank.

Mr. Poche was called as a witness by plaintiffs. He testified that after moving into the house, he had a problem with surface water coming onto the back of his lot from adjoining lots. His testimony and that of witness Hallyburton tended to show that the problem was relieved by the cutting of a small ditch or drain across the back of the lot and on into a ditch that was cut on the vacant lot.

On recall, Mr. Goff testified that he first observed "drainage of septic material" coming down from the back of his lot in August and September of 1969; at that time he also noticed a substantial flow of surface water coming down from the higher lots.

James Smith testified that he was aware that sewage effluent ran down from the higher lots onto the Poche lot but he did not observe "sewage flowing from any of the houses in the back during the time the Poches lived in the house." Testimony of Mrs. Smith and others tended to show that septic tank effluent coming from the Strauss and Person houses ran down the road ditch while the Poches lived in the house.

Plaintiffs contend this case is controlled by *Brooks v. Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454 (1960). Defendants contend it is controlled by *Childress v. Nordman*, 238 N.C. 708, 78 S.E. 2d 757 (1953) and *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957). We agree with defendants' contention.

Childress involved the sale and purchase of a residence which defendants allegedly represented to be free of termites. The sales contract was executed on 10 September, the deed was executed on the following 15 October and termite damage was discovered by plaintiffs the last week in October. In reversing a judgment for plaintiffs, the court, in an opinion by Justice Ervin, said (pp. 712-713): "When all is said, the testimony of Childress and Ivey merely shows the presence of termites in the dwelling during the last week of October, 1951. This being true, the case falls within the purview of the general rule that mere proof of the existence of a condition or state of facts at a given time does not raise an inference or presumption that the same condition or state of facts existed on a former occasion. (Citations.) This general rule is based on the sound concept that inferences or presumptions of fact do not ordinarily run backward. (Citations.)"

Calloway involved the sale and purchase of a residence and the evidence showed that prior to the sale the seller repeatedly represented that there was "plenty of water." The purchaser relied on the representation, purchased the property, and finding the water supply inadequate, brought action against the seller. The Supreme Court affirmed a judgment of nonsuit; we quote from the opinion by Justice (later Chief Justice) Parker (pp. 134-135):

> " * * * When the parties deal at arms length and the purchaser has full opportunity to make inquiry but neglects to do so and the seller resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation action in deceit will not lie. *Cash Register Co. v. Townsend,* 137 N.C. 652; *May v. Loomis,* 140 N.C. 350; *Frey v. Lumber Co.,* 144 N.C. 759; *Tarault v. Seip,* 158 N.C. 369, 23 A.J., 981.
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> * * *
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> "The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest."

In the negotiation of the sale and purchase of the subject property, the parties were dealing at arms length. Plaintiffs

had full opportunity to view the topography of the lot in question and to see that it was lower than the lots adjoining on the north and west. Plaintiffs had full opportunity to inquire of other residents of the area as to any septic tank problems in the area but they neglected to do so. Defendants resorted to no artifice which was calculated to induce plaintiffs to forego investigation. Hence, plaintiffs' action in deceit will not lie. *Calloway v. Wyatt, supra.*

We think *Brooks v. Construction Co., supra,* is clearly distinguishable from the instant case in many respects including the fact that the latent defect in *Brooks* was not only known to, but created by, the seller.

We have considered the other assignments of error brought forward and argued in plaintiffs' brief but find them without merit or, in view of our holding above, moot.

The judgment appealed from is

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. AARON HARPER

No. 7416SC197

(Filed 6 March 1974)

1. **Constitutional Law § 32— appointment of advisory counsel**

Defendant was not prejudiced by the court's appointment of counsel for the limited purpose of furnishing advice to him if so requested after defendant had voluntarily and in writing waived his right to counsel.

2. **Criminal Law §§ 99, 170— comments by trial judge — absence of prejudice**

Comments by the trial judge, while disapproved, were not sufficiently prejudicial to warrant a new trial.

APPEAL by defendant from *Bailey, Judge,* 1 October 1973 Session of Superior Court held in ROBESON County.

Defendant was convicted in the district court upon warrants charging operation of a motor vehicle on the public

highways without a driver's license, failure to stop for siren, operating a motor vehicle while under the influence of intoxicating liquor, operating a motor vehicle in excess of 100 miles per hour in a 35 mile per hour zone, and reckless driving. He appealed to the superior court for trial de novo. Defendant was also indicted in a two-count bill of indictment, proper in form, for felonious breaking and entering and felonious larceny of an automobile. All charges were consolidated for trial in the superior court. Defendant entered a plea of not guilty and requested a jury trial.

After being fully advised of the accusations against him and of his right to counsel, defendant executed written waivers of counsel in both the district and superior courts and elected to defend himself.

The State's evidence tended to show that Rawls Chevrolet Company in the town of Fairmont was broken into the night of 19 July 1973 and a 1968 Chevrolet automobile was stolen. Police officer William Johnson, who was on night patrol, arrived at the scene just as the Chevrolet car was being driven from the premises and gave chase. While the officer was following, the Chevrolet reached a speed of 100 miles per hour in a 35 mile per hour zone on Main Street in Fairmont. The blue light and siren of the police car were on, but the driver of the Chevrolet did not stop until he ran into a ditch and hit a stop sign. Officer Johnson testified that he pulled up on the driver's side of the Chevrolet within about two feet and saw the defendant whom he had known all his life come from beneath the steering wheel and run into an adjacent cemetery. He followed defendant but was unable to apprehend him. Officer Tom Jones arrived and continued the search and within about five minutes found defendant hiding behind a tombstone and took him into custody. Defendant was staggering, rowdy, smelled of liquor, and in the opinion of the officers was under the influence of some alcoholic beverage. He did not have a driver's license with him and a subsequent check with the Motor Vehicle Department disclosed that he had none.

The evidence for defendant consisted principally of State's witnesses recalled for questioning concerning the arrest and one witness who testified that he heard Officer Johnson testify at the preliminary hearing that defendant was picked up at a church about one-half mile from the cemetery in question.

The State took a nol pros as to the charge of reckless driving. Defendant was convicted by the jury upon all the other charges except felonious breaking and entering which was reduced to non-felonious breaking and entering. From judgments imposed upon the verdicts, he has appealed.

Attorney General Morgan, by Assistant Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for the State.

Johnson, Hedgpeth, Biggs & Campbell, by W. Allen Webster, for defendant appellant.

BALEY, Judge.

The errors assigned by defendant fall into two categories: (1) appointment by the court of advisory counsel after the defendant had voluntarily and in writing waived his right to counsel; and (2) comments and conduct of the court during the trial which defendant suggests were prejudicial.

[1] The trial judge in the superior court was particularly solicitous of the right of defendant to counsel. After advising defendant fully concerning the penalties involved in the offenses for which he was being tried and the value of an attorney to represent him, the following colloquy occurred between the judge and defendant:

THE COURT: Now, under all of those circumstances, do you still wish to represent yourself?

DEFENDANT HARPER: Yes, sir.

THE COURT: You understand that the State will employ a lawyer for you if you want one?

DEFENDANT HARPER: Yes, sir.

THE COURT: Do you want one?

DEFENDANT HARPER: No, sir.

THE COURT: Do you want one to sit with you simply to advise you?

DEFENDANT HARPER: Okay, to advise me.

THE COURT: All right, I will do that. Who have we got that is a good adviser?

MR. BRITT: Mr. Durham over there represents the State in other courts. I see Mr. Webster sitting over there, with the blue coat on.

THE COURT: Mr. Webster, would you be willing to assume the rather unusual task of simply advising this gentleman when he seeks advice?

MR. WEBSTER: Yes, when he seeks advice, your Honor.

THE COURT: When he asks you something, you may tell him.

MR. WEBSTER: Yes, sir.

THE COURT: Otherwise, you have no responsibility in the case, but I will appoint you in the matter in an advisory capacity, only.

MR. WEBSTER: Yes, sir.

THE COURT: All right. Mr. McCall, will you write out such an appointment, that Mr. Webster is appointed to act as adviser.

THE CLERK: Yes, sir, your Honor.

THE COURT: You may not know it, but that is just about the most difficult role that a lawyer may have.

MR. WEBSTER: I realize that.

THE COURT: Now, Mr. Harper, any stage of this trial that you want to ask Mr. Webster a question about procedure or the law, you may ask him. He will not volunteer anything. He will not interfere with the trial of this case, except to the extent that you request him to. Is this arrangement satisfactory with you in every respect?

(no audible reply from the defendant.)

There is no merit in the contention of the defendant that he was prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested. A defendant may waive his right to appear by counsel and appear *in propria persona*. *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164; *State v. Morgan*, 272 N.C. 97, 157 S.E. 2d 606; *State v. McNeil*, 263 N.C. 260, 267-68, 139 S.E. 2d 667, 672. In this case defendant did waive counsel and conducted

his own defense. He cross-examined witnesses, objected to admissibility of evidence, and otherwise participated in the trial. Out of an abundance of caution in the protection of defendant's right, the trial court with defendant's consent made an attorney available during the trial in the event defendant decided that he needed an attorney. The court did not require defendant to use the stand-by counsel. There is no showing by defendant that he sought or received any advice from the attorney who was appointed or that such attorney interfered with him in the conduct of his trial. After conviction by a jury he cannot now be heard to complain about either the lack of an attorney which he had waived or the availability of an attorney whose services he did not choose to use.

[2] The comments of the trial judge to which defendant takes exception, while undoubtedly made in a spirit of levity and jest, were inappropriate and did not lend dignity to the court proceedings; however, we do not feel they were sufficiently prejudicial to warrant a new trial. Since the judge occupies such an exalted position in the trial, it is imperative not only that he be fair and impartial in his comments and actions, but that the appearance of such fairness and impartiality be scrupulously maintained. The evidence of the guilt of defendant was overwhelming, and the remarks of the court in this case, while not approved, could not have materially affected the ultimate verdict and were harmless error beyond a reasonable doubt. *Cf. Chapman v. California,* 386 U.S. 18 (1967); *State v. Braswell,* 283 N.C. 332, 196 S.E. 2d 185; *State v. Bryant,* 283 N.C. 227, 195 S.E. 2d 509.

The evidence was sufficient for submission to the jury on the charge of felonious larceny, and the objection to the failure of the court to instruct the jury with respect to an unlawful taking of a vehicle as defined in G.S. 20-105 is overruled.

We find no prejudicial error in defendant's trial.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. BETTY JO CLARK AND WALTER CLARK

No. 7310SC824

(Filed 6 March 1974)

1. **Assault and Battery § 14— assault on police officer — sufficiency of evidence**

In a prosecution for assault on a police officer, evidence was sufficient to be submitted to the jury where it tended to show that an officer asked the female defendant to produce her driver's license, she failed to do so but ran from the officer, he pursued her, caught her and told her she was under arrest whereupon the male defendant stepped between the officer and the female defendant, and a fracas ensued during which defendants pulled the officer, slapped him, kicked him and choked him.

2. **Criminal Law § 169— harmless admission of evidence**

Admission of testimony by the victim in a prosecution for assault on a police officer that defendant had threatened to shoot him on a previous occasion when he served a warrant on defendant's son, if erroneous, did not prejudice defendant.

APPEAL by defendants from *Godwin, Special Judge,* 21 May 1973 Session, Superior Court, WAKE County. Argued in the Court of Appeals on 23 January 1974.

Defendants were convicted of assault on a police officer. Walter Clark was originally also charged with resisting arrest, but the State elected to take a nolle prosequi. The same was true with respect to the charge of failure to produce a valid operator's license against Betty Jo Clark. Betty Jo Clark was given a six-month sentence suspended for three years. Walter Clark was given a two-year sentence suspended for five years. Each defendant appealed from the judgment entered. Facts necessary to decision are set out in the opinion.

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

Jacob W. Todd and Ellis Nassif for defendant appellants.

MORRIS, Judge.

[1] Defendants first assign as error the court's failure to grant their motions for nonsuit. Decision as to this question rests, of course, upon a determination of whether the evidence, when considered in the light most favorable to the State, is sufficient to support a finding that the offense charged was committed and

that the defendants committed it. Upon a motion for judgment of nonsuit, "all admitted evidence favorable to the State, whether competent or incompetent, must be considered and must be deemed to be true." *State v. Roseman,* 279 N.C. 573, 580, 184 S.E. 2d 289 (1971). (Citations omitted.)

Examination of the evidence for the State leaves no doubt as to its sufficiency. The State's evidence tended to show: Officer L. T. Liggins, Raleigh Police Department, was on duty in uniform on 6 August 1972. About 9:25 p.m. in the 700 block of Method Road, he saw an automobile being operated by defendant Betty Jo Clark. At the time, he was headed south on Method Road. He saw a 1966 Mustang pull from the curb, drive approximately 40 yards, and stop at an angle to the curb. Officer Liggins pulled to the curb, parked, and turned out the lights on his vehicle. The 1966 Mustang was then backed up onto the curb by its operator. Officer Liggins then pulled up behind the Mustang, turned on his blue light, got out of his vehicle and went to the driver's side of the Mustang. Defendant Betty Jo Clark was the operator of the Mustang. Officer Liggins asked for her driver's license. Her reply was, "What in the hell for?" Officer Liggins informed her that she had been operating her automobile in an abnormal manner and that he had a right to see her driver's license. She started to get out the car as defendant Walter Clark walked from the front door of his residence onto his front porch. As she was getting out, defendant Walter Clark said, "What in the hell is going on here?" Whereupon defendant Betty Jo "took off running toward him." Officer Liggins gave chase and caught her as she reached the front porch. He grabbed her arm and told her she was under arrest for refusing to produce her driver's license. At that point, defendant Walter Clark stepped between the two of them and pulled Officer Liggins, causing him to release defendant Betty Jo Clark. Officer Liggins advised defendant Walter Clark that he was under arrest for assaulting a police officer. Officer Liggins then grabbed Walter Clark from behind with his arm around Clark's neck. Betty Jo started slapping Officer Liggins. They scuffled for some three or four minutes and Walter Clark's wife came out and got in the fracas. During this time, Officer Liggins was kicked, slapped, and choked by defendant Clark. After several minutes during which time the officer tried to get to his police car to call for help, all three of the Clarks freed him and went in the house. Defendant Clark came back out of the house with something in his hand which the officer

could not positively identify. He testified: "It was long, resembling a rifle. It could have been a broom, could have been a handle. I think the light in the front room was out and I could not tell exactly what it was. On a previous occasion Mr. Clark has threatened to shoot me." The occasion was at a time when the officer was serving a warrant on Clark's son. The Clarks closed the front door and locked it. Officer Liggins returned to his patrol car and called for help. When help arrived, they were admitted into the house by Mrs. Clark. The defendants were not in the house. The officers found the defendants approximately 200 yards behind the house "squatting in some bushes." The two were taken back to the police cars where a crowd had gathered. Defendant, Betty Jo, when they got to the street, began shouting and threatening to kick Officer Liggins in the groin. Each of the Clarks was put in a separate police car and all three were taken to the Wake County jail where warrants were signed and served upon them. Sufficiency of the warrants is not before us.

G.S. 20-29 requires that a holder of a driver's license is required to exhibit his license upon request of an officer in uniform, when he is operating or in charge of a motor vehicle. Refusal to do so constitutes a misdemeanor. *State v. Danzinger,* 245 N.C. 406, 95 S.E. 2d 862 (1957). See also G.S. 20-49(4). Officer Liggins was attempting to perform his duty and had every right to pursue defendant Betty Jo Clark and place her under arrest. The evidence for the State clearly shows that defendants pulled him, slapped him, kicked him and choked him.

Without doubt, the evidence comes within the definition of assault given by Justice Branch in *State v. Roberts,* 270 N.C. 655, 658, 155 S.E. 2d 303 (1967):

> "This Court generally defines the common law offense of assault as 'an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.' 1 Strong's N. C. Index, Assault and Battery, § 4, p. 182; *State v. Davis,* 23 N.C. 125; *State v. Daniel,* 136 N.C. 571, 48 S.E. 544; *State v. Gay,* 224 N.C. 141, 29 S.E. 2d 458; *State v. McIver,* 231 N.C. 313, 56 S.E. 2d 604."

Defendants' first assignment of error is overruled.

[2] Defendants' second assignment of error is directed to the court's allowing into evidence the testimony of Officer Liggins that defendant Walter Clark had threatened to shoot him on a previous occasion of his serving a warrant on Clark's son. This assignment of error is without merit. If the court's ruling constituted error, and this we do not concede, we fail to see how defendants were prejudiced. There was ample evidence presented to support the State's contentions. As was said in *State v. Temple,* 269 N.C. 57, 66, 152 S.E. 2d 206 (1967) :

> "It is thoroughly established in our decisions that the admission of evidence which is not prejudicial to a defendant does not entitle him to a new trial. To warrant a new trial it should be made to appear by defendant that the admission of the evidence complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued if the evidence had been excluded." (Citations omitted.)

This defendants have not shown.

Defendants' remaining assignments of error are directed to the charge of the court. We have carefully reviewed these assignments of error and find that the charge, when construed contextually, is free from prejudicial error.

It seems clear to us from a reading of the evidence and the charge of the trial judge that defendants were granted a full and fair trial.

No error.

Chief Judge BROCK and Judge CARSON concur.

ROBERT J. REICHLER AND ERIC SCHOPLER v. ALBERT T. TILLMAN AND WIFE, ELIZABETH R. TILLMAN

No. 7415SC87

(Filed 6 March 1974)

1. **Frauds, Statute of § 7; Vendor and Purchaser § 1— contract to convey entirety property — absence of wife's signature — agency of husband for wife**

In an action seeking specific performance of a contract for sale of land owned by defendants as tenants by the entirety, the trial

court erred in entering judgment on the pleadings in favor of the femme defendant where plaintiffs alleged they entered into a binding contract with both defendants, notwithstanding a written "memorandum of said contract" which was incorporated by reference into the complaint made no reference to the femme defendant and was not signed by her, since plaintiffs may offer evidence to show that the male defendant was authorized by the femme defendant to act as her agent to contract to sell lands belonging to both as tenants by the entirety. G.S. 22-2.

2. **Malicious Prosecution § 1— nature of the claim**

To recover for malicious prosecution the claimant must establish that the person against whom the claim is asserted (1) instituted or procured the institution of the proceeding against him, (2) without probable cause, (3) with malice, and that (4) the proceeding terminated in claimant's favor.

3. **Malicious Prosecution § 6— counterclaim for malicious prosecution**

Since a claim for malicious prosecution does not arise until the termination of the prosecution upon which it is based, a counterclaim cannot be maintained to recover damages for the malicious prosecution of the action in which the counterclaim is asserted, this rule not having been changed by G.S. 1A-1, Rule 18.

APPEAL by plaintiffs from *Hall, Judge,* 17 September 1973 Session of Superior Court held in ORANGE County.

Plaintiffs sued defendants, man and wife, seeking specific performance of a contract for the sale of land owned by defendants as tenants by the entirety or, in the alternative, damages for breach of the contract. Plaintiffs alleged that for valuable consideration they "entered into a binding contract with defendants" for the purchase of the land, and attached to their complaint a "memodandum of said contract," which they asked to be incorporated by reference as if fully set forth therein. This document refers to "property belonging to Ted Tillman," the male defendant, and refers to "the seller" in the singular. It was signed by plaintiffs and by the male defendant but was not signed by the feme defendant, and she is in no way referred to therein.

Defendants filed separate answers in which they denied material allegations in the complaint. In her answer the feme defendant also pled the statute of frauds as an affirmative defense and counterclaimed for actual and punitive damages on allegations that plaintiffs had brought this suit and had filed notice of lis pendens in connection therewith willfully and maliciously and knowing that the feme defendant was never a party to any transaction with either of the plaintiffs and knowing that

the purported contract, incorporated by reference as a part of their complaint, makes no reference to the feme defendant or to any property owned as an estate by the entirety.

The feme defendant filed motion for summary judgment dismissing plaintiffs' action as to her and dismissing the lis pendens, stating as grounds for her motion that "the purported contract upon which the plaintiffs rely is not executed nor does it purport to be executed by the movant," and "no evidence exist (sic) or has been brought forward showing agency or ratification."

Plaintiffs filed a reply to the feme defendant's counterclaim and also filed a motion for summary judgment in their favor on the counterclaim.

The two motions for summary judgment were heard at the same time. The feme defendant's motion was allowed and plaintiffs' motion was denied, and plaintiffs appealed.

Winston, Coleman & Bernholz by Steven A. Bernholz for plaintiff appellants.

James A. Farlow for defendant appellees.

PARKER, Judge.

Both motions were purportedly made under Rule 56 relating to summary judgments. The record on appeal, however, contains no affidavits, answers to interrogatories, or anything else other than the pleadings upon which to base decision. Therefore, the motions will be considered as though made under Rule 12(c) for judgment on the pleadings.

[1] We first consider the trial court's ruling allowing the motion of the feme defendant. We find this ruling in error. Plaintiffs alleged that they "entered into a binding contract with defendants" for the purchase of the land. Both defendants denied this allegation, thereby raising the basic issue for decision in this case. It is true that the written "memorandum of said contract" which was incorporated by reference into the complaint made no reference to the feme defendant and was not signed by her. This, however, would not preclude plaintiffs from attempting to prove that the feme defendant was in fact a party to the contract. Our Statute of Frauds, G.S. 22-2, expressly provides that the writing may be signed either "by the party

to be charged therewith, or by some other person by him thereto lawfully authorized." Dealing with this statute, Denny, J. (later C. J.), speaking for our Supreme Court in *Lewis v. Allred,* 249 N.C. 486, 489, 106 S.E. 2d 689, 692, said:

> "The owner of real estate may sell such property through an agent, and when so acting the owner is not required to sign the agreement or to communicate with the purchaser. Moreover, the authority of a duly authorized agent to contract to convey lands need not be in writing under the statute of frauds. *Wellman v. Horn,* 157 N.C. 170, 72 S.E. 1010; 8 Am. Jur., Brokers, section 62, page 1019. The agent may sign the contract to sell and convey in his own name or in the name of his principal or principals. *Hargrove v. Adcock,* 111 N.C. 166, 16 S.E. 16; *Neaves v. Mining Co.,* 90 N.C. 412, 47 Am. Rep. 529; *Washburn v. Washburn,* 39 N.C. 306; *Oliver v. Dix,* 21 N.C. 158. Furthermore, the authority of an agent to sell the lands of another may be shown *aliunde* or by parol. *Hargrove v. Adcock, supra.*"

Thus, under the pleadings in this case, in which plaintiffs alleged and defendants denied that plaintiffs entered into a binding contract with both defendants, plaintiffs are free to offer such evidence as they may have to show that the husband-defendant was authorized by his wife to act as her agent to contract to sell the lands belonging to both as tenants by the entirety. There was no necessity that plaintiffs allege that the contract was executed by the feme defendant through an agent. 3 Am. Jur. 2d, Agency, § 343, p. 699; Annotation, 89 A.L.R. 895.

[2, 3] We next consider the trial court's ruling denying plaintiffs' motion for judgment in their favor on the feme defendant's counterclaim. This ruling we also find to be error. To recover for malicious prosecution the claimant must establish that the person against whom the claim is asserted (1) instituted or procured the institution of the proceeding against him, (2) without probable cause, (3) with malice, and that (4) the proceeding terminated in claimant's favor. *Mooney v. Mull,* 216 N.C. 410, 5 S.E. 2d 122; Byrd, *Malicious Prosecution in North Carolina,* 47 N.C. L. Rev. 285. Since the claim does not arise until the termination of the prosecution upon which it is based, a counterclaim cannot be maintained to recover damages for the malicious prosecution of the action in which the counterclaim is asserted. *Finance Corp. v. Lane,* 221 N.C. 189, 19 S.E.

2d 849. In our opinion no change in this regard has been effected by Rule 18 of the Rules of Civil Procedure, which is cited and relied on by appellees. That Rule applies to joinder of claims and remedies and not to counterclaims, which are controlled by Rule 13. The holding of *Finance Corp. v. Lane, supra,* seems still sound not merely on technical grounds but as a means of keeping lawsuits within manageable proportions.

The order appealed from is reversed and this cause is remanded to the Superior Court in Orange County for further proceedings not inconsistent herewith.

Reversed and remanded.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD HINTON

No. 7410SC65

(Filed 6 March 1974)

Constitutional Law § 34; Criminal Law § 26— double jeopardy — robbery conviction set aside — wrong victim named — trial for robbery of correct victim

Where defendant's conviction for attempted armed robbery of a named employee of an insurance agency was set aside because the evidence showed that defendant made a demand for money only upon another employee of the insurance agency and that the person named in the indictment stepped into a robbery already in progress and was shot by defendant when she sprayed gas in defendant's face, defendant was not subjected to double jeopardy when he was placed on trial for the attempted armed robbery of the insurance agency employee from whom he had demanded money.

APPEAL by defendant from *Braswell, Judge,* 23 July 1973 Session of Superior Court held in WAKE County. Argued in the Court of Appeals 19 February 1974.

Defendant was charged in a bill of indictment with attempted armed robbery of Honore Parker Holmes.

The State's evidence consisted of the testimony of Honore Parker Holmes and her co-worker, Elizabeth Putman Blake. Mrs. Holmes testified: "I was employed at Auto Insurance Service on East Martin Street. I saw the defendant at my place of

employment on July 29, 1969. In the morning, the defendant came in and said he wanted to make a payment for Carl Jones, on Lee Street. I looked in the file and advised him that we didn't have a person that we insured named Carl Jones, but I had a Carl Johns. The defendant said he would come back, and (he) left. After lunch Elizabeth Putman Blake and I had just come back in the office. The defendant came back in the office. I was at my desk and he said he wanted to make a payment for Carl Johns and I turned to get the file for Carl Johns, and I had pulled the file out and was turning back around and the the defendant had pulled a gun out and he said I want your money and get in the back, get in the back. Mrs. Blake had come in at that time and saw him with the gun, too. I said if we get in the back I can't give you any money. I said why don't you just take my pocketbook right down there, it was by the file. I just said take my pocketbook and go and get what you want out of it. Mrs. Blake moved over towards her desk and opened the drawer and had gotten out a little can of tear spray and had sprayed that on him." Mrs. Holmes further testified that, when Mrs. Blake sprayed the tear gas on defendant, he shot Mrs. Blake and ran out of the office.

Mrs. Blake's testimony corroborated the testimony of Mrs. Holmes concerning defendant's first visit to the office. Concerning defendant's second visit, Mrs. Blake testified: "When he came in the office I was coming from the back room . . . I heard a mumbling going on. I don't remember what he was saying because I didn't understand it all. As I came back into the room Mrs. Holmes was getting the file and he had the gun and from then I can't recall the exact movements that I made. I remember coming in, seeing the gun and leaning over my desk." Mrs. Blake suffered serious permanent injury from being shot in the head.

The jury found defendant guilty of attempted armed robbery of Mrs. Holmes. Defendant appealed.

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

Ernest H. Ball for the defendant.

BROCK, Chief Judge.

Before entering upon the trial of this case, defendant filed a written plea in bar to the prosecution on the grounds of

former jeopardy. The ruling of the trial court denying defendant's plea of former jeopardy is the sole question raised on this appeal.

Defendant was tried at the 18 October 1971 Session of Superior Court held in Wake County upon two indictments: (1) felonious assault upon Elizabeth Putman Blake, and (2) attempted armed robbery of Elizabeth Putman Blake. He was convicted of both charges and appealed. This Court found no error in the trial and conviction of the felonious assault charge. *State v. Hinton,* 14 N.C. App. 253, 188 S.E. 2d 17. However, in the same opinion, this Court found no evidence to sustain a conviction of the charge of attempted armed robbery of Mrs. Blake and reversed.

We have carefully reviewed the evidence in the trial of defendant at the 18 October 1971 Session and the evidence in the trial from which this appeal has been taken. The State's evidence in defendant's trial at the 18 October 1971 Session upon the charge of attempted armed robbery of Mrs. Blake was, in all pertinent respects, the same as the State's evidence in defendant's trial upon the charge of attempted armed robbery of Mrs. Holmes which is involved in this appeal. The reason for the reversal of defendant's conviction of the attempted armed robbery of Mrs. Blake is clearly stated in the opinion of the Court in *State v. Hinton, supra:* " . . . [T]he indictment charged defendant with the armed robbery of Elizabeth Putman Blake. All of the evidence in the record discloses, and the State's brief concedes, that it was only upon Honore Parker Holmes that a demand for money was made. There was no evidence from which the jury could find that defendant took or attemped to take any property from Mrs. Blake. Rather all of the evidence tends to support the conclusion that Mrs. Blake stepped into a robbery already in progress and that defendant shot her, not in an attempt to rob her, but because she sprayed gas in his face. Because of the fatal variance between the indictment and the proof, defendant's motion for nonsuit . . . should have been allowed."

Clearly, the evidence does not support a conviction of both charges. It only supports a conviction of an attempted armed robbery of Mrs. Holmes. Defendant relies upon the "same—evidence test" as defined in *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871, and as applied in *State v. Ballard,* 280 N.C. 479, 186 S.E. 2d 372. The test is stated as follows: "Whether the facts

alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment, or whether the same evidence would support a conviction in each case." The allegations in the indictments did not allege an attempted armed robbery of the employer of Mrs. Holmes and Mrs. Blake. On the contrary, the first alleged an attempted armed robbery of Mrs. Blake, and the present one alleges an attempted armed robbery of Mrs. Holmes. There was no evidence at either trial that defendant attempted to rob the employer of Mrs. Blake and Mrs. Holmes. The evidence at both trials was the same, but it tended to show an attempt to rob only Mrs. Holmes. Consequently, the facts alleged in the second indictment, and the evidence given in support thereof, could not have sustained (and in fact did not) a conviction under the first indictment, nor could the same evidence support a conviction in each case. Application of the "same—evidence test" does not aid defendant's argument. Defendant has not been twice put in jeopardy for the same offense.

No error.

Judges MORRIS and CARSON concur.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION, NORTH CAROLINA COTTON GINNERS ASSOCIATION, HERTFORD COUNTY BOARD OF EDUCATION, PITT COUNTY SCHOOL BOARD, BERTIE COUNTY BOARD OF EDUCATION, HALIFAX COUNTY BOARD OF EDUCATION AND ROBERT MORGAN, ATTORNEY GENERAL, APPELLES

— V. —

VIRGINIA ELECTRIC AND POWER COMPANY, AND THE MUNICIPALITIES OF ROANOKE RAPIDS, AHOSKIE, PLYMOUTH, RICH SQUARE, ROPER AND WELDON, APPELLANTS

No. 7410UC140

(Filed 6 March 1974)

Utilities Commission § 4— electric power company — general rate increase

Order of the Utilities Commission allowing a general increase in the rates and charges for a power company's services in this State is affirmed.

Judge PARKER dissenting.

APPEAL by Virginia Electric and Power Company and Cities of Ahoskie, Plymouth, Rich Square, Roanoke Rapids, Roper and Weldon from order of the North Carolina Utilities Commission entered on 28 June 1973 in Docket No. E-22, Sub. 141.

This proceeding was initiated upon application by Virginia Electric and Power Company (Vepco) filed with the North Carolina Utilities Commission (Commission) on 27 July 1972 seeking approval for a general increase in the rates and charges for Vepco's service in North Carolina. By its order dated 31 August 1972, the Commission declared the proceeding to be a general rate case under G.S. 62-133 and, among other things, scheduled the matter for investigation and hearing before the Commission.

Upon petition, the Commission allowed the Attorney General of North Carolina on behalf of the using and consuming public, the Northeastern Cotton Ginners Association, the municipalities of Ahoskie, Plymouth, Rich Square, Roanoke Rapids, Roper and Weldon, the Boards of Education of Bertie, Halifax, Hertford and Pitt Counties, and Pitt County to intervene and become parties to the proceeding.

In its application Vepco alleged, among other things, that it is a public utilities corporation rendering electric service in twenty-two counties and forty-one municipalities in Northeastern North Carolina; that an increase in its revenue is necessary to provide a fair return on investment; it asked for approval of an increase in rates that would yield additional annual revenue of approximately $2,480,000, resulting in a return of 8.56% on original cost of its rate base components used in its North Carolina operations subject to the Commission's jurisdiction. Vepco also asked for approval of an automatic fossil fuel adjustment clause that would authorize Vepco periodically to increase or decrease charges for all material services to reflect increases or decreases in the cost of fossil fuel.

The intervening municipalities alleged that they had contracts with Vepco which would be affected adversely by an increase in rates, and asked the Commission not to approve any increase that would apply to them.

Following extensive hearings in January and February of 1973, the Commission entered an order approving an increase in certain rates that would yield approximately $962,685 addi-

tional revenue, or about 38% of that sought in the application, resulting in a rate of return of 6.89% on fair value. The intervening cities were not exempted from the rate increases.

Vepco and the municipalities of Ahoskie, Plymouth, Rich Square, Roanoke Rapids, Roper and Weldon noted exceptions to, and appealed from, the order.

Joyner & Howison, by Robert C. Howison, Jr., and Hunton, Williams, Gay & Gibson, by Evans B. Brasfield, Guy T. Tripp, III, and Allen C. Barringer, for Virginia Electric and Power Company, appellants.

Crisp, Bolch & Smith, by William T. Crisp, and Nicholas Long, attorneys for appellants cities of Ahoskie, Plymouth, Rich Square, Roanoke Rapids, Roper and Weldon.

Attorney General Robert Morgan, by I. Beverly Lake, Jr., Assistant Attorney General, and Robert P. Gruber and Jerry J. Rutledge, Associate Attorneys, for the Using and Consuming Public, appellees.

Fountain & Goodwyn, by George A. Goodwyn, for Northeastern Cotton Ginners Association, appellee.

Edward B. Hipp, Maurice W. Horne and Jerry B. Fruitt, attorneys for the North Carolina Utilities Commission, appellee.

BRITT, Judge.

This being an appeal to review a decision of the North Carolina Utilities Commission in a general rate making case, any aggrieved party, as a matter of right, may appeal from the decision of this court to the State Supreme Court. G.S. 7A-30(3). Under Article IV of our State Constitution, the appellate jurisdiction of our Supreme Court relates solely to appeals from decisions of "the courts below"; the Utilities Commission being an administrative agency and not a part of the General Court of Justice, direct appeals from the Utilities Commission to the Supreme Court are not constitutionally permissible. *Utilities Commission v. Finishing Plant,* 264 N.C. 416, 142 S.E. 2d 8 (1965).

We perceive no worthwhile purpose that would be served by a discussion of the various points raised by appellants. Suffice to say, we have carefully reviewed the record in this case, with particular reference to the assignments of error brought

forward and argued in the briefs, and find no error which we consider sufficiently prejudicial to justify a remanding of the cause to the Utilities Commission.

The order appealed from is

Affirmed.

Judge VAUGHN concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

The record in this case indicates to me that the Commission, after making its finding as to the fair value of the utility's property, effectively ignored that finding by fixing the rate of return, not on the basis of fair value, but on the basis of book value. G.S. 62-133(b)(4) directs that the rate of return be fixed on fair value. I would remand this proceeding with direction that the Commission fix the rate of return on the basis required by our statute.

STATE OF NORTH CAROLINA v. MILDRED LOCKLEAR

No. 7412SC176

(Filed 6 March 1974)

1. **Taxation § 37; Constitutional Law § 21— taxes as distinguished from debts — imprisonment for nonpayment of taxes**

Since taxation is a means employed by the government to raise revenue for its support, and taxes which are imposed are not, therefore, contractual obligations of the taxpayer to the state, taxes do not constitute a debt within the meaning of the Constitutional prohibition against imprisonment for debt. N. C. Constitution Art. I, § 28.

2. **Taxation § 37; Indictment and Warrant § 7— wilful failure to pay tax — sufficiency of warrant**

In a prosecution charging defendant with wilful failure to pay a tax assessed upon her as the operator of retail sales businesses, warrants which identified defendant as the person accused, alleged that a tax was assessed against her in accordance with the provisions of G.S. 105-241.1, and alleged that defendant wilfully refused to pay the tax were proper in form, alleged the violation of a valid criminal statute, and should not have been quashed.

State v. Locklear

APPEAL by the State from *Canaday, Judge,* 5 September 1973 Session of Superior Court held in CUMBERLAND County.

Defendant was convicted in the District Court of Cumberland County upon two warrants each charging the violation of G.S. 105-236(9) by wilfully failing to pay to the Department of Revenue of North Carolina a tax assessed upon her as the operator of retail sales businesses known as "Ye Old Tavern" and "Margie's Bar" during the time period July 1, 1969 to December 31, 1970, pursuant to the provisions of G.S. 105-241.1.

From judgments imposed she appealed to the superior court.

After entry of not guilty pleas in the superior court, defendant moved to quash the warrants. The court granted her motion and quashed the warrants. The State has appealed to this Court.

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

No brief filed by defendant appellee.

BALEY, Judge.

The warrants upon which defendant was convicted in the district court are identical except for the names of the business and the amount of the tax. One of the warrants reads as follows:

> "The undersigned, T. M. Bolton, being duly sworn, complains and says that at and in the County named above and on or about the 23rd day of March, 1971, the defendant named above did unlawfully, and wilfully Fail to pay to the Department of Revenue of the State of North Carolina the tax assessment of $2,017.84 levied upon her for her business 'Ye Old Tavern,' by the Commissioner of Revenue as provided by N.C.G.S. 105-241.1. She, the said Mildred Locklear, being a person required by Subchapter I of Chapter 105 to pay the tax assessment of $2,017.84 in that she was the operator of a retail sales business 'Ye Old Tavern' for the time period July 1, 1969 to Dec. 31, 1970 and that she was assessed said tax in compliance with the provisions of N.C.G.S. 105-241.1 and wilfully and unlawfully failed to pay said tax on March 23, 1971 as required by N.C.G.S. 105-241.1.

"The offense charged here was committed against the peace and dignity of the State and in violation of law Defendant is charged under penalty provisions 105-236.9 for failure to pay an assessment provided for by N.G.S. 105-241.1.

s/ T. M. BOLTON
Complainant"

Under G.S. 105-241.1 the Secretary of Revenue, upon compliance with the procedures set out therein, may determine that a taxpayer has not paid a sufficient amount of tax and may assess such taxpayer for the amount unpaid. The taxpayer may contest the assessment in a hearing before the Secretary, but if the Secretary reaffirms his decision after the hearing, or if the taxpayer does not request a hearing then G.S. 105-241.1(d) provides that the assessment "shall be immediately due and collectible" in the same way as any other tax.

G.S. 105-236(9) provides:

"Any person required under this Subchapter to pay any tax . . . who wilfully fails to pay such tax . . . shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall be punished by a fine not to exceed two hundred dollars ($200.00), or by imprisonment not to exceed 30 days, or by both such fine and imprisonment."

[1] Ordinarily, mere nonpayment of taxes is not a criminal offense. *Henry v. Wall,* 217 N.C. 365, 8 S.E. 2d 223. But in the enactment of G.S. 105-236(9), the General Assembly has determined that any person required by the State Revenue Act to pay any tax who *wilfully* fails to pay such tax shall be guilty of a misdemeanor. The legislature had full authority to make this decision. It is a valid exercise of legislative power. Art. I, Sec. 28, of the North Carolina Constitution, which prohibits imprisonment for debt, is only applicable to actions arising out of or founded upon contract. *Ledford v. Smith,* 212 N.C. 447, 193 S.E. 722; *Long v. McLean,* 88 N.C. 3. Taxation is a means employed by the government to raise revenue for its support. Taxes which are imposed are not, therefore, contractual obligations of the taxpayer to the state. They do not constitute a debt within the meaning of the Constitution.

Statutes similar to G.S. 105-236(9) making wilful failure to pay taxes a criminal offense have been approved in other

jurisdictions as not violative of a constitutional provision against imprisonment for debt. *City of Cincinnati v. De Golyer,* 25 Ohio St. 2d 101, 267 N.E. 2d 282 (1971); *People v. Neal C. Oester, Inc.,* 154 Cal. App. 2d Supp. 888, 316 P. 2d 784 (Super. Ct. 1957); Annot., 48 A.L.R. 3d 1324 (1973). *See also* 26 U.S.C. § 7203 (1970) for statute similar to G.S. 105-236(9) creating federal offense.

[2] The warrants in this case are not defective in form. A warrant is sufficient if it identifies the defendant and "express[es] the charge against the defendant in a plain, intelligible and explicit manner." G.S. 15-153; *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897, *cert. denied,* 403 U.S. 940; *State v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857; *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133. Here the warrants identify Mildred Locklear as the person accused. They allege that a tax was assessed against her in accordance with the provisions of G.S. 105-241.1, and that she wilfully refused to pay the tax. Clearly, therefore, they satisfy the requirements of G.S. 15-153.

Since the warrants are proper in form and allege the violation of a valid criminal statute, they should not have been quashed. The judgment of the Superior Court is reversed.

Reversed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. STEVE LEON CRAIG

No. 7425SC202

(Filed 6 March 1974)

Automobiles § 119; Constitutional Law § 28; Criminal Law § 18— drunken driving — appeal to superior court — plea of guilty of reckless driving

The superior court had no jurisdiction to accept a plea of guilty to a charge of reckless driving when defendant was before the court on appeal from a conviction in the district court for operating a motor vehicle while under the influence of intoxicating liquor since reckless driving is not a lesser included offense of driving under the influence of intoxicating liquor and the record shows no written information charging reckless driving and no waiver of indictment or information. G.S. 7A-271(a)(5); G.S. 15-140.

State v. Craig

ON *certiorari* to review trial before *Wood, Judge,* 13 August 1973 Session of Superior Court held in CALDWELL County.

Defendant was tried in the district court upon a two-count warrant charging him with (1) operating a motor vehicle on a public highway in Caldwell County on the 12th day of April, 1973 while under the influence of intoxicating liquor, and (2) failing to yield right-of-way in obedience to a duly erected stop sign. He was found guilty upon both charges and judgment entered imposing a suspended sentence of imprisonment. From this judgment defendant appealed to the superior court.

When the cases were called for trial in the superior court, the State elected to take a nol pros on the charge of failure to yield right-of-way in obedience to the stop sign and accepted a plea of guilty to reckless driving. The court sentenced the defendant to six months imprisonment which was suspended and defendant placed on probation for two years. When defendant did not consent to the terms of probation, the court entered an active sentence. Two days later the defendant agreed to accept the conditions of probation as pronounced by the court in its original judgment, and this judgment was reinstated.

Upon petition by defendant, this Court granted certiorari.

Attorney General Morgan, by Associate Attorney James Wallace, Jr., for the State.

Gudger and Sawyer, by Wesley F. Talman, Jr., for defendant appellant.

BALEY, Judge.

The sole question here involved is whether the superior court has jurisdiction to accept a plea of guilty to a charge of reckless driving when defendant is before the court on appeal from a conviction in the district court for operating a motor vehicle while under the influence of intoxicating liquor. We hold that the superior court does not have such jurisdiction in this case and vacate the judgment imposed.

Reckless driving is a misdemeanor. G.S. 20-140, G.S. 20-176. Except as provided in G.S. 7A-271, the district court has exclusive original jurisdiction for the trial of misdemeanors. G.S. 7A-272. *State v. Wall,* 271 N.C. 675, 157 S.E. 2d 363.

There was no charge of reckless driving against the defendant in either the district or superior courts. He has appealed his conviction in the district court for the misdemeanor of driving under the influence of intoxicating liquor and was in the superior court for trial de novo upon that charge. The jurisdiction of the superior court for the trial of defendant was entirely derivative and obtained only with respect to the charge of driving under the influence of intoxicating liquor.

> "'[T]he Superior Court has no jurisdiction to try an accused for *a specific misdemeanor* on the warrant of an inferior court unless he is first tried and convicted for *such misdemeanor* in the inferior court and appeals to the Superior Court from the sentence pronounced against him by the inferior court on his conviction for *such misdemeanor.*'" *State v. Guffey,* 283 N.C. 94, 96, 194 S.E. 2d 827, 829.

When a conviction for a misdemeanor is appealed from the district court to the superior court for trial de novo, the superior court is permitted to accept a plea of guilty to a lesser included offense or related charge as provided in G.S. 7A-271(a) reading as follows:

> "[T]he superior court has jurisdiction to try a misdemeanor:
>
> . . .
>
> (5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser-included or related charge."

But the acceptance of a plea of guilty by the superior court to a related charge in misdemeanor appeals from the district court is conditioned upon the requirement that the related charge be contained in a written information. G.S. 15-140 provides:

> "*Waiver of indictment in misdemeanor cases.*—In any criminal action in the superior court where the offense charged is a misdemeanor, the defendant may waive the finding and return into court of a bill of indictment. If the defendant pleads not guilty, the prosecution shall be on a written information, signed by the solicitor, which information shall contain as full and complete a statement of the accusation as would be required in an indictment. No

waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel. *Pursuant to G.S. 7A-271(a)(5), the superior court is authorized to accept a plea to a related charge in misdemeanors appeals from the district court if the related charge is contained in the written information authorized by this section.*" (Emphasis added.)

Reckless driving is not a lesser offense included in the charge of driving under the influence of intoxicating liquor. The two offenses are separate and distinct even though they may both arise out of the same transaction. *State v. Fields,* 221 N.C. 182, 19 S.E. 2d 486. Even if reckless driving is considered a related charge, there is nothing in the record here to indicate compliance with G.S. 15-140. While ordinarily no indictment or information for a misdemeanor may be obtained in the superior court, the General Assembly has authorized a written information in the limited instances set out in G.S. 15-140. The record does not show a written information nor a waiver of indictment or information. In fact, there is no accusation at all of reckless driving except as it may be implied by the guilty plea.

As quoted with approval by Chief Justice Parker in *McClure v. State,* 267 N.C. 212, 215, 148 S.E. 2d 15, 17-18:

> "There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity."

See also State v. Cassada, 6 N.C. App. 629, 170 S.E. 2d 575.

Since the superior court has no original jurisdiction of the misdemeanor of reckless driving, and the statutes which conferred jurisdiction upon appeal for the acceptance of a plea to a lesser included or related charge were not complied with, it follows that the superior court had no jurisdiction to accept the plea of defendant and impose judgment.

Judgment arrested.

Judges CAMPBELL and HEDRICK concur.

DOUGLAS WAYNE ROBERTSON, AN INFANT, BY AND THROUGH HIS GUARDIAN AD LITEM, SAMUEL B. ROBERTSON v. CARPER S. STANLEY, JR.

No. 7417SC124

(Filed 6 March 1974)

Trial § 52— failure of jury to award damages — setting aside verdict discretionary

In an action to recover compensatory damages for personal injuries alleged to have been caused by defendant's negligence, the trial judge had the discretionary power, but as a matter of law was not compelled, to set aside the jury's verdict for its failure to include any award of damages for pain and suffering, and no abuse of the trial judge's discretion has been shown.

Judge VAUGHN dissenting.

ON *Certiorari* to review order of *Kivett, Judge,* 9 April 1973 Session of Superior Court held in ROCKINGHAM County.

Civil action by a minor plaintiff, Douglas Wayne Robertson, to recover compensatory damages for personal injuries alleged to have been caused by defendant's negligence. Plaintiff, a 9½ year old boy, was lying in the grass watching a movie at a drive-in theatre when defendant, a patron who was preparing to leave the theatre, drove his automobile over him. Defendant denied negligence and pled contributory negligence. The case was consolidated for trial with a companion case brought by George Dillard Robertson, plaintiff's father, to recover for medical expenses incurred by him in treating plaintiff's injuries. In a pretrial order the parties stipulated:

> "As a result of the accident Douglas Wayne Robertson suffered a dislocation of his right sternoclavicular joint which resulted in his hospitalization on three occasions and caused George Dillard Robertson to incur expenses in the amount of one thousand, nine hundred and seventy dollars."

The jury answered issues as follows:

> "1. Were the plaintiffs, Douglas Wayne Robertson and George Dillard Robertson injured and damaged by the negligence of the defendant, Carper S. Stanley, Jr., as alleged in the complaint?
>
> "ANSWER: Yes.

"2. If so, did the plaintiff, Douglas Wayne Robertson, by his own negligence, contribute to the injuries and damages as alleged in the Answers?

"ANSWER: No.

"3. What amount, if any, is the plaintiff, Douglas Wayne Robertson, entitled to recover of the defendant, Carper S. Stanley, Jr., for personal injury?

"ANSWER: None.

"4. What amount, if any, is the plaintiff, George Dillard Robertson entitled to recover of the defendant, Carper C. Stanley, Jr., for medical expenses?

"ANSWER: Full Amount $1970.00."

Plaintiff moved pursuant to G.S. 1A-1, Rule 59(a), for a new trial on the third issue. The motion was denied. Judgment was entered that plaintiff recover nothing of defendant, that his father, George Dillard Robertson, recover from defendant for medical expenses incurred in treating the plaintiff, and that defendant pay the costs of both actions. Plaintiff gave notice of appeal, and this Court subsequently granted his petition for certiorari to allow him to perfect the appeal.

Harrington & Stultz by Thomas S. Harrington and Joseph G. Maddrey for plaintiff appellant.

Henson, Donahue & Elrod by Joseph E. Elrod III and Richard L. Vanore for defendant appellee.

PARKER, Judge.

Plaintiff's sole assignment of error is directed to the denial of his motion for a new trial on the issue of damages. "The granting or the denying of a motion for a new trial on the ground that the damages assessed by the jury are excessive or inadequate is within the sound discretion of the trial judge." *Hinton v. Cline,* 238 N.C. 136, 76 S.E. 2d 162. Plaintiff recognizes this well-established rule, but contends that this discretionary authority of the judge is applicable only where the jury awards some amount, however small, but not where the jury awards nothing. From this he argues that it was the judge's duty as a matter of law to set aside the verdict on the third issue. We do not agree.

At the outset we note that, although the evidence shows that plaintiff's injuries were such as to require that he be hospitalized three times and receive substantial medical and surgical treatment, it also shows that his doctor finally discharged him with a diagnosis that he was without any disability other than a scar on his right shoulder. Further, the jury did award damages in the full amount of his medical expenses, though because of his infancy this award went to his father, who had paid those expenses; had plaintiff been of full age, there would have been but one action and one award of damages. Thus, the question presented by this appeal is whether the trial judge's refusal to set aside the third issue must be held error as a matter of law merely because the jury failed to award plaintiff any amount of damages for his pain and suffering and other noneconomic losses. We hold that the trial judge's denial of plaintiff's motion did not constitute error as a matter of law.

Plaintiff had the burden of proof on the issue of damages. The weight and credibility of the evidence and the amount of damages to be awarded were for the jury to determine. Though plaintiff presented testimony as to his pain and suffering, the jury was not compelled to accept it. No exception was taken to the charge, and we must presume that the jury was properly instructed.

We hold that the trial judge had the discretionary power, but as a matter of law was not compelled, to set aside the jury's verdict for its failure to include any award of damages for pain and suffering. We also hold that on this record no abuse of the trial judge's discretion has been shown. He, as well as the jury, observed and heard the witnesses. The case was a close one on the issues of liability. It would have been manifestly unfair to have set aside only the third issue, which was what plaintiff's motion requested he do, without at the same time setting aside the verdict on the other issues, which plaintiff did not request.

We find

No error.

Judge BRITT concurs.

Judge VAUGHN dissenting.

By its answer to the issues the jury found that this minor was injured by the sole negligence of defendant and then said that he was not entitled to recover anything for these injuries. Obviously the jury made a mistake which the trial judge should have, on his own motion, corrected by setting the verdict aside and ordering a new trial.

STATE OF NORTH CAROLINA v. BILLY RAY WEST

No. 7310SC809

(Filed 6 March 1974)

1. **Criminal Law § 112— reasonable doubt as possibility of innocence — no error**

   Definition of the term "reasonable doubt" as "possibility of innocence" by the trial court in its jury instruction, though not commended, was not prejudicial to defendant.

2. **Criminal Law § 116— right of defendant not to testify — instruction not required**

   Where the trial court erroneously instructed the jury that defendant testified in his own behalf, but the court corrected the inadvertence as soon as it was brought to his attention, defendant was not entitled to an instruction, absent a request, with respect to his right not to testify.

3. **Criminal Law § 122— additional jury instructions — no prejudice**

   Additional instructions given the jury before they resumed deliberations following a lunch recess, though unnecessarily long, were not coercive.

APPEAL by defendant from *Godwin, Judge,* 18 June 1973 Session of Superior Court held in WAKE County. Argued in the Court of Appeals 16 January 1974.

Defendant was charged in a warrant with the misdemeanor of assault by pointing a gun. He was found guilty in District Court and appealed to the Superior Court where he was tried de novo upon the allegations contained in the warrant. The jury returned a verdict of guilty, and defendant appealed to this court.

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

H. Spencer Barrow for the defendant.

BROCK, Chief Judge.

[1] Defendant first assigns as error that the trial judge explained to the jury that the term "reasonable doubt" meant "possibility of innocence." In *State v. Chaney,* 15 N.C. App. 166, 189 S.E. 2d 594, we held that an instruction identical to the one complained of here was not prejudicial although we did not commend it. The instruction complained of was adopted by the Conference of Superior Court Judges as N.C.P.I., Criminal, § 101.10, effective June 1970. *State v. Chaney, supra,* was filed 28 June 1972. Effective November 1972, N.C.P.I., Criminal, § 101.10 was rewritten to adopt the suggestion in *State v. Chaney, supra,* to the effect that the definitions of the term "reasonable doubt" given in *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, are more desirable. Nevertheless, we see no prejudice to defendant in the definition of which he complains. This assignment of error is overruled.

Defendant assigns as error that the trial judge omitted from his summary of the evidence certain parts of the testimony which defendant felt were helpful to him. The trial judge is not required to recapitulate the testimony. He is only required to summarize the evidence sufficiently to permit him to explain and apply the appropriate priniciples of law. In our view, he has done so. This assignment of error is overruled.

[2] Defendant assigns as error that the trial judge failed to instruct the jury upon defendant's right not to testify. Defendant concedes that ordinarily the trial judge is not required to instruct on this subject absent a request from defendant. Defendant also concedes that he made no request for such an instruction in this case. The assignment of error is based upon the following occurrences. Defendant offered four witnesses to testify in his defense, but defendant did not personally testify. At the close of his summary of the State's evidence and at the beginning of his summary of defendant's evidence, the trial judge inadvertently stated to the jury: "The defendant also offered evidence. Several witnesses testified in his behalf. He also testified in his own behalf, and he offered evidence tending to show . . . "

Obviously, something or someone called his honor's attention to his error because, very shortly after the error, the following appears in the record of the charge: "The defendant further offered evidence—

"COURT: The defendant didn't testify in his own behalf?

"MR. BARROW: No, sir.

"COURT: When I told you that the defendant offered evidence and he testified in his own behalf, I advised you erroneously. You are to remember the evidence."

Clearly, the trial judge corrected his inadvertence as soon as it came to his attention. We fail to see how the jury could have been misled. They knew whether defendant had or had not testified. Nevertheless, defendant argues that because of this inadvertence the trial judge was required to instruct, without request, that defendant had the right not to testify. We fail to see how defendant could be prejudiced by this inadvertence. If defendant had felt injury from the inadvertence, he could have easily requested an instruction upon his rights. "The general rule in this State is that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal." *State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3. No objection or request was made to the trial judge in this case. Additionally, the trial judge corrected the inadvertence. This assignment of error is overruled.

[3] In this case, the jury retired to deliberate at 10:45 a.m. At 1:00 p.m. they were called out to recess for lunch. At that time, the foreman announced that they were divided 7 to 5, that it "looks like a hung jury." They were advised to recess for lunch and to return at 2:30 p.m. After the recess and before the jury resumed its deliberations, the trial judge gave additional instructions upon the desirability of their reaching a verdict. Defendant assigns these additional instructions as error. He argues that they coerced the jury into reaching a verdict of guilty. Without encumbering these pages by setting out the additional instructions, we observe that they were of much greater length than was necessary. However, length itself does not create coercion, and we find no coercive effect in what was said or in the manner in which it was said. Nevertheless, we indulge in the hope that the trial judges, when they find it necessary to give additional instructions, will first prepare themselves upon what they will say and then instruct as briefly

as circumstances will permit. This assignment of error is overruled.

No error.

Judges MORRIS and CARSON concur.

CHARLES BURNS v. WILLIE FRENCH TURNER AND WILLIE EARL TURNER

No. 7416SC33

(Filed 6 March 1974)

Automobiles § 63— striking child — insufficient evidence of negligence

Plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendant's negligence in striking a 6-year-old child where it tended to show that as defendant drove west on a highway he could not see the child on the south shoulder because of an approaching eastbound car, that defendant was traveling 42 mph in a 45 mph zone, that defendant did see another child who was on the north shoulder, that immediately after the approaching car passed the child, he darted into the highway in front of defendant's car, and that as soon as defendant saw the child he unsuccessfully attempted to prevent a collision by swerving and applying his brakes.

APPEAL by plaintiff from *McLelland, Judge,* 14 May 1973 Session of Superior Court held in ROBESON County.

Plaintiff brought this action to recover medical expenses which he had incurred for the treatment of his six-year-old son, Philip Burns. His son was seriously injured on 30 May 1970 when struck by an automobile owned by defendant Willie French Turner and operated by defendant Willie Earl Turner. The complaint alleged that the accident was caused by the negligence of Willie Earl Turner while acting as the agent of Willie French Turner.

At the close of the evidence for the plaintiff, defendants moved for a directed verdict. The motion was granted, and plaintiff appealed.

Johnson, Hedgpeth, Biggs & Campbell, by John Wishart Campbell, for plaintiff appellant.

Page, Floyd & Britt, by W. Earl Britt, for defendant appellees.

BALEY, Judge.

This appeal involves a single issue: whether the trial court erred in granting defendants' motion for a directed verdict.

When the defendant moves for a directed verdict, the evidence must be considered in the light most favorable to the plaintiff. All contradictions and inconsistencies must be resolved in plaintiff's favor. *Summey v. Cauthen,* 283 N.C. 640, 197 S.E. 2d 549; *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47; *Waycaster v. Sparks,* 267 N.C. 87, 147 S.E. 2d 535. But even when viewed in this favorable perspective, plaintiff's evidence does not show that defendants were in any way negligent.

The only evidence offered by the plaintiff concerning the accident was the testimony of the defendant Willie Earl Turner (hereinafter referred to as Turner), who was called as a witness for plaintiff, and the testimony of plaintiff's son, Philip Burns, and his companion, Steven Boyette. Turner testified that on 30 May 1970 he was driving west on N. C. Highway 211 between Lumberton and Red Springs. He was traveling at a speed of 42 miles per hour in a 45-mile zone. He saw an automobile approaching in the eastbound lane, and at about the same time he saw a child playing near the north shoulder of the highway. He did not see any child on the south side of the road. When the eastbound car passed by, Turner suddenly saw Philip Burns directly in front of him, about thirty feet away, running across the highway from south to north. Turner applied his brakes and swerved to the right, but he was unable to avoid striking Philip.

Philip Burns testified that on May 30 he was hunting crickets with Steven Boyette, an older boy who lived next door. They were on the north side of Highway 211. Philip crossed over to the south side of the highway, chasing his dogs, and then turned around to return to the north side. He waited for a car to pass by in the eastbound lane, and then he started across the highway. At that point Philip said: "When it [eastbound car] passed, I ran across and got hit. . . . It was in the lane of traffic nearest to where I was standing. . . . When it passed is when I went out. . . . Just after the car passed me I started to run across the road. . . . " While he was crossing, Turner's car hit him.

Steven Boyette corroborated the testimony of Philip. He said he saw Philip standing on the south shoulder waiting to

cross over to the north side again, but Steven did not actually see the collision occur.

All of this evidence indicates that the injuries to Philip Burns were not caused by the negligence of Turner. When Philip started to cross Highway 211, Turner could not see him, because the approaching eastbound car hid him from view. When the eastbound car passed and Philip became visible, Turner did not have sufficient time to avoid a collision.

A motorist who sees children playing near the highway must drive carefully, keeping in mind that a child may suddenly run out into the road, but he is not an insurer of the safety of children near the highway. *Winters v. Burch,* 284 N.C. 205, 200 S.E. 2d 55. In this case the evidence shows that after Turner saw Steven Boyette playing near the north shoulder of Highway 211, he continued to drive in a careful and prudent manner. He proceeded at a lawful rate of speed in his proper lane of the highway, and as soon as he saw Philip he unsuccessfully attempted to prevent a collision by swerving and applying the brakes. In a number of cases the courts have held that a driver is not negligent when he strikes a pedestrian who suddenly darts out into the highway. *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610; *Brinson v. Mabry,* 251 N.C. 435, 111 S.E. 2d 540; *Westbrook v. Robinson,* 11 N.C. App. 315, 181 S.E. 2d 231.

Since there is no evidence that Turner drove in a negligent manner, defendants' motion for a directed verdict was properly granted. The judgment of the Superior Court is affirmed.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE STEVE GRAY

No. 7410SC100

(Filed 6 March 1974)

Crime Against Nature § 2— jury instructions — reference to Sodom and Gomorrah — no error

In a prosecution for crime against nature, the trial court's inclusion in its jury instructions of the biblical story of Sodom and

Gomorrah in explanation of the derivation of the word "sodomy" amounted to an aside comment which, although irrelevant, was not inherently prejudicial.

APPEAL by defendant from *Copeland, Judge,* 27 August 1973 Session of Superior Court held in WAKE County.

Defendant was charged in a bill of indictment, proper in form, with crime against nature in violation of G.S. 14-177. Upon a plea of not guilty, he was convicted by a jury and received a sentence of 8 to 10 years. From that judgment, he has appealed to this Court.

Attorney General Morgan, by Associate Attorney Keith L. Jarvis, for the State.

Theodore A. Nodell, Jr., for defendant appellant.

BALEY, Judge.

All of the assignments of error are based upon the following portion of the charge of the court to which defendant takes exception:

"I will tell you a little more about this Law later on. I guess I will just tell you about it right now. The crime of sodomy comes from the name Sodom.

"You recall in the Old Testament in the 18th Chapter of Genesis, the Lord appeared to Abraham, and the Lord said he was going to destroy the City of Sodom and Gomorrah, evil and wicked place.

"And then Abraham replied, as you recall, said, will you destroy the good people, along with the wicked?

"Well, he said, he reckoned he would, but then suppose there are fifty I can produce, fifty righteous people, will you destroy them. He said, no, I won't.

"Well, Abraham couldn't produce them; couldn't do it. And he said forty and five, and he couldn't do it. Forty, then thirty and five, then thirty, then twenty and five, then twenty; and finally bargained down to ten. And he could not produce them.

"So, the Lord said, told Abraham that he would have to destroy the City. And the angels of the Lord went into

the City and communicated with Lot and his wife. They were good people.

"And the net result of that was, that Lot was given the word to his wife and two daughters that they could go and flee, which they did.

"And on the next morning, you will recall, that the Lord told Lot and his wife and children that if anybody looked back on the City, after fire and brimstone, as it was destroyed as the Bible said by fire and brimstone, if anybody looked back on the City, they would be turned to a pillar of salt.

"Lot's wife could not restrain herself, as a lot of people haven't been able to restrain curiosity; curiosity killed the cat, but she couldn't restrain herself and looked back, and she turned to a pillar of salt, and that was the end of Lot's wife.

"The only reason I repeat that, is because of the word, it comes to us from the Bible, from that place of Sodom and Gomorrah."

Defendant contends that the court by this explanation of the historical derivation of the word "sodomy" has intimated an opinion concerning the guilt or innocence of the defendant and that the court felt defendant should be punished as were residents of Sodom and Gomorrah. He asserts that the remarks of the court were inflammatory and destroyed the required "atmosphere of judicial calm."

In *Withers v. Lane,* 144 N.C. 184, 191-92, 56 S.E. 855, 857-58, the principle is well stated:

"The judge should be the embodiment of even and exact justice. He 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."

While the extraneous remarks of the court to which defendant objects are not approved, it would require a strained inter-

pretation of their meaning to warrant the sinister implications suggested by the defendant. The biblical story of Sodom and Gomorrah was simply an aside comment which, although irrelevant, was not inherently prejudicial. There is no indication at any point in the charge that the court made any effort to relate the story of Sodom and Gomorrah to the facts, witnesses, or defendant in this case. There was no exception to any instruction of the court concerning the elements of the crime and the application of the law arising upon the evidence. When the charge is considered in its entirety, it is free from any error sufficiently prejudicial to require a new trial.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. DANNY E. COBB

No. 7312SC765

(Filed 6 March 1974)

1. **Criminal Law § 84; Searches and Seizures § 4— necessity for placing warrant in evidence**

Evidence seized pursuant to a search warrant was not inadmissible by reason of the State's failure to introduce in evidence the affidavit to obtain the warrant where the trial judge examined the affidavit and warrant and determined the validity of the warrant as a matter of law.

2. **Searches and Seizures § 3— validity of warrant — voir dire — evidence considered**

On *voir dire* to determine whether probable cause existed for issuance of a search warrant, the court is not confined to a consideration of evidence contained in the affidavit but can properly consider all information that was presented under oath to the official who issued the warrant. G.S. 15-26.

3. **Searches and Seizures § 3— search warrant — affidavit — confidential informant — time activities observed**

Affidavit based on information received from a confidential informant was sufficient to support issuance of a search warrant although it did not disclose when the informant observed the activities referred to in the affidavit where the magistrate could reasonably conclude from the affidavit that the informant observed the events so recently that reasonable cause existed to believe that the illegal activities were occurring at the time of the issuance of the warrant.

State v. Cobb

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

Defendant was convicted of the felonious possession of heroin and judgment imposing a prison sentence was entered.

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

Frye, Johnson & Barbee by Ronald Barbee for defendant appellant.

VAUGHN, Judge.

The evidence of defendant's guilt was cogent. Defendant's only assignment of error is that the court erred in denying his motion to suppress the evidence seized pursuant to a search warrant.

[1] Defendant first argues that "the State failed to introduce into evidence the affidavit to obtain the search warrant" and that this constitutes error. The record discloses that the trial judge examined the affidavit and warrant and determined the validity of the warrant as a matter of law. The affidavit and warrant were made a part of the record. This was the proper procedure. Our court has adopted the rule that when documentary evidence is regularly admitted, it is presumed that its contents are made known to the jury. Generally the search warrant and accompanying affidavits should not be introduced into evidence because they usually contain statements which are incompetent and the admission of such evidence can constitute prejudicial error. *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881.

[2] The court conducted a *voir dire* to determine the validity of the search warrant. Nevertheless, when the officer who executed the affidavit was called, the court sustained defendant's objections to evidence not contained in the affidavit. The defendant, of course, does not complain of this favorable ruling on his objection. We observe, however, that if on *voir dire* to determine probable cause for the issuance of the warrant, the court confines itself to a repetition of matters set out in the affidavit, one of the reasons for conducting the *voir dire* on the question of probable cause becomes meaningless. If the affidavit is sufficient on its face to establish probable cause, the court can make its determination from an examination of that

document. There is no requirement, constitutional or statutory, that the affidavit attached to the warrant contain *all* of the information necessary to establish probable cause. The statute only requires that an affidavit be attached to the warrant "indicating the basis" for the finding of probable cause. G.S. 15-26. On *voir dire* the court can properly consider all information that was presented under oath to the official who issued the warrant. The better practice is, of course, to set out in the affidavit, in considerable detail, all of the information constituting the grounds for issuance of the warrant so that the question of the existence of probable cause can be determined by an examination of the affidavit. *See State v. Wooten,* 20 N.C. App. 139, 201 S.E. 2d 89; *State v. Logan,* 18 N.C. App. 557, 197 S.E. 2d 238 and *State v. Milton,* 7 N.C. App. 425, 173 S.E. 2d 60.

[3] Defendant contends that the affidavit is insufficient to support a finding of probable cause for issuance of the search warrant. The affidavit is as follows:

"STATE OF NORTH CAROLINA
County of Cumberland

In The General Court
of Justice, District
Court Division

STATE
v.
Danny Cobb or anyone in charge
1910 Newark St. Fayetteville, NC

William H. Nichols, Det. Sgt. Cumberland County Sheriff's Dept. & CCBN, being duly sworn and examined under oath, says under oath that he has probable cause to believe that Danny Cobb or anyone in charge has on his premises in his vehicle certain property, to wit: Heroin, which constituted evidence of a crime, to wit: Violation of GS 90-95(a)(3), NC Controlled Substances Act, at 1910 Newark Ave., Fayetteville, North Carolina on Jan. 13, 1973. The property described above is located on the premises in the vehicle described as follows: A wood frame house, pink in color, with pink shingles, white trim, and white door, numbers 1910 on front of house, house located at 1910 Newark Ave., Fayetteville, North Carolina. A 1972

Chev. 2 Dr. Blue in color w/black top, NC Tags 3825-C rented to Mr. Cobb by DOLLOR a Day, rent a car. The facts which establish probable cause for the issuance of a search warrant are as follows: On the morning of Jan 13, 1973 this reporting agent, the affiant, received information from a confidential source of information that he (the source) had been to 1910 Newark Ave. and had bought a quantity of Heroin, and while inside the house that he had seen a large quantity of Heroin, some that was being cut, and that some of the Heroin, was in a rubber bag and then wrapped in tinfoil, and that one of the Negro females in the house would be carrying some on her person. That the source is familiar with Heroin, and that the source had given the affiant information in the past that has been reliable, and that had been on the drug traffic in the Cumberland County area, and that the information has been within the past 6 months and that the arrests and convictions of at least 8 persons within the past 4 months. I pray that this search warrant be issued and if the items be found that they be seized and held for court action."

Defendant contends that the affidavit does not disclose when the informer observed the activities referred to in the affidavit and that they could have occurred several years prior to the issuance of the warrant. It is true, of course, that one component in the concept of probable cause is the time of the happening of the facts relied upon. Here the magistrate could realistically and reasonably conclude from the affidavit that the informer observed the events so recently that reasonable cause existed to believe that the illegal activities were occurring at the time of the issuance of the warrant. When the affidavit is considered in the light of common sense, the existence of probable cause for issuance of the warrant is clear and this and defendant's other objections are dispelled.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JIMMIE LEE WILLIAMS

No. 743SC230

(Filed 6 March 1974)

1. **Criminal Law § 138— several charges — single judgment — severity of sentence**

In cases in which there is a verdict or plea of guilty to charges set forth in separate warrants or bills of indictment, and the court imposes a single judgment, a consolidation for the purpose of judgment will be presumed, and punishment may not exceed that permitted on a single charge.

2. **Bills and Notes § 22; Criminal Law § 138— issuing worthless checks — consolidation of cases for judgment — severity of sentence**

Where none of the seven warrants charging defendant with issuing and delivering worthless checks in amounts less than $50 charged that the offense was a fourth or subsequent offense, the maximum punishment authorized for each charge was a fine not exceeding $50 or imprisonment for not more than 30 days; and when the court consolidated three of the cases for purpose of judgment and the other four cases for purpose of judgment, it was error for the court to impose punishment greater than that permitted in an individual case.

ON *certiorari* to review judgments of *Cowper, Judge,* entered at the 13 August 1973 Session of Superior Court held in PITT County (Certiorari allowed 18 December 1973).

In seven separate warrants, defendant was charged with issuing and delivering worthless checks in amounts ranging from $13.82 to $50.00. One of the offenses allegedly occurred on 30 August 1971 and the others on various dates in January and February of 1973. In district court, defendant pled guilty to all the charges and from judgments entered, he appealed to superior court.

When the cases were called for trial in superior court, defendant again pled guilty to all seven charges. After determining that the pleas were made freely, understandingly and voluntarily, without undue influence, compulsion or duress, and without promise of leniency, the court accepted the pleas. The court consolidated three of the cases for purpose of judgment and, as to them, entered judgment imposing prison sentence of six months, to begin at the expiration of sentence invoked in another case on 19 April 1973. The court consolidated the other four cases for purpose of judgment, and, as to those,

entered judgment imposing prison sentence of six months, to begin at expiration of sentence imposed in the three consolidated cases. Within ten days thereafter, defendant gave notice of appeal and, because of his indigency, requested appointment of counsel.

The appeal was not perfected within the time provided by the rules and this court allowed certiorari.

Attorney General Robert Morgan, by Associate Attorney Jerry J. Rutledge, for the State.

Willis A. Talton for defendant appellant.

BRITT, Judge.

Defendant's assignments of error to the judgments imposed have merit and are sustained.

G.S. 14-107 provides in pertinent part as follows:

> "Worthless checks.—It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.
>
> * * *
>
> "Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished as follows:
>
> (1) If the amount of such check or draft is not over fifty dollars ($50.00), the punishment shall be by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor."

[1] In *State v. McCrowe*, 272 N.C. 523, 524, 158 S.E. 2d 337, 339 (1967), the Supreme Court held: "In cases in which there

is a verdict or plea of guilty to more than one count in a warrant or bill of indictment, and the Court imposes a single judgment (sentence, or fine, or both) a consolidation for the purpose of judgment will be presumed. *The punishment may not exceed that permitted on the major count.*" (Emphasis added.) We hold that the same rule applies to charges set forth in separate warrants or bills of indictment.

The question then arises as to the maximum punishment permitted on either of the warrants before the court in this case. No warrant alleged the amount of the check as being greater than $50.00, therefore, the maximum punishment permitted in each case is a fine of $50.00 or imprisonment for 30 days *unless* the proviso relating to a fourth or subsquent conviction is applicable.

In *State v. Miller,* 237 N.C. 427, 429, 75 S.E. 2d 242, 243 (1953), in an opinion by Justice Ervin, the court said: "Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty. (Citations.)" See also *Harrell v. Scheidt, Comr. of Motor Vehicles,* 243 N.C. 735, 92 S.E. 2d 182 (1956).

In *State v. Owenby,* 10 N.C. App. 170, 171, 177 S.E. 2d 749, 749 (1970), this court said:

> "For a defendant to be subjected under G.S. 20-179 to the infliction of the heavier punishment for a second offense of driving while under the influence of intoxicating liquor, it is necessary that a prior conviction, and the time and place thereof, be alleged in the warrant and proved by the State. *State v. White,* 246 N.C. 587, 99 S.E. 2d 772; *Harrell v. Scheidt, Comr. of Motor Vehicles* [supra]; *State v. Cole,* 241 N.C. 576, 86 S.E. 2d 203. Whether there was in fact a prior conviction is a question for the jury and not the court. *State v. Cole, supra.*"

[2] Neither of the warrants in the case at bar alleged that the offense charged was a fourth or subsequent offense, therefore, the maximum punishment authorized in either of the cases is a fine not exceeding $50.00 or imprisonment for not more than 30 days. In a consolidation of two or more of the cases for purpose of judgment, the court was not authorized to im-

pose punishment greater than that permitted in an individual case.

For the reasons stated, the judgments, together with the orders consolidating the cases for purpose of judgments, are vacated and this cause is remanded to the superior court for entry of proper judgments. On remand, the court may enter judgments in the respective cases, or it may consolidate any or all of the cases for purpose of judgment, as it deems advisable.

Error and remanded.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOSEPH WILLIAM ARTIS

No. 7412SC141

(Filed 6 March 1974)

Criminal Law § 34; Homicide § 15— murder of child — prior mistreatment

In a prosecution of defendant for the murder of his 2½ year old child by beating and kicking her, testimony by defendant's wife as to defendant's mistreatment of his children on prior occasions was competent to show *quo animo*, or state of mind.

APPEAL by defendant from *Canaday, Judge,* 4 September 1973 Criminal Session of Superior Court held in CUMBERLAND County.

Defendant was charged with the murder of his 2½ years old daughter, Myra Ann Artis, on or about 24 March 1973. Pertinent evidence, briefly summarized, tended to show:

Around 5:00 or 6:00 p.m. on 22 March 1973, defendant went home after drinking intoxicants. He got mad with Myra Ann and proceeded to kick her "about six times." Defendant's wife testified: "She [Myra Ann] went upstairs and he went up there and started whipping her. When she was upstairs, he took his fist and hit her in the stomach, and in the side. He was doing it like he was beating a man or something like that. He was punching her in the stomach and in the back. I would say that he hit her four times. After that he whipped her

with a leather belt. She was crying. I gave her a bath and put her to sleep. He then came in and went to sleep."

Two days later, defendant and his wife went to the store and when they returned, Mrs. Artis noticed that Myra Ann would not sit up. Mrs. Artis further testified: "I went upstairs and Joseph, my husband, he came upstairs and found some boo boo on the floor. My little girl boo booed on herself downstairs and I was getting ready to clean her up. I went upstairs and wiped her off. I was changing her panties. This was March 24. Joseph came upstairs and went in the bathroom. He found some boo boo on the floor and got mad and started whipping Myra Ann Artis. He started whipping her with the belt and after a while he started throwing a little round ball at her. He was hitting her all on the stomach and the chest. She was in the room, standing by the couch. She had her back to the couch. He was standing by the door just throwing the ball real hard." I saw him hit her ten times."

Thereafter, defendant filled a bathtub with cold water, placed Myra Ann in the tub and kept her in there for about fifteen minutes. When he took her out "she was just shaking and couldn't stand up." A short while later, after further mistreatment by defendant, the child died.

A pathologist testified that he performed an autopsy on the body of the child; that death resulted from a ruptured liver which could have been caused by a blow to her abdomen and that death could have occurred some two days after the injury.

The jury found defendant guilty of second-degree murder and from judgment imposing prison sentence of not less than 25 nor more than 30 years, with credit given for time spent in jail pending trial, defendant appealed.

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

Sol G. Cherry, public defender, for defendant appellant.

BRITT, Judge.

By his sole assignment of error, defendant contends the court committed prejudicial error in permitting his wife to testify with respect to instances prior to 22 March 1973 wherein defendant mistreated his children (consisting of Myra Ann and

a two-year-old son). Defendant argues that admitting the testimony was violative of the rule that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. The assignment is without merit.

In *State v. Humphrey,* 283 N.C. 570, 572, 196 S.E. 2d 516, 518 (1973), we find:

> "The general rule in North Carolina is that the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime. *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364; 1 Stansbury North Carolina Evidence § 91 (Brandis rev. 1973). However, such evidence is competent to show 'the *quo animo,* intent, design, guilty knowledge, or scienter, or to make out the *res gestae,* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions.' *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241."

See also *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969).

We hold that the challenged evidence was competent to show defendant's *quo animo,* or state of mind, and the assignment of error is overruled.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN EDWARD HOWARD

No. 7411SC188

(Filed 6 March 1974)

1. Criminal Law § 77— statement made by defendant out of custody — admissibility

Statement by defendant to his next door neighbor that he wanted someone to get a doctor for deceased because he had stabbed her in

the head with a knife was admissible in a second degree murder prosecution since the statement was made when defendant was not in custody and before criminal proceedings had begun.

2. **Criminal Law § 75— voluntariness of waiver of rights**

Evidence that defendant was read his full *Miranda* rights three times, that one of the examining officers asked him if he understood and offered to explain any of the terms in the statement of rights or the waiver, and that defendant did not ask for any explanation was sufficient to support the trial court's finding that defendant freely, voluntarily and understandingly waived his rights.

3. **Homicide § 21— second degree murder — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a second degree murder case where it tended to show that defendant stabbed his victim.

APPEAL by defendant from *Smith, Judge,* at the 15 October 1973 Criminal Session of JOHNSTON Superior Court.

The defendant was indicted for the first-degree murder of his wife, Joyce Elaine Howard. The State elected to proceed on a second-degree murder charge. The defendant was convicted of voluntary manslaughter and given a sentence of not less than ten nor more than fifteen years in the State Prison. From said conviction the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Jones P. Byrd for the State.

Corbett and Corbett by Albert A. Corbett, Jr., for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error the trial court's allowing, over defendant's objection, several witnesses for the State to testify as to certain incriminating statements made by the defendant.

[1] Gladys Jones, defendant's next-door neighbor, testified that during the night of June 29-30, 1973, the defendant came into her house wanting someone to go get a doctor for Elaine because he had stabbed her in the head with a knife. The defendant contends that because this statement was made before he had an opportunity to consult with counsel that it was obtained in violation of his *Miranda* rights *(Miranda v. Arizona,* 384

U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)). The defendant was not in custody, criminal proceedings had not begun, and therefore the statement is admissible. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971).

[2] The defendant also assigns as error the admission into evidence of the statements made by the defendant to two deputy sheriffs to the effect that he had stabbed his wife. The defendant asserts that there was insufficient evidence to show that the waiver signed by the defendant was freely and intelligently given. Defendant contends that considering defendant's age, race, education, mental condition, intoxication and the complexity of the crime, that there was no effective waiver of his rights.

The defendant is twenty-nine years old, and his age is thus not an important factor. Defendant's race is totally irrelevant. There was no evidence that defendant was under the influence of an intoxicant. The crime of murder is not particularly complex. In determining whether the waiver was freely and intelligently made, however, it is important whether or not defendant understood his constitutional rights. Officer Crabtree gave the defendant his full *Miranda* rights once and Officer Narron did so twice after learning that the defendant had only a second-grade education and could not read or write, other than to sign his name. Officer Narron asked him if he understood and offered to explain any of the terms in the statement of rights or the waiver. The officers testified that the defendant appeared to understand his rights, that he did not ask for any explanation, and that he signed the waiver which was introduced into evidence. The defendant testified on *voir dire* that he had not been threatened, promised anything or pressured in any way to sign the waiver and that he had freely and voluntarily signed his name. He did testify, however, that he did not understand the waiver at the time it was explained to him. The finding of the trial court upon *voir dire* that the statements made by the defendant to the officers were freely, voluntarily and understandingly made is supported by competent evidence and must be sustained. *State v. Perry,* 212 N.C. 533, 193 S.E. 727 (1937); *State v. Caldwell,* 212 N.C. 484, 193 S.E. 716 (1937); *State v. Stamey,* 6 N.C. App. 517, 170 S.E. 2d 497 (1969), *aff'd, State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507 (1970), *cert. denied,* 400 U.S. 842, 91 S.Ct. 85, 27 L.Ed. 2d 78 (1970).

[3] Defendant next assigns as error the failure of the trial court to grant his motion for judgment as of nonsuit. The defendant asserts that the only evidence linking the defendant to the death of his wife was the testimony of Gladys Jones and the two officers as to statements made by the defendant that he had stabbed his wife in the head. The coroner testified as to the butcher knife still being inbedded in the deceased's head when he arrived at the morgue, but he also testified that the cause of death was a stab wound in the chest. The defendant asserts that since the State put on no evidence showing that he had stabbed his wife in the chest that there was no evidence he had proximately caused the death of his wife and that his motion for judgment as of nonsuit should have been granted. Taking the evidence in the light most favorable to the State, and giving the State the benefit of all reasonable inferences therefrom, we find the evidence sufficient to go to the jury.

We have considered the defendant's other assignments of error and find them without merit. We find no error.

No error.

Judges HEDRICK and BALEY concur.

JACK HERRING v. SHEPARD SCOTT

No. 7416SC37

(Filed 6 March 1974)

1. **Automobiles § 46— striking opinion testimony as to speed — instructions to jury**

Any error in the admission of a witness's opinion testimony as to the speed of defendant's car was cured when the court struck the testimony and instructed the jury not to consider it.

2. **Automobiles § 46— opinion testimony as to speed — opportunity to observe car**

In a pedestrian's action to recover for personal injuries received when he was struck by defendant's car, a witness had sufficient opportunity to observe defendant's car to permit her to give an opinion as to its speed where she testified that she heard the collision and observed defendant's car as it braked down over a distance of 50 to 60 feet.

3. **Automobiles § 89— last clear chance — no admission of contributory negligence**

The trial court did not err in the submission of an issue as to last clear chance in a case in which contributory negligence had not been admitted by the plaintiff.

4. **Automobiles § 62— striking pedestrian**

Plaintiff's evidence was sufficient to support a jury finding that defendant was negligent in failing to keep a proper lookout when he struck plaintiff who was standing at the edge of the road under a street light.

APPEAL by defendant from *McLelland, Judge,* at the 21 May 1973 Session of ROBESON Superior Court.

This is a civil action instituted to recover for personal injuries sustained by the plaintiff, Jack Herring, a pedestrian, when struck by defendant's car. The plaintiff's evidence tended to show that on the night of 20 October 1967 the plaintiff was walking west on Carthage Road at or near its intersection with Albion Street in Lumberton, North Carolina. The plaintiff saw and hailed his brother, Pete Herring, who was walking north on Albion Street. The plaintiff crossed Carthage Road and stood in the edge of the road under a street light at the northeast corner of Carthage Road and Albion Street while talking with his brother. The defendant was proceeding west on Carthage Road when his car struck the plaintiff, knocking the body across Albion Street to a point twenty-five feet west of the northwest corner of Carthage Road.

Mrs. Juanita Pittman, who lives on the corner of Carthage and Albion, and who, upon hearing the collision rushed to the door which was open, saw the plaintiff's body skidding down the road, and the defendant's car as it hit the brakes and slid to a halt. Mrs. Pittman and the plaintiff's brother, neither of whom actually saw the impact, testified that the speed of defendant's car was approximately 50-55 miles per hour in a 35 mile per hour zone. The plaintiff's brother testified that he turned and saw the defendant's car moving for a total of two seconds as it crossed Albion Street. Mrs. Pittman testified that she observed defendant's car for five to six seconds as it braked down over a distance of 50 to 60 feet. The brother's testimony as to speed was stricken and the jury instructed to disregard this testimony. There was testimony to the effect that the view back down Carthage Road from Albion Street is unobstructed for approximately 200 yards. The issues sub-

mitted to the jury were negligence, contributory negligence, last clear chance, and damages. The jury found that the defendant was negligent, the plaintiff was not contributorily negligent, did not reach the issue of last clear chance, and awarded the plaintiff $10,000 in damages. From said verdict and judgment, the defendant appealed.

L. J. Britt & Son by L. J. Britt; and McLean, Stacy, Henry & McLean by Dickson McLean, Jr., for plaintiff appellee.

Johnson, Hedgpeth, Biggs & Campbell by John Wishart Campbell for defendant appellant.

CAMPBELL, Judge.

[1] The defendant assigns as error the failure of the trial court to grant a mistrial rather than just striking the speed testimony of the plaintiff's brother. Any error of the trial court was cured by the striking of the evidence and by the judge's instruction that the jury should disregard that testimony. *Wands v. Cauble,* 270 N.C. 311, 154 S.E. 2d 425 (1967); *Smith v. Perdue,* 258 N.C. 686, 129 S.E. 2d 293 (1963). See also Stansbury's North Carolina Evidence (Brandis Revision, 1973) § 28.

[2] The defendant also assigns as error the failure of the trial court to strike the testimony of Mrs. Pittman as incompetent because she had insufficient opportunity to observe the car and to accurately estimate its speed. We hold that in this case that issue is really one of what weight should be given Mrs. Pittman's testimony and that that question is for the jury. *Jones v. Bagwell,* 207 N.C. 378, 177 S.E. 170 (1934); *Ray v. Electric Membership Corporation,* 252 N.C. 380, 113 S.E. 2d 806 (1960); *Harrison v. Lewis,* 15 N.C. App. 26, 189 S.E. 2d 662 (1972).

[3] The defendant also assigns as error the submission by the trial court of the issue of last clear chance to the jury in any case where contributory negligence has not been admitted by the plaintiff. However, on similar facts it has been held no error to submit the issue of last clear chance to the jury. *Harrison v. Lewis, supra; Wanner v. Alsup,* 265 N.C. 308, 144 S.E. 2d 18 (1965). We would note that the jury did not even reach the issue of last clear chance and that the question defendant raises is largely academic.

[4] Lastly, the defendant assigns as error the failure of the trial court to grant his motion for directed verdict. Even if no consideration be given to plaintiff's evidence as to excessive speed, the evidence was ample to allow the jury to infer that defendant failed to keep a proper lookout. Taken in the light most favorable to the plaintiff with all contradictions, conflicts and inconsistencies resolved in plaintiff's favor, the evidence was sufficient to withstand a motion for directed verdict.

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

No error.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. ROBERT EARL BAXTER, JR.

No. 7414SC198

(Filed 6 March 1974)

Narcotics § 4— manufacture of marijuana — insufficiency of evidence

The State's evidence was insufficient to be submitted to the jury on the issue of defendant's guilt of manufacturing marijuana where it tended to show only that while defendant was away from his apartment officers found therein a total of 219 grams of marijuana, 16 small envelopes containing marijuana, 28 empty small brown envelopes, four small plastic bags containing marijuana seed, and two boxes of cigarette paper, there being no showing as to when the marijuana was packaged, by whom and for what purpose.

APPEAL by defendant from *Clark, Judge,* at the June 1973 Session of DURHAM Superior Court.

This is a criminal action wherein the defendant and his wife were indicted under separate bills of indictment charging each of them with the manufacture of marijuana and with possession with the intent to distribute marijuana. The State's evidence tended to show that on the night of 13 June 1973, under a proper search warrant police officers entered the apartment of the defendant and his wife and found a total of 219 grams of marijuana. In the top drawer of the dresser in one bedroom, the officers found 16 small envelopes containing

marijuana. In the second drawer were found four small plastic bags containing marijuana seed. Also found in the dresser were two boxes of cigarette paper, one full, one empty. In the desk in the bedroom were found 28 empty small brown envelopes. Also found was a roll of scotch tape. In the bedroom closet, in a man's sport coat, the owner of the coat not being identified, was found one small yellow envelope containing marijuana. No marijuana cigarettes and no marijuana plants were found on the defendant's property. The defendant was not at home at the time and there was testimony to the effect that officers involved did not know of the defendant living at that apartment in the last week.

The defendant's wife was convicted of simple possession of marijuana and did not appeal. The defendant was found guilty of both manufacturing marijuana and of possession with the intent to distribute, and from said conviction, the defendant appeals.

Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey for the State.

Blackwell M. Brogden for defendant appellant.

CAMPBELL, Judge.

Defendant contends that it was error for the trial court to deny his motion for judgment as of nonsuit as to the charge of manufacturing marijuana. The State contends that the discovery of the items found on defendant's property raises an inference of knowledge and possession sufficient to carry the case to the jury on the issue of manufacturing. However, the cases cited by the State, *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972), and *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972), deal with the raising of an inference of possession, not an inference of manufacture. Unlike *State v. Elam,* 19 N.C. App. 451, 199 S.E. 2d 45 (1973), there was no evidence of growing marijuana or of any other process, preparation, production, propagation, compounding, conversion or synthesis. Compare with *State v. Cockman,* 20 N.C. App. 409, 201 S.E. 2d 740 (1974).

The word "manufacture" by definition in G.S. 90-87(15) can only mean manufacture with the intent to distribute and cannot mean manufacture for one's own use. As of 1 January

1974, there is no longer a statutory presumption that possession of more than five grams is possession with the intent to distribute. See G.S. 90-95(d)(4). Even were the old presumption still the law, it would be of no avail to the State in a case of manufacture to prove intent to distribute.

The only evidence of manufacturing, therefore, is the fact that the marijuana was "packaged." G.S. 90-87(15). However, there was no showing when the marijuana was packaged, by whom, or for what purpose. The defendant was not at home at the time and it was not established that he had been home in over a week. The sport coat containing marijuana was not established as being the defendant's nor was any of the marijuana or other items found established to have been defendant's, other than on the theory of constructive possession. We hold that the State failed to prove a sufficient nexus between the defendant, the marijuana, and other items to establish that (1) marijuana was being manufactured and (2) that it was being done by the defendant.

We therefore reverse as to the conviction for manufacture.

We have reviewed the defendant's other assignments of error and find them without merit. There was no error in the trial, conviction and sentence for possession with the intent to distribute marijuana.

Reversed in part and no error in part.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. CAUSTIN EUGENE LASHLEY

No. 7416SC200

(Filed 6 March 1974)

Constitutional Law § 32— duty of court to defendant appearing pro se

Where defendant voluntarily and understandingly waived his right to counsel and appeared *pro se*, the trial court was not required to exclude evidence to which defendant offered no objection, nor was the court required to warn defendant of his right against self-incrimination when the defendant offered to testify in his own behalf.

State v. Lashley

APPEAL by defendant from *Braswell, Judge,* 30 July 1973 Session of Superior Court held in ROBESON County.

This is a criminal action wherein the defendant, Caustin Eugene Lashley, was charged in warrants, proper in form, with hit and run driving involving property damage, speeding 90 miles per hour in a 35 mile per hour zone, failing to stop for a blue light and siren, careless and reckless driving, driving a motor vehicle upon the public highway while under the influence of some intoxicating liquor (third offense), driving while his license was permanently revoked, failing to stop at the scene of an accident, and assault with a deadly weapon, to wit, an automobile.

In the District Court the defendant was found guilty as to all charges contained in the warrants and he appealed to the Robeson County Superior Court where he was afforded a trial *de novo.* The defendant was informed by the trial judge of his right to have court-appointed counsel to represent him in these cases; however, he expressly waived this right in writing. The defendant was convicted of all charges except assault with a deadly weapon and was sentenced to be imprisoned for various terms, ranging from 30 days to two years. From these judgments the defendant appealed.

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

Johnson, Hedgpeth, Biggs & Campbell by John Wishart Campbell for defendant appellant.

HEDRICK, Judge.

The defendant in this case, as was his right under G.S. 1-11, appeared *pro se* and unfortunately proved to be a "poor lawyer and an unwise client." *State v. Pritchard,* 227 N.C. 168, 41 S.E. 2d 287 (1947). Now, through court-appointed counsel, the defendant attempts to argue that the trial court erred in allowing the admission of certain evidence (evidence to which defendant offered no objection at the time of its admission) and in failing to warn the defendant of his right against self-incrimination when the defendant offered to testify in his own behalf. These several assignments of error serve to raise the question of what obligation or duty does the trial judge owe to a defendant who has voluntarily and understandingly

waived his right to counsel. It is our opinion that a defendant who elects to appear *pro se* cannot expect the trial judge to relinquish his role as impartial arbiter in exchange for the dual capacity of judge and guardian angel of defendant. *State v. McDougald,* 18 N.C. App. 407, 197 S.E. 2d 11 (1973), cert. denied 283 N.C. 756 (1973). The consequences of a defendant representing himself are carefully analyzed in the following excerpt from a note appearing in the North Carolina Law Review:

> " . . . [A]n accused does so at his peril and acquires as a matter of right no greater privileges or latitude than would an attorney acting for him. Thus, a defendant appearing *pro se* does not become a ward or client of the court, nor must the court give the defendant legal advice, explain potential defenses, or advise the defendant of the right to ask instructions, nor generally allow him to proceed differently than would his attorney. The usual caveat holds that such a defendant 'assumes for all purposes connected with his case, and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken.' " Note, Right to Defend *Pro Se,* 48 N. C. Law Rev. 678, 683-4 (1970).

Nevertheless, we have reviewed the assignments of error presented by defendant and find them to be without merit. The defendant was afforded a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. LEROY JOHNSON

No. 7416SC101

(Filed 6 March 1974)

Escape § 1— felonious escape — sufficiency of instructions

For failure of the trial court to instruct the jury that before they could convict the defendant of felonious escape they must first find beyond a reasonable doubt that at the time of his escape defendant was serving a sentence imposed upon conviction of a felony, defendant is entitled to a new trial.

State v. Johnson

APPEAL by defendant from *McKinnon, Judge,* August 1973 Session of Superior Court held in SCOTLAND County.

This is a criminal action wherein the defendant, Leroy Johnson, was charged in a bill of indictment, proper in form, with the violation of G.S. 148-45(a) in that he escaped from a prison camp while he was serving a sentence for the crimes of possession of marijuana and possession of a sawed-off shotgun which are felonies under the law of this State. The defendant entered a plea of not guilty and the jury returned a verdict of guilty as charged. From a judgment that the defendant be imprisoned for a term of not less than eighteen nor more than twenty-four months, the defendant appealed.

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

J. Robert Gordon for the defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the failure of the trial court to instruct the jury that before they could convict the defendant of felonious escape they must first find beyond a reasonable doubt that at the time of his escape defendant was serving a sentence imposed upon conviction of a felony. The specific portion of the instructions upon which defendant bottoms his argument appears in the record as follows:

"Our law makes it unlawful for a person who is in the lawful custody of the State Department of Corrections to escape or to attempt to escape therefrom and for the State to be entitled to a conviction upon the charge against this defendant, it must prove beyond a reasonable doubt that he was in the custody of the State of North Carolina, Department of Corrections, by reason of the judgment of the court, a lawful commitment; and that while he was in that custody, he escaped or attempted to escape from that custody. If one escapes or attempts to escape when he leaves or attempts to leave intentionally, the lawful custody or bounds within which he has been placed by the Department of Corrections, and if one intentionally left a work force or crew under the supervision of the State Highway Commission officer, he had been properly assigned to that crew, and he intentionally left the area or bounds prescribed by the rules or the directions of the person in charge of the—of him,

then that would be escape. The State contends that you should be satisfied beyond a reasonable doubt that the defendant did intentionally escape from the lawful custody of the State Department of Corrections on this occasion."

The shortcoming of the foregoing instruction is that the court did not require the jury to find beyond a reasonable doubt that the defendant was serving a felony sentence. As stated by Mallard, C. J., in *State v. Ledford,* 9 N.C. App. 245, 175 S.E. 2d 605 (1970), "[t]here are two classes of escape from the State prison system. One is a felonious escape and the other is a misdemeanor. G.S. 148-45(a). The defendant [is] entitled to have his case submitted to the jury on the question of whether he was imprisoned while serving a sentence imposed for a felony or for a misdemeanor." For error in failing to instruct the jury as to this essential element of the crime charged, the defendant is entitled to a

New trial.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. FLOYD BROWN, JR.

No. 7416SC214

(Filed 6 March 1974)

Criminal Law § 11— accessory after the fact of armed robbery — indictment charging armed robbery — jurisdiction of court

Where the bill of indictment charges armed robbery, both a waiver and information are necessary, under G.S. 15-140.1, to vest the court with jurisdiction to try the defendant, or to entertain his plea, on a charge of accessory after the fact of armed robbery, because the offense of accessory after the fact is not a lesser included offense of the principal crime; therefore, the court in this case had no jurisdiction where defendant was charged with armed robbery, defendant did not waive the finding of a bill of indictment charging accessory after the fact of armed robbery, and the solicitor did not prepare an information setting out the elements of accessory after the fact of armed robbery.

ON writ of *certiorari* to the Superior Court to review proceedings before *Bailey, Judge,* at the 7 August 1973 Session of

Superior Court held in ROBESON County. Argued in the Court of Appeals on 14 February 1974.

Defendant was charged in a bill of indictment with the felony of armed robbery. Defendant, through counsel, tendered a plea of guilty to the felony of accessory after the fact of armed robbery. Upon the plea, defendant was sentenced to a term of not less than eight nor more than ten years. Upon petition of defendant, we issued the writ of certiorari.

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

Joseph C. Ward, Jr., for the defendant.

BROCK, Chief Judge.

The trial judge, upon competent evidence, adjudicated that defendant freely, voluntarily, and understandingly entered the plea of guilty. However, a court has no authority to accept a plea to a charge until it has properly acquired jurisdiction. A plea of guilty, standing alone, does not waive a jurisdictional defect. *State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770. Article I, Sec. 22, N. C. Constitution provides: "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases." Trial upon a presentment was abolished by G.S. 15-137. Therefore, no person may be put to answer a felony charge in the Superior Court except by indictment in noncapital cases, or, when represented by counsel, by waiver of indictment in noncapital cases under regulations prescribed by the General Assembly. The regulations for waiver of a bill of indictment in a noncapital case are prescribed by G.S. 15-140.1.

Defendant, in the case presently before us, was charged in a bill of indictment with armed robbery. Defendant did not waive the finding of a bill of indictment charging accessory after the fact of armed robbery nor did the solicitor prepare an information setting out the elements of accessory after the fact of armed robbery. Where the bill of indictment charges armed robbery, both a waiver and information are necessary, under G.S. 15-140.1, to vest the court with jurisdiction to try the

defendant, or to entertain his plea, on a charge of accessory after the fact of armed robbery, because the offense of accessory after the fact is not a lesser included offense of the principal crime. *State v. McIntosh,* 260 N. C. 749, 133 S.E. 2d 652.

Because the trial court did not have jurisdiction, the judgment must be arrested. The effect of arresting judgment in this case is to vacate the plea of guilty and the judgment. The State, if it so desires, may proceed against the defendant upon the charge of armed robbery as contained in the present bill of indictment. Or, if it so desires, the State may proceed against defendant upon a sufficient bill of indictment, or information (with waiver of indictment), charging the offense of accessory after the fact of armed robbery.

Judgment arrested.

Judges MORRIS and CARSON concur.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION; NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.; THE CITY OF DURHAM; NORTH CAROLINA OIL JOBBERS ASSOCIATION; JOSEPH L. BERRY; ROBERT AREY; GREAT LAKES CARBON CORPORATION; DUKE UNIVERSITY; HOUSTON V. BLAIR; BETTY MAJETT; AND ROBERT MORGAN, ATTORNEY GENERAL v. DUKE POWER COMPANY

No. 7410UC116

(Filed 6 March 1974)

Utilities Commission § 4— power company — general rate increase

Order of the Utilities Commission allowing a power company to increase its rates is affirmed where the findings of the Commission are supported by competent evidence and the rates fixed by the Commission were established as provided by statute.

Judge PARKER dissenting.

APPEAL by Duke Power Company from an order of the North Carolina Utilities Commission entered on 21 June 1973 in Docket No. E-7, Sub 145.

This is a general rate case initiated by Duke Power Company in an application seeking approval of proposed changes in its rate structure. Others named in the title of the case were allowed to intervene and become parties to the proceeding. On

21 June 1973, the Commission issued its final order which, among other things, allowed approximately seventy-two percent of the proposed increase. Duke Power Company appealed.

Edward B. Hipp, Commission Attorney, and John R. Molm, Associate Commission Attorney, for the North Carolina Utilities Commission; Claude V. Jones, attorney for the City of Durham; Boyd, Byrd, Ervin & Blanton by Robert B. Byrd, for Great Lakes Carbon Corporation; Attorney General Robert Morgan by I. Beverly Lake, Jr., Assistant Attorney General and Robert P. Gruber, Associate Attorney, for the State.

William H. Grigg, Steve C. Griffith, Jr., Clarence W. Walker and John M. Murchison, Jr., for defendant appellant, Duke Power Company.

VAUGHN, Judge.

The Courts are not authorized to fix rates for a public utility. That responsibility lies with the Utilities Commission. The findings of the Commission, when supported by competent evidence, are conclusive. This court may not substitute its judgment for that of the Commission even when it is of the opinion that the rate of return authorized by the Commission is inadequate.

After a review of the record, we are of the opinion that the findings of the Commission in this case are supported by substantial evidence and that the rates fixed by the Commission were established as provided by statute.

Affirmed.

Judge BRITT concurs.

Judge PARKER dissents.

Judge PARKER dissenting:

The record in this case, as in case No. 7410UC140 decided this day, indicates to me that the Commission made its determination as to fair rate of return on the basis of book value rather than on the basis of the fair value of the utility's property. As in case No. 7410UC140, I would remand this proceeding with direction that the Commission fix the rate of return on fair value as required by G.S. 62-133(b)(4).

STATE OF NORTH CAROLINA v. RICKEY STEVEN ALEXANDER

No. 7326SC788

(Filed 6 March 1974)

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

In-court identification of defendant based on the victim's observation of defendant at the scene of the robbery was properly allowed.

2. **Criminal Law § 84— search of defendant's person — admissibility of items seized**

Where defendant was seen running from the scene of the crime shortly after it occurred and officers stopped him and searched him, items seized from his person were properly admitted in his trial for armed robbery.

APPEAL by defendant from *Martin (Robert M.), Special Judge,* at the 30 April 1973 Schedule "A" Session of Superior Court held in MECKLENBURG County.

Defendant was convicted of armed robbery. Judgment imposing a prison sentence of from twenty to twenty-five years was entered. The sentence is to begin at the expiration of a sentence defendant is now serving. At defendant's request, his court appointed counsel gave notice of appeal.

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

Francis O. Clarkson, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant's exceptions to allowing the victim of his crime to identify him at trial are without merit. The evidence supports the court's findings, after *voir dire,* to the effect that the identification of defendant by the victim was based solely on what the victim saw at the time of the robbery. The court's findings which are supported by competent evidence are conclusive. *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677.

[2] Shortly after the robbery, defendant was seen running away from the scene of the crime. He was stopped and searched by police officers. The victim's wallet and a loaded pistol were taken from defendant's person. Defendant objected to the admission of these and other objects later taken from him. On appeal, defendant's able counsel concedes that *State v. Streeter,* 283 N.C.

203, 195 S.E. 2d 502 negates his argument on the admission of these items. We agree and find no prejudicial error in defendant's trial.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. VESTA RAY ARNOLD

No. 7414SC94

(Filed 6 March 1974)

1. **Constitutional Law § 30— lapse of three months between offense and trial — no denial of speedy trial**

Defendant failed to show that he was denied his right to a speedy trial where he was charged on 25 March 1973 with commission of the offense on 23 March 1973, the case was continued once because he was in the hospital and a second time because his counsel was absent and not ready for trial, and the case was finally tried and judgment was entered on 12 June 1973.

2. **Arson § 4— burning of items in carport — sufficiency of evidence**

Evidence was sufficient to withstand defendant's motion for nonsuit in a prosecution for attempt to commit arson where it tended to show that defendant was staying in a house with his former wife, the wife's landlord instructed her to get rid of defendant or she would have to move away, defendant was advised of the landlord's instructions, defendant, accompanied by his son, obtained a plastic bottle which he partially filled with gasoline, defendant drove to the landlord's house, lighted the bottle and threw it into the landlord's carport, and some contents of the carport were set on fire and damaged.

APPEAL by defendant from *Hall, Judge,* 11 June 1973 Session of Superior Court held in DURHAM County. Argued in the Court of Appeals 12 February 1974.

Defendant was convicted of attempt to commit arson. From judgment imposing prison sentence of not less than 7 nor more than 8 years, with credit for time spent in prison awaiting trial and with recommendation that he be given proper treatment for "his alcoholic condition," defendant appealed.

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

D. R. Smith for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the court to grant his motion to dismiss the action for the reason that he was not given speedy trial. The record discloses: Warrant was issued on 25 March 1973 charging defendant with commission of the offense on 23 March 1973. Probable cause was found on 2 April 1973 and bill of indictment was returned on 9 April 1973. Trial of the case was continued at the 25 April 1973 Session for the reason that defendant was in Cherry Hospital. Trial was continued at the 23 May 1973 Session by consent, defendant's attorney being absent and not ready for trial. The case was tried at the 11 June 1973 Session with judgment being entered on 12 June 1973.

There is no semblance of merit in the assignment. 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. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969). Not only did defendant fail to show neglect or willfulness on the part of the prosecution, he failed to show that he did not receive a speedy trial. The assignment of error is overruled.

[2] Defendant assigns as error the failure of the court to allow his motion for nonsuit. Pertinent evidence, viewed in the light most favorable to the State, tended to show:

Defendant's former wife was living in a house in Durham belonging to Robert Chandler (Chandler). Upon learning that defendant was staying at the house, Chandler advised the former wife that unless she ran defendant away, she would have to move. Defendant was advised of Chandler's instructions. He went to Chandler's office, asked him about the conversation with his former wife, and Chandler confirmed the conversation. Thereupon, defendant, accompanied by his 17-year-old son, went to a liquor store, bought some liquor, took two or three drinks, obtained a plastic bottle which he partially filled with gasoline, drove to Chandler's house, lighted the bottle and threw it into Chandler's carport. Certain contents of the carport were set on fire and damaged; the fire department was called and extinguished the fire. Principal testimony against defendant was supplied by his son who testified as a reluctant witness.

We hold that the evidence was more than sufficient to survive the motion for nonsuit and the assignment of error is overruled.

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

No error.

Judges PARKER and VAUGHN concur.

MR. AND MRS. WILL MAULDIN v. T. C. BALLOU, T/A BALLOU CONSTRUCTION COMPANY OF LUMBERTON, N. C.

No. 7416DC206

(Filed 6 March 1974)

Contracts § 27— payment for partial construction of house — damages for inadequate work

The evidence was sufficient to support the trial court's determination that defendant was entitled to recover $7,655 from plaintiffs for work completed on a house for plaintiffs and that plaintiffs were entitled to recover liquidated damages of $1,530 for work not adequately completed by defendant.

ON *certiorari* to review the order of *Britt, District Court Judge*, 1 June 1973 Session of ROBESON County District Court.

This action was instituted by plaintiffs to recover sums paid by them to defendant for the partial construction of a house, or, in the alternative, to compel defendant to complete the house and pay damages for the delay in completion. Defendant by answer averred that it had made diligent efforts to complete the home, and that plaintiffs requested the delay in order that they could reconsider the plans. Defendant averred also that once construction was resumed, plaintiffs delayed defendant's efforts by insisting on frequent changes in the construction. Defendant thereupon prayed that the court award it $7,655 damages for work completed on plaintiffs' house but not yet paid for.

After hearing evidence of both parties, Judge Britt made findings of fact and, based on these findings, concluded that

defendant was entitled to recover $7,655 from plaintiffs for work completed and that plaintiffs were entitled to recover liquidated damages of $1,530 for work not adequately completed by defendant. The court concluded that the recoveries should be offset, leaving the defendant with a net recovery of $6,125 against plaintiffs.

From the entry and signing of judgment, plaintiffs appealed.

J. H. Barrington, Jr., for plaintiff appellants.

Page, Floyd and Britt, by W. Earl Britt, for defendant appellee.

MORRIS, Judge.

Plaintiffs assign as error the findings of fact. Basically, plaintiffs argue that the trial judge should have found facts in accordance with plaintiffs' contentions. However, the findings of fact by the trial judge are conclusive if supported by competent evidence. We have carefully reviewed the evidence, and we conclude that it supports the facts, as found, even though it might have justified contrary findings upon some points.

The findings of fact support the conclusions of law. The judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge CARSON concur.

BOARD OF TRANSPORTATION, FORMERLY STATE HIGHWAY COMMISSION v. ELIZABETH L. POWELL; BETTY LOU CHESHIRE AND HUSBAND, JOHN LOUIS CHESHIRE; DOROTHY P. MARSHALL; NANCY P. BASS AND HUSBAND, GLENN BASS; AND THE TEXAS COMPANY

No. 7413SC104

(Filed 6 March 1974)

Highways and Cartways § 5— condemnation for highway relocation — adequacy of charge to jury

In a proceeding to condemn land for relocation of a highway, the charge of the trial court, when considered as a whole, correctly stated the law and presented the issues fairly to the jury.

APPEAL by all defendants, except Texaco, Inc. (Texas Company) who claimed no interest in the property, from *Brewer, Judge,* at the 20 August 1973 Session of BRUNSWICK Superior Court.

This action was instituted by the North Carolina Board of Transportation for the purpose of condemning a portion of defendants' land for the relocation of U. S. Highways 17, 74 and 76 near the town of Leland in Brunswick County. From a verdict of $38,210.00, the defendants appealed.

Attorney General Robert Morgan by Assistant Attorney General Claude W. Harris for plaintiff appellee.

Frink, Foy & Ganey by Henry G. Foy; and Addison Hewlett, Jr., for defendant appellants.

CAMPBELL, Judge.

The defendants have brought forward a number of assignments of error dealing with the admission and exclusion of evidence. We have reviewed these assignments of error and found no prejudicial error.

The defendants offered testimony as to the difference in value of their property before and after the taking in the following amounts: $98,000.00, $72,770.00, and $77,250.00. The State presented evidence as to a difference in value in the following amounts: $29,500.00, and $31,625.00. The jury returned a verdict of $37,500.00 to which the trial judge added interest of $710.00 for a total verdict of $38,210.00. The charge of the trial court, when considered as a whole, correctly stated the law and presented the issues fairly to the jury. We find

No error.

Judges HEDRICK and BALEY concur.

FRED ALEXANDER THOMPSON v. JAMES ALEX BOLES AND ALITA REE BOLES

No. 7421SC164

(Filed 6 March 1974)

Automobiles § 50— insufficiency of evidence of negligence

Plaintiff's evidence was insufficient to permit a jury to find that the collision between his motorcycle and defendants' car occurred from any negligence on the part of defendants.

APPEAL by plaintiff from *Armstrong, Judge,* 15 October 1973 Session of Superior Court held in FORSYTH County.

Action for damages arising from a collision between plaintiff's motorcycle and defendants' automobile. At the close of plaintiff's evidence the court allowed defendants' motion for a directed verdict and plaintiff appealed.

Richard Tyndall and Walter W. Pitt, Jr. for plaintiff appellant.

W. F. Maready for defendant appellees.

PARKER, Judge.

Plaintiff was the only witness to testify concerning the collision. From his testimony it is impossible to determine what occurred. Even resolving all discrepancies in his favor and giving him the benefit of all favorable inferences, his testimony was insufficient to permit a jury to find that the collision occurred from any negligence on the part of defendants.

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM MACKIE LOWE

No. 7419SC190

(Filed 6 March 1974)

Criminal Law § 161— appeal as exception to judgment

Defendant's appeal was an exception to the judgment and presented the face of the record for review.

ON *Certiorari* to review the trial before *Seay, Judge,* June 1973 Session of Superior Court held in ROWAN County.

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

Davis and Ford by Larry G. Ford for defendant appellant.

HEDRICK, Judge.

This appeal is an exception to the judgment and presents the face of the record proper for review. 3 Strong, N. C. Index 2d, Criminal Law, § 161, p. 112. The record reveals that defendant was charged in a bill of indictment, proper in form, with felonious escape pursuant to G.S. 148-45, entered a plea of not guilty, and was found guilty by a jury.

The judgment imposing a prison sentence of 24 months is within the limits prescribed for a violation of the statute.

In the defendant's trial in the Superior Court, we find

No error.

Judges CAMPBELL and BALEY concur.

VIVIAN DuBOSE v. JAMES MICHAEL REECE

No. 7421DC114

(Filed 6 March 1974)

Divorce and Alimony § 22— child custody — sufficiency of complaint

Plaintiff's complaint seeking to obtain custody of two children born of her marriage to defendant was sufficient to state a claim for relief.

APPEAL by plaintiff from *Clifford, District Judge,* 13 August 1973 Session of District Court held in FORSYTH County.

Plaintiff instituted this action for custody of two children born of her marriage to defendant. Before hearing any evidence, the court entered an order dismissing the action for failure to state a claim upon which relief could be granted.

White and Crumpler by Fred G. Crumpler, Jr., Michael J. Lewis and Melvin F. Wright, Jr., for plaintiff appellant.

Wilson and Morrow by John F. Morrow, for defendant appellee.

VAUGHN, Judge.

The complaint gives defendant sufficient notice of the nature and basis of plaintiff's claim to enable him to answer and prepare for trial. In fact, defendant had filed answer and an order had been entered directing an investigation by the Family Service Division of the Court. The complaint shows no insurmountable bar to the relief sought by plaintiff. It was, therefore, error to dismiss the action. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161. The order from which plaintiff appealed is vacated and the case is remanded.

Vacated and remanded.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. BENNIE FRANK TYSON

No. 7411SC122

(Filed 6 March 1974)

APPEAL by defendant from *Smith, Judge,* 10 September 1973 Session of Superior Court held in JOHNSTON County.

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

Robert A. Spence for defendant appellant.

VAUGHN, Judge.

Defendant was ably represented at trial and on appeal from his conviction of robbery with firearms. We find no prejudicial error in his trial.

No error.

Judges BRITT and PARKER concur.

JEAN H. HIGH v. CLARENCE MARSHALL HIGH

No. 7411DC19

(Filed 6 March 1974)

APPEAL by defendant from *Godwin, District Judge,* 20 March 1973 Session of District Court held in JOHNSTON County.

Action for alimony and support for two minor children. Plaintiff waived alimony. Defendant's answer admitted that he had an annual salary of $7500.00 plus a bonus. On cross-examination, he admitted that his gross salary is $775.00 per month plus an annual bonus of approximately ten percent of his salary. The court awarded plaintiff exclusive possession of the former home of the parties, ordered defendant to pay the monthly installments on the indebtedness on that property in the amount of $212.00, ordered defendant to pay $50.00 per month for the support of each child, restrained defendant from going on the

premises occupied by plaintiff and ordered defendant to pay plaintiff's counsel $300.00.

L. Austin Stevens for plaintiff appellee.

Corbett & Corbett by Albert A. Corbett, Jr., for defendant appellant.

VAUGHN, Judge.

The testimony at trial was not officially recorded, and the case on appeal was finally settled by the trial judge. It may well be, as contended by defendant, that not all of the court's findings of fact are supported by the record before us. It is clear, nevertheless, that the record does support those findings which are essential to the order entered and that no abuse of discretion has been shown.

Affirmed.

Judges BRITT and PARKER concur.

Smith v. Keator

GARY P. SMITH, D/B/A HOLIDAY HEALTH CLUB, ROBERT THOMPSON AND PEGGY N. THOMPSON, D/B/A PEGGY'S HEALTH CLUB, JAMES B. EDGE, D/B/A ROMAN HEALTH CLUB, STEPHEN B. SCOTT, D/B/A TOUCH OF MAGIC, ON BEHALF OF THEMSELVES AND SUCH OTHER PERSONS, FIRMS AND CORPORATIONS AS ARE SIMILARLY AFFECTED BY SECTION 17-14.1 AND SECTION 17-12 OF THE CITY CODE OF THE CITY OF FAYETTEVILLE, NORTH CAROLINA, CONCERNING THE LICENSING OF MASSEURS AND MASSEUSES AND MASSAGE PARLORS AND HEALTH CLUBS IN THE CITY OF FAYETTEVILLE v. HERVEY KEATOR, ACTING CHIEF OF POLICE OF THE CITY OF FAYETTEVILLE, NORTH CAROLINA, OTTIS F. JONES, SHERIFF OF CUMBERLAND COUNTY, NORTH CAROLINA, AND JACK THOMPSON, DISTRICT ATTORNEY (DISTRICT SOLICITOR) OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF NORTH CAROLINA

No. 7412SC147

(Filed 20 March 1974)

1. **Municipal Corporations § 8— city ordinance — conflict with State law**

A city has no power to adopt an ordinance which is in conflict with State law.

2. **Municipal Corporations § 32; Physicians, Surgeons, Etc. § 1— art of healing — masseurs — privilege licenses — local regulation**

Masseurs are not persons "practicing any professional art of healing" within the meaning of G.S. 105-41(a); therefore, masseurs are not required to obtain a privilege license from the State, G.S. 105-41(h) does not give them the right to operate throughout the State, and they are subject to regulation by local governments.

3. **Constitutional Law §§ 12, 14; Municipal Corporations § 32— massage parlor ordinance — constitutionality**

The Fayetteville massage parlor ordinance is construed to allow a licensee to appear before the city council and present his case before his license can be revoked and to permit the city council to deny an application for a massage license only upon reasonable grounds and after notice and hearing; when so construed, the ordinance meets the requirements of due process.

4. **Constitutional Law §§ 12, 20; Municipal Corporations § 32— prohibiting massage by member of opposite sex — equal protection**

Provision of a massage parlor ordinance making it unlawful for any person licensed under the ordinance "to treat a person of the opposite sex, except upon the signed order of a licensed physician, osteopath, chiropractor, or registered physical therapist" does not discriminate against women in violation of the equal protection clause of the Fourteenth Amendment.

5. **Municipal Corporations § 32— massage parlor ordinance — invalidity of one provision — validity of remaining provisions**

Even if a provision of a city ordinance forbidding massagists to treat persons of the opposite sex should be held unconstitutional, the remaining provisions of the ordinance regulating massage parlors would remain in effect.

6. Constitutional Law §§ 12, 14; Municipal Corporations § 32— validity of massage parlor ordinance

It is proper for a city to license massage parlors and to deny licenses to those applicants who cannot provide proof of good moral character, who are unable to furnish the required health certificate, or who otherwise fail to meet any reasonable qualifications.

APPEAL by defendants from *Braswell, Judge*, 9 August 1973 Session of Superior Court held in CUMBERLAND County.

Plaintiffs brought this action to enjoin the defendants in their official capacities as law enforcement officers from enforcing the provisions of Section 17-14.1 and Section 17-12 of the Code of Ordinances of the City of Fayetteville which are applicable to masseurs, massage parlors, health salons and clubs. Plaintiffs operate massage parlors in Fayetteville and have paid a state privilege license tax as a masseur or masseuse under G.S. 105-41 but have not obtained licenses under the Fayetteville ordinance.

Section 17-14.1 is a detailed ordinance which provides that every masseur or masseuse must obtain a license from the city council. Persons applying for a license must furnish proof of moral character and a "health certificate" from a doctor. Subsection (e) of the ordinance provides that when an application "is submitted in proper form and is approved by the city council, then the city tax collector is authorized to issue a business license to such applicant." Licensees must file the names and addresses of their employees with the chief of police, and they must keep records of the names and addresses of their customers. The ordinance regulates the hours of operation of massage parlors and forbids minors to patronize any massage parlor except under the orders of a doctor.

Subsection (j) of the ordinance reads as follows:

> "*Revocation of License.* Whenever, in the opinion of the chief of police of the city, there is good cause to revoke a license acquired hereunder, he shall submit a written recommendation of revocation, stating the reasons therefor, to the mayor and the city council, and by registered mail shall forward to the licensee a copy of his recommendation. The city council shall thereupon be authorized to revoke such license if in its sound discretion it is deemed in the best interests of the health, safety, welfare or morals of the people of the city."

Subsection (l) provides in part:

"*Treatment of Persons of Opposite Sex Restricted.* It shall be unlawful for any person holding a license under this section 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)."

Section 17-12 of the Fayetteville code provides that when a business is subject to a licensing ordinance, no person may engage in that business without obtaining a license.

The superior court entered judgment:

". . . IT IS ORDERED, ADJUDGED AND DECREED that Section 17-14.1, and that limited part of Section 17-12 dealing with massage parlors, of the Code of Ordinances of the City of Fayetteville is invalid and void. It is in conflict with G.S. 105-41, which has preempted the subject. It is also declared unconstitutional.

"The danger of prosecution of the plaintiffs is real and imminent. The plaintiffs would suffer irreparable damage if the ordinance were enforced. Pending the trial of this cause, a preliminary injunction is now granted the plaintiffs. The defendants are hereby restrained and prohibited from enforcing or attempting to enforce Section 17-14.1 and Section 17-12 of the Code of Ordinances of the City of Fayetteville."

Defendants appealed.

Butler, High & Baer, by Sneed High, for plaintiff appellees.

Nance, Collier, Singleton, Kirkman and Herndon, by Rudolph G. Singleton, Jr., and Clark, Clark, Shaw & Clark, by Heman R. Clark, for defendant appellants.

BALEY, Judge.

The superior court held that the Fayetteville massage parlor ordinance was invalid on two grounds: first, because it was in conflict with state law; and second, because it violated the due process and equal protection clauses of the United States Constitution.

[1] A city has no power to adopt an ordinance which is in conflict with state law. An ordinance is inconsistent with state law when it "makes unlawful an act, omission or condition which is expressly made lawful by State . . . law." G.S. 160A-174(b)(2); *see Tastee-Freez, Inc. v. Raleigh,* 256 N.C. 208, 123 S.E. 2d 632. Plaintiffs contend that the operation of massage parlors is expressly made lawful by G.S. 105-41(a) and (h), and therefore cannot be restricted by a city ordinance.

G.S. 105-41(a) provides as follows:

> "[A]ny person practicing any professional art of healing for a fee or reward . . . shall apply for and obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business or profession . . . ."

G.S. 105-41(h) provides:

> "[T]he statewide license herein provided for shall privilege the licensee to engage in such business or profession in every county, city or town in this State."

In determining whether plaintiffs' contention is a valid one, it is necessary to consider whether or not massagists are within the scope of G.S. 105-41(a). If massagists are not required to obtain a privilege license under G.S. 105-41(a), then G.S. 105-41(h) does not give them the right to operate throughout the state, and the city of Fayetteville is free to regulate them.

[2] We are of the opinion that masseurs are not persons "practicing any professional art of healing . . . " within the meaning of G.S. 105-41(a). The term is used in the statute in conjunction with physician, veterinary, surgeon, dentist, and others which require long periods of specialized education and training and a degree of specialized knowledge of an intellectual as well as physical nature. It seems clear that the legislature intended to use the word "professional" as implying a specialized knowledge and skill beyond manual dexterity. In this sense a "professional" art is one requiring "knowledge of advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study." *Paterson v. University of the State of New York,* 14 N.Y. 2d 432, 437, 201 N.E. 2d 27, 30, 252 N.Y.S. 2d 452, 455 (1964); *see Reich v. Reading,* 3 Pa. Cmwlth. 511, 518, 284 A. 2d 315, 319 (1971). "A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge,

labor, or skill, and the labor of skill involved is predominantly mental or intellectual, rather than physical or manual." *Marx v. Hartford Accident & Indem. Co.*, 183 Neb. 12, 14, 157 N.W. 2d 870, 872 (1968). Administering a massage requires manual skill and dexterity, but it does not require mental or intellectual skill, advanced knowledge, or specialized instruction and study. An uneducated person can give a massage as well as an educated person.

In addition, massage is not an "art of healing." The word "healing" is ordinarily understood to mean the curing of diseases or injuries. A person may receive a massage for relaxation, to relieve sore muscles, or for other purposes, but ordinarily massage is not used as a means of curing diseases. Certainly there is no evidence in the record that plaintiffs claim the ability to cure diseases.

It is true that the Commissioner of Revenue has interpreted G.S. 105-41(a) as applying to massagists. His interpretation of the statute, however, cannot be binding on the courts. It is entirely proper for the Commissioner to issue rulings setting forth his interpretation of the revenue statutes, in order to co-ordinate Revenue Department policy and make it uniform; but the power to construe statutes authoritatively belongs to the courts and not to any administrative official. *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939); *Pipeline Co. v. Clayton, Comr. of Revenue*, 275 N.C. 215, 166 S.E. 2d 671.

Since massage is not a professional art of healing, it is not within the scope of G.S. 105-41. Massagists are not required to obtain a privilege license from the state, and they are subject to regulation by local governments. The Fayetteville massage parlor ordinance does not conflict with state law.

[3] Plaintiffs next assert that the massage parlor ordinance violates the due process clause of the Fourteenth Amendment by permitting the city council to act arbitrarily in denying or revoking massage licenses. They argue that subsections (e) and (j) give the council unlimited discretion to deny any application for a license or revoke any license already issued. Under the due process clause, a city may not deny or revoke an occupational license arbitrarily, or without notice and a hearing. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102-03 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *Goldsmith v. United States Board of Tax Appeals*, 270

U.S. 117, 123 (1926); 1 Davis, Administrative Law, §§ 7.18-.19 (1958, Supp. 1970); 9 McQuillin, Municipal Corporations § 26.75. But the wording of the massage parlor ordinance is not incompatible with this principle. The ordinance can be construed so as to avoid constitutional deficiencies. *See Education Assistance Authority v. Bank,* 276 N.C. 576, 174 S.E. 2d 551; *Milk Commission v. Food Stores,* 270 N.C. 323, 154 S.E. 2d 548. Subsection (j) should be construed to allow a licensee to appear before the city council and present his case before his license can be revoked. The subsection expressly provides that a licensee must be notified by registered mail whenever there is a proposal to revoke his license, and this notice procedure would be of no use if the licensee were not allowed to come before the council for a hearing. Subsection (e), likewise, should be interpreted in a manner that will satisfy the requirements of the due process clause; the city council should not be permitted to deny an application for a massage license except upon reasonable grounds, and after notice and a hearing. When interpreted in this way, the licensing provisions of the ordinance are entirely constitutional.

[4] Finally plaintiffs contend that subsection (l) of the massage parlor ordinance discriminates against women in violation of the equal protection clause of the Fourteenth Amendment. *In Cheek v. City of Charlotte,* 273 N.C. 293, 160 S.E. 2d 18, the North Carolina Supreme Court upheld a similar city ordinance forbidding massagists to treat persons of the opposite sex. It quoted with approval from *In re Maki,* 56 Cal. App. 2d 635, 639, 644, 133 P. 2d 64, 67, 69 (1943):

> "The ordinance applies alike to both men and women. . . . The barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers.
>
> * * *
>
> "There is nothing in the ordinance that denies the equal protection guaranteed by the Fourteenth Amendment. It applies to all alike who give massages for hire and who are not licensed to practice one of the arts of healing."

Ordinarily, a statute will not be held to violate the equal protection clause unless it lacks any rational basis. *Dandridge v. Williams,* 397 U.S. 471 (1970); *Williamson v. Lee Optical, Inc.,* 348 U.S. 483 (1955); *Goesaert v. Cleary,* 335 U.S. 464 (1948);

Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1077-87. But when a statute classifies persons on the basis of a suspect criterion, it will not be judged by this lenient standard; instead, the courts will subject it to strict scutiny. *Frontiero v. Richardson,* 411 U.S. 677, 682-88 (1973), (opinion of Brennan, J.); *Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Developments in the Law, supra* at 1087-1120, 1124-27. Among the suspect criteria are race, alienage and national origin. *Frontiero v. Richardson, supra* at 682 (opinion of Brennan, J.); *Developments in the Law, supra* at 1124. A classification which infringes upon a constitutional right will also be viewed with strict scrutiny. *Dunn v. Blumstein,* 405 U.S. 330, 337-42 (1972); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969); *Developments in the Law, supra* at 1120-23, 1127-31. When a statute is subjected to strict scrutiny, it will be held constitutional only if it is shown to be *"necessary* to promote a *compelling* governmental interest." *Dunn v. Blumstein, supra* at 342; *Shapiro v. Thompson, supra* at 634. Such a statute will not be upheld merely because it serves the purpose of administrative convenience. *Frontiero v. Richardson, supra* at 688-90 (opinion of Brennan, J.); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972); *Shapiro v. Thompson, supra* at 631.

For many years the United States Supreme Court has held that sex was not a suspect criterion. Statutes applying differently to the different sexes were held constitutional if they had a rational basis. *Hoyt v. Florida,* 368 U.S. 57 (1961); *Goesaert v. Cleary, supra; West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 400 (1937); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L. J. 871, 875-82. Two recent decisions, however, *Reed v. Reed,* 404 U.S. 71 (1971), and *Frontiero v. Richardson, supra* (1973), have cast some doubt on the court's view of the rational basis standard. In *Reed v. Reed, supra,* the Court struck down an Idaho statute which provided that when two persons of opposite sex were equally qualified to serve as administrator of a decedent's estate, the man must always be chosen. In *Frontiero v. Richardson, supra,* a federal statute provided that a serviceman could claim his wife as a dependent (for purposes of obtaining increased medical and dental benefits and quarters allowance) regardless of whether she was in fact financially dependent on him, whereas a woman could not claim her husband unless he was actually dependent upon her. The Court held that this statute violated the equal protection clause.

In neither of these cases did the court explicitly state that sex was a suspect criterion. While these cases give a more liberal construction to the equal protection clause of the Fourteenth Amendment in its application to sex, we do not interpret them as directly applicable to an ordinance regulating massage parlors. Absent a direct holding of the United States Supreme Court which would have the effect of overruling the *Cheek* case, it continues to be the law of this state and is here controlling.

[5, 6] Even if subsection (l) should be held unconstitutional because it discriminates against women, this would not mean that the entire ordinance is void. "The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Ref. Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932) ; *accord, State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19; *Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78. Subsection (l) is only one part of a detailed regulatory scheme, and its absence would not impair the effectiveness of the other provisions of the ordinance. It should be emphasized that the equal protection clause does not deprive a city of the power to regulate massage parlors. It is entirely proper for the city of Fayetteville to license massage parlors and to deny licenses to those applicants who cannot provide proof of good moral character, who are unable to furnish the required health certificate, or who otherwise fail to meet any reasonable qualifications.

We hold Section 17-14.1 and Section 17-12 of the Fayetteville Code of Ordinances to be constitutional and valid.

The judgment of the Superior Court is

Reversed.

Judges CAMPBELL and HEDRICK concur.

HOMER M. SHARPE, ADMINISTRATOR OF THE ESTATE OF BRENDA ADELINE SHARPE v. DR. V. WATSON PUGH

No. 7310SC211

(Filed 20 March 1974)

1. **Evidence § 33— warning accompanying drug — inadmissible to prove truth of warning**

In a wrongful death action based on the alleged negligence of defendant in prescribing a drug for plaintiffs' minor child, the trial court did not err in excluding from evidence descriptive literature including warnings prepared by or for the manufacturer of the drug in question since the literature was inadmissible to prove the truth of the warning contained therein.

2. **Physicians and Surgeons, Etc. §§ 15, 17— wrongful death — prescription of drug — no evidence of standard of care required**

Even if the drug manufacturer's warnings were admissible in this wrongful death prosecution to show that defendant doctor knew, or should have known, of the dangerous propensities of the drug, there was a complete lack of evidence to establish the standard of care which defendant was required to adhere to in order for the jury to determine that he prescribed the drug for plaintiffs' child without exercising reasonable care and diligence, or that defendant failed to use his best judgment in his treatment of deceased.

3. **Physicians and Surgeons, Etc. § 17— prescription of drug — insufficiency of evidence of negligence**

While the evidence in a wrongful death action was sufficient to support a jury finding that defendant prescribed and administered to plaintiffs' child a drug knowing it could cause aplastic anemia, the disease from which the child died, and that defendant failed to warn plaintiffs of this dangerous side effect, the evidence was insufficient to support a jury finding that the drug was prescribed as a remedy for illnesses for which it was neither necessary nor suited.

4. **Physicians and Surgeons, Etc. § 20— wrongful death action — failure to show causal connection between negligence and death**

Even if the evidence was sufficient to establish a *prima facie* case of negligence on the part of defendant in prescribing and administering a drug to plaintiffs' child or in failing to warn plaintiffs about the effects of the drug, the evidence failed to show a causal connection between the negligence and the child's contraction of aplastic anemia from which her death resulted.

APPEAL by plaintiff from *Bone, Judge,* 16 October 1972 Session of Superior Court held in WAKE County.

This wrongful death action was before the North Carolina Supreme Court on the question of the sufficiency of the pleadings in *Sharpe v. Pugh,* 270 N.C. 598, 155 S.E. 2d 108 (1967).

The case came on for trial by jury on the issues of malpractice raised by the pleadings, but at the close of the evidence Judge Bone directed a verdict against the plaintiff administrator. Viewed in the light most favorable to plaintiff, the evidence adduced at trial tended to show:

Homer and Sarah Sharpe (Mr. and Mrs. Sharpe) were the parents of the decedent, Brenda Adeline Sharpe (Brenda), who was two years old in June 1963. Defendant was the child's pediatrician from the date of her birth until January 1964. He treated Brenda on numerous occasions between 18 June 1963 and 17 January 1964, and on three occasions during that interval of time, prescribed the drug chloromycetin to cure viral infections contracted by Brenda. The chloromycetin was administered by Mrs. Sharpe as prescribed by defendant.

During the course of treatment, no blood tests or other tests were administered to Brenda until 8 January 1964, after she had developed red spots, or petechiae, over her entire body. The spots became worse and on 17 January 1964 Brenda was referred to Rex Hospital in Raleigh for further tests. Thereafter she was referred to Memorial Hospital in Chapel Hill where she was treated by Dr. Campbell White McMillan who diagnosed her illness as aplastic anemia.

Dr. McMillan treated Brenda at Memorial Hospital over the course of three and a half months, during which time she was administered hormones and given several blood transfusions. On 8 May 1964, Brenda became unconscious and was taken to Memorial Hospital where she died the next morning. The postmortem examination revealed the cause of death to have been massive intracranial bleeding, a known complication resulting from aplastic anemia.

Concerning aplastic anemia, Dr. McMillan testified by deposition that: "Aplastic anemia should be regarded as a descriptive term rather than a specific disease process. . . . It is a descriptive word of a condition. . . . [W]hich really refers to a set of findings rather than an underlying cause." In response to a hypothetical question, not objected to by defendant, Dr. McMillan testified that chloromycetin might have caused the aplastic anemia condition which led to the bleeding which caused Brenda's death. However, on cross-examination, he testified that "[t]he general situation at the present time regarding this disease is that the fundamental causes of it have to be re-

garded as unknown. When I diagnose a condition of what I have described as aplastic anemia, then it would not be possible to specifically determine with certainty any particular cause for it." The incidence of aplastic anemia occurring as a result of the administration of chloromycetin at the lowest estimate was one case for every sixty thousand courses of therapy.

Dr. Joseph H. Callicott, Jr., testified by deposition that he conducted a postmortem examination on the body of Brenda Sharpe. The examination revealed that the bone marrow content showed a disease in the blood forming cells, and in Dr. Callicott's opinion, the cause of Brenda's death was intracranial bleeding resulting from aplastic anemia. In response to a hypothetical question, not objected to by defendant, Dr. Callicott testified that, "It is my opinion that it is possible that the aplastic anemia could have resulted from administration of chloromycetin. . . ."

At the end of the testimony of plaintiff's witnesses, plaintiff offered into evidence exhibits 14, 15 and 16, descriptive literature packaged with chloromycetin, and exhibits 23, 24 and 25, booklets prepared by the manufacturer of chloromycetin for distribution by salesmen, the identification and authenticity of exhibits 23, 24 and 25 having been stipulated to by the defendant. Objections by defendant to the admission of the exhibits were sustained. Plaintiff offered into evidence without objection copies of pages from the 1963 and 1964 Physicians' Desk Reference.

At the close of all the evidence, defendant moved for a directed verdict pursuant to G.S. 1A-1, Rule 50, on the ground that plaintiff had failed to offer sufficient evidence of negligence. The trial judge allowed the motion and plaintiff appealed.

Boyce, Mitchell, Burns & Smith, by F. Kent Burns and Eugene Boyce, for plaintiff appellant.

Maupin, Taylor & Ellis, by W. W. Taylor, Jr., and Richard C. Titus, and Manning, Fulton & Skinner, by Howard E. Manning, for defendant appellee.

BRITT, Judge.

Plaintiff assigns as error the exclusion from evidence of plaintiff's exhibits 14, 15, 16, 23, 24 and 25 and testimony as to their availability to doctors generally, and the dismissal of

the action by directed verdict. We find no merit in either assignment.

[1] The excluded exhibits were descriptive literature prepared by or for the manufacturer of chloromycetin and contained the following:

"WARNING

"Serious and even fatal blood dyscrasias (aplastic anemia, hypoplastic anemia, thrombocytopenia, granulocytopenia) are known to occur after the administration of chloramphenicol [chloromycetin]. Blood dyscrasias have occurred after both short term and prolonged therapy with this drug. Bearing in mind the possibility that such reactions may occur, chloramphenicol should be used only for serious infections caused by organisms which are susceptible to its antibacterial effects. Chloramphenicol should not be used when other less potentially dangerous agents will be effective, or in the treatment of trivial infections such as colds, influenza, or viral infections of the throat, or as a prophylactic agent.

"Precautions: It is essential that adequate blood studies be made during treatment with the drug. While blood studies may detect early peripheral blood changes, such as leukopenia or granulocytopenia, before they become irreversible, such studies cannot be relied on to detect bone marrow depression prior to development of aplastic anemia."

In *Koury v. Follo,* 272 N.C. 366, 158 S.E. 2d 548 (1968), the court held that literature of the type excluded in this case, when offered to prove the truth of the statement, is inadmissible under the hearsay rule; however, it is admissible to show the giving of a warning by the manufacturer. We quote from the opinion (p. 376): "It is not proof that the drug was unsafe for use upon a child. (Citation.) It is evidence of a warning which the physician disregards at his peril, and his disregard of it is relevant upon the issue of his use of reasonable care, where other evidence shows the drug is, in fact, dangerous to a child."

In *Hunt v. Bradshaw,* 242 N.C. 517, 521-522, 88 S.E. 2d 762, 765 (1955), the court said:

"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.) 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."

Reaffirmed in *Koury v. Follo, supra.*

[2] Clearly the trial court did not err in excluding the exhibits to prove the truth of the warning. Assuming, *arguendo,* that they were admissible to show that defendant knew, or should have known, of the dangerous propensities of chloromycetin, we are of the opinion that there was a complete lack of evidence to establish the standard of care which defendant was required to adhere to in order for the jury to determine that he prescribed the drug chloromycetin for Brenda without exercising reasonable care and diligence, or that defendant failed to use his best judgment in his treatment of Brenda. This case does not fall within the scope of the rule that where the physician's lack of due care is so gross as to be within the comprehension of laymen and to require only common knowledge and experience to understand and judge it, that expert evidence as to the standard of care the physician was required to meet is not necessary. See *Groce v. Myers,* 224 N.C. 165, 29 S.E. 2d 553 (1944). Rather, the standard of care in the treatment and prescription of the drug chloromycetin is peculiarly within the province of the experts, and in this case there was no expert testimony to establish the standard of care.

The only evidence we have discovered in the record which would indicate when chloromycetin should be prescribed and administered is the precautionary statement included in the warning quoted above, and that evidence was inadmissible to prove the truth of the statement.

[3] We are not unmindful of the statement made in the opinion in the former appeal of this case that defendant may have been negligent if he failed to advise or warn Brenda's parents with reference to the dangers inherent in the use of chloromycetin, where defendant prescribed the drug as a remedy for

illness for which it was neither necessary nor suited, knowing that the drug was dangerous. However, we are of the opinion that while the evidence was sufficient to support a jury finding that the defendant prescribed and administered chloromycetin, knowing it *could* cause aplastic anemia, and that defendant failed to warn Mr. and Mrs. Sharpe about this dangerous side effect, the evidence was insufficient to support a jury finding that the drug was prescribed as a remedy for illnesses for which it was neither necessary nor suited. As to the appropriateness of prescribing chloromycetin to treat viral infections, there is a total paucity of expert testimony or any other testimony. Once again the only evidence in this regard is the warning appearing on the face of the excluded exhibits and they were not admissible for that purpose.

[4] Assuming, *arguendo,* that plaintiff's evidence was sufficient to establish a prima facie case of negligence—that defendant was negligent in prescribing and administering chloromycetin for and to Brenda, or that he was negligent in failing to warn the Sharpes about chloromycetin—we think the evidence failed to show a causal connection between the negligence and Brenda's contraction of aplastic anemia. The testimony of plaintiff's witness Dr. McMillan included the following: "Based upon my experience and knowledge in the medical field, I have not been able to determine the causes of the condition described as aplastic anemia. And the general situation at the present time regarding this disease is that the fundamental causes of it have to be regarded as unknown. When I diagnose a condition of what I have described as aplastic anemia, then it would not be possible to specifically determine with certainty any particular cause for it. * * * I would have to say that in any case of aplastic anemia that I discovered that the cause could be from so many different sources that it would be impossible to specify a specific source. * * * Brenda Sharpe, might have developed or could have developed aplastic anemia from other sources. * * * I see no way to jump from the question of association to the question of a clear cause."

Plaintiff argues that the evidence from medical experts showing that Brenda's contraction of aplastic anemia *could* or *might* have been caused from taking chloromycetin was sufficient to take the case to the jury on the question of causation. Similar argument relating to medical testimony was rejected in *Lee v. Stevens,* 251 N.C. 429, 434, 111 S.E. 2d 623, 627

(1959); we quote from the opinion: "'* * * "We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury."'"

For the reasons stated, the judgment appealed from is

Affirmed.

Judges PARKER and HEDRICK concur.

NORFOLK AND WESTERN RAILWAY COMPANY v. WERNER INDUSTRIES, INC.

No. 7421SC61

(Filed 20 March 1974)

Indemnity § 3— action on indemnity agreement — summary judgment for defendant

Summary judgment was properly entered for defendant contractor in a railway's action to recover, under an agreement that defendant would indemnify the railway on account of injuries "caused by or resulting from any acts or omissions, negligent or otherwise" of defendant contractor, a sum which the railway had paid to defendant's employee for personal injuries the employee suffered while in the performance of defendant's contract with the railway.

Judge CAMPBELL concurring in the result.

Judge BALEY dissenting.

APPEAL by plaintiff from *McConnell, Judge,* 9 July 1973 Session of Superior Court held in FORSYTH County.

This is a civil action instituted by the plaintiff, Norfolk and Western Railway Company, against defendant, Werner Industries, Inc., wherein the plaintiff seeks to recover $6,027.00 under the provisions of an indemnity agreement between the parties. Plaintiff and defendant entered into a contract on 1 November 1969 providing that, among other things, defendant would unfasten and unload motor vehicles from railroad cars at specified unloading facilities belonging to plaintiff. While engaged in unloading operations, Jerry Boyles, an employee of defendant, was injured by an unloading ramp which he was

operating at the time of the accident. Boyles instituted an action against Norfolk and Western Railway Company for damages for personal injury allegedly resulting from the negligence of Norfolk and Western Railway Company. Upon settlement of this claim, plaintiff demanded reimbursement from defendant pursuant to an indemnification provision contained in the 1 November 1969 contract. The indemnification provision, in relevant part, reads as follows:

> "[T]o indemnify and save harmless Norfolk from and on account of injury to any person or persons, including death, as well as damage to or loss of property, or claims in connection therewith, caused by or resulting from any acts or omissions, negligent or otherwise, of Contractor [Werner]. . . ."

The affidavit of Jerry Boyles filed in the present action to support defendant's motion for summary judgment details the events of Boyles' accident. The affidavit discloses that on 15 February 1970, Boyles was moving a mechanical unloading ramp from one track to another by using the standard operating technique. "The standard procedure was for the operator to walk in front of the machine, with his back to it, holding the control switch behind himself and releasing the control switch when the desired position was reached." Boyles further alleged in his affidavit that on the occasion of his injury the control switch malfunctioned causing the ramp to continue to roll forward, strike his right heel, and break his right foot before coming to a stop.

Two affidavits produced by plaintiff indicate that inspections conducted by the plaintiff shortly after the Boyles' accident revealed nothing unusual about the operational status of the ramp.

From the granting of defendant's motion for summary judgment, the plaintiff now appeals.

Craige, Brawley by C. Thomas Ross for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and William F. Womble, Jr., for defendant appellee.

HEDRICK, Judge.

The sole question presented on this appeal is whether the pleadings, affidavits, interrogatories, and other exhibits intro-

duced show that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c), Rules of Civil Procedure. Determination of whether summary judgment was correctly entered in this case involves a two-step investigation: First, the relevant portion of the indemnification provision must be construed; and second, the motion for summary judgment must be viewed in light of the construction given to the provision.

The key language of the indemnity agreement reads as follows:

> "[Werner agrees] [t]o indemnify and save harmless Norfolk from and on account of injury to any person or persons . . . caused by or resulting from any acts or omissions, negligent or otherwise, of Contractor [Werner]. . . ."

If this language is interpreted to be clear, exact, and unambiguous then the terms of the contract are to be taken and understood in their plain, ordinary, and popular sense, *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962); *Bailey v. Insurance Co.*, 222 N.C. 716, 24 S.E. 2d 614 (1943); however, if the material terms of this agreement are found to be ambiguous then the principle that such writing should be construed against its preparer (Norfolk in this case) must govern. *Trust Co. v. Medford*, 258 N.C. 146, 128 S.E. 2d 141 (1962); *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946).

It is our view that the language "acts and omissions, negligent or otherwise, of Contractor" is unambiguous and simply and plainly means that if Werner is negligent and such negligence is the proximate cause of injury or death then the defendant shall be responsible to save plaintiff harmless. See, *Singleton v. R. R.*, 203 N.C. 462, 166 S.E. 305 (1932). Plaintiff submits that by its choice of the words *"any* acts or omissions, negligent or *otherwise"* (emphasis added) that it was attempting to effect the maximum indemnification coverage and thereby insure itself against loss regardless of whether injury or death was caused by plaintiff's negligence, defendant's negligence, the negligence of both, or the negligence of neither. Such a reading of the indemnity provision strains the meaning of the relevant portion of the agreement, accents the ambiguous nature of the language, and prompts a strict construction of the writing. *Trust Co. v. Medford, supra; Jones v. Realty Co.*,

supra. Furthermore, the indemnity provision according to the preceding analysis can be construed as seeking to exculpate plaintiff from its own negligence and such interpretation also requires that the provision be strictly construed. *Gibbs v. Light Co.*, 265 N.C. 459, 144 S.E. 2d 393 (1965). Therefore, regardless of which construction is given the indemnity provision the result is the same.

Next, we must review the pleadings, affidavits, interrogatories, and other exhibits, in light of the above discussed construction of the indemnity provision, to ascertain whether they create a genuine issue as to any material fact. Plaintiff strenuously contends that the affidavit of Jerry Boyles, particularly that portion pertaining to the method or technique of operation of the unloading ramp, serves to raise a genuine issue as to whether defendant Werner was negligent. We do not agree. The matter contained in the affidavit does not serve to raise an inference of negligence on defendant's part which must be submitted to a jury, but rather any possible inference of negligence derived from the affidavit would be nothing more than the product of speculation or conjecture and not sufficient to avoid summary judgment.

The decision of the trial court granting defendant's motion for summary judgment is

Affirmed.

Judge CAMPBELL concurs in the result.

Judge BALEY dissents.

Judge CAMPBELL concurring.

I concur in the result reached but not in the reasons therefore. The opinion requires that Werner be negligent before the plaintiff could hold Werner responsible under the indemnity agreement. I think this is too narrow a construction and that the word "otherwise" has been eliminated from the agreement by such a construction. I think the word "otherwise" has a meaning and a place. The agreement unquestionably, however, does not permit plaintiff to hold Werner unless Werner has done something or omitted to do something. The words "resulting from any acts or omissions" must be given a meaning, and

I think those words mean that Werner must do something or fail to do something before it can be held liable to the plaintiff under the indemnity agreement. In the instant case there is nothing to show either an act or an omission on the part of Werner. The entire contention of the injured employee was to the effect that the plaintiff had failed in a duty which it owed. The indemnity agreement is not as broad as plaintiff asserts and does not make Werner responsible to plaintiff for something the plaintiff itself did and which Werner did not do or omit to do.

I therefore concur in the result.

Judge BALEY dissenting.

I dissent.

The concurring opinion of Judge Campbell gives the construction to the indemnity agreement with which I am in accord, but I differ with the result he reaches. The employee, Boyles, was injured by the malfunctioning of equipment owned by the railway and furnished not to Boyles, but to Werner for use in complying with its contract with the railway. Then Werner, as employer, furnishes to Boyles this equipment which functions improperly causing injury. The indemnity agreement appears to be designed to protect the railway from having to prove negligence of Werner if the injury was caused by any act or omission of Werner. There is room for a difference of opinion concerning whether the injury was "caused by or resulting from any acts or omissions, negligent or otherwise, of contractor (Werner)." The defendant's motion for summary judgment was improvidently granted. I would award a new trial.

SAMUEL WAYNE PASCHALL v. CORA CHOPLIN PASCHALL (WALTERS)

No. 7414DC79

(Filed 20 March 1974)

1. **Divorce and Alimony § 24— child custody — welfare of child controlling**

The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody.

2. **Divorce and Alimony § 24— child custody — adulterous relationship of mother — effect on child**

In a proceeding to determine child custody evidence was sufficient to support the trial court's finding that defendant carried on an adulterous relationship with a man and that defendant's child was old enough to have some partial understanding as to the nature of the relationship, and the court could reasonably conclude that such relationship was likely to and did create emotional difficulties for a young child.

3. **Divorce and Alimony § 24— child custody — fitness of father to have custody**

Evidence that plaintiff had taken proper care of his daughter when she visited him, that he had made regular payments for her support, and that he and his present wife could provide a proper home for the child was sufficient to support the trial court's finding that plaintiff was a fit and proper person to have custody of the minor child.

4. **Divorce and Alimony § 24— child custody — material change in circumstances**

Where defendant claimed that her adulterous relationship began in 1970 but plaintiff offered no evidence of the adultery at the 1971 divorce trial, defendant's contention that there was no material change of circumstances since the divorce decree is without merit, since the circumstances found by the trial court to exist in 1973 were materially different from the circumstances which the court found to exist at the 1971 divorce trial.

APPEAL by defendant from *Moore, Judge,* 9 April 1973 Session of District Court held in DURHAM County.

Plaintiff has filed a motion in his divorce action seeking the exclusive custody of his minor daughter, Tonya Waynette Paschall. The divorce was granted on 26 July 1971 on the ground of one year's separation, and the defendant was awarded custody of the child with visitation rights to plaintiff. Both plaintiff and defendant were found to be fit and suitable to have custody of the child, but the court found that the best interest of the child required that she be placed with her mother.

In his motion for a change of custody, filed 15 March 1973, plaintiff has alleged that defendant was maintaining an adulterous relationship with James Ronald Walters and the exposure of the child to such relationship was emotionally disturbing and detrimental to the best interest and welfare of the child. He further alleged that defendant was no longer a fit and proper person to have custody of their daughter and that he was in a position to provide an environment more suitable to her physical and emotional needs.

At the hearing upon plaintiff's motion, both parties presented evidence. At the conclusion of the hearing the court entered an order awarding custody of the child to plaintiff with visitation privileges to defendant. Defendant has appealed to this Court.

Blackwell M. Brogden for plaintiff appellee.

Charles Darsie for defendant appellant.

BALEY, Judge.

[1] "The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody." *In re Moore,* 8 N.C. App. 251, 253-54, 174 S.E. 2d 135, 137; *accord, Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221; *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73. Frequently a determination of what represents the best welfare of the child is a most difficult decision. The trial court has the opportunity to observe all parties and evaluate the living, breathing evidence which sometimes appears differently in cold print. If the evidence supports the findings of fact by the trial court and those findings of fact form a valid basis for the conclusions of law, the judgment entered will not be disturbed on appeal.

[2] The evidence clearly supports the finding of the court that defendant had "committed a continuous course of adulterous relations with . . . James Ronald Walters." Defendant was called as a witness for plaintiff, and in her testimony she admitted that she had been dating Walters, a married man, since 1970; that she had spent the night with him in his house trailer several times; and that she had had intercourse with him periodically. The court also found that "said adulterous relationship . . . has created emotional problems that are detrimental to the best interest and welfare of said minor child." Defendant testified that when she went to spend the night in Walters' house trailer, she usually took Waynette with her. On these nights she would get into bed with Waynette, wait in bed for a while, climb out of bed and go to Walters' room and have intercourse with him and then get back into bed with Waynette. She and Waynette would get up at six or seven in the morning to return home from Walters' trailer. Waynette was born on 4 October 1965, and in late 1972 and in 1973, when most of these visits occurred, she was old enough to have some partial

understanding of the nature of her mother's relationship with Walters. The court could reasonably conclude that such a relationship was likely to and did create emotional difficulties for a young child.

[3] There is competent evidence supporting the court's finding that plaintiff was a fit and proper person to have custody of Waynette. Patty Holsonback, a neighbor of plaintiff, testified that plaintiff and Waynette were "a loving couple." She also stated that plaintiff's present wife, whom he married in 1972, "would make a fine mother" for Waynette. Plaintiff's own testimony tended to show that he had taken care of Waynette properly when she visited him; that he had made regular payments for her support; and that he and his present wife could provide a proper home environment for his daughter.

Defendant vigorously contests the conclusion of the court that because of her adulterous relationship with James Ronald Walters and the consequent emotional difficulties which the court found were caused for her daughter that she was no longer a fit and proper person to have the custody of the child, citing the cases of *Savage v. Savage,* 15 N.C. App. 123, 189 S.E. 2d 545, *cert. denied,* 281 N.C. 759, 191 S.E. 2d 356; *In re McCraw Children,* 3 N.C. App. 390, 165 S.E. 2d 1; and *In re Custody of Pitts,* 2 N.C. App. 211, 162 S.E. 2d 524. These cases held only that a parent who commits adultery does not automatically, per se, become unfit to have custody of children. Instead of applying any such inflexible rule, the court must consider all the facts of the case and decide the issue in accordance with the best interests of the child. In this case the court found that the mother's adultery had created emotional problems for the child, and it declared the mother unfit for custody. In another case, when the parent's illicit relationship was kept secret from the child, the court might hold that the parent was fit for custody despite the adultery. The trial court has broad discretion in deciding individual cases involving child custody. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324; *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133; *In re Moore, supra.*

[4] In its conclusions of law, the trial court stated that because of "the material change of circumstances that has occurred since July 26, 1971," the date of the divorce decree, plaintiff should be granted custody of Waynette. Defendant contends that since her relationship with Ronald Walters began in 1970, there has in reality been no material change of circumstances since the

divorce was granted, and thus the court's conclusions of law are erroneous. This contention is without merit. It may be that plaintiff did not know of defendant's adultery when he obtained his divorce, or it may be that he knew about it but could not prove it. But whatever the reasons for his failure to offer evidence of adultery at the 1971 divorce trial, the child should not be penalized. Such a decision would actually be more harmful for the child than for plaintiff. A child should not be placed in the custody of an unfit parent merely because the other parent failed to introduce evidence at the proper stage of the litigation. *See Munson v. Munson,* 27 Cal. 2d 659, 666-67, 166 P. 2d 268, 272 (1946); *Wendland v. Wendland,* 29 Wis. 2d 145, 157-58, 138 N.W. 2d 185, 191-92 (1965); Annot., 9 A.L.R. 2d 623 (1950). In this case the present circumstances are materially different from the circumstances which the court found to exist at the 1971 divorce trial, and this is sufficient to support the action of the trial court in directing a change of custody.

The order awarding custody to plaintiff is affirmed.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

IN THE MATTER OF THE PROCEEDINGS BY THE CITY OF GREENSBORO FOR CONDEMNATION OF A RIGHT-OF-WAY ACROSS PROPERTY OF RACHEL E. FLINCHUM, AND HUSBAND, JAMES W. FLINCHUM

No. 7418SC41

(Filed 20 March 1974)

1. **Eminent Domain § 11— appeal to superior court — site selection — question of arbitrariness**

In an appeal to the superior court from a resolution of condemnation by a city, the question of whether the city acted arbitrarily and capriciously in its determination of the site to be condemned is a preliminary question of fact to be determined by the trial judge, and though he has the discretion to submit such preliminary question to the jury, he is not required to do so. G.S. 40-20; G.S. 160A-256.

2. **Eminent Domain § 1— choice of route**

Where an administrative agency or municipality has been granted the power of condemnation, the choice of a route or site is primarily within its discretion and will not be reviewed on the ground that

another route may have been more appropriately chosen, unless it appears that there has been an abuse of discretion.

3. **Eminent Domain § 1— choice of route**

The trial court did not err in its conclusion that a city did not act arbitrarily in condemning a right-of-way for a sewer outfall line across respondents' property rather than along two alternate routes offered by respondents where the court made findings based on the reports of two engineers that the proposed route was preferable to either of the alternate routes because of the impracticality of installation and maintenance of the line.

4. **Eminent Domain § 11— appeal to superior court — issue of damages — trial de novo**

Respondents' appeal to superior court from a condemnation proceeding presented the issue of damages for trial *de novo* before a jury without regard to the sum originally awarded by the commissioners of appraisal.

5. **Eminent Domain § 6— evidence of value — competency of witness**

The trial court in a condemnation proceeding did not err in the exclusion of a witness's testimony based upon its conclusion that the witness did not show adequate knowledge of the value of the property at the time.

APPEAL by respondents from *Crissman, Judge,* 23 April 1973 Session of Superior Court held in GUILFORD County. Argued in the Court of Appeals on 22 January 1974.

The petitioner, City of Greensboro, attempted to acquire a right-of-way for the installation of a sanitary outfall line across the respondents' property. When a voluntary purchase failed, the City Council of the City of Greensboro proceeded to condemn the right-of-way under § 6.101 *et seq.* of the Greensboro City Charter. On 7 July 1972, respondents were served with a resolution of condemnation along with a notice of the meeting of appraisers. A Board of Appraisers met on respondents' property on 11 August 1972, viewed the property, and heard evidence from both parties involved. The Board of Appraisers unanimously voted to award respondents $944.00 for the taking of a right-of-way. The report of the appraisers and condemnation resolution was adopted by the City Council on 6 November 1972.

Respondents appealed the final resolution of condemnation to the Superior Court of Guilford County in accordance with § 6.112 of the Greensboro Charter. The only issue submitted to the jury was the amount of damages respondents were entitled to recover. The jury returned a verdict in the amount of $1250.00. Respondents appealed.

Jesse L. Warren, Samuel M. Moore, and Dale Shepherd for petitioner-appellee.

Walker, Short & Alexander, by E. Raymond Alexander, Jr., for respondents-appellants.

BROCK, Chief Judge.

The parties stipulated in a pre-trial order that the only issues before the trial court were the following:

(1) Did the City of Greensboro abuse its discretion and act arbitrarily and capriciously in condemning the right-of-way across the property of the respondents?

(2) What amount of damages, if any, are the respondents, Rachel E. Flinchum and husband, James W. Flinchum, entitled to recover as just compensation for the taking of the right-of-way across their property?

The question of arbitrariness on the part of the City of Greensboro must be viewed as two separate assignments of error. Respondents contend that (1) the question of arbitrary and capricious action on the part of the City of Greensboro should have been submitted to the jury, and (2) that the trial judge committed error in finding that the City of Greensboro did not act arbitrarily in the condemnation of the right-of-way across respondents' property.

[1] In an appeal to the Superior Court from a resolution of condemnation by a city, the question of whether the city acted arbitrarily and capriciously in its determination of the site to be condemned is a preliminary question of fact to be determined by the trial judge. Only the trial of the issue of damages is required to be *de novo* by a jury. See G.S. 40-20 and G.S. 160A-256. Although it seems that the trial judge may, in his discretion, submit some or all of the preliminary questions of fact to the jury, he is not required to do so. In an appeal wherein it was contended that the Housing Authority acted arbitrarily and capriciously in selecting the site to be condemned, our Supreme Court said: "Conceding, as we may, that the issuable question thus presented was a question of fact reviewable by the presiding Judge (citations omitted), nevertheless it was within the discretionary power of the Judge to submit the question to the jury for determination. (Citations omitted.)" *In re Housing Authority*, 235 N.C. 463, 70 S.E. 2d 500.

The trial judge did not commit error in failing to submit this issue to the jury. This portion of the assignment of error is overruled.

Respondents also contend that the trial judge committed error in failing to find that the City of Greensboro acted arbitrarily in its condemnation of a specific portion of respondents' property rather than along two alternative routes offered by respondents.

[2, 3] Where an administrative agency or municipality has been granted the power of condemnation, the choice of a route or site is primarily within its discretion and will not be reviewed on the ground that another route may have been more appropriately chosen, unless it appears that there has been an abuse of discretion. In this case, the trial judge made findings of fact, based upon the reports of two engineers, that the proposed route of condemnation was preferable to either of the two routes proposed by the respondents due to the impracticality of installation and future maintenance of the line. The trial judge then concluded, as a matter of law, that the City of Greensboro did not abuse its discretion or act in an arbitrary or capricious manner in condemning the right-of-way across respondents' property.

The facts found, based upon competent evidence, support the conclusion of law and are, therefore, conclusive. This assignment of error is overruled.

[4] Respondents' appeal to the Superior Court presented for trial *de novo* by jury the issue as to the amount of damages respondents are entitled to recover as a result of the condemnation.

" . . . [W]hen either party to a condemnation proceeding appeals to the Superior Court in term and demands that the damage be determined by a jury, the trial must proceed in the Superior Court in so far as the question of damages is concerned as though no commissioners of appraisal had ever been appointed. This being true, it necessarily follows that the Superior Court at term is vested with authority to enter judgment for the landowner for the amount of damages fixed by the verdict of the jury, regardless of whether the same be greater or smaller than the sum originally awarded by the commissioners of appraisal, and regardless of whether the landowner or the condemnor took the appeal." *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479. *See* G.S. 40-20.

The record discloses that the appraisers assessed damages in the amount of $944.00. The jury, after hearing the testimony of respondents' witnesses, each witness giving his opinion as to the extent to which respondents' property had been damaged, rendered a verdict in the amount of $1250.00. The trial judge rendered judgment accordingly.

Respondents have availed themselves of their procedural statutory rights and have obtained compensation as prescribed by statute. Absent error at the trial *de novo,* the judgment must be affirmed.

[5] Respondents contend the trial court committed error when it excluded witness Hull's testimony based upon its conclusion that the witness did not show an adequate knowledge of the value of the property at the time and, therefore, did not qualify as being able to give an opinion upon the value of the property.

"Objection to the competency of a witness must be made in the trial court by a motion for the judge to pass upon the competency. The question must be left 'mainly, if not entirely,' to the discretion of the trial judge, and his decision is not reviewable except, perhaps, for a clear abuse of discretion, or where the ruling is based on an erroneous conception of the law. Stansbury, N. C. Evidence 2d, § 55." *State v. Fuller,* 2 N.C. App. 204, 162 S.E. 2d 517.

Other witnesses for respondents testified and gave opinions as to the value of the land; their testimony was not stricken from the record.

This assignment of error is overruled.

For the reasons stated, we find that respondents received a fair trial, free from prejudicial error.

No error.

Judges MORRIS and CARSON concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. ANDREW CURRIE CHANTOS

No. 7410SC112

(Filed 20 March 1974)

Rules of Civil Procedure § 56— affidavits in support of summary judgment motion — time for filing

Though G.S. 1A-1, Rule 56, does not contain a specific provision with respect to when affidavits in support of a motion for summary judgment must be filed and served, it is implicit that they should be filed and served sufficiently in advance of the hearing to permit opposing affidavits to be filed prior to the day of the hearing; therefore, it was error for the trial court to allow defendant to offer affidavits in support of his motion for summary judgment for the first time at the time of the hearing.

APPEAL by plaintiff from *Smith, Judge,* 28 May 1973 Session of Superior Court held in WAKE County. Argued in the Court of Appeals 20 February 1974.

Plaintiff seeks to recover from defendant the sum it paid in damages to a third party because of alleged negligence in the operation of an automobile by defendant. Plaintiff alleges its right to recover arises from its specification of this right in its contract of insurance as permitted by G.S. 20-279.21(h). Plaintiff alleges it was obligated to pay, not by the written provisions of its contract of insurance, but because of the provisions of G.S. 20-279.21(b)(2) requiring it to pay for damages negligently inflicted by one in lawful possession of the insured vehicle.

Defendant filed a Rule 56(b) motion for summary judgment on 4 April 1973, and served notice thereof by mailing a copy of the motion to counsel for plaintiff on 4 April 1973. The motion for summary judgment was heard by Judge Smith during the 28 May 1973 session. At the time of the hearing, defendant offered affidavits in support of his motion for summary judgment. Plaintiff objected to the affidavits being filed, for the first time, on the date of the hearing. Plaintiff's objections were overruled, and, subsequently, summary judgment was rendered for defendant based largely upon the information in the affidavit of defendant which was offered for the first time at the time of the hearing. The allowance of the affidavits at the time of the hearing, over plaintiff's objections, is the subject of plaintiff's first assignment of error.

Ragsdale & Liggett, by George R. Ragsdale, for the plaintiff.

Teague, Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey, for the defendant.

BROCK, Chief Judge.

G.S. 1A-1, Rule 56 does not contain a specific provision with respect to when affidavits in support of a motion for summary judgment must be filed and served. Nevertheless, it seems implicit in Rule 56(c) that such affidavits must be filed and served prior to the day of the hearing. Rule 56(c) provides: "The adverse party prior to the day of hearing may serve opposing affidavits." It is clear that opposing affidavits are to be served prior to the day of the hearing. It follows that the clear intent of the legislature is that supporting affidavits should be filed and served sufficiently in advance of the hearing to permit opposing affidavits to be filed prior to the day of the hearing. The foregoing is inferred by Rule 56(c) without resort to other provisions of the Rules of Civil Procedure. However, Rule 6(d) specifically provides: "When a motion is supported by affidavit, the affidavit shall be served with the motion." This provision of Rule 6(d) applies to affidavits in support of a Rule 56 motion for summary judgment.

Our ruling upon this question is supported by recognized authors on the subject of the federal rules after which our rules are patterned.

"The moving party should serve his supporting affidavits, if any, with his motion; and normally the adverse party should serve his opposing affidavits, if any, prior to the day of hearing." 6 Moore's Federal Practice, 2d ed., p. 2820. "If the party seeking summary judgment desires to use affidavits, he should serve supporting affidavits that meet the testimonial requirements of Rule 56(e) with his motion." Id., p. 2256. "According to Rule 6(d), any affidavits in support of the summary judgment motion also should be served at the time the motion is served, unless the court exercises its discretion under Rule 6(b) and permits later service." 10 Wright and Miller, Federal Practice and Procedure, § 2719, p. 450. See also, 3 Barron & Holtzoff, Federal Practice and Procedure, § 1237, p. 167 (Wright ed. 1958).

Clearly, Rule 6(b) gives the trial court wide discretionary authority to enlarge the time within which an act may be done.

However, the discretion to be exercised is a judicial discretion, not an unrestrained one. Rule 6(b) itself provides that, in order to obtain an enlargement of time within which to do an act, the request for enlargement of time must be made before the expiration of the period originally prescribed or as extended by previous order. If the request for enlargement of time is made after the expiration of the period of time within which the act should have been done, there must be a showing of excusable neglect.

In the case presently before us, there was no request for enlargement of time within which to file and serve the affidavits made prior to making the motion for summary judgment, nor was there a finding of excusable neglect in failing to serve the affidavits with notice of the motion for summary judgment. Therefore, the movant has failed to proceed in a manner that would permit the trial court to exercise its discretion under Rule 6(b).

It is interesting to note that defendant apparently deliberately withheld the service of his affidavit until the day of the hearing. According to the date of the defendant's affidavit, and the date of the verification thereof, it was signed on the same day that counsel certified that notice of the motion for summary judgment was mailed to plaintiff's counsel. It seems clear, therefore, that the affidavit was available for service with the notice of motion for summary judgment. If this practice were permitted, affidavits in support of a motion for summary judgment could always come as a surprise to the opposing party and would effectively deny the opposing party a chance to present affidavits in opposition to the motion.

Undoubtedly, Rule 56(e) grants to the trial court wide discretion to permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. However, this provision presupposes that an affidavit or affidavits have already been served. The rule speaks only of supplementing or opposing. Clearly, it does not intend to authorize filing, on the day of the hearing, the only affidavits supporting the motion for summary judgment.

Defendant cites and relies upon *Millsaps v. Contracting Company,* 14 N.C. App. 321, 188 S.E. 2d 663, in support of his right to withhold his affidavit until the day of the hearing. True, there is language quoted in *Millsaps* which tends to support defendant's position. However, the particular language

relied upon by defendant is contained in a quote from 5 Wake Forest Intra. L. Rev. 87, at 91 (1969). Suffice it to say, we do not agree with the language quoted from the article insofar as it suggests that Rule 6(d) does not apply to an affidavit in support of a motion for summary judgment. In any event, *Millsaps* was not concerned with a failure of the movant to serve the supporting affidavit with the notice of motion for summary judgment. The record in the *Millsaps* case dicloses that the affidavits about which the appellant in *Millsaps* complained were affidavits offered *in opposition* to the motion for summary judgment. Also, the record in the *Millsaps* case discloses that appellant did not object to the offer of the affidavits until appellant's brief was filed in this court. We conclude, therefore, that *Millsaps* does not rule upon the question presented by the present appeal.

Defendant further argues that it is proper to withhold affidavits in support of a motion for summary judgment until the day of the hearing because Rule 43(e) permits oral testimony at the hearing. Defendant argues that, if the movant is permitted to offer oral testimony without prior notice, it is reasonable to offer affidavits without prior notice. One answer to this argument is that a witness giving oral testimony is subject to cross-examination; an affidavit is not. Primarily, the answer to this argument is the further provision in Rule 43(e) that the hearing on oral testimony is at the direction of the court, not necessarily upon the choice of counsel. "The provisions of Rule 43(e) can be used in supplementing a summary judgment hearing through the use of oral testimony. This procedure should normally be utilized only if a small link of evidence is needed, and not for a long drawn out hearing to determine whether there is to be a trial." 6 Moore's Federal Practice, 2d ed., p. 2042.

We express no opinion upon the merits of plaintiff's claim. We merely wish to correct an erroneous proceeding under Rule 56.

Reversed and remanded.

Judges MORRIS and CARSON concur.

CATO LADIES MODES OF NORTH CAROLINA, INC. v. GERTRUDE W. POPE AND JOHN W. POPE

No. 7410DC211

(Filed 20 March 1974)

1. **Landlord and Tenant § 8— breach of covenant to repair — roof repaired by lessee — cost placed on lessor**

Upon breach by the lessor of his covenant to repair, the lessee may make such repairs and collect from the lessor the reasonable cost of such repairs; therefore, plaintiff was entitled to recover of defendant the cost of a new roof placed on defendant's building by plaintiff after the roof leaked, plaintiff informed defendant of the leak, and defendant failed to make necessary repairs.

2. **Landlord and Tenant § 8— failure of lessor to repair roof — damage to lessee's merchandise borne by lessor**

Where plaintiff leased premises from defendant for the specific purpose of operating a ladies' shop, defendant covenanted to make repairs to the roof, and defendant failed to make repairs after he was informed that they were needed, damages suffered by plaintiff to his merchandise when the roof leaked were reasonably within the contemplation of the parties at the time of the making of the lease and thus were properly awarded by the trial court.

APPEAL by defendant from *Barnette, Judge,* 20 August 1973 Session of District Court held in WAKE County.

This is a civil action wherein the plaintiff-lessee, Cato Ladies Modes of North Carolina, Inc., seeks to recover $1,081.48 from defendants-lessors, Gertrude W. Pope and John W. Pope, which sum represents damages allegedly incurred by plaintiff-lessee as a result of defendants-lessors' failure to comply with the terms of a written lease. The amount in question represents (1) $756.00 expended by plaintiff to install a new roof on defendants' building and (2) $325.48 in damages to plaintiff's merchandise allegedly occurring as a result of a leaking roof. On 2 August 1973 plaintiff pursuant to G.S. 1A-1, Rule 41(a) of the Rules of Civil Procedure, voluntarily dismissed this action as to defendant Gertrude W. Pope.

The parties having waived the right to a jury trial this matter was heard by the trial judge without a jury; and after hearing the evidence as presented by the plaintiff and defendant, the court made findings of fact which are summarized as follows:

Plaintiff and defendants entered into a lease agreement in February 1969 by the terms of which plaintiff leased space in defendants' building for the purpose of operating a retail store. This lease contained a provision requiring the defendants-lessors to "maintain the roof, walls, and foundation of the building in proper condition" and in January 1971, in accordance with this repair covenant, the plaintiff-lessee notified the defendants-lessors of a leak in the roof. Defendants-lessors failed to respond to plaintiff-lessee's initial request that they repair the roof, and over the course of the next two years the plaintiff-lessee repeatedly, although unsuccessfully, urged defendants-lessors to repair the roof. In February 1973 the plaintiff-lessee suffered damage to its merchandise in the amount of $325.48 as a result of heavy rains and the roof remaining in an unrepaired state. The following month the plaintiff-lessee contracted with a roofing company to repair the roof, and the roofing company charged plaintiff-lessee $756.00 for putting on a new roof. This bill was paid by the plaintiff-lessee and was found by the trial court to be a reasonable amount for the work done.

Based upon these findings of fact the court made the following conclusions of law:

> "(1) The plaintiff has been damaged in the amount of Three Hundred Twenty-Five and 48/100 Dollars ($325.48) for water damage to merchandise occasioned by the failure of the defendants to repair a leak in the roof of the plaintiff's store, which was a breach of the defendants' covenant to repair as contained in his Lease Agreement with the plaintiff."
>
> "(2) Plaintiff is also entitled to recover Seven Hundred Fifty-Six Dollars ($756.00) from the defendants, which represents the reasonable costs of repairing the roof in order to stop the leak. This was also occasioned by the failure of the defendants to repair the leak in breach of his covenant to repair the roof as contained in his Lease Agreement with the plaintiff."

From a judgment for plaintiff in the amount of $1,081.48, defendant appealed.

Cotten & Cotten by Michael A. Cotten for plaintiff appellee.

Jack Senter for defendant appellant.

HEDRICK, Judge.

Defendant having taken no exceptions to the findings of fact of the trial court, the only question presented by this appeal is whether the findings of fact support the conclusions of law and the judgment entered thereon.

[1] Defendant-lessor contends that the court erred in concluding that he must compensate plaintiff-lessee for repairs made to the roof by the latter. The undisputed facts clearly reveal that the lease agreement between plaintiff and defendant contained a covenant which required defendant-lessor to repair any defects in the roof; that such repairs became necessary, that defendant-lessor failed to repair such defects after being notified by plaintiff-lessee of their existence; that the plaintiff-lessee employed the services of a roofing contractor to repair the roof and in so doing incurred expenses in the amount of $756.00. The general rule is that upon breach by the lessor of his covenant to repair, the lessee may make such repairs and collect from the lessor the reasonable cost of such repairs. See Annot., 28 A.L.R. 1448. North Carolina's adherence to this principle is exemplified by the following passage from *Jordan v. Miller,* 179 N.C. 73, 101 S.E. 550 (1919):

> " . . . *the duty of the tenant, if the landlord fails to perform his contract to repair, is to do the work himself,* and recover the cost in an action for that purpose, or upon a counterclaim in an action for rent, or if the premises are made untenable by reason of the breach of contract, the tenant may move out and defend in an action for rent as upon an eviction."

See also, Webster, *Real Estate Law in North Carolina,* § 213, pp. 251-252 (1971); *Brewington v. Loughran,* 183 N.C. 558, 112 S.E. 257 (1922). Therefore, the repair measures taken by the plaintiff-lessee were in all respects proper, and we are bound by the trial court having found as at fact that such repairs were reasonable in cost.

[2] Defendant-lessor further asserts that the court erroneously concluded that the plaintiff-lessee was entitled to recover $325.48 for damage to merchandise which resulted from defendant-lessor's failure to repair the roof. The uncontroverted findings disclose that plaintiff-lessee leased the premises from defendant-lessor for the express purpose of operating a retail store; that

plaintiff-lessee had notified defendant-lessor on several different occasions that the roof was leaking and the defendant-lessor had failed to make the necessary repairs; that after suffering damage to its merchandise in the sum of $325.48 the plaintiff-lessee had the roof repaired to prevent further loss. These findings dictate that we make reference to the apposite legal principle which states:

> "It frequently happens that as a result of the breach by the landlord of his covenant to repair, the property of the lessee is injured. Whether or not the damage recovered may include compensation for such loss must necessarily depend upon the circumstances of the particular case, such as the purpose for which the premises were leased, the nature of the defect, and the character of the property." 49 Am. Jur. 2d, Landlord and Tenant, § 846, pp. 813-814.

Considering the aforementioned factors in conjunction with the findings that the plaintiff-lessee leased the premises for the purpose of operating a ladies' shop and that defendant-lessor covenanted to make repairs to the roof, we conclude that such damages as were suffered by the plaintiff-lessee were reasonably within the contemplation of the parties at the time of the making of the lease and thus were properly awarded by the trial court, Brewington, *supra.*

For the reasons herein stated, the decision of the trial court is

Affirmed.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. WILLIAM HOWARD McDONALD

No. 7415SC136

(Filed 20 March 1974)

1. **Automobiles § 3— driving "after" license was revoked — defective verdict**

Jury verdict finding defendant guilty of driving "after" his license was revoked rather than "while" his license was suspended or revoked was defective and should not have been accepted by the court.

2. Automobiles § 117— speeding — sufficiency of evidence

The trial court properly denied defendant's motion for nonsuit on a charge of driving 60 mph in a 45 mph zone where a highway patrolman testified he followed defendant for approximately one and a half miles and during such period defendant was driving between 68 mph and 70 mph in an area with a posted limit of 45 mph.

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

This is a criminal action in which the defendant, William Howard McDonald, was charged in a warrant, proper in form, with driving a motor vehicle upon a public highway while his operator's license was suspended in violation of G.S. 20-28(a) and operating a motor vehicle on a public highway at a speed of 60 miles per hour in a 45 mile per hour zone.

The defendant was found guilty in District Court and he appealed to the Superior Court where he received a trial *de novo.* Upon arraignment the defendant entered a plea of not guilty; however, the jury returned a verdict of "Guilty of exceeding the posted speed limit and Guilty of driving after license was revoked." From a judgment imposing a prison sentence of 90 days for driving while his operator's license was suspended and 30 days for exceeding the posted speed limit the defendant appealed.

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

John D. Xanthos for defendant appellant.

HEDRICK, Judge.

[1] Defendant maintains that the verdict returned by the jury as to the charge of driving a motor vehicle on a public highway *while* his license was suspended was not responsive to the charge contained in the bill of indictment and that the verdict was insufficient to support the judgment. The following excerpt from the record discloses the objectionable portion of the jury's verdict:

> "Upon returning to the courtroom after deliberating, upon inquiry as to whether the jury had reached a verdict, the foreman announced the following: Guilty of exceeding the posted speed limit and *Guilty of driving AFTER license was revoked.*" [Emphasis added.]

The immediate question posed by this verdict is the effect of the presence of the word *after* in the jury's verdict in lieu of the word *while* which appears in the bill of indictment. Justice Bobbitt, now C. J., was confronted with the distinction between these two words in *State v. Sossamon,* 259 N.C. 374, 130 S.E. 2d 638 (1963), and he determined that the warrant in that case (which contained the word "after") was fatally defective for failing to charge, in words or substance that the offense was committed *while* the license was suspended or revoked. Justice Bobbitt further stated that "[t]o constitute a violation of G.S. 20-28(a) such operation must occur *'while* such license is suspended or revoked,' that is, during the period of suspension or revocation." Therefore, the jury in the instant case has returned a verdict of guilty as to a non-criminal offense and thus, we must discuss the impact of such a faulty verdict upon the judgment.

As early as 1819 our Supreme Court recognized the principle that if the jury returned a verdict which was inconsistent with the bill of indictment then the jury should be directed by the court to reconsider such a verdict. *State v. Arrington,* 7 N.C. 571 (1819). In *State v. Hudson,* 74 N.C. 246 (1876), the defendant was charged in a proper bill of indictment with assault and battery and the jury returned a verdict of "guilty of shooting." The court commenting on this verdict stated that "the instrument contains no such charge, and the verdict standing by itself is therefore senseless; certainly it is not responsive to the indictment. The courts should never allow such . . . irresponsive verdicts to be recorded. They should have the jury to correct them, so as to be in conformity to law and to present an intelligent record." Similar language has appeared in many of the decisions of the appellate courts of this jurisdiction. See *State v. Sanders,* 280 N.C. 81, 185 S.E. 2d 158 (1971); *State v. Ingram,* 271 N.C. 538, 157 S.E. 2d 119 (1967); *State v. Whitaker,* 89 N.C. 472 (1883); *State v. Medlin,* 15 N.C. App. 434, 190 S.E. 2d 425 (1972).

In the instant case the trial court should not have received the jury's verdict; however, since the verdict was received, the verdict and judgment as to the offense of driving on a public highway while his license was suspended must be *ex mero motu* vacated, *State v. Ingram, supra;* 3 Strong, N. C. Index 2d, Criminal Law, § 127, p. 43.

Also this case provides an appropriate opportunity to reiterate the following cogent admonition contained within *State v. Medlin, supra,* at pp. 436-7:

> "Had the verdict been simply 'guilty,' or 'guilty as charged,' it would have been sufficient to support the judgment, 'but when the jury undertakes to spell out its verdict . . . as in the instant case, it is essential that the spelling be correct.' "
>
> "Trial judges would be well advised to exercise utmost care in accepting verdicts in order to assure that the verdict rendered accurately reflects the jury's findings as to defendant's guilt or innocence of the exact charge or charges for which he is being tried. This can best be accomplished if the jury is requested to respond with a simple answer of 'guilty,' or 'not guilty' to specifically formulated issues which contain clear and accurate statements of the charge or charges for which defendant is being tried."

[2] Having reached the result that the judgment must be arrested as to the charge of driving upon a public highway *while* his license was suspended or revoked, we are left to consider only the question of whether the trial court properly denied defendant's motion for nonsuit as to the speeding charge. The State introduced evidence which tended to establish that on 26 February 1973 defendant was traveling south on Highway 49 and that defendant was being followed by a highway patrolman. The patrolman testified that he followed defendant for approximately one and a half miles and during this period of surveillance the defendant was driving between sixty-eight and seventy miles an hour in an area which had a posted speed limit of forty-five miles per hour. Upon the patrolman's flashing his blue light, the defendant stopped his car and the officer approached defendant's car where he observed the defendant sitting behind the steering wheel. This evidence, when considered in the light most favorable to the State, is sufficient to withstand defendant's motion of nonsuit, *State v. Jackson,* 19 N.C. App. 749, 200 S.E. 2d 199 (1973).

The result is — in the case charging defendant with driving while his license was suspended the judgment is arrested. In the case charging defendant with speeding, we find no error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. JAMES LEWIS WILBURN

No. 7410SC105

(Filed 20 March 1974)

1. **Constitutional Law § 30— ten months between arrest and trial — right to speedy trial not abridged**

Defendant was not denied his right to a speedy trial where ten months elapsed between his arrest and trial, there was no showing that the State wilfully or negligently delayed defendant's case, and defendant made no showing that witnesses were not available or that memories were dimmed due to the delay.

2. **Constitutional Law § 30; Criminal Law § 91— speedy trial — release from custody — motion to dismiss properly denied**

Where the trial judge ordered that defendant's trial be instituted within sixty days or that defendant be released from custody on his own recognizance and the trial judge made no finding that defendant's right to a speedy trial had been denied, the court properly refused to grant defendant's motion to dismiss made after his case was called for trial on the fifty-ninth day, a Friday, and continued until Monday, the next day of court, at which time it was tried.

3. **Constitutional Law § 30; Criminal Law § 91— release of defendant from custody — applicability to defendant allowed bail**

G.S. 15-10, which has been held to be for the protection of persons held in custody without bail, should also be available to the trial court in deserving situations when the defendant cannot make bail.

APPEAL by defendant from *Hobgood, Judge,* at the 13 August 1973 Session of WAKE Superior Court.

Heard in the Court of Appeals 19 February 1974.

This is a criminal action in which the defendant was indicted and tried for first-degree murder. The defendant was arrested on 4 December 1972 and placed in jail where he remained until trial, being unable to meet the $25,000.00 bond. On 7 December 1972 an attorney was appointed to represent the defendant. On 19 December 1972 probable cause was found and on 3 January 1973 a true bill of indictment was returned against defendant. On 11 June 1973 the defendant moved for a speedy trial. On 12 June 1973, Judge A. Pilston Godwin, Jr., after being informed by the Solicitor that he would be able to set defendant's case for trial within 60 days, ordered defendant's case be tried within 60 days and that if trial was not instituted within 60 days that defendant be released on his personal recognizance. The 60 days was to expire on 11 August 1973. Defend-

ant's case was called late on Friday afternoon, 10 August 1973, and continued until Monday, 13 August 1973. On 13 August, the defendant moved to dismiss the action on the grounds he had not been given a speedy trial. The motion was denied and the trial was immediately begun. The defendant was found guilty of second-degree murder and given a sentence of twenty years less a credit for the 253 days spent in jail awaiting trial. From the judgment, defendant appealed.

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

Hatch, Little, Bunn, Jones & Few by David H. Permar for defendant appellant.

CAMPBELL, Judge.

[1] The defendant assigns as error the failure of the trial court to grant his motion to dismiss on the grounds that he had not been given a speedy trial as is his right under the Constitutions of North Carolina and the United States. The defendant relies on the cases of *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), and *Strunk v. United States,* 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed. 2d 56 (1973). *Strunk, supra,* will be discussed under the defendant's second assignment of error. In *Barker v. Wingo, supra,* the Supreme Court laid down the following factors by which to test speedy trial cases:

(1) Length of the delay, (2) the reason for the delay, (3) the defendant's assertion or nonassertion of his right, and (4) prejudice to the defendant. These factors are precisely those endorsed by the North Carolina Supreme Court in *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969), *State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972), *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659 (1972), *State v. Roberts,* 18 N.C. App. 388, 197 S.E. 2d 54 (1973), *cert. denied,* 283 N.C. 758, 198 S.E. 2d 728 (1973), and numerous other cases. See also *Moore v. Arizona,* ___ U.S. ___, 94 S.Ct. 188, 38 L.Ed. 2d 183 (1973). The United States and North Carolina Supreme Courts also stated in the above cited cases that the word "speedy" cannot be defined in specific terms of days, months or years and that the question of whether a defendant has been denied a speedy trial must be answered in light of the facts of each particular case. Considering the proper factors, it cannot be said that in this case the defendant had been denied the right to a speedy

trial. The delay was ten months. In *Barker v. Wingo, supra,* a delay of five years was not found unreasonable. As of January 10, 1972, Wake County Superior Court had a backlog of 1,742 cases pending trial. There were 55 capital cases, 32 of which were first-degree murder charges. It has not been made to appear that the State willfully or negligently delayed defendant's case. The defendant did not subpoena any witnesses and presented no evidence. At no time has defendant shown that any witnesses were not available or that memories were dimmed due to the delay. Finally, we note that Judge Godwin ordered that the trial be set and begun within 60 days. The case was called for trial in the late afternoon of the fifty-ninth day, a Friday, and continued until Monday, the next day of court, at which time it was tried. Considering the proper factors, we hold that defendant's contention that he has been deprived of a speedy trial is without merit.

[2, 3] Defendant further assigns as error the failure of the trial court to grant his motion to dismiss based on the order of Judge Godwin in that his trial was not held within the 60-day time limit. In the *Strunk* case, *supra,* the U. S. Supreme Court held that in a case in which it had already been determined that the defendant had been denied his right to a speedy trial that the only possible remedy was to dismiss the charges. However, in this case, there was no finding in Judge Godwin's order that defendant's right to a speedy trial had been denied. The trial court apparently was applying G.S. 15-10 and the order merely would have released defendant from jail had he not been tried within 60 days but would not have dismissed the charges. G.S. 15-10 has been held to be for the protection of persons held without bail. *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870 (1965), *cert. denied,* 382 U.S. 22, 86 S.Ct. 227, 15 L.Ed. 2d 16 (1965). We feel that the remedy in G.S. 15-10 should also be available to the trial court in deserving situations when the defendant cannot make bail. *United States v. Strunk, supra,* is distinguishable in that its holding that dismissal of the charges is the only remedy applies only to situations in which it has been determined that defendant has been denied his right to a speedy trial. In the case at bar, no such determination had been made. The trial court properly denied defendant's motion.

We have reviewed defendant's other assignments of error and find no prejudicial error.

No error.

Judges HEDRICK and BALEY concur.

CAROLINA TIMBER MANAGEMENT COMPANY, INC. v. HIRAM C. BELL, EXECUTOR FOR EDWARD EARL BELL, DECEASED

No. 7411DC151

(Filed 20 March 1974)

1. **Damages § 6— loss of use of vehicle**

The right to recover for loss of use of a vehicle during the time in which plaintiff is necessarily deprived of it is limited to situations in which the vehicle can be repaired at a reasonable cost in a reasonable time.

2. **Damages §§ 6, 15— loss of use of vehicle — mitigation of damages**

In an action to recover for loss of use of plaintiff's truck which was damaged in a collision with an automobile operated by defendant's testate, the evidence did not disclose as a matter of law that plaintiff failed to act reasonably to minimize his damages where it tended to show that the truck was taken to a Mack truck repair shop in Raleigh, that the next closest facility to repair such truck was in Greensboro, that the repairs took six months, that plaintiff made twelve personal visits or telephone calls to the repair shop to see when the truck would be available, and that the cost of a new truck was $25,000, the cost of repairs was $7,350 and the cost of renting a replacement vehicle was $4,948.

3. **Negligence § 27; Trial § 16— auto accident — reference to insurance — withdrawal of evidence**

In an action to recover damages for loss of use of plaintiff's truck, defendant was not prejudiced by the testimony of plaintiff's witness that he talked to an insurance company employee about leasing a vehicle where the court allowed defendant's motion to strike the testimony and instructed the jury to disregard it.

APPEAL by defendant from *Lyon, District Judge,* at the 1 October 1973 Session of JOHNSTON District Court.

Heard in the Court of Appeals 14 February 1974.

This is a civil action to recover for the loss of use of plaintiff's truck which was damaged in a collision with an automobile owned and operated by Edward Earl Bell, now deceased. From a judgment against him for $4,450, the defendant appealed.

W. Kenneth Hinton for plaintiff appellee.

Donald P. Brock for defendant appellant.

CAMPBELL, Judge.

[1, 2] The defendant assigns as error the failure of the trial court to grant defendant's motions for directed verdict made at the close of plaintiff's evidence and again when defendant offered no evidence. The defendant is correct in his contention that the right to recover for loss of use of a vehicle during the time in which the plaintiff is necessarily deprived of it is limited to situations in which the vehicle can be repaired at a reasonable cost in a reasonable time. *Roberts v. Freight Carriers,* 273 N.C. 600, 160 S.E. 2d 712 (1968). It is the defendant's contention that the trial court should have found that as a matter of law the plaintiff acted unreasonably and that the trial court should have granted defendant's motion for directed verdict. The plaintiff's evidence showed that after the accident, which occurred near Pollocksville, North Carolina, the truck was towed to a Mack truck repair shop in Raleigh. The next closest facility to repair such a truck is in Greensboro, North Carolina. The repairs took six months. The plaintiff, during that time, made twelve personal visits or telephone calls to the repair shop to see if and when the truck would be available. The cost of a new truck would be $25,000.00. The cost of the repairs was approximately $7,350.00 and is not involved in the present case. The actual cost of renting a replacement vehicle in the interim was $4,948.78. We hold that the evidence, taken in the light most favorable to the plaintiff, was sufficient to go to the jury. We note that the trial court instructed the jury that before they could render a verdict for the plaintiff that they had to find that the plaintiff acted reasonably to minimize his damages.

[3] Defendant next assigns as error the mention by one of plaintiff's witnesses in his testimony of insurance. The testimony in question reads as follows:

"Q Did you at any time later on talk with anyone about leasing a vehicle?

A Yes.

Q Who did you talk to?

A I talked to a Mr. Bob Pinkston.

OBJECTION . . . . MOTION TO STRIKE.

OVERRULED . . . . MOTION TO STRIKE DENIED.

I talked to Mr. Bob Pinkston. He is employed by Nationwide Insurance Company.

OBJECTION . . . . MOTION TO STRIKE.

OBJECTION SUSTAINED . . . . MOTION TO STRIKE

ALLOWED . . . . "

The defendant's motion to strike was granted. The jury was instructed to disregard that statement by the witness. No question was asked or answer given to the effect that defendant had liability insurance or that Mr. Pinkston or Nationwide Insurance Company represented defendant. Ordinarily, it is not permissible to introduce evidence of liability insurance or to make any reference thereto in front of the jury in negligence cases. However, there are circumstances in which it is sufficient for the court, in its discretion, because of the incidental nature of the reference, to merely instruct the jury to disregard it. *Fincher v. Rhyne,* 266 N.C. 64, 145 S.E. 2d 316 (1965); *Keller v. Furniture Co.,* 199 N.C. 413, 154 S.E. 674 (1930); *Lane v. Paschall,* 199 N.C. 364, 154 S.E. 626 (1930); *Fulcher v. Lumber Co.,* 191 N.C. 408, 132 S.E. 9 (1926); *Gilland v. Stone Co.,* 189 N.C. 783, 128 S.E. 158 (1925); *Bryant v. Furniture Co.,* 186 N.C. 441, 119 S.E. 823 (1923); *Norris v. Mills,* 154 N.C. 474, 70 S.E. 912 (1911). We hold that upon full consideration of the circumstances that there was no prejudicial error.

Defendant's other assignment of error is a broadside exception to the charge of the trial court and will not be considered. *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729. See also Strong, North Carolina Index 2d, "Appeal and Error," § 31, p. 166.

No error.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION v. CAROLINA FOREST UTILITIES, INC. APPLICANT

No. 7410UC135

(Filed 20 March 1974)

Utilities Commission § 5— water service — recreation subdivision — "availability charge"

The Utilities Commission has jurisdiction and authority to allow the use of an "availability charge" in a rate schedule for water services provided by a utility to a recreational subdivision.

APPEAL by defendant applicant from Order of North Carolina Utilities Commission of 28 June 1973.

Heard in the Court of Appeals 21 February 1974.

By application filed with the North Carolina Utilities Commission on 26 October 1972, Carolina Forest Utilities, Inc., sought a certificate of public convenience and necessity to provide water utility service in Carolina Forest Subdivision, Montgomery County, and approval of a proposed schedule of rates.

Carolina Forest is a recreational development of about 1,105 lots on Lake Tillery approximately ten miles east of Albemarle, North Carolina. In the standardized contract for the conveyance of each lot, the lot purchaser warranted that he would not use the lot as his principal residence. The contract a'so provided that the lot owner would not drill for water on his own lot but would pay, in addition to the cost of the lot, a flat charge of $300 for the establishment and maintenance of a water system. Each purchaser also agreed to pay a $60.00 per year water service fee, denominated an "availability charge," regardless of whether he actually tapped onto appellant's line or used any water.

The Hearing Commissioner's recommended order, issued 25 January 1973, granted the franchise sought, and approved the proposed rates with the exception of the "availability charge" as applied to customers who had not become active water users. The full Commission, in an order dated 14 March 1973, affirmed the recommended order and in effect ruled that an availability charge was illegal and could never be a just and reasonable rate for service. Chairman Wooten dissented. From said order, defendant appealed.

Edward B. Hipp, Wilson B. Partin, Jr., and Jerry S. Fruitt for the North Carolina Utilities Commission.

Bailey, Dixon, Wooten, McDonald & Fountain by J. Ruffin Bailey and Ralph McDonald for defendant appellant.

CAMPBELL, Judge.

In its final order the Utilities Commission relied heavily on *Forest Hills Util. Co. v. Pub. Util. Comm. of Ohio,* 31 Ohio St. 2d 46, 285 N.E. 2d 702 (1972), which held that the Ohio Utilities Commission had no statutory authority to impose "availability charges" and which was conceded to be the only available appellate decision on availability charges. However, in *Mohawk Utilities v. Pub. Util. Comm. of Ohio,* 37 Ohio St. 2d 47, 307 N.E. 2d 261 (1974), the Supreme Court of Ohio spoke directly to the use of availability charges in a recreational subdivision and distinguished the *Forest Hills* case on the grounds that the availability charge in *Mohawk* was agreed to in contracts between the parties rather than being imposed by the Commission. The Ohio Supreme Court in *Mohawk* went on to hold that under the Ohio statutes the landowners who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility; that Mohawk Utilities, Inc., is a "utility"; that the contractual obligation to provide water service as well as the actual delivery thereof directly affects the utility's ability to function as a utility; that the whole transaction was within the jurisdiction of the Ohio Public Utilities Commission; and hence, that a review of water availability charges was within the jurisdiction of the Commission.

The Ohio and North Carolina statutes governing utilities are quite similar. See, generally, N.C.G.S. Chapter 62 and, particularly, G.S. 62-2; G.S. 62-3(23), (24) and (26); G.S. 62-32; G.S. 62-130; G.S. 62-133; G.S. 62-138(a)(1); and G.S. 62-140. We adopt the reasoning of the *Mohawk* case and hold that under the facts of this case, the North Carolina Utilities Commission does have the jurisdiction and authority to allow the use of an availability charge, in a rate schedule, should any be deserved. We therefore reverse that part of the Commission's Order and remand for a determination of what amount of availability charge, if any, would be a just and reasonable rate.

Defendant's other assignments of error deal with the Commission's determination of depreciation and other operating

expenses and are without merit. As to this portion of the Commission's order, we affirm.

Reversed in part.

Affirmed in part.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. DENNIS HATCH AND KENNETH HATCH

No. 7415SC88

(Filed 20 March 1974)

1. **Criminal Law § 97, 119— jury request for further instructions — denial proper**

In a prosecution for the discharge of a firearm into an occupied dwelling, the trial court did not err in denying the jury's request that the court reporter read back a portion of the testimony and in denying the jury's request for additional evidence with respect to the type of shotgun used in the crime.

2. **Criminal Law § 113— discharge of firearm into occupied dwelling — sufficiency of instructions**

Trial court's instruction in a prosecution for the discharge of a firearm into an occupied dwelling was sufficient where it reviewed defendants' contention that the firing was not willful or wanton, defined "willful and wanton," and recapitulated the principal features of the evidence relied upon by the State and by the defendants.

APPEAL from *Hall, Judge,* 13 August 1973 Session of ALAMANCE County Superior Court. Argued in the Court of Appeals 19 February 1974.

Defendants were charged with kidnapping and with shooting a shotgun into an occupied dwelling in contravention of G.S. 14-34.1. They were acquitted of the kidnapping charge and convicted of the firearm charge.

The State's evidence tended to show that defendants came to the apartment of Jack Koonsman armed with shotguns. Defendants walked holding Koonsman at gunpoint to the apartment of Wayne Moorefield—Koonsman's next door neighbor—and Koonsman entered the Moorefield apartment while defendants

remained outside. As Koonsman attempted to warn Moorefield of the armed men outside, there was a gun blast, and pellets came into the apartment. A struggle between Mr. and Mrs. Moorefield and the defendants ensued with several shots being fired. When Koonsman came out of the kitchen, he saw both defendants crouched behind his car, which was parked at the curb, pointing their guns at the house; and there was an exchange of gunfire several minutes in duration between Moorefield and his roomer, Alex Baker, in the apartment and defendants behind the car. There was testimony to the effect that the defendants had been trying to collect a debt owed them by Alex Baker and that they had threatened violence to Baker. Following the incident, deputies tracked the defendants with the use of bloodhounds and found each with a shotgun and two or three boxes of shells in his pocket.

Defendants testified that their family had "had trouble" with Alex Baker and that he had shot at defendants' brother, Hubert Hatch. They further testified that they went to Moorefield's apartment to discuss the debt owed them by Baker. They admitted that the exchange of gunfire took place between them and Baker and Moorefield while defendants were behind the car.

From the judgment of guilty of discharging a firearm into an occupied dwelling, defendants appealed.

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

W. R. Dalton, Jr., for defendant appellant Dennis Hatch.

M. Glenn Pickard for defendant appellant Kenneth Hatch.

MORRIS, Judge.

[1] Defendants assign error to the trial court's denial of the jury's request that the court reporter read back a portion of the testimony. There is no merit to this assignment; for as we said in *State v. Crane,* 11 N.C. App. 721, 182 S.E. 2d 225 (1971), it is discretionary with the court to grant or refuse the jury's request for a restatement of the evidence. There is likewise no merit to the assignment of error to the court's refusal of the jury's request that additional testimony be taken. It is defendants' contention that the request was denied, not in the exercise

of discretion, but rather under a misapprehension of law. The specific exchange between the court and the jury was as follows:

> "FOREMAN: One other question, this particular type shotgun, when does it eject that shell, can we know that, do you have to pump it?
>
> COURT: Again, you remember the evidence and take your own recollection.
>
> FOREMAN: This came up in the discussion back there and it hasn't been established the type of shotgun.
>
> COURT: I can't help you with the evidence, that is solely a matter for your determination."

It is within the discretion of the trial court to reopen a case and admit additional evidence, even after the jury has retired for deliberation. However, if the trial court denies such a motion, not in the exercise of its sound discretion but rather in misapprehension of law, a new trial will be granted. *State v. Jackson,* 19 N.C. App. 370, 199 S.E. 2d 32 (1973). In *Jackson, supra,* a new trial was granted because the court refused to reopen the case to receive additional witnesses on the defense of alibi on the ground that the parties were limited by law to three witnesses on a given point. The above-quoted colloquy in this case can by no means be regarded as a statement that the court was forbidden by law to reopen the case. The court properly instructed the jury that the evidence was a matter for their determination, and this assignment of error is overruled.

[2] Defendants next contend that the court violated G.S. 1-180 by commenting on the evidence when he neglected to instruct the jury that if defendants fired into the house in order to cause Moorefield and Baker to cease firing at them, their conduct would not be willful and wanton. They contend, in addition, that certain portions of defendants' evidence were not called to the attention of the jury. The trial court instructed the jury that defendants contended that the firing was not willful or wanton, and he defined "willful and wanton." Furthermore, a careful review of the court's instruction reveals that the principal features of the evidence relied upon by the State and by the defendants were recapitulated. A recapitulation of the principal features relied on satisfies the requirement of G.S. 1-180. *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14 (1965); *State v. Craig,* 11 N.C. App. 196, 180 S.E. 2d 376 (1971).

No error.

Chief Judge BROCK and Judge CARSON concur.

STATE OF NORTH CAROLINA v. JOHNNY STEVEN TURNER

No. 7420SC280

(Filed 20 March 1974)

Criminal Law § 113— instruction as to voir dire testimony — error

In a prosecution for possession of marijuana with intent to distribute, the trial court erred in instructing the jury with respect to the arresting officer's *voir dire* testimony concerning probable cause for defendant's arrest and search of his car without a warrant, since that testimony was not contained in the evidence and would not have been admissible had it been offered before the jury.

ON *Certiorari* to review judgment of *Falls, Judge,* 22 March 1973 Session of Superior Court held in STANLY County.

The jury found defendant guilty of unlawful possession of marijuana with intent to distribute. To review the judgment entered on the verdict, this Court granted his petition for certiorari.

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

Chambers, Stein, Ferguson & Lanning by Charles L. Becton for defendant appellant.

PARKER, Judge.

In the absence of the jury the arresting officer testified concerning probable cause for his arrest of defendant and search of defendant's car without a warrant. During this voir dire examination the officer testified that he had received information from a confidential informant that defendant "was bringing marijuana to the Norwood area on weekends," that the informant stated that defendant "drove a dark green foreign car with a Chapel Hill city tag on the front of it," and that on the 28th of October 1972 he received information "that a car had arrived at the Capel house with a load of marijuana." The arresting officer also testified before the jury, but he did not

testify concerning any of the foregoing except that he was "familiar with the green 4-door Volvo, bearing a Chapel Hill city tag on the front," which was regularly used by the defendant.

While charging the jury concerning the arresting officer's testimony, the trial judge instructed them that the officer had testified:

> "[T]hat he had had some information concerning a Volvo automobile with a Chapel Hill license plate on the front of it coming into the Norwood area with marijuana in it; that on the date of the 28th that he had some information that a car was coming in there on that evening with some marijuana."

Appellant's assignment of error to this instruction must be sustained. Not only did the trial judge state material facts not contained in the evidence, which constitutes reversible error, *State v. Alexander*, 4 N.C. App. 513, 167 S.E. 2d 37, but he recited evidence which, though admissible for purposes of the voir dire examination, would not have been admissible had it been offered before the jury.

Other assignments of error appear to have merit, but we refrain from discussing them because the questions presented may not arise upon a new trial. For the error noted, defendant is entitled to a

New trial.

Judges BRITT and VAUGHN concur.

N. M. BILL v. DONALD HUGHES

No. 7412DC145

(Filed 20 March 1974)

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

Appeal is dismissed for failure of appellant to docket the record on appeal within 90 days from the date of the order appealed from. Court of Appeals Rules 5 and 48.

Bill v. Hughes

APPEAL by plaintiff from an order entered by *Carter, District Judge,* on 27 August 1973.

This cause was first tried on its merits at the 20 March 1972 Civil Session of District Court held in CUMBERLAND County and resulted in a judgment for defendant. Upon entry of the judgment, plaintiff gave notice of appeal to this court, however, plaintiff failed to perfect this appeal.

On 8 November 1972 an order was entered denying plaintiff's motions to vacate the 20 March 1972 judgment and for a new trial, both of these motions having been duly filed within ten days after the entry of the 20 March 1972 judgment. The plaintiff gave notice of appeal from the 8 November 1972 order but again failed to perfect his appeal. On 30 April 1973 the defendant, pursuant to G.S. 1-287.1 and Rule 7(b) of the Rules of Civil Procedure, filed a motion to dismiss the appeal of plaintiff and this motion was granted on 11 June 1973. Thereafter, on 23 June 1973 the plaintiff filed a motion to vacate the order dismissing his appeal which motion was denied on 27 August 1973 and from this denial, the plaintiff filed the present appeal.

McCoy, Weaver, Wiggins, Cleveland & Raper by Neil V. Davis for plaintiff appellant.

Williford, Person & Canady by N. H. Person for defendant appellee.

HEDRICK, Judge.

The record on appeal was docketed in this court on 30 November 1973 which was more than 90 days from the date of the order from which the purported appeal was taken. For failure of appellant to docket the record on appeal in this court in accordance with the Rules of Practice in this court, the appeal is dismissed, Rules 5 and 48 of the Rules of Practice of this court.

Dismissed.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. CLARENCE FRIDAY AND LEROY DAVIS

No. 7426SC219

(Filed 20 March 1974)

1. **Criminal Law § 98— motion to sequester prosecuting witnesses**

In a trial of each of two defendants upon two counts of common law robbery, the trial court did not abuse its discretion in the denial of defendants' motions to sequester the prosecuting witnesses.

2. **Criminal Law § 91— motion to delay trial**

The trial court in a robbery case did not abuse its discretion in the denial of defendants' motions made during the trial that the proceedings be delayed in order for defendants to obtain certain evidence where the court delayed the proceedings for some 40 minutes and then insisted that the trial proceed.

APPEAL by defendants from *Friday, Judge,* 6 August 1973 Schedule "B" Criminal Session, MECKLENBURG Superior Court.

Each defendant was charged in separate bills of indictment with two counts of common law robbery. They pleaded not guilty and a jury found them guilty as charged. In one case against each defendant, the court entered judgment imposing prison sentence of not less than five nor more than seven years as a committed youthful offender and continued prayer for judgment for five years in the other cases. Defendants appealed.

Attorney General Robert Morgan, by Assistant Attorney General Ralf F. Haskell, for the State.

Levine & Goodman, by William F. Burns, Jr., for defendant appellants.

BRITT, Judge.

[1] Defendants assign as error the failure of the court to grant their motions to sequester the prosecuting witnesses. The assignment has no merit. It is clear that a motion to sequester witnesses is directed to the discretion of the trial court and its ruling thereon will not be disturbed absent a showing of abuse of discretion. *State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104 (1972). There is no showing of abuse of discretion.

[2] Defendants also assign as error the denial of their motions during the trial of the cases that the proceedings be delayed in

order for defendants to obtain certain evidence and present it at the trial. This assignment has no merit. The record reveals that the court delayed the proceedings for some forty minutes but then insisted that the trial proceed. A motion for continuance or delay of a trial is directed to the discretion of the trial court and its ruling thereon is not reviewable on appeal except for abuse of discretion. *State v. Shue,* 16 N.C. App. 696, 193 S.E. 2d 481 (1972). No abuse of discretion is made to appear here.

Defendants received a fair trial, free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. J. R. HENDERSON

No. 7416SC179

(Filed 20 March 1974)

ON *certiorari* to review the order of *McLelland, Judge,* at the March 1973 Criminal Session of ROBESON Superior Court.

Heard in the Court of Appeals 12 March 1974.

The defendant was indicted for common law robbery. The State's evidence tended to show that on the morning of 30 December 1972, at about 6:30 o'clock a.m., the defendant, J. R. Henderson, struck Leonard Carter, the operator of the Direct Service Station at East Second and Grace Streets in Lumberton, North Carolina, on the head from behind with an Ajax can. The defendant struck Carter in the face several times with his fists. The defendant removed a roll of money from Carter's pocket which Carter had from the operation of the service station; but, in the ensuing struggle, the money was knocked to the floor. Both men grabbed at the money on the floor, and the defendant made off with a handful of bills which Carter estimated to be thirteen dollars. From a verdict of guilty as charged and a sentence of not more than five nor less than eight years in the State Prison, the defendant, in open court, appealed.

Attorney General Robert Morgan by Assistant Attorneys General Donald A. Davis and James Blackburn for the State.

Lee & Lee by W. Osborne Lee, Jr., for defendant appellant.

CAMPBELL, Judge.

This case presents only the face of the record for review.

We have carefully reviewed the record and find no prejudicial error.

No error.

Judges HEDRICK and BALEY concur.

REVCO SOUTHEAST DRUG CENTERS, INC., CARLTON BAXTER, JESSE BEALE, WILLIAM BRANTLEY, BRYON D. KARRON, CHARLES JYLES, GILBERT HARDIS, FRED HOLT, JENNINGS KNIGHT, RICHARD MARX, LESLIE MYERS, CLYDE ROBINSON, JOHN SIMPSON, JAMES STREET, JOHN TINKLER, MORTON TRUGHMAN, EARL WILLIAMS, HENRY WILLIAMS, MARK WILLIAMS, DON DEATON, MYRON WINKELMAN, AND ALBERT SEBOK,

— v. —

THE NORTH CAROLINA BOARD OF PHARMACY, AND THE NORTH CAROLINA PHARMACEUTICAL ASSN.

No. 7410SC21

(Filed 3 April 1974)

1. **Physicians, Surgeons, Etc. § 2— regulation prohibiting advertisement of prescription drugs — constitutionality — summary judgment**

The trial court erred in granting summary judgment for plaintiffs on the basis of its conclusion that a section of the Code of Professional Conduct for pharmacists which prohibited the advertising of prescription drugs was unconstitutional because it bore no substantial, rational relationship to the public health, safety or general welfare where a factual dispute as to such issue was presented by the pleadings and affidavits.

2. **Constitutional Law § 12; Physicians, Surgeons, Etc. § 2— Code of Professional Conduct for pharmacists — unconstitutionality of enabling statute**

The statute authorizing the Board of Pharmacy to adopt a "code of professional conduct appropriate to the establishment and main-

tenance of a high standard of integrity and dignity in the practice of the profession of pharmacy," G.S. 90-57.1, constitutes an unlawful delegation of legislative power without sufficient standards and guidelines; consequently, a section of the code adopted by the Board of Pharmacy which prohibited the advertising of prescription drugs is invalid.

APPEAL from *Smith, Judge,* 28 May 1973 Session of WAKE County Superior Court. Argued in the Court of Appeals 19 February 1974.

The plaintiffs, Revco Southeast Drug Centers, Inc., (Revco) and individual pharmacists employed with Revco, brought this action against the North Carolina Board of Pharmacy in the form of a declaratory judgment pursuant to Chapter 1, Article 26, of the General Statutes. The action was brought to have declared unconstitutional G.S. 90-57.1 and Section 8 of the Code of Professional Conduct adopted by the North Carolina Board of Pharmacy pursuant to said statute.

Revco is a foreign corporation authorized to do business in North Carolina. It has a number of retail drug outlets located throughout this state and in other states. Revco regularly advertises the availability of prescription services and various discount plans, including a 10% discount on prescription drugs to those over the age of 60. Various individual plaintiffs who have advertised this senior citizens discount plan in the paper have received letters from the Board stating that such advertising is not consistent with the spirit of the Code and apparently attempting to require compliance with the Board's interpretation of the Code.

The 1969 General Assembly passed an act codified as G.S. 90-57.1 which reads as follows:

> Powers of the Board; professional standards.—The Board of Pharmacy shall by regulation and after due notice and hearing, adopt a code of professional conduct appropriate to the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession of pharmacy. In adopting such a code, or any amendment thereto, the Board shall consider the recommendations of the North Carolina Pharmaceutical Association.

Pursuant to the authority contained in this statute, public hearings were held and the Code of Professional Conduct was

adopted by the Board effective 1 January 1971. Section 8 of the Code, the provision under attack by the plaintiffs, reads as follows:

> A pharmacist should not solicit professional practice by means of advertising or by methods inconsistent with his opportunity to advance his professional reputation through service to patients and to society.
>
> This section does not affect the commercial element of the traditional community pharmacy or infringe upon legitimate public interest in knowing where professional pharmaceutical services may be obtained. This section has three primary objectives:
>
> (a) To prohibit advertising to the general public, with or without price information, any narcotic drug or any drug or preparation which bears on its label "Caution, federal law prohibits dispensing without prescription"; or any drug or preparation sold pursuant to a health practitioner's prescription; or any drug product the use of which requires the supervision of a health practitioner; and (b) To prohibit the publication or circulation of any statement tending to deceive, misrepresent, or mislead anyone with regard to the practice of pharmacy; or to engage in any fraudulent or deceitful practice or transaction in pharmacy or in the operation or conduct of a pharmacy; and (c) To prohibit the advertising of professional superiority, or claiming the performance of professional services in a superior manner, or the advertising of preferential treatment to any class of persons.

After considering the pleadings in this matter, the interrogatories and their answers, and the affidavits and depositions filed by each side, the trial court entered a judgment in favor of the plaintiffs. From the entry of the judgment, the defendant gave notice of appeal.

Sanford, Cannon, Adams, and McCullough, by E. D. Gaskins, Jr., Robert W. Spearman and Daniel T. Blue, Jr. for plaintiff-appellee.

Bailey, Dixon, Wooten, McDonald, and Fountain, by Kenneth Wooten, Jr. for defendant-appellant.

CARSON, Judge.

The summary judgment entered by the trial court contained extensive findings of fact and three conclusions of law. To summarize the conclusions of law, the court held as follows: 1. That G.S. 90-57.1 did not grant authority to the Board to regulate the advertising of prescription drugs. 2. That even if the statute did authorize the Board to adopt regulations concerning advertising, it was unconstitutional as an unlawful delegation of legislative power without sufficiently clear standards and guidelines. 3. Even if the legislature did authorize the Board to regulate advertising, and even if such delegation of authority were valid, that the Code was in violation of the North Carolina Constitution and the United States Constitution because there was no substantial, rational relationship to the public health or safety or the general welfare. Based on the findings of fact and the above cited conclusions of law, the court held that Section 8 of the Code is invalid and inoperative and of no force and effect.

[1] We hold that the third conclusion of law entered by the trial court was erroneous. While the plaintiffs had alleged that there was no rational or substantial relationship to the public health and welfare, the defendant in its answer denied this allegation. The defendant further introduced into evidence statements in opposition to the motion for summary judgment. One of these affidavits was from the Dean of the School of Pharmacy at the University of North Carolina at Chapel Hill, and the other was from the Secretary-Treasurer of the North Carolina Board of Pharmacy. Each of these two affidavits stated that restriction of advertising of prescription drugs was in the public interest. A factual dispute was put forth by the pleadings and the affidavits, and it should have been resolved by the court or a jury as appropriate. In any event it was not a subject for summary judgment.

[2] The next question presents a more substantial problem. Assuming, without deciding, that the General Assembly can prohibit the advertising of prescription drugs or special treatment to a class of persons in the selling or administering of said drugs, we are confronted with the question of whether this authority may be delegated to an administrative agency such as the Board of Pharmacy. In the case of *State v. Harris*, 216 N.C. 746, 6 S.E. 2d 854 (1940), our Supreme Court held

that legislative standards must be the guides for administrative agencies in setting forth rules and regulations. There, a dry cleaning board was established to promulgate whatever rules and regulations it decided to be related to public health, safety, and welfare of the people. In that case, at page 754, it was held that:

> In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the Legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. 16 C.J.S., Page 373, and cases cited. Where such a power is left to the limited discretion of a board, to be exercised without the guide of legislative standards, the statute is not only discriminatory, but must be regarded as an attempted delegation of the legislative function offensive both to the State and the Federal Constitution.

Similar results were reached in the *Board of Trade v. Tobacco Co.*, 235 N.C. 737, 71 S.E. 2d 21 (1952), where the Kinston Tobacco Board of Trade had been set up to make "reasonable rules and regulations" for the economic and efficient handling of leaf tobacco sales. While pointing out that the legislature has the authority to regulate within constitutional limits the sale of leaf tobacco, the court held that this is a nondelegable power and that the power to regulate may be delegated to an administrative agency only to the extent of filling in the details within the general scope and express purposes of the statutes prescribing the standards. A similar result was reached in the case of *Harvell v. Scheidt, Comr. of Motor Vehicles*, 249 N.C. 699, 107 S.E. 2d 549 (1959), where the legislature purported to give power to the Department of Motor Vehicles to suspend the license of anyone who was an habitual offender of the traffic laws. Since no guidelines were provided to interpret the words "habitual violator," it was held that this was an unconstitutional delegation of legislative authority.

G.S. 90-57.1 contains no specific guidelines for the Board to follow. It merely refers to the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession. The guidelines, if they can be considered guidelines, do not meet the constitutional standards of certainty to allow the Board to adopt such rules. Without such guidelines,

G.S. 90-57.1 is an unlawful attempt to delegate legislative authority and is in violation of the North Carolina Constitution.

In view of our holding that G.S. 90-57.1 is unconstitutional, we do not decide the remaining questions of whether the General Assembly may prohibit the advertising of prescription drugs or the preferential treatment of certain classes of persons in the sale of such products.

The judgment of the trial court is modified to conform with this opinion and, as so modified, is affirmed.

Chief Judge BROCK and Judge MORRIS concur.

CITY OF DURHAM v. W. Y. MANSON AND WIFE, PATRICIA S. MANSON; DAVID S. EVANS, TRUSTEE; WACHOVIA BANK AND TRUST COMPANY, N.A.; MARY JOHNSON LIVENGOOD (WIDOW); AND HELEN JOHNSON BUGG AND HUSBAND, E. B. BUGG

No. 7414SC73

(Filed 3 April 1974)

1. **Statutes § 11— local act — exception to subsequent general law**

It is the general rule of statutory construction that a subsequent legislative enactment will not repeal a former local act unless the intent to do so is expressly stated.

2. **Statutes § 2— "quick take" condemnation procedure — local act**

Chapter 506, Session Laws 1967, which allows the City of Durham to employ the "quick take" procedure provided by Article 9 of Chapter 137 in condemnation proceedings, is a "local act" as that term is defined in G.S. 160A-1(5), and as such it is subject to the applicable provisions of Chapter 160A.

3. **Statutes § 11— local act — effect of subsequent repeal of general law**

Chapter 506, Session Laws 1967, authorizing use of the "quick take" condemnation procedure by the City of Durham was not repealed by the repeal in 1971 of the statute to which the local act was appended, and the trial court erred in dismissing plaintiff's condemnation proceeding which was instituted pursuant to the local act.

4. **Eminent Domain § 7— "quick take" procedure — notice required — constitutionality**

The "quick take" condemnation procedure authorized by a local act for the City of Durham was not unconstitutional for its failure to require notice, since notice is not a prerequisite to the determination of questions as to the necessity and expediency of a taking but

only to the determination of the issue of just compensation, and the local act under consideration met that requirement by providing that "notice of deposit" be given.

5. Statutes § 2— local act — constitutionally forbidden subjects

A local act authorizing the "quick take" condemnation procedure for the City of Durham did not involve any of the forbidden subjects listed in Article II, Section 24 of the N. C. Constitution.

APPEAL by plaintiff from *Clark, Judge,* September 1973 Session of Superior Court held in DURHAM County.

This is an eminent domain proceeding instituted pursuant to a local act (Chapter 506, Session Laws 1967, as it amended G.S. 160-205) wherein the plaintiff, City of Durham, seeks to acquire real property owned by the defendants, W. Y. Manson et al, for the purpose of developing a public park. Chapter 506, Session Laws 1967, reads as follows:

"Section 1. Section 160-205 of the General Statutes of North Carolina is hereby amended by adding thereto as a separate paragraph the following words and figures:

'The procedures provided in Article 9 of Chapter 136 of the General Statutes, as specifically authorized by G.S. 136-66.3(c), shall be applicable in the case of acquisition by a municipal corporation of lands, easements, privileges, rights-of-way, and other interests in real property for any and all public purposes in the exercise of the power of eminent domain; and such municipal corporation seeking to acquire such property or rights or easements therein or thereto shall have the right and authority, at its option and election, to use the provisions and procedures as authorized and provided in G.S. 136-66.3(c) and Article 9 of Chapter 136 of the General Statutes for any of said purposes without being limited to streets constituting a part of the State Highway System.'

Sec. 2. This act shall apply only to the City of Durham."

The present action was commenced on 8 March 1973 with the filing of a complaint, declaration of taking, and notice of deposit. The complaint and declaration of taking both contained the following pertinent language:

"Plaintiff possesses certain powers conferred upon it as a municipal corporation as contained in its Charter and

amendments thereto and by the provisions of Chapter 40 of the General Statutes of North Carolina, as amended by Chapter 506, Session Laws 1967, among which are the express power and authority to acquire by purchase or condemnation lands and rights-of-way for public park and public playground purposes as in the opinion of the governing body of plaintiff may be necessary or advisable in promotion of the public welfare and generally in promotion of the public interest."

On 22 August 1973 defendants W. Y. Manson and Patricia S. Manson filed a motion to dismiss this action basing their motion on the theory that the enabling legislation upon which the City of Durham had relied in instituting this proceeding, namely, Chapter 506, Session Laws 1967, had been repealed by Chapter 698, Session Laws 1971. Chapter 506, Session Laws 1967, had amended G.S. 160-205 so as to allow the City of Durham to employ the "quick take" procedure provided by Article 9 of Chapter 136; however, the defendants in their motion to dismiss contended that the City of Durham was stripped of its authority to use the "quick take" procedure in 1971 when G.S. 160-205 was repealed. On 4 September 1973 the defendants' motion was heard by Judge Clark and at the conclusion of the hearing he directed that memoranda of law be filed by the parties on 7 September 1973.

On 11 September 1973 Judge Clark made the following relevant findings of fact and conclusions of law:

"4. Chapter 506, Session Laws 1967, purports to specifically amend N.C.G.S. Sec. 160-205; however, this section was repealed by action of the General Assembly by Chapter 698, Session Laws 1971, such repeal to be effective January 1, 1972.

* * * *

6. The court finds particularly that Chapter 160A, Article II and Article 19, Part 4, are in irreconcilable conflict with Chapter 506, Session Laws 1967, particularly because of the provisions of Chapter 506, Session Laws 1967, which purport to bestow the right to take by eminent domain without a prior hearing.

7. The court finds that Chapter 160A was intended to be and is a law of general statewide application and that

under its terms the City of Durham has available to it a number of optional methods by which to proceed in the condemnation of land.

* * * *

9. The extraordinary power to eminent domain, without a prior hearing, which is found in N.C.G.S. Chapter 136, Article 9, will be strictly construed, particularly when sought to be applied by a municipality without a showing of immediate need of such magnitude as to justify such procedure. The ordinary purpose of N.C.G.S. 136, Article 9, is to permit the State Highway Commission to have this power to condemn and take before a hearing.

10. The court reserves the question of the constitutionality of Chapter 506, Session Laws 1967, because it has been able to arrive at a determination without reaching that issue."

Based on these findings and conclusions, an order was entered dismissing the action of plaintiff "without prejudice to bring the action again pursuant to different authority." The plaintiff appealed.

Attorney General Robert Morgan and Associate Attorney C. Diederich Heidgerd, Amicus Curiae for the State.

City Attorney W. I. Thornton, Jr., and Assistant City Attorney Rufus C. Boutwell, Jr., for plaintiff appellant.

Paul, Keenan & Rowan by James V. Rowan for defendant appellees, W. Y. Manson and wife, Patricia S. Manson.

HEDRICK, Judge.

The primary question presented by this appeal is whether the local act (Chapter 506, Session Laws 1967, as it amended G.S. 160-205) under which plaintiff seeks to condemn defendants' land was repealed by Chapter 698, Session Laws 1971 (Chapter 160A of the General Statutes). Defendants contend that the 1971 rewriting and streamlining of former Chapter 160 resulted in the repeal of the local act upon which plaintiff bottoms its "quick take" condemnation authority, while plaintiff maintains that the local act remains in full force and effect.

[1] It is a general rule of statutory construction that a subsequent legislative enactment will not repeal a former local

act unless the intent to do so is expressly stated, *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E. 2d 813 (1971); *Felmet v. Commissioners*, 186 N.C. 251, 119 S.E. 353 (1923); *State v. Johnson*, 170 N.C. 685, 86 S.E. 788 (1915); therefore, we must carefully scrutinize the relevant sections of Chapter 160A in order to ascertain the legislative intent. G.S. 160A-2, which is entitled "Effect upon prior laws" manifests the legislative concern that certain prior laws should be preserved. This section reads in relevant part as follows:

> "Nothing in this Chapter shall repeal or amend any city *charter* in effect as of January 1, 1972, or any portion thereof, unless this Chapter or a subsequent enactment of the General Assembly shall clearly show a legislative intent to repeal or supersede all *local acts*. The provisions of this Chapter, insofar as they are the same in substance as laws in effect as of December 31, 1971, are intended to continue such laws in effect and not to be new enactments . . . . " (Emphasis added.)

[2] G.S. 160A-2 is made more meaningful by reference to G.S. 160A-1 wherein the definitions of "charter" and "local act" are contained. G.S. 160A-1(1) provides that " 'charter' means the entire body of local acts currently in force applicable to a particular city . . . " , and "Local Act" is defined in G.S. 160A-1(5) as a legislative act applying to one or more specific cities by name. Chapter 506, Session Laws 1967, is a legislative act which applies specifically to Durham by name, and is, therefore, a "local act" as that term is defined in G.S. 160A-1(5) and as such it is subject to the applicable provisions of Chapter 160A.

[3] Having determined that it was the express intent of the legislature in Chapter 160A to retain local acts unless otherwise specifically indicated, we must next consider whether those local acts preserved include the act which is the focal point of this appeal. Defendants submit that the repeal in 1971 of G.S. 160-205—the statute to which the local act in question was appended —also resulted in the repeal of the local act; however, this approach overlooks G.S. 160A-241 which describes the methods of acquiring property which may be employed by a municipality. G.S. 160A-241 reads in pertinent part as follows:

> *"In addition to powers conferred by any other general law, charter, or local act,* each city shall possess the power of eminent domain and may acquire by purchase or condem-

nation any property necessary or useful for the following purposes:

* * * *

In exercising the power of eminent domain a city may in its discretion use the procedures of Article 2 of Chapter 40 of the General Statutes, or the procedures of this Article, *or the procedures of any other general law, charter or local act applicable to the city.*" (Emphasis added.)

Clearly, G.S. 160A-241 exemplifies the express legislative intent to provide alternative condemnation procedures for cities and, in close conjunction with this concept, to continue the existence of the "quick take" condemnation proceeding authorized by Chapter 506, Session Laws 1967. Furthermore, if as defendants contend, it is necessary for the local act to attach to one of the sections of Chapter 160A in order to perpetuate the existence of the local act, we are of the opinion that this is accomplished by attaching the local act to G.S. 160A-241.

We fail to see how the local act in question can be considered to have been repealed and we conclude that the trial court erred in dismissing plaintiff's condemnation proceeding which was instituted pursuant to such act.

Having determined that it was the intent of the legislature to preserve the local act *sub judice*, we must next consider the constitutionality of the "quick take" procedure authorized by this act. Such an investigation of the constitutionality of the local act requires careful reflection upon two important questions: (1) Does this local act afford procedural due process? (2) Does this local act encompass a subject matter which is expressly prohibited by Article II, Section 24, of the North Carolina Constitution?

[4] The sole aspect of procedural due process which merits discussion is the element of notice. In an Annotation entitled "Notice In Condemnation Proceedings" which appears in 1 L.Ed. 2d 1635, we find the following:

"As to the necessity of notice, as a matter of due process, in proceedings for the condemnation of real property, a distinction has been made between the taking of the property and the determination of just compensation. Where the taking of property is for a public use, the due process clause of the Fourteenth Amendment does not require that the

necessity and expediency of the taking be determined upon notice and hearing. However, with respect to the compensation for the taking, due process requires that the owner be given reasonable notice of, and opportunity to be heard in, the pending proceedings . . . . "

Similar statements are to be found in several decisions of the N. C. Supreme Court. *Redevelopment Comm. v. Grimes,* 277 N.C. 634, 178 S.E. 2d 345 (1970) ; *State v. Jones,* 139 N.C. 613, 52 S.E. 240 (1905). These cases indicate that notice is not a prerequisite to the determination of questions of a political nature (e.g. the necessity and expediency of a taking) but that notice is only necessary prior to the determination of the issue of just compensation. Thus, in the instant case the city council of Durham acting pursuant to the authority vested in it by the local act, properly determined, without giving notice to the defendants-landowners, that the best interest of the people would be served by condemning the land in question for public use as a park and "neither the landowner affected nor the court can interfere with the exercise of the power until the question of compensation is reached." *City of Charlotte v. McNeely,* 281 N.C. 684, 190 S.E. 2d 179 (1972). As for the notice which is required to be given to the landowner prior to the determination of the question of just compensation, we find that the procedure under attack fully satisfies this condition. The "notice of deposit" which must be given in a "quick take" proceeding is nothing more than its title would imply and certainly does not displace future determination of the compensation issue. In fact, if the condemnee is dissatisfied with amount deposited, he is provided by statute express methods of having the value of the condemned property reconsidered; and in this regard the "notice of deposit" in effect serves the vital function of giving the requisite notice. See G.S. 136-105 et seq.

[5] The other constitutional question to be discussed is whether the local act under discussion is prohibited by Article II, Section 24, of the North Carolina Constitution. This portion of our State Constiution prohibits the General Assembly from enacting any local, private, or special legislation which deals with the subject matters therein enumerated. There is no question that the act in question is a local act; hence, the only matter left for our consideration is whether this local legislation involves one of the forbidden subjects listed in Article II, Section 24, of the Con-

stitution of North Carolina. It is our view that no part of Section 24 prohibits the enactment of local legislation of the character such as that which is now before us.

For the reasons stated herein the order of the trial court dismissing this action is

Reversed.

Judges CAMPBELL and BALEY concur.

LEON KAPLAN AND WIFE RENEE M. KAPLAN, TRADING AS TINY TOWN v. CITY OF WINSTON-SALEM

No. 7421SC7

(Filed 3 April 1974)

1. **Municipal Corporations § 14; State § 4— action against city — sidewalk repairs — damage to store merchandise — governmental immunity**

The doctrine of governmental immunity did not apply to bar plaintiffs' action to recover for damages to merchandise in their store caused by concrete dust which infiltrated the store while defendant city was engaged in replacing deteriorating sidewalks in the vicinity of the store.

2. **Municipal Corporations § 16— sidewalk repairs — damage to store merchandise — negligence by city**

In an action to recover for damages to merchandise in plaintiffs' store from concrete dust arising from the fall of broken concrete into the basement bays of the store while defendant city was replacing sidewalks adjoining the store, the evidence was sufficient to justify a finding that defendant's crew was negligent in performing the work without taking sufficient precautions to safeguard plaintiffs' property from dust damage or in failing to advise plaintiffs of the risk of dust in the area.

3. **Municipal Corporations § 16— sidewalk repairs — damage from dust particles — foreseeability**

Defendant city should have foreseen that concrete dust would be spread throughout plaintiffs' store by pieces of broken concrete which the city knew would drop into the basement bays of the store while the city replaced deteriorating sidewalks adjoining the store.

4. **Municipal Corporations § 17— sidewalk repairs — dust particles — damage to store merchandise — contributory negligence**

Plaintiffs were not contributorily negligent in failing to take action to minimize damages to merchandise in their store from dust

particles arising from pieces of broken concrete falling into the basement bay areas of the store where plaintiffs were informed that the sidewalk directly above the bay areas was going to be torn up by the city and a city representative tacked cardboard over the opening of one of the bays, but plaintiffs were not informed of the manner in which the job would be done or the possible results of the city's action.

5. **Damages § 13— damage to store merchandise — evidence of retail value**

In an action to recover for damages to merchandise in plaintiffs' store caused by concrete dust particles from defendant city's sidewalk repair project, the trial court erred in allowing testimony of damages based on retail selling prices of the merchandise since prospective profits may not be included as an element of damages.

APPEAL by defendant from *Collier, Judge,* 7 May 1973 Session of Superior Court held in FORSYTH County. Argued in the Court of Appeals 15 January 1974.

In October, 1966, defendant, the City of Winston-Salem, was engaged in replacing deteriorating sidewalks in the vicinity of a store owned by plaintiffs, Leon Kaplan and Renee M. Kaplan. On 10 October 1966, a representative of defendant notified plaintiffs that defendant's work crew would be replacing the sidewalk in front of plaintiffs' store. Plaintiff and the city representative went into the basement and examined the area, including two bay areas beneath the sidewalk, each twelve feet high and extending nine feet under the sidewalk.

The east bay, filled with obsolete merchandise to within two feet of the ceiling, was entirely open from the basement of the store. The west bay, containing a large number of boxes, had a solid wall between it and the basement with only a doorway. City workmen moved the boxes into the main portion of the basement while the crew foreman covered the door with a piece of cardboard. Plaintiff advised the work crew not to move merchandise from the east bay and that it did not require protection. The east bay was not covered because the storage extended out into the basement, precluding a place to put a cover.

On 11 October 1966, when employees arrived and opened the store after work had commenced on the sidewalk, dust was found in the basement, the first floor, and the second floor of the store. A complete inventory of the store was taken by employees of plaintiffs along with a city representative.

As to damages to his inventory and merchandise caused by cement dust and grit, Mr. Kaplan testified that in his opinion

the total fair market value of the merchandise immediately before the incident was $66,685.07 and immediately after it was $18,335.00, or net damages of $48,350.07 to the merchandise.

Plaintiffs tendered Mr. Walter S. Gary as an expert in the field of children's toys. Mr. Gary testified that, in his opinion, damage to the merchandise in the basement was in the amount of 85% of retail value; on the first floor, 75% of retail value; and on the second floor, 66⅔% of retail value.

The jury found plaintiffs were damaged by the negligence of defendant and were entitled to recover $21,752.00.

Defendant appealed.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and George L. Little, Jr. for plaintiffs-appellees.

Deal, Hutchins & Minor, by John M. Minor and William Kearns Davis, for defendant-appellant.

BROCK, Chief Judge.

[1] Defendant contends that plaintiffs' cause of action, not being on behalf of a member of the travelling public, is barred by the doctrine of governmental immunity.

It is generally held that the duty of keeping sidewalks in a reasonably safe condition rests primarily on a municipality. A municipality may not undertake a task of street improvement or repair in a careless or negligent fashion and then seek to escape liability by invoking the privilege of governmental immunity. Numerous cases have held that the exercise of due care in keeping streets and public ways safe and in suitable condition is a positive obligation imposed upon a municipal corporation. A municipality cannot, with impunity, create in its streets a condition palpably dangerous, neglect to provide the most ordinary means of protection against it, and avoid liability for proximate injury on the plea of governmental immunity. *See Hunt v. High Point,* 226 N.C. 74, 36 S.E. 2d 694; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42; *Waters v. Belhaven,* 222 N.C. 20, 21 S.E. 2d 840; *Meares v. Wilmington,* 31 N.C. (9 Ire.) 73. The same principle of liability applies when a municipality undertakes a task of street or sidewalk improvement in a careless or negligent fashion and causes damage to the property of an adjoining property owner.

[2] The evidence discloses that damage to plaintiffs' property was the result of concrete dust permeating and infiltrating the interior of plaintiffs' store. The dust arose from the fall of broken concrete into the basement bays of the store. Testimony reveals that city representatives knew that concrete and dust would fall into the basement area. The record reveals that cardboard was placed over one of the two basement bays. However, it is not clear whether the purpose of the board was to block out large chunks of concrete or to eliminate all foreign particles from the basement area. Regardless, it was known by city representatives that amounts of concrete and dust would fall into the basement area.

The duty to maintain sidewalks and streets in a safe condition carries with it a correlative duty to perform these maintenance tasks in a competent manner or suffer the consequences of negligently inflicted damage which is foreseeable. The evidence justifies a finding that defendant's crew was negligent in performing the work without taking sufficient precautions to safeguard plaintiffs' property from dust damage or advising plaintiffs of the risk of dust in the area. This assignment of error is overruled.

[3] Defendant contends that the method of replacing the sidewalk had been used extensively in similar work, and that the spread of dust was accidental, unintended, and due to unforeseeable conditions beyond the control of defendant.

Testimony of witnesses employed by defendant reveals that these witnesses were aware that in breaking up the sidewalk, chunks of concrete would fall into the bay areas of the basement, spreading concrete particles and dust.

Negligence, to be actionable, must be a proximate cause of the injury, and foreseeability is an essential element of proximate cause. A defendant is not required to foresee occurrences which are merely possible, but only such occurrences which are reasonably foreseeable.

Under the circumstances presented by the evidence in this case, defendant should have foreseen and should have known that dust would be spread by the pieces of concrete dropping into the bay areas underneath the sidewalk. This assignment of error is overruled.

[4] Defendant contends plaintiffs were guilty of contributory negligence since plaintiffs were advised of the nature of the work before excavation began, had peculiar knowledge of the special conditions affecting the interior of the store, and failed to take action to prevent damages.

"Contributory negligence, as its name implies, is negligence on the part of plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Jackson v. McBride,* 270 N.C. 367, 154 S.E. 2d 468.

Defendant is contending that plaintiffs failed to take any defensive action against a danger which plaintiffs were unaware would come about. The evidence reveals that the only information plaintiffs received was in the form of a visit by a city representative who informed them that the sidewalk was going to be torn up directly above the basement. Later that same afternoon, city representatives went into the basement and tacked cardboard panels over the opening of the west bay. Plaintiffs were not informed of the manner in which the job would be done or the possible results of such actions.

Plaintiffs cannot be found contributorily negligent for failure to avert to minimize dust damage when they were uninformed that falling chunks of concrete and airborne dust particles would be by-products of the sidewalk excavation process. Refusal by the trial court to submit the issue of contributory negligence was not error. This assignment of error is overruled.

[5] Defendant contends that the trial court erred in allowing testimony of damages based on retail selling prices. "North Carolina is committed to the general rule that the measure of damages for injury to personal property is the difference between the market value of the damaged property immediately before and immediately after the injury. The purpose of the rule is to pay the owner for his loss." *Light Company v. Paul,* 261 N.C. 710, 136 S.E. 2d 103.

The purpose of the rule is to return the owner to his status prior to the incident which damaged or destroyed the personal property. The rule is not intended to award prospective profits. Profits are contingent upon the goods being sold and upon the business expertise of the owner. Rather, the rule is intended to

afford compensation to the owner in an amount sufficient to buy goods identical to those damaged or destroyed, plus compensation for any expenses incurred by the owner in attempts to minimize damages, less any salvage obtained in a sale or exchange of the damaged goods. Anticipated profits of a non-conjectural nature which can be demonstrably proven by reliable records, accumulated over a reasonable period of time, dealing in such goods, may also be included as factors of compensation.

Plaintiffs' witness Gary, tendered as an expert witness on the value of children's toys, gave his opinion of damages to the merchandise in terms of percentages of the retail prices. He testified: "I said on the first floor I estimate damage to be 75% of the retail value of the merchandise. In the basement, I estimate the damage to be 85% of the retail value of the merchandise. And, on the top floor, I estimate the damage to be 66⅔% of the retail value of the merchandise." Evidence of this nature, when coupled with evidence of the retail value of the inventory, would be competent as tending to establish the salvage value of the merchandise. However, the court did not instruct the jury upon how this evidence was to be considered. There was no instruction of any nature that the salvage value of the merchandise was to be considered. The jury was permitted to consider evidence of damage to the retail value of the merchandise without limits upon its applicability. This was error prejudicial to defendant.

New trial.

Judges MORRIS and CARSON concur.

STATE OF NORTH CAROLINA v. EDDIE WHITE

— AND —

STATE OF NORTH CAROLINA v. OTIS DEXTER KEARNEY

No. 7410SC156

(Filed 3 April 1974)

1. Criminal Law § 84— admissibility of evidence seized — failure to make findings on voir dire

Where there was no conflict in the evidence on a *voir dire* hearing to determine admissibility of evidence found as a result of a

search made of defendants at the police station, failure of the trial judge to make findings of fact before ruling on defendants' motions to suppress was not fatal.

2. **Arrest and Bail § 3; Searches and Seizures § 1— prison escapees — arrest and search without warrant**

Defendants had no standing to challenge the probable cause for their warrantless arrest where they were escapees from the State's prison system, an officer heard their description on a police radio broadcast, observed defendants and had them arrested as escapees; furthermore, it was entirely reasonable for officers to search defendants after they were apprehended, and items belonging to a robbery victim found during the search were admissible in this common law robbery case.

3. **Arrest and Bail § 3— prison escapees — arrest without warrant**

Prison escape is a continuing offense, and arrest of defendants as prison escapees without a warrant was justified where officers had reasonable ground to believe that defendants were committing the offense in their presence.

4. **Robbery § 5— common law robbery — failure to submit lesser included offenses**

Trial court in a common law robbery case did not err in failing to submit to the jury lesser included offenses of assault and larceny where under no reasonable view of the evidence could the jury have found either that defendants had simply beaten the victim without robbing him or that they had taken his property after finding him unconscious on the sidewalk.

APPEAL by defendants from *Blount, Judge,* 4 September 1973 Session of Superior Court held in WAKE County.

Defendants were separately indicted but jointly tried for the common-law robbery of one Bouchett. The State's evidence tended to show: On the night of 28 January 1973 Bouchett and the two defendants, White and Kearney, were patrons at the Teddy Bear Lounge in Raleigh, N. C. About 11:00 p.m., Bouchett left the Lounge and started walking toward his hotel. When he had walked approximately 400 feet, he was knocked unconscious by a blow on the head, and his wrist watch and wallet, containing approximately $40.00 in cash and a Brigg's Hardware sales slip for a recently purchased hot plate, were taken from him. The bartender at the Lounge, who was personally acquainted with Kearney, saw both defendants leave the Lounge together within four or five minutes after Bouchett had left. Within a few minutes thereafter, a police officer in a patrol car discovered the unconscious Bouchett lyng on the sidewalk. Immediately before this, the officer had observed two white

males walking away on the sidewalk at a point approximately 75 feet from where he found Bouchett. No one else was seen in the area at that time. Shortly thereafter, Raleigh police officers stopped the two defendants in the immediate vicinity and arrested them on charges that they were escapees from the State prison system. A subsequent search at the police station uncovered Bouchett's watch and $16.10 on White and the Brigg's Hardware sales slip and $23.17 on Kearney.

Defendant White presented the testimony of his mother and father, who testified that they had given him the watch found in his possession as a Christmas present. Defendant Kearney did not present any evidence.

The jury found each defendant guilty as charged, and judgments were entered sentencing each defendant to prison for not less than eight nor more than ten years, the sentences to run consecutively with any sentences then being served.

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

Emanuel & Thompson by W. Hugh Thompson for defendant appellant White.

Weaver & Noland by Everette Noland for defendant appellant Kearney.

PARKER, Judge.

There was ample evidence to require submission of the cases to the jury as to each defendant, and their motions for nonsuit were properly overruled.

Appellants assign error to denial of their motions to suppress the evidence found as a result of the search made of defendants at the police station, contending that the search was unlawful. Prior to ruling on the motions to suppress, the trial court conducted a voir dire examination to determine the admissibility of the evidence. At the close of this examination, the court, without making findings of fact, denied defendants' motions to suppress, and in this ruling we find no error.

[1] The evidence presented at the voir dire consisted solely of the testimony of two police officers. Their testimony was neither mutually contradictory nor contravened by any evidence presented by either defendant. Although it is the better practice in

all such cases for the trial judge to make findings of fact and enter them in the record, where, as here, there is no conflict in the evidence at the voir dire, the trial judge's failure to make findings of fact is not fatal, and the facts disclosed by the uncontradicted evidence will be assumed to have furnished the basis for the trial judge's subsequent ruling. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Basden,* 8 N.C. App. 401, 174 S.E. 2d 613.

The evidence presented at the voir dire disclosed the following: While driving in his patrol car east on Martin Street, at about 11:15 p.m., Officer Broadwell passed two men walking west on the sidewalk. Almost at the same time, he saw Bouchett lying collapsed and bleeding about 75 feet further east on the sidewalk. Broadwell, finding Bouchett in need of immediate medical attention, radioed police headquarters for an ambulance and gave a general description of the two men he had just passed. Broadwell was then given by police radio a detailed description of two recent Oxford Prison Unit escapees. This detailed description had previously been broadcast by police radio at 11:05 p.m. to all officers on the 11:00 o'clock shift and was broadcast a second time shortly after Broadwell discovered the unconscious Bouchett at 11:15 p.m. The broadcast description referred to each of the defendants by name and gave a detailed description of the physical characteristics of each, including reference to a tattoo on defendant White's left hand. Following the second broadcast, the defendants were stopped and questioned, but were not immediately taken into custody, by several police officers on the corner of Hargett and Dawson Streets, a few blocks from the scene of the robbery. Broadwell, who had remained with Bouchett until the ambulance arrived, proceeded to Hargett and Dawson. There, he observed the defendants and found that the broadcast description of the two escapees closely matched the appearance of the defendants. Broadwell then ordered the arrest of defendants as escapees. Defendants were advised of their rights and taken to police headquarters, where a search revealed the objects subsequently admitted into evidence in the present case. Defendants were thereafter charged with common-law robbery of Bouchett and again advised of their rights.

[2] On the facts disclosed by the uncontradicted evidence at the voir dire, defendants' arrest and their subsequent search were lawful. As escapees from the State's prison system, they

were subject to being apprehended and returned to custody at any time. It is feckless to argue, as appellants do on this appeal, that the State failed to show that the officers had probable cause to arrest them as escapees because, at the time of such arrest, the only information which the officers had was that contained in the police radio broadcasts. An escapee from the State's prison system may be lawfully seized and held in custody by the police, with or without probable cause. To make a lawful return of an escapee into the custody from which he fled, he need not be charged and convicted of the escape; it is only necessary that he be apprehended, since the original commitment from which he escaped remains in effect. Only had defendants been mistakenly identified as the escapees would the question of probable cause for their arrest arise. In this case there was no mistake in their identification as escapees, and they were in lawful custody at the time they were searched at the police station. Once they were apprehended, it was entirely reasonable for the police to search them, and the fruits of that search were admissible in evidence in the present case.

[3] By holding, as we do, that defendants in this case lacked standing to challenge the probable cause for their arrest, we do not imply that the officers may not actually have had probable cause to arrest in this case. Quite to the contrary. Prison escape is a continuing offense, and in our opinion the uncontradicted evidence in this case fully supports a finding that the officers had reasonable ground to believe that defendants were committing the offense in their presence. Arrest without a warrant was justified. G.S. 15-41(1).

[4] There was no error in the trial court's failure to submit to the jury issues as to defendants' guilt of the lesser included offenses of assault and larceny. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545. Under no reasonable view of the evidence in this case could the jury have found either that defendants had simply beaten Bouchett without robbing him or that they had taken his property after finding him unconscious on the sidewalk as result of a blow struck by some unknown third party. We also find no prejudicial error in other portions of the court's charge to which exception was noted.

In the trial and judgments appealed from we find

No error.

Judges BRITT and VAUGHN concur.

NORTH CAROLINA NATIONAL BANK, EXECUTOR OF THE WILL OF THOMAS A. NORRIS, JR. v. THOMAS A. NORRIS III, LAURA NORRIS RAYNOR, LEE M. NORRIS AND EVELYN ANN NORRIS, A MINOR

No. 7410SC224

(Filed 3 April 1974)

1. **Wills § 41— rule against perpetuities**

Under the rule against perpetuities, no devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest.

2. **Wills § 41— remainder to great-grandchildren — rule against perpetuities — doctrine of separability**

Attempted devise to testator's great-grandchildren of the remainder interest in property after the termination of successive life estates granted to testator's widow, his daughters and his grandchildren violated the rule against perpetuities and was invalid; such devise was not saved by the "Doctrine of Separability" since testator dealt with one remainder to take effect at one time and did not devise life estates successively to his children and grandchildren in such manner as to constitute separate and distinct devises to different classes which take effect at different times upon the respective death of each life tenant.

APPEAL by defendant Evelyn Ann Norris, a Minor, by her Guardian Ad Litem, from *Hobgood, Judge,* November 1973 Session of Superior Court held in WAKE County.

Action for a declaratory judgment to determine whether certain provisions of the last will of B. F. Montague violated the rule againts perpetuities. The facts are not in dispute and the case was submitted for decision upon stipulaton that the allegations in the pleadings are true.

B. F. Montague died a resident of Wake County on or about 1 April 1928, leaving a will dated 19 November 1927. At the

time of his death, he left surviving a widow, three daughters who were then 38, 40 and 43 years of age, and one grandchild, Thomas A. Norris, Jr., who was then six years of age; there were no children or grandchildren born subsequent to the death of B. F. Montague. Montague's widow, daughters, and only grandchild have successively deceased. Thomas A. Norris, Jr., the grandchild, died 10 January 1973, leaving surviving four children, who are the defendants herein, and a last will naming plaintiff herein as the Executor.

The pertinent provisions in the will of B. F. Montague are the following:

> "FOURTH: I give, devise and bequeath to my three daughters, May M. Allison and Annie M. Hunter and Marjorie M. Norris, all of my estate, below described, during their natural lives and at the death of either of my said daughters, I give, devise and bequeath all of said property to the survivor or survivors alike, and at the death of the last survivor, I give, devise and bequeath all of my estate below described to the child or children of my said daughters for and during the natural life or lives of such child or children (my grandchild or grandchildren) with remainder over to the lawful issue of such grandchild or grandchildren forever. In default of such issue from such grandchild or grandchildren, the remainder shall go to Peace Institute of Raleigh, N. C., absolutely and forever. First of all, however, I give, devise and bequeath to my wife, Bettie L. Montague a life estate in and to all the property below described in this section (Section FOURTH), and at her death, the same shall descend to my said daughters in the manner and form above specified in this section (Section FOURTH)."

There then follows a description of certain tracts of real property in Raleigh, N. C.

If the rule against perpetuities was violated by the foregoing provisions of Montague's will, title to the real property in question would have been vested in his grandchild, Thomas A. Norris, Jr., immediately prior to Norris's death and would now be vested in plaintiff by virtue of Norris's will. If the rule was not violated, title to such property would now be vested in defendants, Montague's great-grandchildren.

The trial court, concluding as a matter of law that the attempted devise of the remainder interest to the testator's great-grandchildren violated the rule against perpetuities, entered judgment that title to the property in question is now vested in plaintiff as Executor under the will of Thomas A. Norris, Jr., subject to the provisions of Norris's will.

From this judgment, the minor defendant, Evelyn Ann Norris, through her guardian ad litem, appealed.

Lassiter & Walker by James H. Walker for plaintiff appellee.

Walton K. Joyner, Guardian Ad Litem, for defendant appellant.

PARKER, Judge.

[1] The common-law rule against perpetuities has been long recognized and enforced in this jurisdiction, and its application has the continuing sanction of Article I, Section 34 of our State Constitution. This rule, which is "not one of construction but a positive mandate of law to be obeyed irrespective of the question of intention," *Mercer v. Mercer,* 230 N.C. 101, 52 S.E. 2d 229, has been stated by our Supreme Court as follows:

> "No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void." *Clarke v. Clarke,* 253 N.C. 156, 161, 116 S.E. 2d 449, 452.

[2] The devise which B. F. Montague attempted to make in Item Fourth of his will to his great-grandchildren of the remainder interest after the termination of the successive life estates granted to his widow, his daughters, and his grandchildren, clearly violated the rule. As of the date of the testator's death, which in case of wills is the time at which the validity of the limitation is to be ascertained, the possibility existed, at least insofar as the law views the matter, that one or more children might thereafter be born to one or more of Montague's three surviving daughters. Had this occurred, the life estates which he provided for his grandchildren might well

have extended and postponed vesting of the remainder in his great-grandchildren to a date beyond the time prescribed by the rule. It is the possibility, not the actuality, of such an occurrence which renders the grant void. See: *Parker v. Parker*, 252 N.C. 399, 113 S.E. 2d 899; Annotation, "Remainder to Great-Grandchildren," 18 A.L.R. 2d 671. As stated by the author of the last cited Annotation (at p. 673), "it should be noted that a remainder to great-grandchildren whose vesting is not limited upon termination of a secondary life estate in a named grandchild, but upon the death of all the creator's grandchildren as a class, is invalid, since other grandchildren might be born after the creation of the future interests and postpone the vesting of the remainder beyond the permitted period."

Appellant here acknowledges the possibility that a grandchild or grandchildren might have been born after Montague's death with the result that vesting of at least portions of the remainder might have been postponed beyond the period permitted by the rule, but seeks to invoke the so-called "Doctrine of Separability" to save the devise to the great-grandchildren in the present case. That doctrine has been stated by the author of the last-cited Annotation as follows:

> "While a class gift may not be split and is either good or bad in toto, it has been held that where a creator makes a gift of remainder to his great-grandchildren following life estates successively in his children and grandchildren in such a manner as to constitute separate and distinct devises or bequests to different classes, which take effect at different times, upon the respective death of the life tenants, and the number of classes or shares is definitely fixed within the period of the rule, although not until after the creator's death, the question of remoteness is to be considered with reference to each share separately." Annotation, 18 A.L.R. 2d 671, 680.

For further discusson and analysis of the Doctrine of Separability by other authorities, see: "Perpetuities in a Nutshell," 51 Harvard Law Review 638; Simes and Smith, The Law of Future Interests (2d Ed.) Sec. 1267; Tiffany, Real Property (3d Ed. 1970) Sec. 183.

As we read Item Fourth of Montague's will, however, we find the doctrine of separability simply not applicable in the present case. Montague did not devise life estates successively

to his children and grandchildren "in such a manner as to constitute separate and distinct devises or bequests to different classes, *which take effect at different times, upon the respective death of the life tenants.*" (Emphasis added.) Quite to the contrary, he devised all of the property described in Item Fourth of his will, first to his wife for life, then to his three daughters for life and at the death of any of them to the survivors or survivor for life, then, upon the death of the last to survive of his daughters, and still dealing with *all* of his estate, "to the child or children" of his daughters "for and during the natural life or lives of such child or children" (his grandchild or grandchildren), and finally, and still dealing with *one* property interest, "with remainder over to the lawful issue of such grandchild or grandchildren forever." In default of such issue, "the remainder" is devised to Peace Institute. All the way through the testator dealt with only *one* remainder to take effect at *one* time. Though he obviously contemplated the possibility that he might have more than one grandchild, he did not provide any "separate and distinct" devise of separate portions of the remainder interest to the issue of each grandchild to take effect at different times upon the respective death of each grandchild. Nothing in his will indicates any intention that each of his grandchildren should have a separate life estate in a separate share and that each such separate share should vest separately at the death of such grandchild in such grandchild's issue.

The judgment appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION AND E. A. FRIDDLE, ET AL v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND CENTRAL TELEPHONE COMPANY

No. 7410UC115

(Filed 3 April 1974)

Telephone and Telegraph Companies § 1; Utilities Commission § 7— compelling telephone service — area served by another company

G.S. 62-42, when construed *in pari materia* with G.S. 62-110, does not authorize the Utilities Commission to compel a telephone company

to provide local exchange service to an area which is already receiving such service from another telephone company.

APPEAL by Southern Bell Telephone and Telegraph Company and Central Telephone Company from the Order of the North Carolina Utilities Commission in Docket No. P-29, Sub 85, dated 19 June 1973.

This proceeding originated on 9 May 1972 when E. A. Friddle, his wife, and several other residents living in a small area of Rockingham County near the Guilford County line filed a petition with the Utilities Commission seeking to have their neighborhood removed from the Madison franchise exchange area of Lee (now Central) Telephone Company and added to the adjoining Summerfield franchise exchange area of Southern Bell Telephone and Telegraph Company (Southern Bell). Hearings on the complaint were held on 24-25 October 1972 in Raleigh before Division III of the Commission (Commissioners Wells, McDevitt, and Rhyne). Thirteen of the complainants testified at this hearing and their testimony tended to establish among other things (1) that these complainants were not receiving any telephone service whatsoever; (2) that the service presently offered by Central from its Madison exchange was of no value to them as their common interests reside with Stokesdale, Summerfield, and Greensboro, which communities are in the Southern Bell franchise area; (3) that the cost of telephone communication which could be provided to the complainants by Central Telephone Company would be prohibitive as most of the calls made by the complainants would be to Stokesdale, Summerfield, and Greensboro, and such calls are of the long distance variety. Testimony proffered by Southern Bell and Central Telephone Company tended to show that Central Telephone Company has facilities presently available to serve the complainants and is ready, willing, and able to serve them. Conversely, Southern Bell has never offered nor undertaken to serve the area in question.

At the conclusion of all the evidence Southern Bell renewed its motion to dismiss the complaint as to it (Southern Bell having made the same motion at the conclusion of complainants' evidence) on the grounds that Southern Bell, having neither undertaken nor proffered service in the geographic area in which complainants reside and in which they desire the right to demand Southern Bell service, the Commission is without

constitutional jurisdiction to require Southern Bell to render such service. This motion was denied. Also, at the conclusion of all the evidence, Central Telephone Company moved to dismiss the complaint as to it on the grounds that the geographic area involved is assigned to it by the Commission, that it has made substantial investment in such area, and that there is no showing of any constitutional reason for changing the boundary line. This motion was likewise denied.

On 19 March 1973, Division III of the Commission issued its Recommended Order changing the boundary line. The Commissioners made the following findings of fact:

> "1. Southern Bell Telephone and Telegraph Company and Lee Telephone Company are certificated public utilities operating a telephone utility enterprise in the State of North Carolina, and both telephone companies are franchised in the area in the southern portion of Madison (sic) [Rockingham] County bounded on the north and west by North Carolina Highway 65, on the east by State Road 2340, and on the south by the Madison (sic) [Rockingham] Guilford County line.
>
> 2. Petitioners herein reside in the general area described above.
>
> 3. The service area boundary lines between Bell's Summerfield Exchange and Lee's Madison Exchange are ill-defined and not precisely fixed, do not reflect any design criteria, and were fixed by the unilateral, arbitrary action of the two companies many years ago.
>
> 4. The needs and preferences of Petitioners and other (sic) similarly situated in the area in question were not taken into consideration in the fixing of said boundary lines, and in that respect, there was no opportunity for said needs and preferences to be expressed to this Commission at the time said boundary lines were fixed.
>
> 5. The boundary lines as they now exist do not meet the test of public convenience and necessity as it applies to the Petitioners herein and other (sic) similarly situated in the area in question and the telephone communication needs of said Petitioners and others similarly situated in said area are therefore not being met.

6. Pursuant to its Certificate of Public Convenience and Necessity and its franchise privileges it exercises and enjoys in this State, Bell is obligated under the circumstances of this case, to extend service to Petitioners, and its service exchange boundary line and that Lee should be modified in a manner consistent with Bell providing said service, which modification will be dealt with in the Conclusions stated later in this opinion.

7. Lee has certain facilities in the immediate vicinity of the area in question which have apparently been extended to furnish service to one or more subscribers, which facilities may and should remain in the area so long as the present subscribers desire to use them."

Based upon these findings the Commission concluded "that the needs of these Petitioners for telephone service has not been met and cannot be met by Lee Telephone Company [now Central Telephone Company]; can be and should be met by Southern Bell Telephone and Telegraph Company; that Bell should proceed to modify its Summerfield Exchange boundary limits to anticipate serving the needs of Petitioners, and should begin plans immediately to extend service into the area in question.

* * * *

IT IS, THEREFORE, ORDERED:

* * * *

(3) Bell shall immediately begin plans to serve all unserved customers in said area and shall extend service to them as soon as is practicable.

(4) Lee shall be allowed to continue to serve its present customers in said area so long as it desires to do so, but may surrender any or all of said customers if requested, and if Lee so desires to surrender them. In the event Lee surrenders any of said customers, Bell shall serve said customers upon request. The word 'customers' as used herein shall be construed to include the physical premises wherein the telephone service is located."

Edward B. Hipp and Robert F. Page for plaintiff appellees, North Carolina Utilities Commission.

Bailey, Dixon, Wooten, McDonald & Fountain by J. Ruffin Bailey for plaintiff appellees, E. A. Friddle, et al.

Joyner & Howison by R. C. Howison, Jr., for defendant appellant Southern Bell Telephone and Telegraph Company.

Boyce, Mitchell, Burns & Smith by F. Kent Burns and Ross Hardies, O'Keefe, Babcock & Parsons by Donald W. Glaves for defendant appellant Central Telephone Company.

HEDRICK, Judge.

The single issue presented by this appeal is whether the Utilities Commission was correct in ordering Southern Bell to provide telephone service to individuals who reside in an area which is presently served by Central Telephone Company. The order in the instant case requiring Southern Bell to render telephone service to the complainants was founded upon G.S. 62-42 which reads as follows:

> "G.S. 62-42. *Compelling efficient service, extensions of services and facilities, additions and improvements.*—(a) Whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:
>
> (1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or
>
> (2) That persons are not served who may reasonably be served, or
>
> (3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or
>
> (4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or
>
> (5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and

> adequately to serve the public convenience and necessity,
>
> the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order. * * *"

Although we do not dispute the fact that G.S. 62-42 is germane to the issue of whether Southern Bell should be ordered to provide complainants with telephone service, we agree with the view propounded by Wooten, Chairman of the Utilities Commission, when he stated in his dissent to the Commission's Final Order that "G.S. 62-42 . . . must be construed in connection with G.S. 62-110 which requires the issuance of a certificate of public convenience and necessity to construct new facilities except where such construction is 'into territory contiguous to that already occupied AND NOT RECEIVING SIMILAR SERVICE FROM ANOTHER PUBLIC UTILITY.'" The uncontroverted evidence clearly demonstrates that Central Telephone Company has incurred a substantial capital investment in order that it might stand ready, willing, and able to provide the complainants with telephone service, and under the facts of this case, to order Southern Bell to render service to an area already occupied by Central Telephone Company would foster duplication, wastefulness, and unwarranted competition—all of which are repugnant to the avowed policy of the public utility law. *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966). Clearly a reading of G.S. 62-42 *in pari materia* with G.S. 62-110 results in the determination that the Commission does not have the authority to compel Southern Bell to provide local exchange service to an area which is already receiving such service from another public utility.

For the reasons herein stated the order of the Commission requiring Southern Bell to provide telephone service to the complainants is

Reversed.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. JACK W. RIGSBEE

No. 7412SC185

(Filed 3 April 1974)

1. **Criminal Law § 91— unavailability of witness — continuance denied**

Defendant was not prejudiced by the trial court's denial of his motion to continue based upon the unavailability of a witness.

2. **Criminal Law § 84— search warrant for marijuana — currency in plain view — admissibility**

Where there was evidence on *voir dire* to support the trial court's finding that currency seized from defendant's apartment during a search for marijuana was in plain view, the trial court did not err in denying defendant's motion to suppress the currency.

3. **Narcotics § 4— possession and distribution of marijuana — sufficiency of evidence**

In a prosecution for possession and distribution of marijuana, evidence was sufficient to withstand defendant's motion for nonsuit where it tended to show that defendant sold three lids of marijuana to an SBI agent for $60 and that, when officers subsequently searched defendant's apartment pursuant to a warrant, they found three lids of marijuana and the marked $60.

4. **Criminal Law §§ 7, 113— entrapment — instruction not required**

In a prosecution for possession and distribution of marijuana, evidence presented by defendant was insufficient to require that the court instruct the jury on the defense of entrapment and apply the law to the facts of this case.

APPEAL from *Canaday, Judge,* 10 September 1973 Session, CUMBERLAND County Superior Court. Argued in the Court of Appeals 13 March 1974.

Defendant, an officer of the Fayetteville Police Department, was charged with possession of marijuana and with distribution of marijuana to a special agent of the S.B.I.

Prior to trial, defendant moved for a disclosure by the State of the identity of the female who was present at the time of the alleged sale and also the confidential informant on the ground that he would be unable adequately to prepare his defense absent a disclosure. In support of the motion, counsel argued that his defense would be based upon entrapment, and he needed the testimony of the confidential informant to establish that the criminal intent originated not with defendant, but in the threats and inducements made by the informant to defendant. Defendant testified in support of the motion that he

had made the sale because of the threats of the confidential informant that she would report his drug activities to the police unless he sold a quantity of marijuana to a friend of hers. The court ordered the State to furnish the name of the witness.

Over the objection of defendant the two charges were consolidated. Defendant moved for a continuance on the ground that the confidential informant was unavailable by reason of her being in jail awaiting trial for prostitution. The motion was denied.

The evidence presented by the State tended to show that S.B.I. Special Agent Adams drove Special Agent Douglas and the informant, Mary Helen Allen, to the residence of defendant. Douglas and Allen went into the house and purchased three lids of marijuana from defendant, using $60 in currency that had been previously marked by the S.B.I.

Following the purchase by Agent Douglas, Special Agents Windham and Harrah conducted a search pursuant to a warrant—stipulated by defendant to be valid as to the marijuana—wherein they discovered three lids of marijuana as well as the marked currency on top of the stereo speaker. Defendant contends, and the State does not deny, that the warrant made no mention of the currency.

Defendant moved to suppress the introduction of the currency, and on the resulting voir dire examination, the following testimony was received: Officer Harrah testified that the tops of the speakers were six to six and one-half feet from the floor, that he was six feet, one inch tall and that he could see the currency on the top of the speaker without moving anything out of the way. Defendant and his father both testified that the top of the speaker was seven feet, one and three-fourths inches from the floor and that the entire top of the speaker was obscured from view by a parachute which hung from the ceiling. The court found that Officer Harrah saw the currency on top of the speaker, and that he did not open any containers or move any objects in order to enable himself to see it. The court thereupon concluded that the currency was in plain and open view; and since a search was not necessary to its discovery, no warrant was required.

Defendant's motion for nonsuit at the close of State's evidence was denied.

Defendant took the stand and testified that he had known Mary Helen Allen prior to the arrest and that she had come to the door with Agent Douglas when Douglas had bought the marijuana. The State's objections to defendant's questions concerning threats made to him were sustained.

Defendant was found guilty on both charges, and from the entry and signing of judgment, he appeals.

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

Cherry & Grimes, by Donald W. Grimes, for defendant appellant.

MORRIS, Judge.

[1] Defendant assigns error to the denial of his motion for continuance based upon the unavailability of the witness Mary Helen Allen. This Court has held continually that such a motion may be granted or denied in the sound discretion of the trial court. *State v. Willis*, 20 N.C. App. 365, 201 S.E. 2d 588 (1974); *State v. Howes*, 19 N.C. App. 155, 198 S.E. 2d 86 (1973); *State v. Fountain*, 14 N.C. App. 82, 187 S.E. 2d 493 (1972). Counsel for defendant concedes that he was aware of the contents of the conversations between defendant and Mary Helen Allen at the time of his conference with defendant in mid June 1973. He filed a written motion for disclosure of identity on 31 August 1973, which was allowed by the court. The case was continued from 10 September to 13 September at defendant's instance in order that he be able to locate said witness. On 13 September, defendant's motion for a further continuance was denied, with the court finding that Mary Helen Allen had been served with a subpoena but had failed to appear. Defendant has shown neither prejudice nor abuse of discretion.

Defendant assigns error to the trial court's sustaining State's objection to questions pertaining to the conception and planning of the crime. Although he lists this purported assignment of error as a question presented, defendant fails to offer argument or authority in support of this position, and the assignment is deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals. For the same reason, defendant is deemed to have abandoned his assignment of error to the sustaining of the State's objections to questions regarding whether the

informant was paid and was under investigation for armed robbery.

[2] There is no error in the court's denying defendant's motion to suppress the currency seized during the search for the marijuana.

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris v. U.S.*, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed. 2d 1067 (1968).

Since defendant concedes that the search was legal as to the marijuana, the only question presented is whether the currency was in plain view of the officers. The findings of the court previously referred to are based upon competent evidence on voir dire—although there is evidence to the contrary—and the findings of fact support the conclusion of the court that the currency was in plain view. Findings of fact made on voir dire will not be disturbed when based upon competent evidence, even though there is contrary evidence. *State v. Brooks*, 225 N.C. 662, 36 S.E. 2d 238 (1945).

[3] Defendant assigns error to the denial of his motion for nonsuit made at the close of State's evidence. Since defendant presented evidence, his assignment of error presents for review 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). 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 is ample to establish defendant's guilt. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). The nonsuit was properly denied.

[4] In his final assignment of error, defendant contends that he is entitled to have the law of entrapment applied to the evidence. This contention is untenable in light of the testimony. The trial court in a criminal case must not only properly instruct the jury on the law of a particular defense, but it must also apply the law to defendant's evidence. *State v. Lovedahl*, 2 N.C. App. 513, 163 S.E. 2d 413 (1968). Defendant is correct in his position that the court's instructions are devoid of testimony concerning entrapment. However, defendant has in fact presented no testimony before the jury on which such a

defense could be grounded. As we have noted, defendant's testimony on the threats made by Mary Helen Allen was offered in support of a motion of disclosure of the informant's identity. The only testimony offered on entrapment was defendant's statement "After persuasion and threats I did give the three bags of marijuana to Curtis Douglas . . . The persuasion and threats were made by the confidential informant, Mary Helen Allen." Although the court did instruct the jury on the law of entrapment, the evidence presented by defendant is insufficient to warrant application of the law of entrapment to the facts in this case. Defendant received more beneficial instructions than he was entitled to have.

No error.

Chief Judge BROCK and Judge CARSON concur.

DOROTHEA C. BLAND v. CATHERINE M. BLAND, EXECUTRIX OF ESTATE OF BERRY JEWEL BLAND

No. 7426DC139

(Filed 3 April 1974)

1. **Divorce and Alimony § 16— consent judgment — support payments — termination upon husband's death**

   Where a consent judgment obligated the husband to make support payments to the wife of $13.00 per week "until he is relieved therefrom by operation of law," the wife's right to receive the support payments terminated upon death of the husband.

2. **Divorce and Alimony § 16— consent judgment — occupancy of dwelling — payment of taxes — continuation after husband's death**

   Obligations imposed on a husband by a consent judgment to permit his former wife to occupy the dwelling and to pay taxes on the dwelling were binding on the husband's estate after his death, and the obligation to pay the taxes became a debt of the estate.

3. **Rules of Civil Procedure § 56— summary judgment against movant**

   In an action to recover benefits due under a consent judgment entered between plaintiff and defendant's testate, the court properly entered summary judgment against defendant, the moving party. G.S. 1A-1, Rule 56(c).

APPEAL by defendant from *Johnson, Judge,* 8 October 1973 Session of District Court held in MECKLENBURG County.

This is a civil action to recover benefits allegedly due plaintiff under a consent judgment entered in a previous action between plaintiff and defendant's testate. In her complaint, filed 6 September 1973, plaintiff alleges:

Plaintiff and defendant's testate, at times before and after 19 January 1948, were husband and wife. On said date, in an action pending between plaintiff and testate, a consent judgment was entered in the superior court requiring testate to pay for the "use, benefit and support" of plaintiff the sum of $13.00 per week. The judgment then provided:

> "The payments directed herein shall be made by the defendant until he is relieved therefrom by operation of law.
>
> * * *
>
> "The plaintiff shall continue to occupy the dwelling and premises owned by the parties as tenants by the entireties and shall pay from her own funds insurance premiums upon such premises. The defendant shall pay all taxes now accrued or which may hereafter accrue upon and against said premises. The plaintiff shall at all times carry not less than $3,000 insurance upon the premises. Plaintiff's occupancy of the premises shall continue, until she remarries, with no restriction upon her use of same, provided only that she shall maintain her residence at said premises."

Subsequent to the entry of said judgment testate obtained a divorce from plaintiff. Under the judgment testate obligated himself to pay plaintiff $13.00 per week throughout her lifetime. Plaintiff has made demand on defendant to continue said payments but defendant has refused to make payments since 13 January 1973. Plaintiff prays that she recover $351.00 (the $13.00 payments due her for 27 weeks) and that the court declare the consent judgment an enforceable contract binding upon testate's estate.

In her answer, defendant admits allegations with respect to the former marriage of plaintiff and testate, their divorce, entry of the consent judgment, and demand of plaintiff for, and refusal of defendant to make, further payments. Defendant denies that testate's estate is indebted to plaintiff in any manner and asks that the action be dismissed.

Defendant moved for summary judgment under G.S. 1A-1, Rule 56, on the ground that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law. Defendant filed affidavit showing, among other things, that testate died on 13 January 1973 and all payments due plaintiff up until that date were fully paid.

Following a hearing, the court entered judgment concluding that there is no genuine issue of material fact; that the question presented is one of law and not of fact; that the obligations imposed on testate by the consent judgment to pay alimony and ad valorem taxes, and to permit plaintiff continued occupancy of the residence, are binding upon and are a debt of testate's estate; and that this matter is one in which entry of judgment against the moving party is appropriate. The judgment provided that plaintiff recover of defendant a sum equal to weekly payments of $13.00 per week from 13 January 1973 through 1 October 1973; that defendant continue to make the weekly payments from the assets of testate's estate until the death or remarriage of plaintiff; that plaintiff be permitted to continue to occupy the dwelling in which she now resides; that defendant pay all taxes "now accrued or which may hereafter accrue" upon said real estate; that plaintiff carry at all times not less than $3,000 of insurance upon the residence; and that plaintiff be permitted to occupy said premises until she remarries "with no restriction upon her use of the same provided only that she shall maintain her residence at said premises."

Defendant appealed.

Mullen, Holland & Harrell, P.A., by Graham C. Mullen, for plaintiff appellee.

Anne M. Lamm and Basil L. Whitener for defendant appellant.

BRITT, Judge.

The first question presented is whether summary judgment is proper in this action. We hold that it is. The purpose of the summary judgment procedure provided by G.S. 1A-1, Rule 56, is to ferret out those cases in which there is no genuine issue as to any material fact and in which, upon undisputed facts, a party is entitled to judgment as a matter of law. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972);

Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E. 2d 865 (1971).

In this case, admissions in the pleadings, together with affidavits and other materials introduced at the hearing, are sufficient to establish the absence of any genuine issue as to any material fact and that only questions of law are presented.

[1] The next question for our determination is whether the court erred in concluding as a matter of law that plaintiff's right to receive the $13.00 weekly support payments did not terminate with testate's death. We hold that the court erred in this conclusion.

The rights and obligations of the parties in this action are provided in the consent judgment entered on 19 January 1948. A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and its provisions cannot be modified or set aside without consent of the parties except for fraud or mistake. *Layton v. Layton*, 263 N.C. 453, 139 S.E. 2d 732 (1965). A consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties. *Webster v. Webster*, 213 N.C. 135, 195 S.E. 362 (1938). It must be interpreted in the light of the controversy and the purposes intended to be accomplished by it. *Spruill v. Nixon*, 238 N.C. 523, 78 S.E. 2d 323 (1953).

The consent judgment involved here obligated testate to pay plaintiff $13.00 per week "until he is relieved therefrom by operation of law." The question then arises as to when "the law"—not a contract—relieves a husband from supporting his wife.

Interpreting the consent judgment in the light of the controversy in which it was entered and the purposes intended to be accomplished by it, we think the $13.00 weekly payments were, in effect, alimony. In Black's Law Dictionary, Fourth Edition, as a definition of "alimony" we find: "Comes from Latin 'alimonia' meaning sustenance, and means, therefore, the sustenance or support of the wife by her divorced husband and stems from the common-law right of the wife to support by her husband. *Eaton v. Davis*, 176 Va. 330, 10 S.E. 2d 893, 897." That being true, it would appear that the rule that would terminate a man's obligation to pay alimony ordered by the court would apply to testate's obligation to make support payments in this case.

As early as 1846, in *Rogers v. Vines,* 28 N.C. 293, 297, opinion by Chief Justice Ruffin, our Supreme Court said: " . . . Now, 'alimony' in its legal sense may be defined to be that proportion of the husband's estate which is judicially allowed and allotted to a wife for her subsistence and livelihood during the period of their separation. Poynter Marriage and Divorce, 246; Shelford on Mar. and Div., 586. In its nature, then, it is a provision for *a wife* separated from her husband, and it cannot continue after reconciliation or the death of either party . . . . " Quoted with approval by Chief Justice Devin in *Hester v. Hester,* 239 N.C. 97, 100, 79 S.E. 2d 248, 250 (1953).

In *Crews v. Crews,* 175 N.C. 168, 173, 95 S.E. 149, 152 (1918), the Supreme Court said: " . . . Growing out of the obligation of the husband to properly support his wife, it [alimony] is not allowed with us as a matter of statutory right in divorces *a vinculo. Duffy v. Duffy,* 120 N.C. 346, and whether awarded as an incident to divorce *a mensa et thoro* or as an independent right under the present statute, and whether in specific property or current payments, it terminates on the death of either of the parties or on their reconciliation . . . . "

In 2 Lee, N. C. Family Law, § 154, at 82 (Supp. 1972), we find: "Alimony, whether permanent or temporary, terminates on the death of either of the parties."

It is clear that in this jurisdiction the obligation imposed by operation of law" to pay alimony terminates on the death of either of the parties; we think the same rule applies in the instant case, and that testate's legal obligation to make support payments to plaintiff terminated with his death.

[2] The next question relates to the trial court's conclusion with respect to plaintiff's right to continue occupation of the residence, subject to specified conditions, and defendant's obligation to pay taxes on the residence. We hold that the court did not err in its conclusion on this question.

The "operation of law" provision of the consent judgment applied only to the support payments which testate was obligated to make. Provisions relating to the residence were contractual, unaffected by any "operation of law," and plaintiff's rights with respect to the residence survived testate's death.

[3] Finally, we face the question of whether the trial court was authorized to enter summary judgment against defendant,

the moving party. G.S. 1A-1, Rule 56(c) provides, among other things, that summary judgment, *when appropriate,* may be rendered against the moving party. Under the facts in this case, we hold that the rendition of summary judgment against the moving party, to the extent hereinafter set forth, was appropriate.

For the reasons stated, the judgment appealed from is modified as follows: (1) Conclusions of law to the effect that testate's obligation to pay $13.00 per week for the support of plaintiff survived his death are vacated. (2) Paragraphs Numbered 1, 2 and 3 providing that plaintiff recover an aggregate of $390.00, representing $13.00 per week for thirty weeks following testate's death, and that defendant continue to pay plaintiff $13.00 per week from the assets of testate's estate until plaintiff's death or remarriage, are vacated. Except as so modified, the judgment is affirmed.

Modified and affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. RONNIE HORNE

No. 7426SC85

(Filed 3 April 1974)

1. **Robbery § 4— robbery with a dangerous weapon — sufficiency of evidence**

Trial court did not err in allowing the robbery with a dangerous weapon charge to go to the jury where the evidence tended to show that defendant removed his victim's eyeglasses and started beating him in the eye, a third person approached and started beating the victim with a board while defendant continued to use his fists, defendant then took his victim's wallet containing $1500 and fled with the third person.

2. **Constitutional Law § 30— seven months between arrest, trial — no denial of speedy trial**

Defendant was not denied his right to a speedy trial where he was arrested on 3 January 1973 and indicted on 2 April 1973; though counsel was appointed for defendant in January, he never requested that the case be calendared until after 4 July 1973; and on 3 August 1973 the case was placed on the calendar for trial.

3. **Criminal Law § 91— failure of witness to appear — continuance properly denied**

Trial court did not err in denying defendant's motion for a continuance because defendant's witness who had been subpoenaed failed to appear where the record revealed that the subpoena for the witness was issued on the morning of the commencement of the trial, twenty minutes before the motion for continuance was made.

4. **Robbery § 5— robbery with a dangerous weapon — common law robbery — instruction**

Trial court's instructions as to robbery with a dangerous weapon and the lesser included offense of common law robbery were proper.

APPEAL by defendant from *McLelland, Judge,* 13 August 1973 Session of Superior Court held in MECKLENBURG County. Argued in the Court of Appeals 13 March 1974.

Defendant was charged in a bill of indictment with the felony of robbery with a dangerous weapon. Prior to pleading, defendant moved to dismiss on the grounds that he had been denied a speedy trial. Evidence was presented on the motion, following which the trial judge made findings of fact and conclusions of law. The trial judge denied the motion to dismiss. The State's evidence tended to show that on 8 September 1972, Herman Dulin, the prosecuting witness, was attacked by the defendant on the premises of the Ashland Oil Company in Charlotte, North Carolina. After defendant removed Dulin's eyeglasses, he started beating Dulin in the right eye, and both he and Dulin fell to the ground. While the altercation continued, a Negro male appeared and said to Dulin, "God damn you, I'm going to kill you." The Negro male then struck Dulin repeatedly with a board about the head, arms, and torso. Defendant continued to hit Dulin with his fists. Defendant then took Dulin's wallet containing $1,500.00 in currency and fled, accompanied by the Negro male. Dulin was then driven to the hospital by the warehouse manager for Ashland Oil Company, who testified as to the extent of Dulin's injuries.

At the scene of the beating, a detective with the Charlotte Police Department found a blood-stained board in the area of the scuffle, Dulin's eyeglasses, and papers which had originally been in Dulin's wallet.

At the conclusion of the State's evidence, defendant moved to dismiss, and pleaded, in the alternative, that if the matter should go to the jury, it should go to the jury only on the question of common law robbery. The motion was denied.

The defendant testified in his own behalf that he had left a tape player in Dulin's possession with the understanding that Dulin would pay defendant $40.00 at a later date. On 8 September 1972, defendant demanded $40.00 or the tape player; Dulin advised defendant he would take it out of the money defendant owed Dulin. When Dulin reached for his back pocket, defendant grabbed him, thinking Dulin had a gun on his person. Defendant testified that Dulin started swinging, and defendant struck back in self-defense, while attempting to flee.

Defendant testified that the man who had given him the tape player to sell, and who had accompanied defendant to the place of Dulin's employment, came up to Dulin after defendant had fled the scene. Defendant, before leaving the scuffle site, observed Dulin and the other man kicking and swinging at each other.

At the close of all the evidence, defendant renewed his motion to dismiss. The motion was denied. Defendant was found guilty of robbery with a dangerous weapon.

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

Hamel, Cannon & Hamel, by William F. Hamel, for defendant.

BROCK, Chief Judge.

[1] Defendant contends that the trial court erred in allowing the robbery with a dangerous weapon charge to go to the jury. Considering the evidence in the light most favorable to the State, each of the elements of the offense of robbery with a dangerous weapon is present. Under these circumstances, the question was properly submitted to the jury. This assignment of error is overruled.

Defendant contends that the trial court erred in failing to dismiss the case on the ground of denial of his right to a speedy trial.

[2] The trial judge, upon hearing evidence following defendant's motion, made findings of fact which showed that defendant had been arrested on 3 January 1973 on separate warrants charging armed robbery and murder; that on 5 March 1973, a preliminary hearing was conducted in District Court where prob-

able cause was found in each case, and defendant was bound over to the Superior Court; that true bills of indictment were returned in each case on 2 April 1973; that investigation of the cases was made and the case of the codefendant was disposed of in May, 1973; that counsel for defendant was appointed in January, 1973, but never contacted the district attorney about setting the cases for trial until after 4 July 1973; that counsel filed a motion to dismiss the case for denial of a speedy trial on 19 July 1973; and that on 3 August 1973, the robbery case was placed on the calendar for trial. The trial judge then concluded that defendant had failed to show denial of a speedy trial and denied the motion to dismiss.

Whether an accused has been granted or denied a speedy trial is to be determined in the light of the facts and circumstances of each particular case; and, absent a statutory standard, what is fair and reasonable time is within the discretion of the court. *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870.

The finding of the trial judge that defendant did not request trial until after 4 July 1973, would indicate that defendant was not seeking an expeditious adjudication but was content to await trial at a later date. "A defendant who has been indicted is in a position to demand a speedy trial. Indeed, if he does not do so he will waive his right to the constitutional guarantee. (Citations omitted.)" *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274. This assignment of error is overruled.

[3] Defendant argues that the trial court erred in not allowing defendant's motion for a continuance because defendant's witness, who had been subpoenaed, failed to appear. The record reveals that the subpoena for the witness was issued on the morning of the commencement of the trial, twenty minutes before the motion for continuance was made.

Defendant's effort to obtain a continuance appears inconsistent with his argument that he was denied a speedy trial. "A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion. (Citation omitted.) Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for continuance should be supported by an affidavit showing sufficient grounds. (Citation

omitted)." *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844. This assignment of error is overruled.

Defendant has made numerous assignments of error as to testimony by the State's witnesses as to what occurred during the beating, descriptions of injuries received by the prosecuting witness, evidence found by the Charlotte Police Department, and admission into evidence of the blood-stained board allegedly used in the beating. We have carefully reviewed these exceptions and hold that the trial court did not commit prejudicial error in allowing testimony and the board into evidence. This assignment of error is overruled.

[4] Defendant contends that the trial court erred in its charge to the jury. From the evidence presented at trial, all essential elements of the offense of robbery with a dangerous weapon or the lesser offense of common law robbery were presented for evaluation by the jury. The trial court correctly charged the jury as to what evidence it could consider in arriving at a verdict on the issue of robbery with a dangerous weapon or common law robbery. The trial court also instructed the jury as to the requisite elements of the primary offense charged and the lesser included offense of common law robbery. It was unnecessary to instruct upon the offense of assault, because, although an assault may be a lesser included offense of robbery, there was no evidence in this case to support a verdict of guilty of such lesser offense. The State's evidence would support only a verdict of guilty of robbery with a dangerous weapon, of common law robbery, or of not guilty. If defendant's evidence were believed, it would support only a verdict of not guilty upon the grounds that defendant acted in self-defense.

This assignment of error is overruled.

The defendant had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and CARSON concur.

E. W. MEYERS, JR. v. SOUTHERN NATIONAL BANK OF NORTH CAROLINA, ADMINISTRATOR C.T.A. OF G. F. LANDGRAF, DECEASED

No. 7411SC29

(Filed 3 April 1974)

Corporations § 18— stock purchase agreement — cost per share

In an action for a declaratory judgment to determine the rights of the parties under a stock purchase agreement, the trial court properly concluded that the parties intended that the surviving shareholder be given the option to purchase deceased shareholder's stock at a price of so much per share regardless of the original holdings of the parties.

APPEAL by plaintiff from judgment entered in LEE Superior Court by *Canaday, Resident Judge* of the Eleventh District, on 28 June 1973.

Plaintiff instituted this action for a declaratory judgment under the provisions of the Uniform Declaratory Judgment Act, seeking a determination of the rights of the parties under a stock purchase agreement. The controversy was submitted on an agreed statement of facts summarized in pertinent part as follows:

Plaintiff and defendant's testate (Landgraf) were officers, directors and substantial shareholders of Trion, Inc. On 11 January 1957, plaintiff, Landgraf and the corporation entered into a written agreement whereby the survivor of plaintiff and Landgraf acquired the right to purchase the stock of the other within sixty days after his death, at a price to be fixed semi-annually by the joint determination of plaintiff, Landgraf and the board of directors of Trion, Inc. The agreement provided for a secondary option in favor of the corporation to purchase the stock of the deceased shareholder if the prior right of purchase was not exercised by the surviving shareholder, and an obligation to purchase such stock to the extent it was funded by life insurance owned by the corporation. The purchase price of the stock was initially fixed at $5.00 per share and modified from time to time thereafter in accordance with the provisions of the agreement. On 30 November 1959 the purchase price of the stock for purposes of the agreement was fixed at $6.50 per share and the agreement was amended to provide that such price should remain in effect until changed by a joint determination, preferably, but not necessarily, every six months. Thereafter, the

price of $6.50 per share was not changed by the parties to the agreement.

On 23 January 1967, Landgraf, by a written statement, waived all rights to purchase under the 1957 agreement. On 11 August 1967, by written statement signed by plaintiff and Landgraf, plaintiff waived all rights under the 1957 agreement except his option to purchase the stock of Landgraf. Between 1963 and 1967, Trion, Inc., declared two 3% common stock dividends and in 1968, declared a 100% stock dividend.

Following the death of Landgraf on 7 December 1971, plaintiff gave defendant notice of his desire to exercise his option to purchase Landgraf's stock. It was determined that Landgraf owned 13,366 shares at the time of his death and defendant contends plaintiff must pay $6.50 per share (aggregate of $86,879) in order to acquire the stock. Plaintiff tendered payment in the sum of $39,413.51 which was based on $6.50 per share as agreed upon on 30 November 1959, adjusted for the dilution occasioned by the three stock dividends paid to Landgraf subsequent to that date.

The court ruled that plaintiff had properly exercised his option to purchase all stock of Landgraf in Trion, Inc., but was obligated to defendant for the purchase price at the rate of $6.50 per share without dilution and with interest thereon commencing ten days from entry of judgment. Plaintiff appealed.

McDermott & Parks, by George M. McDermott, for plaintiff appellant.

Pittman, Staton & Betts, by J. C. Pittman and R. Michael Jones, for defendant appellee.

BRITT, Judge.

Plaintiff contends that the option in question dealt with the quantum of stock existing at the time of the execution of the agreement and that, therefore, a subsequent change in the number of shares constituting that quantum requires an appropriate adjustment of the agreed price per share. In support of this contention plaintiff cites *Trust Co. v. Mason,* 151 N.C. 264, 65 S.E. 1015 (1909), *on reh.* 152 N.C. 660, 68 S.E. 235 (1910).

In *Trust Co.* the seller contracted on 23 December to sell four shares of common stock at $650 per share "allowing

the January dividend to [the seller]." Unknown to either party to the contract, the corporation had on 16 December declared cash dividends and a stock dividend, in addition to a regular semi-annual cash dividend, payable to shareholders of record on 2 January of the following year. The Supreme Court held on rehearing that a construction of the quoted phrase reserved in the seller the cash dividends but not the stock dividends. The court drew a distinction between cash and stock dividends, and, quoting *Gibbons v. Mahon,* 136 U.S. 549, 10 S.Ct. 1057, 34 L.Ed. 525 (1890), adopted the principle that a cash dividend is deemed income of each share but that a dividend in stock is deemed to be capital.

We feel that the facts in the instant case distinguish it from *Trust Co.* In this case the original agreement of 11 January 1957 provides: "WHEREAS, the Shareholders own the number of shares of Common Stock of Trion set opposite their names below, which shares together with all shares of Common Stock of Trion received as a stock dividend thereon or in exchange therefor and all shares of Common Stock of Trion hereafter acquired by the Shareholders are hereinafter referred to as the Stock."

Further, the parties agreed in paragraph number 1 of this same agreement that "[u]pon the death of a Shareholder the surviving Shareholder shall have an option to purchase the Stock of the deceased Shareholder during a period of 60 days after the date of death at the applicable price as set forth in paragraph 3 below." Paragraph 3 provided:

> "The price of the Stock shall be determined jointly by the Shareholders and the Board of Directors of Trion semi-annually at the meeting of said Board next following September 1 and April 1 of each year. Such price shall be based primarily upon the then current market value but consideration shall also be given to other factors normally considered in determining a fair value such as book value, earnings, prospects, and the like. The price shall be recorded in the minutes of the meeting at which it is determined and such price shall apply to any purchase hereunder until the next semi-annual price is determined."

In every instance in which the price of the stock was set in accordance with the agreement, we find that the stock was priced at so much per share as opposed to a block price. The

best evidence of the intention of the parties to a contract is the practical interpretation given to their contract by the parties while engaged in their performance. *Peaseley v. Coke Co.*, 282 N.C. 585, 194 S.E. 2d 133 (1973); *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965); *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962).

A clear reading of the agreement, and an interpretation thereof with the conduct of the parties *ante litem motam* in mind, leads us to the conclusion that the parties intended a purchase of Landgraf's stock at a price of so much per share regardless of the original holdings of the parties.

The judgment appealed from is

Affirmed.

Judges PARKER and VAUGHN concur.

BORDEN, INC. AND J. EDGAR MOORE, TRUSTEE IN BANKRUPTCY FOR WILBUR T. WADE AND WIFE, CLORENE ALLEN WADE v. WILBUR T. WADE AND WIFE, CLORENE A. WADE, ROY WHITLEY BROWN AND WIFE, LINDA GAIL WADE BROWN AND JOHN A. JAMES, TRUSTEE UNDER DEED OF TRUST

— AND —

J. EDGAR MOORE, TRUSTEE IN BANKRUPTCY FOR WILBUR THOMAS WADE AND WIFE, CLORENE ALLEN WADE, BANKRUPTS v. ROY WHITLEY BROWN AND WIFE, LINDA GAIL WADE BROWN AND WILBUR THOMAS WADE, JR.

No. 736SC823

(Filed 3 April 1974)

Fraudulent Conveyances § 3— conveyances to defraud creditors — question of value — summary judgment

In an action to set aside conveyances of realty and personalty allegedly made with intent to defraud creditors of the now bankrupt grantors, summary judgment was improperly entered for plaintiffs, notwithstanding plaintiffs' evidence showed that the property was conveyed to the grantor's daughter and son-in-law in consideration of their agreement to pay liens against the property of $18,676 and plaintiffs presented uncontradicted and unimpeached testimony that the realty alone had a value of at least $29,000, since the material question of value remained for resolution by the jury which could believe or disbelieve plaintiffs' evidence on that question.

Judge CAMPBELL dissents.

Borden, Inc. v. Wade and Moore v. Brown

APPEAL by defendants Roy Whitley Brown, Linda Gail Wade Brown and Wilbur Thomas Wade, Jr., from *Lanier, Judge,* 14 May 1973 Session of Superior Court held in BERTIE County. The action was pending in NORTHAMPTON County and was, by consent, heard in BERTIE County.

These are actions to set aside conveyances of certain real estate and personal property on the grounds that the conveyances were fraudulent and made with intent to defraud creditors of defendants Wilbur T. Wade and wife Clorene A. Wade.

Plaintiffs moved for summary judgment. In support of their motion plaintiffs submitted verified pleadings, answers to interrogatories, excerpts of testimony from the bankruptcy proceedings of Wilbur and Clorene Wade, the order of the referee in bankruptcy and parts of the depositions of defendants and an affidavit of Marvin Coleman.

These documents, in summary, tended to show that, at a time when they were insolvent and hard pressed by creditors, Wilbur T. Wade and Clorene Wade transferred all of their real estate and farming equipment to their daughter Linda and her husband Roy Brown. The only consideration was that the Browns agreed to assume liability for the satisfaction of liens against the property in the sum of $18,676.98. Wilbur T. Wade also transferred a race horse for which he had paid $3500.00 to his daughter Linda Brown and defendant Thomas Wade, Jr., his son. Wade, Jr. was unemployed and lived with his parents. The only consideration for the transfer was an understanding that Wade, Jr. would perform unspecified labor on the farm to pay for his interest in the horse. The Wades continued to live on the farm, rent free, after the transfer to the Browns. Several months after the transfer of the property, the Wades filed petitions in bankruptcy. The referee found that the real estate alone had a value of $29,000.00 and that the transfers were made with intent to defraud creditors. He denied the petitions for discharge in bankruptcy, and the Wades did not appeal from that order. At the hearing on the petition for discharge in bankruptcy, an agent for one of the plaintiffs testified that the fair market value of the real estate was $29,000.00. At the same hearing an attorney who had represented other creditors of Wade testified that the fair market value of the real estate was between

$28,500.00 and $31,600.00. There was no evidence as to the value of the personal property. Both witnesses were subjected to cross-examination. Other documents filed by plaintiffs in support of their motion tended to show that the Wades made the transfer to the daughter and son-in-law so that it would not be sold by their creditors and that they retained no assets with which to pay creditors. The documents also tended to show that the Browns were aware of the Wades' financial condition. Defendants Brown alleged in their answer that they paid more than full value for the property. The defendants did not respond to the motion for summary judgment by affidavit or otherwise.

Plaintiffs' motion for summary judgment was allowed and judgment was entered in their favor. Defendants Brown and Thomas Wade, Jr., appealed.

Leroy, Wells, Shaw, Hornthal & Riley by L. P. Hornthal, Jr., for plaintiff appellees.

Revelle, Burleson and Lee by L. Frank Burleson for defendant appellants.

VAUGHN, Judge.

The transfers under attack in this lawsuit bear all the badges of fraud. Defendants did not respond to plaintiffs' motion for summary judgment. If defendants had simply responded by affidavits tending to show, for example, that "full value" was paid for the property then summary judgment clearly would have been inappropriate for summary judgment is not a vehicle for conducting a trial by affidavits. Despite defendants' failure to respond, we hold that the case was one for trial on the merits and that summary judgment in favor of plaintiffs was inappropriate. The opinions as to the fair value of the property contained in the documents filed by plaintiffs were not sufficient to establish the fair value as a matter of law and thereby remove that question from consideration by the jury. We are aware of cases from other jurisdictions holding that uncontradicted and unimpeached testimonial evidence from qualified witnesses is sufficient to support summary judgment, even in favor of the party with the burden of proof. We are of the opinion, however, that our Supreme Court takes a contrary view and would hold that although plaintiffs' evidence as to value was uncontradicted and unimpeached, the material question of value remained for resolution by the jury which would

be at liberty to believe or disbelieve plaintiffs' evidence on that question. Certainly the court would not allow a directed verdict in favor of plaintiffs on the same evidence. *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297.

The appellate courts of this State have repeatedly emphasized that summary judgment is a drastic remedy and should be allowed in only those cases where it is clearly appropriate. If there is the slightest doubt, the trial court should deny the motion and allow trial on the merits. If there is to be error, the error should be in failing to allow the motion and in favor of allowing a trial. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189.

The judgment entered allowing plaintiffs' motion for summary judgment is reversed.

Reversed.

Judge BRITT concurs.

Judge CAMPBELL dissents.

NATIONWIDE MUTUAL INSURANCE COMPANY v. PAULINE POOLE BULLOCK, BYARD BELL, JOHN L. WHITLEY, ADMINISTRATOR OF JEANNE ALISON BELL, DECEASED, AND DOROTHY MERCER

No. 737SC613

(Filed 3 April 1974)

Insurance § 85— automobile insurance — nonowned vehicle — regular use

Defendant was not covered by a policy issued her husband by plaintiff insurance company when she was involved in an accident while driving a vehicle belonging to her aunt, since the vehicle had been placed in the exclusive possession of defendant, she had used it for over three months, and she used the car daily for transportation to and from her place of employment and for other personal trips.

APPEAL by defendants Whitley and Mercer from *James, Judge,* 9 April 1973 Session of Superior Court held in WILSON County.

Plaintiff is insurer in an automobile liability policy issued to Wade Bullock, husband of defendant Pauline Poole Bullock.

Allegedly, Pauline was the driver of an automobile owned by Bertha Poole Bartlett when an accident occurred resulting in the death of defendant Whitley's intestate and injury to defendant Mercer. Plaintiff filed this action seeking judgment declaring the rights of the parties with respect to the policy of insurance issued to Wade Bullock.

Plaintiff's motion for summary judgment was allowed. Judgment was entered declaring that as to the accident in question Pauline Bullock was not entitled to coverage under the policy issued to her husband and that plaintiff has no liability to defendants Whitley and Mercer.

Battle, Winslow, Scott & Wiley, P.A. by J. B. Scott; Robert R. Gardner, Regional Claims Attorney, attorneys for plaintiff appellee.

Narron, Holdford, Babb & Harrison by William H. Holdford and Henry C. Babb, Jr.; Farris, Thomas & Farris by Allen G. Thomas, attorneys for defendant appellants.

VAUGHN, Judge.

On plaintiff's motion for summary judgment the court considered the pleadings, stipulations and depositions of Pauline Bullock and Bertha Pool Bartlett, the operator and owner respectively of the vehicle involved in the accident.

Under the terms of the policy issued to Pauline Bullock's husband, Pauline's liability for the accident in question was not insured if the vehicle owned by Bertha Poole Bartlett was furnished for her regular use. Plaintiff's motion for summary judgment should not have been granted if there existed a genuine question of fact material to this issue.

The documents before the trial judge can be fairly said to establish the following as uncontroverted facts. Pauline Bullock lives with her husband, Wade, who purchased the policy in question and owns a motor vehicle. Bertha Poole Bartlett is Pauline's aunt. She is physically unable to operate a motor vehicle. One of her legs has been removed, her physical condition is poor, and it is necessary for her to have someone take her for the medical treatments she receives at various facilities. About June 1971, she bought the car which was involved in the accident. Two or three weeks after Bartlett bought the vehicle, it was delivered to Pauline who kept it at her residence from that

time until the accident occurred on 16 October 1971. Bartlett turned the car over to Pauline so that she would have someone to take her to receive medical treatment and go on other errands for her. Pauline regularly drove the car to and from her place of employment. She also used the car on other trips which were for her own personal benefit. On most of these occasions she asked for and received permission from Bartlett. On the day of the accident she had driven the car to work. After work she had driven the car to two separate places to gather vegetables. Defendant Mercer was with her. After gathering the vegetables, the pair drove to a grill to get something to eat. The accident occurred after they left the grill. Pauline drove the car to work so that if Bartlett needed help she could go directly to her assistance and kept the car at her home for the same reason. She had responded to such calls from her place of employment and from her home. She also used the car for other personal errands for Bartlett. Pauline paid for all gasoline and oil.

Appellant contends that a material question exists as to whether the car was placed with Pauline for her regular use or was placed with her for the sole purpose of enabling her to be of assistance to Bartlett. Under the facts of this case, it is our opinion that Bartlett's reason or motive for placing the car with Pauline has little bearing on the risk assumed by plaintiff-insurer when it issued the policy to Pauline's husband, Wade Bullock. "The clear import of the provision excluding coverage of another's automobile which is furnished the insured for his 'regular use' is to provide coverage to the insured while engaged in only an infrequent or merely casual use of another's automobile for some quickly achieved purpose but to withhold it where the insured uses the vehicle on a more permanent and reoccurring basis." *Devine v. Casualty & Surety Co.*, 19 N.C. App. 198, 198 S.E. 2d 471, *cert. den.* 284 N.C. 253, 200 S.E. 2d 653. Coverage depends upon the availability of the car for use by Pauline and the frequency of its use by her. *Whisnant v. Insurance Co.*, 264 N.C. 195, 141 S.E. 2d 268.

It is undisputed that the unowned car was placed in the exclusive possession of Pauline and was available for her use for over three months. The frequency of her use of the car is also undisputed. Pauline used the car daily for transportation to and from her place of employment and for other personal trips. That this use was with the permission of the owner and was for

the principal purpose of making it easy for Pauline to be of assistance to the owner affects neither the availability nor frequency of the use of this unowned vehicle.

Affirmed.

Judges MORRIS and HEDRICK concur.

CLAUDE A. WILLIAMSON, JR. AND WIFE, ANGELA C. WILLIAMSON v. DOROTHY A. AVANT

No. 7418DC15

(Filed 3 April 1974)

Counties § 5.5— county subdivision ordinance — division of land among heirs

Conveyances made for the purpose of dividing land among heirs did not violate a county subdivision ordinance since such an ordinance may apply only to divisions of a tract "for the purpose, whether immediate or future, of sale or building development." G.S. 153-266.7.

APPEAL by plaintiffs from judgment by *Clark, District Court Judge,* entered 21 May 1973 in the District Court in GUILFORD County.

Plaintiffs seek to recover a deposit made in an offer to purchase real estate from defendant.

Plaintiffs contracted to purchase a five-acre tract of land located in Guilford County provided defendant was able "to convey a good and marketable title free and clear of all encumbrances . . . " except those expressly stated in the contract. Pursuant to this agreement, plaintiffs paid a $500.00 deposit which was to be refunded if the defendant could not deliver good and marketable title.

The land involved was conveyed to defendant in August 1970 by a deed, duly recorded in Deed Book 2503, Page 651, containing the following reference: "according to survey and unrecorded plat of T. D. Alley property made by Kenneth A. Vaughn, R.L.S., July, 1970, and being designated as Lot #7 on said plat." The conveyance was made for the purpose of dividing up the real estate of the late T. D. Alley among the heirs of

T. D. Alley. The division of the land was never approved by the County Commissioners. The contract between plaintiffs and defendant described the parcel as "Center Grove. Five acres situated in township—(Being recorded in Deed Book 2503, pages 651, 652 & 653, Guilford County Registry. . . . " Plaintiffs refused defendant's tender of deed to the property, contending that noncompliance with the Subdivision Control Ordinance of Guilford County constituted a defect of title. The ordinance was not made a part of the record. That portion of the ordinance available to this court was set out in the judgment, as follows:

> "The sale of land in subdivisions which have not been approved by the County Commissioners is prohibited. Any person who, being the owner or agent of the owner of any land located within the jurisdiction granted to the Commissioners by G.S. 153-266.1, hereafter subdivides his land in violation of this Ordinance or transfers or sells such land by reference to, exhibition of, or any other use of a plat showing a subdivision of the land before the plat has been properly approved under said Ordinance and recorded in the Office of The Register of Deeds, shall be guilty of a misdemeanor. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring land shall not exempt the transaction from this penalty. The County through its County Attorney or other official designated by the Board of County Commissioners, may enjoin such illegal transfer or sale by action for injunction."

The judge concluded that although the 1970 conveyance to defendant involved a subdivision which violated the Guilford County ordinance, defendant nevertheless tendered a deed which would convey good and marketable title with the result that plaintiffs were not entitled to a refund of their deposit. Plaintiffs appealed.

Hubert E. Seymour, Jr., for plaintiff appellants.

J. Bruce Morton for defendant appellee.

VAUGHN, Judge.

Although we agree with the trial court's determination that defendant tendered marketable title, we are unable to sus-

tain his conclusion of law that the 1970 deed to defendant "constituted a subdivision within the definition of the Guilford County Subdivision Control Ordinance."

G.S. 153-266.3, the statute authorizing the Guilford County ordinance, prohibits a county from regulating "the platting and recording of subdivisions in any manner other than through the adoption of an ordinance pursuant to this article." G.S. 153-266.1 only authorizes an ordinance regulating the platting and recording of any "subdivision of land *as defined by this article.*" (Emphasis added.) G.S. 153-266.7 defines a subdivision as: "A 'subdivision' shall include all divisions of a tract . . . into two or more lots . . . for the purpose, whether immediate or future, *of sale or building development. . . .* " (Emphasis added.)

The court found as a fact that the 1970 "conveyance was made for the purpose of dividing up the real estate of the late T. D. Alley among the heirs of T. D. Alley." There is no dispute as to this finding. Thus the 1970 conveyance to defendant did not constitute a division of land for immediate or future sale or development within the meaning of G.S. 153-266.1 et seq. and was not subject to regulation thereunder. For the reasons stated, the judgment is affirmed.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. BEATTIES FORD UTILITIES, INC., DERITA WOODS UTILITIES, INC., IDLEWILD UTILITIES, INC., SHARON UTILITIES, INC., SPRINGFIELD UTILITIES, INC., PROVIDENCE UTILITIES, INC.

No. 7410UC39

(Filed 3 April 1974)

Utilities Commission § 5— water and sewer utilities — rate case

Order of the Utilities Commission in a rate case involving five water and sewer utilities in Mecklenburg County is affirmed.

Judge MORRIS dissenting.

APPEAL by five of the applicants from an order of the North Carolina Utilities Commission issued 29 July 1973 in Docket Nos. W-192, Sub 2; W-191, Sub 2; W-167, Sub 1; W-193, Sub 1; W-194, Sub 2; and W-181, Sub 3. Argued in the Court of Appeals 19 February 1974.

Each of the applicants, with the exception of Providence Utilities, Inc., is a water and sewer utility serving various franchise areas in Mecklenburg County. Providence Utilities, Inc. provides only sewer service in its franchise area. Each of the applicants is a wholly owned subsidiary of The Ervin Company. By order issued 14 June 1972, the Utilities Commission consolidated the six applications for hearing, and declared these proceedings to be general rate cases pursuant to G.S. 62-137.

Edward B. Hipp, Commission Attorney, and E. Gregory Stott, Associate Commission Attorney, for the North Carolina Utilities Commission.

Mraz, Aycock, Casstevens & Davis, by John A. Mraz, for the five applicants.

BROCK, Chief Judge.

These are general rate cases and have been so declared by the Commission pursuant to G.S. 62-137. See G.S. 7A-30(3).

The order of the Utilities Commission does not apply to the applicant, Sharon Utilities, Inc., Docket No. W-193, Sub 1. That utility has transferred its system to the City of Charlotte and its certificate has been cancelled.

Each of applicants' assignments of error has been considered and is overruled. The order of the North Carolina Utilities Commission is affirmed.

Judge CARSON concurs.

Judge MORRIS dissents.

Judge MORRIS dissenting.

In my opinion the Commission erred in several respects. The Commission found there was a negative rate base. There was uncontradicted evidence that the original cost of appellants' plant was $1,613,763. After deduction for depreciation, the

value was $1,186,165. The Commission took the position that the plant was contributed by customers and, therefore, applicants were not entitled to depreciation expense. This, I think, was erroneous. Over the years, appellants had received the sum of $1,773,069 tap on fees which were classified as contributions-in-aid of construction. The uncontradicted evidence was that $865,550 income tax was paid on these contributions. When this almost 50% of the contributions is put back into the rate base, the applicants would have an out-of-pocket investment of some $340,000. For the Commission to fail to consider the amount paid as income tax on the contributions-in-aid of construction, in my opinion, constituted error. Additionally, the Commission concluded that most of the service areas served by the applicants were subject to be annexed by the City of Charlotte on 30 June 1973, and after that time the City of Charlotte would provide water and sewer service in some of the areas. Therefore, the Commission concluded, "it would be unjust and unreasonable to increase the applicants' rates for the period from the time of this Order through said annexation, which is presently planned for June 30, 1973." The order was issued 5 December 1972. I am of the opinion that the proposed annexation by a city of a part, or even all, of an area served by applicants has nothing to do with the rate making process. If the utility is entitled to an increase, it is entitled to it even though the period of collection be only a few months. Nor was there absolute assurance that the area would be annexed. Indeed, a portion of it was not.

VIVIAN LAMB THOMPSON v. FREDDIE W. THOMPSON

No. 7410DC113

(Filed 3 April 1974)

1. **Judgments § 25— party served with process — duty to determine time of trial**

A party to a legal action who has been duly served with process is bound to keep himself advised as to the time and date his cause is calendared for trial or hearing; and when a case is listed on the court calendar, he has notice of the time and date of the hearing.

2. **Courts § 2; Divorce and Alimony § 22— jurisdiction — person served with process — failure to appear at hearings**

The trial court had jurisdiction to enter orders in an action for child custody and support, although defendant was not represented

by counsel and did not appear at any of the hearings, where defendant was served with process at the inception of the action, the case was properly calendared for hearing, and a copy of each calendar on which the action appears calendared for trial was mailed to defendant at his last address available to the Clerk of Court.

APPEAL from *Barnette, District Judge,* 14 August 1973 Session of WAKE County District Court. Argued in the Court of Appeals 20 February 1974.

On 2 July 1971, plaintiff filed a complaint asking for custody and support of minor children, subsistence pendente lite, and counsel fees. The parties stipulated that defendant was served with process on 10 August 1971 by a Wake County Deputy Sheriff. The case was docketed for hearing on Tuesday, 14 September 1971, at 2:30 p.m., and it appeared on the court calendar for the Session of Wake County District Court beginning 13 September 1971. Defendant was not represented by counsel and did not appear at the hearing.

On 21 September 1971, Judge Barnette entered an order providing for the custody and support of the minor children. On 12 November 1971, 22 November 1971, 30 November 1971, and 14 August 1973, Judge Barnette entered additional orders with respect to the custody and support of the minor children and defendant's noncompliance with the previous orders of the court. The record does not reveal that defendant was either represented by counsel or physically present at any of the hearings presided over by Judge Barnette.

On 24 August 1973, defendant gave notice of appeal to the Court of Appeals from all orders entered by Judge Barnette. Following notice of appeal, District Judge Winborne ordered a continuance, pending appeal, of a hearing on plaintiff's motion that defendant show cause why he should not be held in contempt, post bond, and pay arrearages in support.

George M. Anderson for plaintiff appellee.

Carl E. Gaddy, Jr., for defendant appellant.

MORRIS, Judge.

Defendant's contention is that the orders of Judge Barnette should be vacated inasmuch as the court did not have jurisdiction. The notice of appeal was filed by defendant on 24 August 1973, so it is sufficient to present for review the

order of 14 August 1973. We do not determine the sufficiency of the notice of appeal with regard to the orders of Judge Barnette prior to that of 14 August 1973. We will, however, review the prior orders irrespective of the timeliness of appeal notice since the appeal is based on a question of jurisdiction.

The parties have stipulated that defendant was in fact served with the original process on 14 August 1971. Thus, it remains only for us to determine whether the docketing of an action constitutes notice to a litigant who has been served with the original process.

[1] A party to a legal action, having been duly served with process, is bound to keep himself advised as to the time and date his cause is calendared for trial for hearing; and when a case is listed on the court calendar, he has notice of the time and date of the hearing. *Craver v. Spaugh,* 226 N.C. 450, 38 S.E. 2d 525 (1946); *Cahoon v. Brinkley,* 176 N.C. 5, 96 S.E. 650 (1918), where the Court said:

> "Even when he has employed counsel, he cannot abandon all attention to the case (citation omitted), and in this case the defendant well knew he had no counsel. It has also been held that one who has been made party to an action by summons is fixed with notice of all orders and proceedings taken in open court. *Le Duc v. Slocomb,* 124 N.C. 347." Id., at 8.

[2] The record shows that defendant was served with process at the inception of the action. The record shows as well that the case was properly calendared for hearing. We note that it is now, and has long been, the practice in Wake County that when a party to an action does not have counsel, a copy of each calendar on which his action appears calendared for trial is mailed to him at the last address available to the Clerk. We have no reason to believe that this customary and quite appropriate practice was not followed in this case. Indeed, it appears from plaintiff's affidavits that defendant was aware of orders entered and stated his intention not to comply with them. Defendant will not be permitted to frustrate the trial of the case or avoid the duties imposed by orders entered by merely declining or refusing to attend trial. He has been afforded proper legal notice of the orders of the District Court which he now seeks to have declared null and void.

The cause is remanded for hearing on plaintiff's motion that defendant be adjudged in contempt, which hearing was continued by Judge Winborne pending determination of defendant's appeal.

Remanded for hearing.

Chief Judge BROCK and Judge CARSON concur.

FAYE W. HINES v. H. T. HINES, JR.

No. 738DC354

(Filed 3 April 1974)

Divorce and Alimony § 23— child support — no finding of changed circumstances — increase error

The trial court erred in increasing the amount of child support due from defendant without first making findings as to a change in defendant's income and changes in the needs of the three children involved.

APPEAL by defendant from *Nowell, District Judge,* 18 December 1972 Session of District Court held in WAYNE County.

This civil action was commenced on 1 October 1969 by plaintiff-wife against defendant-husband to obtain alimony pendente lite, custody of the four minor children of the parties, support for the children, and other relief. A consent order was entered on 23 March 1970, which contains as a finding of fact:

> "4. That in discharge of support obligations for the benefit of the children, defendant shall pay directly to plaintiff the sum of $50.00 per week. . . . "

Subsequently, the marriage of the parties was dissolved by a decree of absolute divorce entered in a separate proceeding, and the oldest child married and has become emancipated. The three youngest children continue to reside with plaintiff.

On 1 November 1972 plaintiff filed a motion for an increase in the support payments for the children, alleging as changed circumstances that defendant had greatly increased his earnings since entry of the 23 March 1970 consent order. Following a hearing, an order was entered, dated 21 December 1972 but

filed 11 January 1973, in which the court made certain findings of fact and conclusions of law, on the basis of which the court ordered the defendant to pay $60.00 per week for support of the three minor children still residing with plaintiff, maintain certain medical insurance for benefit of the children, be responsible for any medical or dental bills which exceed $25.00 upon prior approval of such bills by the court, and pay $100.00 to plaintiff's attorneys as fees for legal services on behalf of plaintiff and the minor children.

From this order, defendant appealed.

Freeman & Edwards by H. Jack Edwards and James A. Vinson, III for plaintiff appellee.

George B. Mast for defendant appellant.

PARKER, Judge.

In the order appealed from the court concluded as a matter of law that "there has been a change of circumstances with regard to the defendant's ability to provide support for the minor children of the parties in that the defendant has had a substantial increase in his salary." The only factual finding upon which this conclusion was based was the following:

> "5. That the defendant is an ablebodied man being regularly employed with the North Carolina State Highway Commission as a landscape engineer; and that the defendant has recently had a raise in his income so that he now earns an annual income of $10,824.00 and has a net take home income in excess of $600.00 per month."

Other than this, and findings as to the ages of the three children and that plaintiff was also employed, the court made no factual findings to support its conclusion that there had been a change in circumstances. There was no finding as to how much defendant's income had increased, and because the prior order dated 23 March 1970 also contained no finding as to defendant's income at the time of that order, a comparison of the two orders is not enlightening. Other than the finding that the oldest of the children had married and become emancipated and the finding as to the ages of the three youngest children who still reside with the plaintiff, there was no factual finding as to what the reasonable needs of the three youngest children

might be or as to what changes may have occurred in those needs since entry of the prior order.

As stated by our Supreme Court in *Crosby v. Crosby,* 272 N.C. 235, 237, 158 S.E. 2d 77, 79:

> "In cases of child support the father's duty does not end with the furnishing of bare necessities when he is able to offer more, *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227, nor should the court order an increase in payments absent evidence of changed conditions or the need of such increase. Admittedly, the welfare of the child is the 'polar star' in the matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs. *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487."

It may well be that because of inflation, increasing needs of children as they grow older, changes in defendant's income, or some combination of these and other factors, an increase in the amount which defendant should pay toward the support of his three youngest children, over the amount he was formerly paying for support of all four of his children, would be entirely justified. If so, the court should find the facts to justify the increase.

For the court's failure to make adequate findings to support its order, the order appealed from is vacated and the cause is remanded for further proceedings, findings, and determination.

Error and remanded.

Chief Judge BROCK and Judge HEDRICK concur.

HURLEY D. KING v. WILLIAM M. BUCK, ADJUTANT GENERAL OF THE STATE OF NORTH CAROLINA

No. 7426SC172

(Filed 3 April 1974)

1. **Venue § 4— action against public officer — removal to Wake County**

Action instituted in Mecklenburg County against the Adjutant General of North Carolina was properly removed to Wake Connty pursuant to G.S. 1-77(2).

2. **Venue § 8— action against public officer — removal to Wake County — second removal for convenience of witnesses**

The fact that a public officer is entitled under G. S. 1-77 to have a case removed to Wake County does not preclude the court from changing the venue from Wake County to another county, in the exercise of sound discretion, for the convenience of witnesses and the promotion of the ends of justice.

APPEAL by plaintiff from *Clarkson, Judge,* 5 November 1973 Session of Superior Court held in MECKLENBURG County.

Plaintiff, a resident of Mecklenburg County and a member of the North Carolina National Guard, suffered a heart attack on 15 April 1972 while on active duty participating in field exercises at Fort Bragg. He instituted this civil action on 2 July 1973 in the Superior Court in Mecklenburg County against defendant, the Adjutant General of the State of North Carolina, to obtain judgment determining that plaintiff's illness and disability fall within the provisions of G.S. 127-82 and to obtain a writ of mandamus directing defendant and his successors in office to process and pay such claims as plaintiff may from time to time be entitled to receive under applicable law. On motion of defendant for change of venue, the action was removed to Wake County, and plaintiff appealed.

Warren D. Blair and Richard L. Kennedy for plaintiff appellant.

Attorney General Robert Morgan by Assistant Attorney General John R. B. Matthis for defendant appellee.

PARKER, Judge.

[1] There was no error in the order removing this cause to Wake County. G.S. 1-77 in pertinent part provides:

"G.S. 1-77. *Where cause of action arose.*—Actions for the following causes must be tried in the county where the

cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

* * * * *

"(2) Against a public officer . . . for an act done by him by virtue of his office; . . . "

The pleadings establish and appellant concedes that defendant is a public officer and that this action arises from acts done or to be done by him in Wake County by virtue of his office. Thus, G.S. 1-77(2) applies and the action was properly removed to Wake County.

[2] Appellant points out that the venue provisions of G.S. 1-77 are, by express language of that statute, made "subject to the power of the court to change the place of trial, in the cases provided by law," and he points to G.S. 1-83(2) as authorizing the court to change the place of trial "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." We agree with appellant's contention that the fact that defendant is entitled under G.S. 1-77 to have this case moved to Wake County does not preclude the court from changing the venue from Wake County to another county, in the exercise of sound discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under G.S. 1-83. However, the time for such a motion has not arrived. *Wiggins v. Trust Co.*, 232 N.C. 391, 61 S.E. 2d 72.

The order appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. EDWARD RAY McMILLIAN

No. 7427SC111

(Filed 3 April 1974)

Criminal Law § 91— unavailability of witnesses — motion to continue — denial proper

Trial court did not err in denying defendant's motion for continuance in order that witnesses might be summoned, since the record

showed the motion was made when the case was called for trial but it did not disclose the names of the witnesses, what defendant proposed to prove by them or where the witnesses were.

APPEAL by defendant from *Martin (Robert M.), Judge,* 20 August 1973 Session of Superior Court held in CLEVELAND County.

By indictment proper in form defendant was charged with felonious escape from Subsidiary Unit #4635 of the N. C. Department of Corrections where he was serving sentences for felonious larceny, forgery, conspiracy to commit forgery and conspiracy to commit breaking and entering. He pleaded not guilty, a jury found him guilty as charged, and the court entered judgment imposing prison sentence of twelve months to begin at expiration of specified sentences then being served. Defendant appealed.

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

Joseph M. Wright for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the court to grant his motion for a continuance of the trial in order that witnesses for defendant might be summoned. The assignment has no merit. The record discloses that the motion for continuance was made when the case was called for trial; but the record fails to disclose the names of the witnesses, what defendant proposed to prove by them, or where the witnesses were. The motion was directed to the discretion of the trial judge, *State v. Shue,* 16 N.C. App. 696, 193 S.E. 2d 481 (1972), and his ruling thereon is not reviewable except for abuse of discretion. We perceive no abuse of discretion.

Defendant's other assignments of error relate to the failure of the court to allow his motions for dismissal interposed at the close of the State's evidence and renewed at the close of all of the evidence. The assignments have no merit. No useful purpose would be served in reviewing the evidence here; it suffices to say the evidence was sufficient to survive the motions for dismissal and to support the verdict of guilty of felonious escape.

No error.

Judges HEDRICK and CARSON concur.

MARSHALL CHARLES BOWEN, ADMINISTRATOR OF THE ESTATE OF JOHN LARRY BOWEN v. RICHARD BURNETT JONES

No. 7328SC554

(Filed 3 April 1974)

Evidence § 11— transactions with decedent — waiver of objection

Where, in an action to recover for the wrongful death of a passenger in an automobile driven by defendant, plaintiff offered evidence as to the sobriety of his intestate and of defendant, plaintiff waived such right as he may have had under G.S. 8-51 to object to defendant's rebuttal testimony on the same question.

APPEAL by defendant from *Martin (Harry C.), Judge,* 5 March 1973 Session of Superior Court held in BUNCOMBE County.

This is an action to recover damages for the wrongful death of plaintiff's intestate who was killed while a passenger in a car operated by defendant. Defendant denied negligence and alleged contributory negligence on the part of plaintiff's intestate, contending that he participated in a drinking party with defendant and continued to ride with defendant knowing that defendant was intoxicated. The jury answered issues of negligence, contributory negligence and damages in favor of plaintiff, and defendant appealed.

Wade Hall for plaintiff appellee.

Morris, Golding, Blue and Phillips by James F. Blue III for defendant appellant.

VAUGHN, Judge.

Although defendant argues that his motions for directed verdict and judgment notwithstanding the verdict should have been allowed, we are of the opinion that the evidence made out a case for consideration by the jury.

There must be a new trial, however, for errors committed when the court did not allow certain testimony from defendant.

Plaintiff introduced testimony from several witnesses to the effect that defendant did not have the odor of alcohol about him immediately after the accident. Plaintiff also elicited testimony tending to show that there was no odor of alcohol about plaintiff's intestate immediately after the accident. Defendant thereafter attempted to testify, in effect, that he and plaintiff's intestate had been together for several hours and that both of them had been drinking. That testimony was excluded by the court. Plaintiff, having offered evidence on the material question of the sobriety of the parties, waived such right as he might have had under G.S. 8-51 to object to rebuttal testimony on the same question from defendant. *Pearce v. Barham,* 267 N.C. 707, 149 S.E. 2d 22; *Carswell v. Greene,* 253 N.C. 266, 116 S.E. 2d 801; *Bryant v. Ballance,* 13 N.C. App. 181, 185 S.E. 2d 315, *cert. den.,* 280 N.C. 495, 186 S.E. 2d 513.

New trial.

Judges HEDRICK and BALEY concur.

VIRGINIA J. BRAY v. THE STATE BOARD OF EDUCATION

No. 7421SC157

(Filed 3 April 1974)

Schools § 13— teachers — vacation and sick pay — 1971 Session Law

Chapter 1068 of the Session Laws of 1971 did not provide vacation and sick pay benefits for public school teachers.

APPEAL by plaintiff from *Wood, Judge,* 8 October 1973 Session of Superior Court held in FORSYTH County.

This is an action to compel defendant to pay plaintiff certain sums for vacation and sick benefits to which she claims she is entitled by reason of the enactment of Chapter 1068 of the Session Laws of 1971. Defendant's motion for summary judgment was allowed.

Randolph and Randolph by Clyde C. Randolph, Jr., for plaintiff appellant.

Attorney General Robert Morgan by Andrew A. Vanore, Jr., Deputy Attorney General for defendant appellee.

VAUGHN, Judge.

Plaintiff's action must fail for a number of reasons. We need to mention only one. It is perfectly clear that the General Assembly did not, in 1971, appropriate funds for the payments to which plaintiff contends she is entitled, and, for that reason, the action was properly dismissed. Moreover, notwithstanding the language found in its caption, when the act in question is construed contextually it fails to provide the benefits contended for by plaintiff.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. GEORGE SYLVESTER FOSTER

No. 7428SC152

(Filed 3 April 1974)

APPEAL by defendant from *Anglin, Judge,* at the 13 August 1973 Criminal Session of BUNCOMBE County Superior Court.

Heard in the Court of Appeals 19 March 1974.

The defendant was tried under three bills of indictment charging him with armed robbery, kidnapping, and assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death.

The State offered Goldie Dotson who identified the defendant as the man who held a sawed-off shotgun on her while a codefendant demanded and got money from her while she was on duty at the 7-11 Store on Biltmore Avenue in the City of Asheville. She testified she saw them commandeer one Roy Lee Burrell and take him and his truck and leave the store at a high rate of speed going north on Biltmore Avenue. The defendants took approximately $341.00. Roy L. Burrell testifed that he was grabbed and forced to his truck at gunpoint; that when he did not move fast enough, he was shot in the leg and then pushed in the middle of the truck between the two defendants and forcibly carried to the intersection of Biltmore Avenue and Victoria Road where his truck was wrecked. Burrell further

testified that he spent several weeks in the hospital, and that he is permanently injured, his injuries necessitating his having to wear a brace on his leg for the remainder of his life.

The defendant testified that he was not in Asheville at the time of the robbery and was living in Wilson, North Carolina.

Defendant was convicted of three charges and sentenced to forty-seven years in the State Prison for the kidnapping, fifteen years for the armed robbery, and five years for the lesser included offense of assault with a deadly weapon inflicting serious injury, all sentences to run concurrently.

Attorney General Robert Morgan by Associate Attorney General Keith L. Jarvis for the State.

Robert L. Harrell for defendant appellant.

CAMPBELL, Judge.

This case presents only the face of the record for review. We have carefully reviewed the record and find no prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

IN THE MATTER OF: RICHARD EVERETTE BROWN, BORN: JANUARY 8, 1964 2110 NORTH TRADE STREET WINSTON-SALEM, NORTH CAROLINA

No. 7321DC656

(Filed 3 April 1974)

APPEAL by respondent from *Alexander, Judge,* 25 April 1973 Session of District Court held in FORSYTH County.

This case arose out of petitions alleging that respondent is a delinquent child as defined by G.S. 7A-278(2). The evidence disclosed that respondent along with others participated in a series of robberies from one of his schoolmates. He was found to be delinquent. In a separate order, he was committed to the custody of the North Carolina Board of Youth Development.

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

Legal Aid Society of Forsyth County by Herman L. Stephens for defendant appellant.

VAUGHN, Judge.

Defendant's assignments of error have been considered. We find no error so prejudicial as to require a new hearing.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. PAUL GILBERT ALLRED, AUBREY L. DAVIS, JR., AND IRIS BLUE DAVIS

No. 735SC197

(Filed 17 April 1974)

1. **Indictment and Warrant § 9; Riot and Inciting to Riot § 2— state of emergency — violation of restriction — sufficiency of warrant**

In a prosecution of defendants for wilfully violating provisions of a proclamation issued by the Chairman of the Board of County Commissioners of New Hanover County which declared a state of emergency to exist within said county, the trial court properly denied defendants' motions to quash the warrants, since the warrants charged defendants with failure to comply with the proclamation by using a named public park between the hours of 7:00 p.m. and 7:00 a.m. on 14 November 1971.

2. **Municipal Corporations § 29— proclamation of state of emergency — validity**

Trial court did not err in holding as a matter of law that a proclamation issued by the Chairman of the Board of County Commissioners of New Hanover County declaring a state of emergency to exist within said county and imposing limited restrictions was valid where there was evidence that the Chairman, on the basis of personal knowledge and reliable information, had reasonable grounds to believe and did believe that a state of emergency as defined in G.S. 14-288.1 (10) existed and where the restrictions imposed were extremely limited and were clearly among those authorized by G.S. 14-288.12(b).

3. **Constitutional Law § 20— proclamation of state of emergency — uniform enforcement of restriction**

Though the activities of defendants and an organization to which they belonged may have been responsible for issuance of a proclamation declaring a state of emergency to exist and imposing certain restrictions, the proclamation was not applied in a discriminatory manner against defendants or their organization.

4. **Constitutional Law § 18— use of public parks prohibited — rights of speech and assembly not abridged**

In a proclamation declaring a state of emergency to exist in New Hanover County, a restriction forbidding the use of public parks between the hours of 7:00 p.m. and 7:00 a.m. did not abridge defendants' First Amendment rights to free speech and assembly, since no restraint whatsoever was imposed upon speech, and the only restraint imposed on assembly was clearly reasonable under the circumstances.

5. **Criminal Law § 109— peremptory instructions**

Where the uncontradicted evidence, if true, establishes a defendant's guilt as a matter of law, the court may instruct the jury to return a verdict of guilty if it finds such evidence to be true beyond a reasonable doubt, and the peremptory instruction was appropriate and in approved form in this case.

State v. Allred

APPEAL by defendants from *Clark, Judge,* 7 August 1972 Criminal Session of Superior Court held in NEW HANOVER County.

Each of the three defendants was charged by warrant with willfully violating provisions of a proclamation issued by the Chairman of the Board of County Commissioners of New Hanover County which declared a state of emergency to exist within said county, such offense being a misdemeanor under G.S. 14-288.13(d). After convictions in the District Court, defendants appealed to the Superior Court where they pled not guilty and were tried de novo, the three cases being consolidated for trial. The State's evidence showed:

At a meeting held on 5 February 1971 the Board of County Commissioners of New Hanover County enacted an ordinance permitting imposition of certain prohibitions and restrictions during a state of emergency, being the same prohibitions and restrictions as enumerated in G.S. 14-288.12(b), and delegating to the Chairman of the Board the authority to determine and proclaim the existence of a state of emergency and during such state of emergency to impose authorized prohibitions and restrictions. Following a period of public turmoil in New Hanover County in the fall of 1971, Meares Harriss, Jr., the Chairman of the Board of County Commissioners of New Hanover County, at 6:30 p.m. on 12 November 1971 issued a proclamation proclaiming that a state of emergency existed within New Hanover County and forbade, among other things, "the use of any public park in New Hanover County between the hours of 7:00 p.m. and 7:00 a.m." This proclamation was issued after Chairman Harriss had met at police headquarters with the Chief of Police, the Sheriff, the Mayor, and other officials, and after he heard a tape recording of a speech which had been made on the preceding evening by LeRoy Gibson, head of an organization known as Rights of White People (ROWP) at a meeting sponsored by ROWP at Hugh MacRae Park, a public park in New Hanover County located outside but near the City of Wilmington. Copies of the proclamation were given to the news media, and at approximately 6:40 p.m. on 12 November 1971 an officer of the New Hanover County Sheriff's Department went to the Hugh MacRae Park, where another meeting sponsored by ROWP was in progress. The officer read the proclamation to the crowd of approximately 100 people assembled at the meeting, and those present then left the park. Two days later, on Sunday, 14 No-

vember 1971, a crowd again gathered at Hugh MacRae Park. At about 6:40 p.m. the officer again went to the park and several times read the proclamation over a bullhorn, each time stating that if those present did not leave the park they would be arrested. The three defendants were among those present in the park. When they refused to leave at 7:00 p.m., they were arrested.

At the close of the State's evidence, defendants moved for nonsuit, whereupon the trial judge entered the following order:

"Upon the conclusion of the State's evidence all defendants having made motions for judgment of nonsuit, and the undersigned Judge Presiding having determined that there had not been heretofore in these causes a finding of facts and determination of the validity of the proclamation, dated 12 November, 1971, which the defendants are charged with violating, though motions to quash have been previously denied, and after admitting and accepting evidence beyond the scope of jury trial for the purpose of making such determination, the Court finds the following facts:

"During the Fall of 1971, which continued unabated until 12 November of that year, there was turmoil and strife, including burnings, assaults, sniping, and looting in the City of Wilmington, and in some isolated instances in areas near but outside the city such as Flemington and Green Meadows.

"Hugh MacRae Park was a public park of New Hanover County, adjoining the limits of the City of Wilmington, consisting of a wooded area, playgrounds, and athletic fields, and with a cleared picnic area located approximately in its center.

"The Rights of White People Association, commonly referred to as 'ROWP' had a chapter in New Hanover County, with membership residing in the county, said chapter being headed by the defendant Paul G. Allred, and said Association being headed by LeRoy Gibson of Onslow County.

"Several weeks prior to 12 November, 1971, the local chapter held private and public meetings, most of the public

meetings being held in the picnic area of Hugh MacRae Park.

"LeRoy Gibson made several speeches prior to 11 November, 1971, and advocated and encouraged, among other things, that the audience bring guns and that he would send them so armed on patrols in the city for the purpose of stopping the race war by force. Prior to this date ROWP had sent out armed patrols in the city. A ROWP mob with guns had marched to the home of a public school officer, and at another time to the home of a plant foreman who had fired a ROWP member. Armed members of ROWP stopped persons going through MacRae Park while meetings were being held in the picnic area.

"A public meeting of ROWP was held in the picnic area of Hugh MacRae Park on the night of 11 November, 1971, and the speech of LeRoy Gibson was recorded on tape by Deputy Sheriff Larry Hayes, and later transcribed and received in evidence. In said speech Gibson advocated and requested that those present bring guns and ammunition to the next meeting in the park at 7:00 p.m. on 12 November, 1971, after which he would send them on armed patrol.

"A meeting was called and held at about 5:00 p.m. on 12 November, 1971, when Meares Harriss, Chairman, New Hanover Board of Comissioners, the county sheriff, the mayor of the city, chief of police of the city, and other officers were present. Those present were concerned and feared that in view of the conditions of strife and turmoil such a meeting of ROWP, to which the public was invited, and to which it was urged that attending people bring guns and ammunition, for the purpose of armed patrol, would result in a confrontation between such militant whites and militant blacks which could and probably would spread and balloon into a race riot in the city and county of such proportions that public order could not be maintained.

"Thereupon Chairman Harriss at about 6:30 p.m., signed the proclamation prohibiting use of county parks by the public between the hours of 7:00 p.m. and 7:00 a.m., (Exhibit 2), an ordinance under the Omnibus Riot and Civil Disorder Act having been enacted on 5 February 1971.

"Deputy Hayes was immediately dispatched to the park with the ordinance, and he arrived there about 6:40 p.m., and read it to the approximately 100 people assembled there for the ROWP meeting.

"Copies of the proclamation were delivered to all communication media in the city and county.

"And the Court concludes the following:

"That Chairman Harriss on the basis of personal knowledge and reliable information had reasonable grounds to believe and did believe that a state of emergency, as defined by said Riot Act, existed or was imminent, and his issuance of the proclamation was not arbitrary and was not capricious, and was fully justified under the existing conditions; that the proclamation was lawful and valid; that the State has offered competent evidence tending to show a violation of the proclamation by the defendants as charged.

"Therefore, the motions for judgment of nonsuit by each of the defendants are denied.

"/s/ Edward B. Clark
"Judge Presiding"

Each of the defendants testified that at the time they were arrested in Hugh MacRae Park after 7:00 p.m. on 14 November 1971 they knew of the proclamation forbidding the use of the park between the hours of 7:00 p.m. and 7:00 a.m., and that they deliberately remained in the park because they felt that no state of emergency in fact existed and that their First Amendment Constitutional rights were being denied.

The court instructed the jury that if "you the jury should find beyond a reasonable doubt the facts to be as all of the evidence tends to show, then it would be your duty to return a verdict of guilty as to each defendant, but if the jury is not so satisfied, it would be your duty to return a verdict of not guilty."

The jury found each of the three defendants guilty as charged. Judgments were imposed sentencing each defendant to prison for 30 days, suspended on condition each defendant pay a fine of $25.00 and costs. Defendants appealed.

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

Smith, Patterson, Follin & Curtis by Norman B. Smith for defendant appellants.

PARKER, Judge.

Prior to arraignment for trial de novo in the Superior Court, defendants appeared through counsel before Judge Winifred T. Wells, presiding at the 17 July 1972 Criminal Session of Superior Court in New Hanover County, and moved to quash the warrant in each case on the grounds (1) the proclamation declaring the state of emergency referred to G.S. 160-20.2, which provided for cooperation between law enforcement officers of different political subdivisions in event of a declared emergency, and made no reference to G.S. 14-288.12 (sic) ; (2) the proclamation was issued without any notice and hearing for defendants; and (3) there was no clear and present danger existing, either when the proclamation was issued or when defendants were arrested, which would justify interfering with their freedom of expression and assembly. The motions to quash were denied, which action is the subject of appellants' first assignment of error. There was no error in denial of the motions to quash.

[1] "In this jurisdiction the rule is well established that a warrant may be quashed only for its failure to charge a crime or a lack of jurisdiction of the court to try the case—defects which appear on the face of the record. In ruling upon a motion to quash the judge rules only upon a question of law. He is not permitted to consider 'extraneous evidence,' that is, the testimony of witnesses or documents other than the specific statutes or ordinances involved." *State v. Underwood,* 283 N.C. 154, 195 S.E. 2d 489. In the present cases the warrants charged defendants with willful failure to comply with the proclamation issued by the Chairman of the Board of County Commissioners by using Hugh MacRae Park between the hours of 7:00 p.m. and 7:00 a.m. on 14 November 1971. Use of the park at that time was specifically prohibited by the proclamation. Issuance of the proclamation was authorized by the ordinance, which in turn was authorized by G.S. 14-288.13, by which a portion of the State's police power was delegated to the governing bodies of the counties of this State. A similar delegation of police power to the governing bodies of municipalities, made

by G.S. 14-288.12, was held constitutional in *State v. Dobbins*, 277 N.C. 484, 178 S.E. 2d 449. That the proclamation made no reference to the statute in no way affected its validity; the existence of the statute, not reference to it in the proclamation, was all that mattered. Thus, the face of the warrants charged defendants with committing an act which by G.S. 14-288.13(d) is made a misdemeanor. No defect appears on the face of the record, and defendants' motions to quash the warrants were properly denied by Judge Wells.

[2] Upon trial of these cases before Judge Edward B. Clark and a jury, Judge Clark ruled as a matter of law that the proclamation was valid and constitutional, and accordingly instructed the jury that the only question before the jury was whether the defendants had violated the proclamation. In this we find no error. The limited delegation of the State's police power which our Legislature deemed wise to grant by G.S., Chap. 14, Art. 36A, to local governmental units in order to assist them in maintaining public peace and order during periods of emergency was, as above noted, held constitutional in *State v. Dobbins, supra.* That statute authorizes local governments to permit imposition of certain specified and limited prohibitions and restrictions during a "state of emergency," which is defined by G.S. 14-288.1(10) as:

> "The condition that exists whenever, during times of public crises, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent."

The statute, G.S., Chap. 14, Art. 36A, is the result of experience of recent years which has made us all too painfully aware that local disturbances may suddenly erupt with tragic consequences into massive public disorders. The statute wisely provides for placing in local executive officials, whose first and primary duty it is to maintain public order, powers adequate to their responsibilities. Thus, the initial decision as to whether a "state of emergency" in fact exists must be made by those who bear primary responsibility and who are closest to the scene. Their decision, however, while entitled to great respect, is not conclusive or entirely free from judicial review. The local official may not act arbitrarily or without some factual basis to support his determination that a state of emergency in fact exists,

and the prohibitions and restrictions which he imposes must be among those authorized by the statute, G.S. 14-288.12(b). The scope of judicial review in cases such as this is thus limited to the type of review which traditionally is for the judge, and not for the jury, to perform. In the present case the record amply supports Judge Clark's determination that Chairman Harriss, on the basis of personal knowledge and reliable information, had reasonable grounds to believe and did believe that a state of emergency as defined in the statute existed and that his issuance of the proclamation was not arbitrary or capricious. The extremely limited restrictions imposed by the proclamation, which only prohibited use of the public parks at night or forbade "transportation of dangerous arms or substances," were clearly among those authorized by G.S. 14-288.12(b). Judge Clark committed no error in determining as a matter of law that the proclamation was valid and in so instructing the jury.

[3] We note appellants' contention that the proclamation, though valid on its face, cannot be a proper basis for a criminal charge against them because it was issued and applied in a discriminatory manner. In this connection they contend that it was issued because of and was primarily directed against the activities of ROWP and its members. If this be so, however, there was no evidence that the ordinance was enforced in any discriminatory manner. On the contrary, the evidence showed that others desiring to use the park for such innocent pursuits as playing baseball were similarly denied its use during the prohibited hours. That the activities of ROWP may have been a major factor in bringing on the conditions which prompted declaration of the state of emergency furnishes no valid support for the contention that that organization and its members were unfairly discriminated against. Their activities may have triggered issuance of the proclamation, but once it was issued it was uniformly enforced as to all, at least insofar as the present record discloses.

[4] Nor are we impressed by appellants' contentions that enforcement of the proclamation abridged their First Amendment rights to free speech and to peaceably assemble. No restraint whatsoever was imposed upon speech, and the only restraint imposed on the right of assembly was the prohibition against use of public parks during nighttime hours. Under the circumstances, this very limited restriction was clearly reasonable.

[5] We also find no merit in appellants' several assignments of error to the court's charge to the jury. Where, as here, the uncontradicted evidence, if true, establishes a defendant's guilt as a matter of law, the court may instruct the jury to return a verdict of guilty if it finds such evidence to be true beyond a reasonable doubt. *State v. Kimball,* 261 N.C. 582, 135 S.E. 2d 568. The peremptory instruction was appropriate in the present case and was in approved form.

In the trial and judgments imposed we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

NORTH CAROLINA CONSUMERS POWER, INC. AND THE CITY OF SHELBY, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA, PETITIONERS-PLAINTIFFS v. DUKE POWER COMPANY; ROBERT W. YELTON, N. DIXON LACKEY, JR., GEORGE C. NEWMAN AND EARL D. HUNNEYCUTT, JR., INDIVIDUALLY AND AS CITIZENS, ELECTRIC CUSTOMERS AND TAXPAYERS OF THE CITY OF SHELBY, NORTH CAROLINA; RESPONDENTS-DEFENDANTS

— AND —

CHARLES R. McBRAYER; ALI PAKSOY; VARIETY THEATRES, INC., DOING BUSINESS AS SKYVIEW DRIVE IN THEATRE; BELK BROTHERS COMPANY; BURLINGTON INDUSTRIES, INC.; FIBER INDUSTRIES, INC.; CITY OF WILSON; CITY OF GASTONIA; TOWN OF CORNELIUS; CITY OF CHARLOTTE; AND ATTORNEY GENERAL OF NORTH CAROLINA; ADDITIONAL RESPONDENTS-DEFENDANTS

No. 7327SC747

(Filed 17 April 1974)

Declaratory Judgment Act § 1— validity of contract — lack of justiciable controversy

No justiciable controversy was presented in an action brought by North Carolina Consumers Power, Inc. and a city against Duke Power Company and citizens, electric customers and taxpayers of the city to obtain a declaratory judgment as to the validity of a "System Development and Power Sales Contract" entered between the two plaintiffs.

Judge VAUGHN dissents.

APPEAL by defendant, Duke Power Company, (Duke) from an order of *Friday, Superior Court Judge,* dated 30 May 1973,

and filed 1 June 1973, denying a motion to dismiss a purported cause of action.

Argued in the Court of Appeals 31 October 1973.

This was an action for a declaratory judgment based upon a petition and complaint reading as follows:

"PARTIES

1) North Carolina Consumers Power, Inc. (Consumers Power) is a nonprofit corporation organized under Chapter 55-A of the General Statutes of North Carolina, with principal offices in Raleigh, North Carolina.

2) The City of Shelby, North Carolina (Shelby), is a North Carolina municipal corporation, and, pursuant to the powers granted it in its Charter and Chapter 160 (160A) of the General Statutes of North Carolina, owns and operates an electric distribution system.

3) Duke Power Company (Duke) is a North Carolina corporation with its principal offices in Charlotte, North Carolina. It is a public utility and engages in the electric generation, transmission and distribution business in North Carolina and South Carolina. Duke, because it now supplies Shelby electric power and energy at wholesale and because it resists and will resist Consumers Power's effort to supplant it as Shelby's bulk electric power supplier, is a party in interest herein. Additionally, Duke is a taxpayer of Shelby.

4) Messrs. Yelton, Lackey, Newman and Hunneycutt are citizens, electric customers and taxpayers of Shelby, and are, as well as Duke, representative of the class of electric customers and taxpayers named as respondents defendants herein pursuant to Rule 23 of the North Carolina Rules of Civil Procedure.

JURISDICTION

5) This action is brought under the North Carolina Uniform Declaratory Judgment Act, North Carolina General Statutes 1-253 through 1-267, and, as a Class Action, under Rule 23 of the North Carolina Rules of Civil Procedure.

SHELBY'S ELECTRIC SYSTEM

6) Shelby owns and operates an electric distribution system. The Board of Aldermen of Shelby is charged with the continuing responsibility to seek and obtain for Shelby a source of dependable electric bulk power supply.

7) Now and for many years, Shelby purchases and has purchased all its electric bulk power requirements from Duke.

CONSUMERS POWER

8) Consumers Power was organized—

a) to seek and receive governmental approvals for, and proceed with the design, financing, construction and acquisition of, electric generation and tranmission facilities; and

b) to own and operate such facilities and provide power and energy to municipalities owning and operating electric distribution systems and, incidentally, to other electric systems, so as to take advantage of economies of scale in the generation and transmission of electric power and energy.

9) Copies of the Articles of Incorporation and By-laws of Consumers Power are attached hereto as Exhibits A and B, respectively.

10) Consumers Power has tendered to Shelby a duly approved, authorized and executed System Development and Power Sales Contract and related Agreement, together with the form of the related Bond and Note Indentures, (hereinafter, collectively, referred to as the 'System Contract'), attached hereto as Exhibits C-1, C-2, C-3 and C-4. This System Contract has been tendered to forty-five North Carolina municipalities and, subject to appropriate (non-substantive) modification, to North Carolina Electric Membership Corporation (N.C. EMC). A certified copy of the resolution by the Board of Directors of Consumers Power approving and authorizing the System Contract and directing its tendering to such parties is attached as Exhibit D.

11) Shelby, by resolution of its Board of Aldermen, attached hereto as Exhibit E, has approved and directed the

execution and delivery of the System Contract, and the same has been duly executed and delivered by the parties thereto.

12) By the resolution attached hereto as Exhibit F, Shelby has authorized and directed the commencement of this proceeding.

DUKE'S OPPOSITION

13) The facilities which Consumers Power intends to finance, construct and operate pursuant to the System Contract would furnish to systems which are now captive wholesale customers of, among several power companies, Duke, a competing source of electric bulk power supply. Duke has recognized this threat of competition and, in formal filings with agencies of the United States and otherwise, has committed itself to oppose through litigation and otherwise the construction and operation of any such competing facilities. Such commitment was contained in 1) Duke's petition to intervene (Exhibit G) in Federal Power Commission (FPC) Project No. 2700 (as hereinafter explained), 2) a number of formal prospectuses filed with the United States Securities and Exchange Commission in connection with issuance of securities by Duke (Exhibit H being an excerpt from one such prospectus), and 3) a letter from Duke to its shareholders (Exhibit I).

14) EPIC, Inc. (EPIC) is a nonprofit corporation whose studies and activities led to the incorporation of Consumers Power. EPIC, as substituted applicant in lieu of original applicants City of Statesville and N. C. EMC, applied to the FPC for, and was granted, a preliminary permit for authority and preference to study a site for construction of a hydroelectric pumped storage project on the Green River in Polk County, North Carolina, all of such studies leading up to application for license to construct and operate such hydroelectric project. Thereafter, Duke purchased and acquired lands which are situated approximately on the site of one of the proposed impoundments of the project. EPIC, in due time and with approval of the FPC, will assign all its rights and obligations associated with said project and permit to Consumers Power.

15) As incidents to granting of such preliminary permit, the FPC required that EPIC commit to compliance

with thirteen specific conditions, all of which are recited in the order and attachment incorporated therein by reference (FPC Form P-1) attached hereto as Exhibit J.

16) Respondent Duke has intervened in this FPC proceeding and has challenged EPIC's right to establish itself as a supplier of power to the contracting municipalities and electric membership corporations which are or may become signatories to the System Contract. Also, in opposing the organization of EPIC, Duke posed several 'legal hurdles faced by EPIC,' such as contained in a written presentation by Duke to the City of High Point (attached as Exhibit K). Duke's objections and contentions are also applicable to Consumers Power. The essence of Duke's main contention is that North Carolina municipal corporations may not legally enter into contracts such as the System Contract.

17) As the FPC has granted to EPIC the requested preliminary permit, consideration of the objections raised by Duke has been postponed by FPC for action at the time FPC has before it a final application for a license to Consumers Power to construct and operate the said hydroelectric project. Consideration of these issues is then inevitable, as Section 9(b) of the Federal Power Act (16 USC 802 [b]) and the FPC's regulation thereunder, especially 18 CFR Sec 4.41, require that any applicant for license demonstrate its capacity, under State law, to construct and operate the project consistent with the terms of the license.

18) Duke, in its initial petition to intervene before FPC, which is attached hereto as Exhibit G, made the following representation:

> 'It will oppose the construction of any generating and tranmission facilities by Applicants and Electric-Cities in any application filed with Federal or State regulatory authorities for authority to construct same. . . .'

19) These issues and this controversy between Consumers Power and Shelby, on one hand, and Duke, on the other, must be decided and resolved in this proceeding or, inevitably and unavoidably, they will be the subject of fur-

ther and more expensive litigation between and among the same parties.

20) Inevitably, petitioners plaintiffs and Duke must litigate the validity of the contractual arrangements which support the Consumers Power effort and the authority of Consumers Power to construct, finance and operate electric generation and transmission facilities, subject to such regulatory control as is applicable under the laws of North Carolina and of the United States. Such questions should not be litigated in the forums of State and Federal administrative agencies, but should be decided by the courts of North Carolina, the only courts of competent jurisdiction to render decisions as to North Carolina law which will firmly and finally bind all interested parties.

21) Shelby has now so committed itself that any citizen, electric ratepayer, taxpayer or other person with proper standing can presently file a civil action challenging it. This is a matter thoroughly affected with the public interest. The interests of all such persons and of the public will be served by decision on this matter at a time of minimum risk to the thousands of electric ratepayers of Shelby and the hundreds of thousands of electric ratepayers of other municipalities which may enter into similar contracts with Consumers Power.

REPRESENTATION OF THE CLASS

22) Petitioner plaintiff Consumers Power stands ready and able, subject to the court's approval, to pay the fees and expenses of counsel for the respondents defendants Robert W. Yelton, N. Dixon Lackey, Jr., George C. Newman and Earl D. Hunneycutt, Jr., and any *guardian ad litem* appointed by the court to assure adequate representation of the class herein, and in such amounts as the court approves.

PRAYER

WHEREFORE, petitioners plaintiffs pray that the court:

1) Declare this a Class Action pursuant to Rule 23, further declare that Shelby's citizens, electric customers and taxpayers constitute a sufficient and proper class defendant herein, and further declare that de-

fendants Yelton, Lackey, Newman, Hunneycutt and Duke (in addition to its being a party in interest otherwise) are such representative defendants as to fairly ensure the adequate representation of all members of the class;

2) Prescribe such method of notice as may be proper to afford to other members of the class notice of and opportunity to participate in this proceeding;

3) Make such provision, if the court deems such necessary, as may be proper for the further representation of the class, including members of the class who are absent or otherwise under disability;

4) Declare that:

a) Consumers Power is a duly organized and existing nonprofit corporation under the laws of the State of North Carolina; it has full legal power and authority to enter into the System Contract and to undertake and to perform all of its obligations thereunder; all of the undertakings, obligations and covenants of Consumers Power prescribed therein are valid and binding upon Consumers Power and are enforceable against it in accordance with their terms; and Consumers Power has duly approved, executed and delivered the System Contract;

b) Shelby is a duly organized and existing municipal corporation under the laws of the State of North Carolina; it has full legal power and authority to enter into the System Contract and to undertake and to perform all of its obligations and thereunder; all of the undertakings, obligations and covenants of Shelby prescribed therein are valid and binding upon Shelby and are enforceable against it in accordance with their terms; and Shelby has duly approved, executed and delivered the System Contract;

c) Specifically, that the answer to each of the following questions is 'No':

i. Do the provisions of the System Contract unconditionally requiring payments to Consumers Power by Shelby, including whether or not the

Initial System is completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the Initial System Capability, and not conditioned upon the performance or non-performance of Consumers Power, exceed Shelby's authority under North Carolina General Statute 160A-322, which empowers municipalities to contract for up to thirty years for the supply of electric power, or create a debt of Shelby in violation of Article V, Section 4, of the Constitution of North Carolina, as presently effective or as effective as of July 1, 1973?

ii. Has Shelby, by contracting for System Development Services for a period of several years prior to the beginning of the sale and purchase of electric power supply for a thirty-year period which begins in the future, commencing in all events no later than 1 July, 1984, exceeded the term for which it can legally contract for the supply of electric power?

iii. Is Shelby attempting illegally to exercise, jointly with other municipalities and others, powers the joint exercise of which is not authorized by law, including Article 20, Chapter 160-A, of the General Statutes of North Carolina?

iv. Do the aforementioned (i. above) unconditional payment provisions of the System Contract, or the provisions of Section 6.03 of the System Contract providing for the increase of a Participant's Share (and corresponding obligations) up to a maximum of twenty-five percent of the Participant's decimal fraction (as specified in Exhibit A of the System Contract) upon default of other Participant(s), or the uniform rate schedule specified in Article V of the System Contract, result in a loan of credit or guarantee of the obligations of another by Shelby?

v. Are the obligations of Consumers Power during the System Development period indefinite or wanting in certainty so as to cause the Sys-

tem Contract, or any part thereof, to fail for indefiniteness or uncertainty?

5) Grant to petitioners plaintiffs all other necessary or appropriate relief."

Judge Friday held that at this stage in the controversy the petition should not be dismissed but that the entire cause should be set down for a hearing on the merits.

From this order setting the case down for hearing on its merits, Duke appealed.

Crisp & Bolch by William T. Crisp; Tally & Tally by J. O. Tally; and Wood, Dawson, Love & Sabatine for plaintiff appellees.

Joyner & Howison by R. C. Howison, Jr.; Horn, West, Horn & Wray; Fleming, Robinson & Bradshaw by Robert W. Bradshaw, Jr.; and William I. Ward, Jr., for defendant appellant, Duke Power Company.

CAMPBELL, Judge.

We are of the opinion that this entire project presently is too ephemeral and that the interest of Shelby is too infinitesimal for the Court to take jurisdiction. In other words, the case does not present a justiciable matter.

Reversed.

Judge HEDRICK concurs.

Judge VAUGHN dissents.

GEORGE S. HEATH v. DAVID F. MOSLEY AND EUNICE C. MOSLEY

No. 7426DC258

(Filed 17 April 1974)

1. Damages § 4— damages for injury to personalty

The measure of damages for injury to personal property is the difference between its market value immediately before the injury and its market value immediately after the injury.

2. Damages § 13— personalty — evidence of purchase price

Whether or not evidence of the price previously paid for personal property is admissible on the question of market value immediately prior to its injury is dependent upon the circumstances of the individual case and subject to the discretion of the trial court.

3. Damages § 13— personalty — evidence of purchase price

Circumstances to be considered in determining the admissibility of evidence of the price previously paid for personal property include whether the sale was too remote in point of time, removal of the property to a different market place, intervening physical changes in the property, the relationship of the parties in the prior sale, the nature of the sale itself as being induced by other considerations than true market value, and any other factors which might affect the probative weight of such evidence.

4. Damages § 13— personalty — exclusion of evidence of purchase price

Where plaintiff purchased a boat by sealed bid at a government surplus sale 14 months before defendants damaged it, and plaintiff had removed the boat to his home where he and his son had done considerable improvement and repair work on it, the trial court properly refused to allow defendant to cross-examine plaintiff as to the purchase price of the boat either to show market value of the boat before it was damaged or to impeach plaintiff's opinion as to value.

Judge CAMPBELL dissenting.

APPEAL by defendants from *Johnson, Judge,* 22 October 1973 Session of District Court held in MECKLENBURG County.

This is an action to recover damages for injury to a boat owned by the plaintiff. The damage occurred on 15 November 1968 when a car owned by the defendant Eunice C. Mosley and operated by the defendant David F. Mosley collided with the stern of the boat which was parked in the driveway at plaintiff's home in Charlotte.

Evidence offered by plaintiff tended to show that he purchased a 26-foot diesel-powered work boat in September, 1967, from the United States Department of Defense at a government surplus or salvage sale in Charleston, South Carolina. The purchase was made upon a sealed bid. After the purchase plaintiff hauled the boat to Southport, North Carolina where it was tested in the water for three days and then brought to Charlotte. He unloaded the boat upon a wooden cradle he had built for it at the end of his driveway. From September 1967 to 15 November 1968, plaintiff and his son did intermittent work on the boat, cleaning the engine, installing batteries, sanding, stripping off the paint, and performing other minor repairs. Plaintiff testi-

fied that the collision on 15 November 1968 knocked his boat forward on the cradle on which it rested, breaking the rudder, pintle housing, stern post, gudgeon arm, gudgeon block, a garboard plank, and perhaps other parts. Without objection plaintiff estimated the fair market value of his boat at $3500.00 to $4000.00 immediately before the accident and at $600.00 immediately after the accident. He also estimated that the cost of materials to make proper repairs would be $1753.00

Defendants offered no evidence.

It was stipulated that the only issue to be submitted to the jury was: What amount is the plaintiff entitled to recover for damages to his personal property?

The jury answered the issue in favor of the plaintiff in an amount of $2000.00, and judgment was entered allowing a recovery from the defendants of $2000.00 for property damage.

From the entry of this judgment, defendants appealed.

Parker Whedon for plaintiff appellee.

Carpenter, Golding, Crews & Meekins, by James P. Crews, for defendant appellants.

BALEY, Judge.

Plaintiff purchased the boat which is the subject of this action at a government surplus sale fourteen months prior to the accident resulting in its damage. Upon cross-examination he was asked the price he had paid for his boat at this sale. The trial court sustained an objection to this testimony. If plaintiff had been permitted to answer, he would have testified that the price was $287.75 submitted in a sealed bid which was accepted by the government. The major assignment of error urged by defendants on appeal is the exclusion of this evidence. They contend that the amount of the purchase price was admissible as evidence of the market value of the boat before it was damaged and as impeachment of the opinion as to value given by the plaintiff in his testimony.

[1] The measure of damages for injury to personal property is the difference between its market value immediately before the injury and its market value immediately after the injury. *Givens v. Sellars,* 273 N.C. 44, 159 S.E. 2d 530; *Guaranty Co. v. Motor Express,* 220 N.C. 721, 18 S.E. 2d 116.

The legal definition for market value is:

> "The market value of an article or piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular article or piece of property." Black's Law Dictionary 1123 (rev. 4th ed. 1968); *accord, R. R. v. Armfield,* 167 N.C. 464, 466, 83 S.E. 809, 810; *Brown v. Power Co.,* 140 N.C. 333, 52 S.E. 954.

[2] Whether or not evidence of the price previously paid for personal property is admissible on the question of market value immediately prior to its injury is dependent upon the circumstances of the individual case and subject to the discretion of the trial court. *Peele v. Hartsell,* 258 N.C. 680, 129 S.E. 2d 97; 22 Am. Jur. 2d, Damages, § 325.

[3] Circumstances to be considered in determining the admissibility of evidence of the price previously paid for personal property include whether the sale was too remote in point of time, the removal of the property to a different market place, intervening physical changes in the property, the relationship of the parties in the prior sale, the nature of the sale itself as being induced by other considerations than true market value, and any other factors which might affect the probative weight of such evidence.

[4] In this case plaintiff purchased his boat fourteen months prior to the accident at a government surplus property sale. Such a sale does not necessarily import true market value as the government is under some inducement to dispose of the property at whatever price it may obtain. After purchase plaintiff had removed his boat from Charleston to Southport, North Carolina, for testing and then to Charlotte where he and his son had been engaged in considerable improvement and repair work. The trial judge, in his discretion, might well have concluded that the purchase price paid by plaintiff was too remote in point of time and place, that there was a material change in the property itself, and that the circumstances of the sale were so different that evidence of the previous price paid would have

no probative weight with respect to the fair market value of the property at the time it was damanged. Having reached this conclusion that the evidence is not admissible for substantive purposes, it is clearly within the province of the trial court to prohibit its use for impeachment. In our view there is sufficient basis to justify the exercise of the discretion of the court in excluding this evidence, and this assignment of error is overruled.

Defendants also object to the introduction of evidence of the estimated cost of the materials for repairs made necessary by the injury. Such cost is competent as some evidence to guide the jury in determining the difference in the market value of the boat before and after the injury. *Guaranty Co. v. Motor Express, supra.*

We have considered the other assignments of error of defendants and find them without merit.

No error.

Judge HEDRICK concurs.

Judge CAMPBELL dissents.

Judge CAMBPELL dissenting.

This case presents the question as to whether or not certain evidence elicited by the defendants was competent, and, if so, whether the rejection thereof was prejudicial to the defendants.

Plaintiff was seeking to recover the difference between the fair market value of the boat before it was damaged by the negligence of the defendants and the fair market value thereof immediately after such damage.

The plaintiff purchased the boat from the United States Navy after having examined the boat at the Navy Yard in Charleston, South Carolina. The plaintiff presented a sealed bid pursuant to an open invitation to the public to place bids. The bid submitted by the plaintiff was accepted by the United States Government. The plaintiff was then asked as to what amount his bid was which had been accepted by the government. The question was objected to, and the trial court sustained the objection. If permitted to answer, the plaintiff would have answered $287.75.

Was the amount of this bid, which was the purchase price of the boat in question, competent evidence to be considered by the jury in order to enable the jury to ascertain what was the fair market value of the boat immediately prior to the damage done thereto by the defendants? In my opinion, this evidence was competent as being some evidence and relevant upon the material question to be determined by the jury.

This was the amount paid for the boat in the fall of 1967, and the boat was in practically the same condition in November 1968 when it was damaged.

The plaintiff's son testified, "From the time my father brought the boat to Charlotte and put it on the homemade crib, I had done some work on the boat myself, and I had observed my father working on the boat. I had sanded some paint off. We were sanding the paint off to repaint it. That is about as far as we got other than cleaning it up and trying to start it, and that was about all we had done." The father testified, "It was in October I guess when I built the crib and I got the boat located there, and it was there in that position from October 1967, until November of 1968, when the automobile came in contact with it. During that period of time, I stripped about one quarter of one side of the paint off of it, which would be about 10% of the total paint that had been stripped off in a period of little over a year. I had not done anything else to the boat during that year because I was trying to get in shape to buy electronics to put on it. The boat was roughly in the same condition after it had been at my house for about a year as it was when I bought it except for whatever weathering that had taken place during that year."

There not having been any material change in the boat except moving it from Charleston, South Carolina, to Charlotte, North Carolina, between the time of purchase and the time of the damage, I am of the opinion that it was competent and relevant to show the purchase price of the boat as being some evidence tending to show what the fair market value of the boat was immediately before the damage. In my opinion this evidence was competent, and the refusal of the trial court to permit the jury to consider that evidence along with all the other evidence in arriving at the fair market value of the boat immediately before the damage, was prejudicial error.

I think the defendants are entitled to a new trial.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION, AND TOWN OF BATTLEBORO, NORTH CAROLINA v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY

No. 7410UC109

(Filed 17 April 1974)

1. **Utilities Commission § 6— necessity for majority order — evidence heard by persons no longer on Commission**

Purported final order of the Utilities Commission is invalid for the reason that it is not a majority order as required by G.S. 62-60 where only one of the three commissioners who heard the evidence at the public hearing was still a member of the Commission and participated in the final order and the case was not heard before a hearing division but was heard before the Commission.

2. **Utilities Commission § 6— consolidation of docketed cases — absence of notice**

The Utilities Commission erred in consolidating two docketed cases without notice to respondent telephone and telegraph company and in basing its purported order in one of the cases on the record in both dockets.

APPEAL by respondent, Carolina Telephone and Telegraph Company, from Order of North Carolina Utilities Commission in Docket No. P-7, Sub 481, filed 20 June 1973. Argued in the Court of Appeals 19 February 1974.

This proceeding was initiated on 2 December 1969, and 12 February 1970, by the Town of Battleboro, hereinafter referred to as Battleboro. The complaint, filed by way of two letters to the North Carolina Utilities Commission, hereinafter called Commission, averred that the telephone service furnished by Carolina Telephone and Telegraph Company, hereinafter referred to as Carolina, was inadequate and the rates charged excessive.

On 25 March 1970, Carolina filed a motion asking for a bill of particulars. This motion was denied. Carolina was granted extension of time within which to answer and filed its answer on 10 April 1970. Battleboro found the answer unsatisfactory and asked for a public hearing. By order dated 6 May 1970, a public hearing was set for 28 July 1970 in Battleboro. At that time, the case was heard before Commissioners Harry T. Westcott, Chairman; Marvin R. Wooten and Miles H. Rhyne.

On 24 June 1971, while all three commissioners who had heard the matter were still members of the Utilities Commission,

an interim order was entered making certain reductions in the applicable rates. That order contained the following language: "That this docket be continued and remain open and active for such further action by the Commission from time to time as may be appropriate, pending action by the Commission in Docket No. P-7, Sub 529 and otherwise with reference to Carolina's rates, charges, and the quality of service which it renders." Carolina did not except to nor appeal from this order.

On 16 November 1971, and on 25 and 26 October 1972, the Commission conducted a hearing in Docket P-7, Sub 529. Commissioners Harry T. Westcott, Chairman; John W. McDevitt, Marvin R. Wooten, Miles H. Rhyne, and Hugh A. Wells participated in the November 1971 hearing. With the exception of Harry T. Westcott, the same commissioners participated in the hearings of October 1972. Docket P-7, Sub 529, is captioned: "In the Matter of Order to Show Cause Why Carolina Telephone and Telegraph Company should not flow through to its Rate Payers the Additional Monies That Will Accrue after January 1, 1971, on the Account of and Resulting from the Memorandum of Agreement between American Telephone and Telegraph Company and the United States Independent Telephone Association dated July 15, 1970."

From 1 January 1973 to and including 20 June 1973, the members of the Commission were Marvin R. Wooten, Chairman; John W. McDevitt; Ben E. Roney; and Hugh A. Wells. It is stipulated that no final order has been entered by the Commission in Docket P-7, Sub 529, and that Docket remains open. It is further stipulated that there was no order entered or action taken by the Commission prior to its final order in this cause on 20 June 1973, purporting to consolidate Docket P-7, Sub 481, with Docket P-7, Sub 529, for hearing.

The final order entered on 20 June 1973, directed that Carolina still further reduce its rates in Battleboro and in a corridor running to Battleboro from the outer limits of the Rocky Mount base rate area to the same level as those charged in the Rocky Mount base rate area. Of the three commissioners who heard the evidence at Battleboro, only Commissioner Wooten participated in the final order.

The final order contains the following preliminary statements:

"HEARD IN: The Battleboro Community House, Main Street, Battleboro, North Carolina, on July 28, 1970, at 10:00 a.m.

The Commission Hearing Room, Ruffin Building, Raleigh, North Carolina, on November 16, 1971, and October 25-26, 1972 *(Docket No. P-7, Sub 529)* (Emphasis supplied.)

BEFORE: Chairman Harry T. Westcott (Presiding), and Commissioners Marvin R. Wooten and Miles H. Rhyne.

Chairman Harry T. Westcott (Presiding), Commissioners John W. McDevitt, Marvin R. Wooten, Miles Rhyne and Hugh A. Wells on November 16, 1971 *(Docket No. P-7, Sub 529)* (Emphasis supplied.)

Chairman Marvin R. Wooten (Presiding), Commissioners John W. McDevitt, Miles H. Rhyne, and Hugh A. Wells on October 25-26, 1972 *(Docket No. P-7, Sub 529)* (Emphasis supplied.)"

The Commission order further states:

"BY THE COMMISSION: This proceedings was the subject of an Interim Order dated June 24, 1971. That Order effectively and appropriately reviews the background of the case and the events leading up to the Interim Order, and it is therefore unnecessary to repeat that information here.

As indicated in said Interim Order, this Docket was left open for further Order preceding the outcome of the proceedings in Docket No. P-7, Sub 529. Hearings in that docket have now been concluded, briefs filed, and that matter is awaiting Commission decision.

The Town of Battleboro's complaint was further considered in and consolidated for hearing with Docket No. P-7, Sub 529. Further evidence was presented in that docket which bears upon Battleboro's complaint.

Based upon the entire record in this docket, and in Docket No. P-7, Sub 529, the Commission makes the following

FINDINGS OF FACT."

Findings of fact are not deemed necessary for determination of this appeal.

On 2 August 1973, Carolina moved to rescind, alter, or amend the order. This motion was denied, and Carolina filed its exceptions to the final order, its findings of fact and conclusions of law and appealed to this Court.

Maurice W. Horne, Assistant Commission Attorney, for North Carolina Utilities Commission, appellee.

Joyner and Howison, by R. C. Howison, Jr., and Taylor, Brinson and Aycock, by William W. Aycock, for Carolina Telephone and Telegraph Company, appellant.

Fountain and Goodwyn, by George A. Goodwyn, for Town of Battleboro, appellee.

MORRIS, Judge.

[1] In speaking to appellant's assignments of error, we will follow the sequence used by it in its brief. Since it first argues its assignment of error No. 4, we will first discuss the question raised by that assignment of error, to wit: Is the Commission's final order dated 20 June 1973, invalid for that it is not a majority order of the Commission as required by N. C. General Statutes § 62-60?

Unquestionably, the only commissioner who was a member of the Commission at the time of the entry of the final order who was present and heard the testimony at the public hearing in Battleboro was Commissioner Wooten. Neither is there any question but that "[t]he North Carolina Utilities Commission shall consist of five commissioners . . . " G.S. 62-10, nor but that "[a] majority of the commissioners shall constitute a quorum, and any order or decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this chapter." G.S. 62-60.

G.S. 62-76 provides:

> "(a) Except as otherwise provided in this chapter, any matter requiring a hearing shall be heard and decided by the Commission or shall be referred to a division of the Commission or one of the commissioners or a qualified member of the Commission staff as examiner for hearing, report and recommendation of an appropriate order or decision thereon. Subject to the limitations prescribed in this article, a hearing division, hearing commissioner or examiner to whom a hearing has been referred by order of the chairman shall have the rights, duties, powers and jurisdiction conferred by this chapter upon the Commission. . . . (b) In all cases where a division of the Commission hears a proceeding and as many as three commissioners hearing

> the case approved the recommended order, such order shall thereby become and shall be issued as a final order of the Commission. If less than three commissioners approve such order, it shall be a recommended order only, subject to review by the full Commission, with all commissioners eligible to participate in the final arguments and decision."

The record is devoid of any order of the chairman referring this matter to a hearing division. The order of 6 May 1970 simply directed that a public hearing be held in Battleboro on 28 July 1970 and that the Commission staff investigate the matter and present evidence at the hearing. The Interim Order for Relief was filed 24 June 1971, and contains the statement "Issued by Order of the Commission." By statutory definition (G.S. 62-3(5)), " 'Commission' means the North Carolina Utilities Commission." It appears, therefore, that it was not intended that the Battleboro hearing be before a hearing division, but that it was intended that the hearing be conducted before the Commission. G.S. 62-60 provides that:

> "A majority of the commissioners shall constitute a quorum, and any order or decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this chapter."

It is obvious that if three commissioners concur, the order entered by them constitutes the order of the Commission. The question before us is whether those three concurring in the order must have heard the evidence. Some help is gained from G.S. 62-76 which provides for hearing by divisions of the Commission. Section (b) of that statute is quoted above.

It seems inconceivable that the General Assembly intended that when a matter is heard by a hearing division, if "as many as three commissioners *hearing the case* approved the recommended order," the order shall become a final order, but that the Commission, when a matter is heard before it, can issue a final order when only *one* of the commissioners *who heard the case* approves the order.

If we take the position that, although no order was entered designating a "hearing division," the three commissioners who heard the evidence did constitute a division, there is no question but that G. S. 62-76(b) requires that the purported final order could be nothing more than a recommended order.

The purported final order can, therefore, be no more than a recommended order, and the matter must be remanded for a hearing before the Commission.

[2] This disposition of the case makes unnecessary any further discussion with respect to other assignments of error with one exception. Carolina assigns as error the action of the Commission in consolidating Dockets P-7, Sub 481 and P-7, Sub 529 without notice to it and in basing the purported final order on the record in both dockets. We agree that this was reversible error. We have before us only the record in Docket No. P-7, Sub 481. We have no way of knowing what other evidence the Commission considered. This assignment of error is sustained.

Remanded for hearing by the Commission.

Chief Judge BROCK and Judge CARSON concur.

MASTER HATCHERIES, INC. v. J. HOWARD COBLE, NORTH CAROLINA COMMISSIONER OF REVENUE

No. 7415SC32

(Filed 17 April 1974)

Taxation § 31— use tax — machinery in chicken hatchery — manufacturing

A commercial chicken hatchery is a "manufacturing industry or plant" within the meaning of G.S. 105-164.4(1)(h); therefore, machinery purchased for use in the hatchery is subject to a use tax of only 1% rather than the regular rate of 3%.

Judge CAMPBELL dissenting.

APPEAL by plaintiff from *Hall, Judge,* 20 August 1973 Session of Superior Court held in CHATHAM County.

This is an action against the Commissioner (now Secretary) of Revenue for a refund of taxes paid under protest.

In 1972 plaintiff purchased some machinery for use in its hatchery business. It paid use tax on this machinery at the 1% rate provided in G.S. 105-164.4(1)(h) for "mill machinery or mill machinery parts and accessories to manufacturing industries and plants." The Commissioner of Revenue took the position that plaintiff was not a manufacturing industry or plant

within the meaning of this statute and that the regular rate of 3% imposed under G.S. 105-164.6(1) was applicable and assessed additional tax in the amount of $5,864.60. Plaintiff paid this additional tax under protest and filed claim for refund which was denied.

The facts were stipulated by the parties and are substantially as follows: Plaintiff operates a commercial hatchery, purchasing fertile chicken eggs, incubating the eggs until they hatch into baby chicks, and selling the chicks. As the eggs are received at plaintiff's hatchery, they are cleaned and any oversized or undersized eggs are removed. They are then placed in an incubator, where they remain for 18 days. The temperature in the incubator is maintained at 99°, and the humidity is maintained at 87%. Every hour the eggs in the incubator are turned mechanically in order to prevent the embryo from remaining in one position. After eighteen days in the incubator, the eggs are placed in a "hatching machine," where the temperature is kept at 98° and the humidity at 90%. The eggs hatch after three days in the hatching machine, and the chicks are graded, vaccinated, debeaked, placed in boxes, and sold.

The superior court held that the hatchery operated by plaintiff is not a manufacturing industry or plant within the meaning of G.S. 105-164.4(1)(h) and the equipment used by plaintiff was taxable at the regular 3% rate. Judgment was entered for defendant denying any refund.

Plaintiff appealed.

Attorney General Morgan, by Associate Attorney Norman L. Sloan, for defendant appellee.

Ray F. Swain for plaintiff appellant.

BALEY, Judge.

The sole issue in this case is whether or not plaintiff is engaged in "manufacturing" within the meaning of G.S. 105-164 (1)(h). If plaintiff is a manufacturer, then the machinery it purchased should be taxed at a rate of only 1%, and plaintiff is entitled to a refund of the additional use tax assessment it paid. But if plaintiff is not manufacturer, the trial court acted properly in denying a refund.

In *Duke Power Co. v. Clayton, Comr. of Revenue,* 274 N.C. 505, 513, 514, 164 S.E. 2d 289, 295, "manufacturing" was defined

as " 'the producing of a new article or use or ornament by the application of skill and labor to the raw materials of which it is composed,' " and as "the making of a new product from raw or partly wrought materials." A "manufacturer" was defined in *Bleacheries Co. v. Johnson, Comr. of Revenue,* 266 N.C. 692, 696, 147 S.E. 2d 177, 179, as " 'one who changes the form of a commodity, or who creates a new commodity.' " Plaintiff contends that its activities conform precisely to these definitions. It uses fertile chicken eggs as its raw material, and it applies skill and labor to the eggs by maintaining them at the proper temperature and humidity and turning them periodically in its machines. As a result, it produces a new article, baby chicks. Defendant, on the other hand, contends that the production of living organisms, such as baby chicks, cannot constitute manufacturing. Defendant maintains that sufficient credit is not accorded to the hen and rooster; that chicks are produced by a natural process of growth and development, not manufacturing; that the hatchery does not create a chick from an egg, but merely provides a suitable environment in which the natural development of the egg can take place.

The exact issue involved in this case is one of first impression in North Carolina, but it has been considered by the courts of three other states. In *Miller v. Peck,* 158 Ohio St. 17, 106 N.E. 2d 776 (1952), the Supreme Court of Ohio held that the operation of a chicken hatchery does constitute manufacturing. In Arkansas and Maryland, the courts have accepted defendant's position and held that a hatchery operator is not a manufacturer. *Peterson Produce Co. v. Cheney,* 374 S.W. 2d 809 (Ark. 1964); *Perdue, Inc. v. State Dept. of Assessments & Taxation,* 264 Md. 228, 286 A. 2d 165 (1972).

What constitutes manufacturing or who is a manufacturer within the meaning of a tax statute may well depend upon the terms of the specific statute involved and the circumstances of a particular case. *See* Annot., 17 A.L.R. 3d 7. As pointed out by the Ohio court in *Miller v. Peck, supra,* it is impossible to make a clearcut distinction between industrial processes which make use of living organisms and those which do not. In a tax statute the general terms used by the legislature, such as "manufacturing," frequently cannot be defined with complete precision. In interpreting the intent of the legislature it cannot be assumed that a manifestly inequitable result was envisioned. In determining whether the operation of a chicken hatchery consti-

tutes manufacturing, it is important to consider the general rule that taxing statutes are construed in favor of the taxpayer and against the State, *Pipeline Co. v. Clayton, Comr. of Revenue,* 275 N.C. 215, 166 S.E. 2d 671, that statutory exemption from tax is strictly construed against the claim of exemption, *Yacht Co. v. High, Comr. of Revenue,* 265 N.C. 653, 144 S.E. 2d 821, and the constitutional requirement that taxation must be imposed by a uniform rule. N. C. Constitution, Article 5, Section 2; *see Dyer v. City of Leaksville,* 275 N.C. 41, 165 S.E. 2d 201; *Hospital v. Guilford County,* 221 N.C. 308, 20 S.E. 2d 332.

In our modern day the poultry industry as one of our major sources of food has become a large and complex industry. The egg producer, hatchery, poultry raiser, and chicken processor are integral parts of that industry. As the stipulated facts in this case indicate, the industrial process begins when the fertilized egg is sold by the farmer to commercial hatcheries such as the plaintiff. The egg contains a living reproductive cell which may or may not produce a baby chick. Through artificial means the egg is stimulated, developed, and transformed into a different form of life—the baby chick. Sophisticated machinery controls temperature and humidity and mechanically turns the incubator trays to prevent the embryo from remaining in one position. On the eighteenth day the eggs are transferred to hatching trays which are in turn placed in a hatching machine where the trays remain in a steady position with a constant temperature. On the twenty-first day the chick emerges from the shell, is graded, vaccinated, debeaked, counted, and placed in chick boxes, one hundred to each box, and shipped to the chicken raiser. The incubation process is a continuing action conducted as a business enterprise for profit, and in the case of the plaintiff there are three hundred and sixty-two thousand eggs incubated and approximately three hundred thousand baby chicks actually hatched each week.

After the baby chicks are purchased by those in the poultry business who feed and care for them until they become mature, they are sold to chicken processing plants to be converted into food. The North Carolina Department of Revenue has held that chicken processors, who kill chickens and prepare them for use as food, are manufacturers, and are entitled to pay use tax on their machinery at the reduced rate of 1% while plaintiff who processes the fertilized egg until it becomes a baby chick must pay the 3% use tax on its machinery. Both the hatchery and

the chicken processor are part of the same industry; they are similar in their economic role; they are both highly mechanized. In fact, if the hatchery equipment were adjusted to produce a higher temperature in the incubators and kill the eggs instead of hatching them, the hatchery would be classified as a processor itself and the identical equipment would be treated differently for tax purposes.

We are not persuaded that there is a proper basis for classifying the processing of chickens as "manufacturing" for the purpose of granting tax exemption under G.S. 105-164.4(1) (h) and denying that interpretation of the statute to the operation of hatching chickens.

G.S. 105-164.4(1) (g) authorizes the 1% use tax rate to apply to the machinery of "poultry farmers, egg producers, and livestock farmers for use by them in the production of . . . poultry, eggs, or livestock." The Revenue Department has ruled that commercial hatcheries do not qualify as poultry farmers under this statute nor as a "manufacturing industry or plant" under Section (h) which results in an anomalous situation where the egg producer, the poultry raiser, and the chicken processor are all granted the 1% use rate on their machinery while the other essential process in the poultry industry, the hatchery, is denied this favorable tax treatment.

While the word "manufacturing" does not ordinarily refer to the production of living organism, in the context of the tax statutes of this State as they have been applied by the Revenue Department, we hold that a commercial chicken hatchery is a "manufacturing industry or plant" within the meaning of G.S. 105-164.4(1) (h). The additional use tax of $5,864.60 assessed against plaintiff should be refunded. The judgment of the Superior Court is reversed.

Reversed.

Judge HEDRICK concurs.

Judge CAMPBELL dissenting.

This is a matter for the legislature and I therefore dissent.

E. T. MOYE, T/A NATIONWIDE PRESS AND NATIONAL CONSUMERS RESEARCH CORPORATION, A NORTH CAROLINA CORPORATION v. BOBBY EURE

No. 7410DC220

(Filed 17 April 1974)

1. **Contracts § 31— inducing breach of employment contract — inducing refusal to renew or enter contract**

The fact that plaintiffs and defendants are business competitors does not give defendant any privilege to induce an employee to breach his contract with plaintiff, but a competitor of plaintiff does have the privilege to induce an employee not to enter or renew a contract with plaintiff.

2. **Contracts § 31— right of former employee to compete**

In absence of a valid contract not to compete, an employee whose contract has expired or who is working without a contract is free to work for whomever he chooses.

3. **Contracts § 32— interference with contracts — preliminary injunction — *failure of proof***

A preliminary injunction prohibiting defendant, a former employee of plaintiff, from contacting independent sales contractors allegedly employed by plaintiff for the purpose of persuading them to associate themselves with defendant in a business in competition with plaintiff cannot be sustained on the theory of interference with contract where there was no competent evidence at the hearing of any existing contracts with which defendant could interfere, plaintiff's allegation in the complaint that named people were under contract with plaintiff being an expression of opinion on a question of law which is not admissible in evidence.

4. **Master and Servant § 11— preliminary injunction — trade secrets — names of plaintiff's employees**

A preliminary injunction prohibiting defendant, a former employee of plaintiff, from contacting independent sales contractors allegedly employed by plaintiff for the purpose of persuading them to associate themselves with defendant in a business in competition with plaintiff cannot be sustained on the theory of violation of confidence in the misuse of a trade secret since the names of plaintiff's employees are not the type of trade secret which would be protected from exposure by injunction.

APPEAL by defendant from *Barnette, Judge,* 29 October 1973 Session of District Court held in WAKE County.

This is an action seeking a permanent injunction against defendant to prohibit him from contacting employees of the plaintiffs for the purpose of persuading them to leave plaintiffs

and associate themselves with the defendant in a business in competition with the business of plaintiffs.

Defendant was formerly employed by the plaintiff E. T. Moye who operated a business in Wake County known as Nationwide Press. The other plaintiff is National Consumers Research Corporation (hereinafter referred to as Consumers) of which Moye is controlling stockholder. Both plaintiffs engage in sales advertising which involves a relationship with independent sales contractors.

In their complaint plaintiffs alleged that defendant had left his employment with E. T. Moye on 1 October 1973; that he had stated his intention to form a new business that would be competitive with Consumers; and that he had threatened to induce independent sales contractors to work for him instead of Consumers. The complaint further alleged that defendant had learned the names of these independent sales contractors which Consumers kept confidential and that these names constituted a trade secret. Plaintiffs attached to their complaint a list of independent sales contractors and sought an injunction to prevent defendant from contacting any of these contractors and encouraging them to work for him.

The trial court granted a preliminary injunction which prohibited the defendant or any person acting under his direction from contacting the individual contractors named in the exhibit attached to the complaint for the purpose of persuading them to associate themselves with defendant in a business similar to or in competition with that of plaintiffs. Defendant appealed to this Court.

L. Philip Covington for plaintiff appellees.

Vaughan S. Winborne for defendant appellant.

BALEY, Judge.

The trial court based the preliminary injunction issued in this case upon the verified complaint filed by the plaintiffs. The defendant maintains that the facts alleged in the complaint even if assumed to be true were insufficient to support a preliminary injunction. We agree and direct that the preliminary injunction be vacated.

The action of the plaintiffs is based on the premise that they are entitled to protection from the defendant who seeks to induce

third parties, whether employees or independent contractors, to breach their contract with plaintiffs and enter into contracts with him. North Carolina recognizes liability for unlawful interference with contract. "[A]n action lies against one who, without legal justification, knowingly and intentionally causes or induces one party to a contract to breach that contract and cause damage to the other contracting party." *Overall Corp. v. Linen Supply, Inc.*, 8 N.C. App. 528, 530, 174 S.E. 2d 659, 660; *accord, Johnson v. Gray*, 263 N.C. 507, 139 S.E. 2d 551; *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176; *Bryant v. Barber*, 237 N.C. 480, 75 S.E. 2d 410. In addition, when one induces a third person not to enter into a contract which he would otherwise have entered, the interferring party may under certain circumstances be held liable for interference with contract. *Johnson v. Gray, supra.*

[1, 2] The fact that plaintiffs and defendant are business competitors does not give defendant any privilege to induce an employee to *breach* his contract with plaintiff. *Overall Corp. v. Linen Supply, Inc., supra;* Restatement of Torts, § 768; Prosser, Torts 3d, § 123, at 970. But a competitor of plaintiff does have the privilege to induce an employee not to *renew* a contract with plaintiff after it has terminated, or not to *enter into* a contract with plaintiff in the first place. *Overall Corp. v. Linen Supply, Inc., supra;* Restatement of Torts, § 768; Prosser, Torts 3d, § 124, at 979. This privilege is necessary for the protection of employees. In the absence of a valid contract not to compete, an employee whose contract has expired (or an employee working without a contract) is free to work for whomever he chooses. *See Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543; *Comfort Spring Corp. v. Burroughs*, 217 N.C. 658, 9 S.E. 2d 473. He may work for his previous employer, for a competitor, or for another employer in a different line of business, as he chooses. If an employee has established a reputation for doing good work, so that several employers desire to employ him, he is entitled to reap the benefits of that reputation, by having the various employers compete for his services. Even if the employee has tentatively made up his mind to work for a particular employer, a competitor has the right to come up with a better offer and induce him to change his mind. If the courts were to restrict an employer's right to compete for employees, it would be the employees who would suffer.

[3] As a competitor of Consumers, defendant had the right to persuade Consumers' employees to work for him, so long as he

did not induce them to breach any existing contracts. But in the present case, there is no competent evidence that any contracts existed between Consumers and its sales personnel. The complaint, which is all the evidence, does not discuss the terms or extent or nature of any employment contracts or the circumstances under which they were made. The bare allegation in the complaint that named people were "under contract with National Consumers Research" does not constitute competent evidence; it is merely a statement of a legal conclusion which plaintiffs are attempting to establish. Expressions of opinion on a question of law are not admissible in evidence. The statement that "the following people were under contract with National Consumers Research" is no more factual or specific than the statement that "the speed limit at the time and place of the accident was thirty-five miles per hour," which was held inadmissible in *Hensley v. Wallen,* 257 N.C. 675, 127 S.E. 2d 277; or the statement that defendant "had been in the open, notorious and adverse possession of the land in dispute," held inadmissible in *Memory v. Wells,* 242 N.C. 277, 87 S.E. 2d 497; or that a deed "was never delivered," held inadmissible in *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316. *See* 1 Stansbury, N. C. Evidence (Brandis rev.), § 130.

[4] Plaintiffs also contend that in contacting their employees or independent sales personnel defendant would be violating a trade secret or using improperly confidential information which he acquired while working for plaintiff Moye. The alleged confidential information was a list of the sales personnel which was attached to the complaint and is now a part of the public record and accessible to any interested citizen. The injunction would prevent defendant from using information which is freely available to the public generally. Without regard to the public disclosure, however, the list of employees of plaintiffs would not be considered as the type of trade secret which would be protected from exposure by injunction.

The preliminary injunction cannot be sustained on the theory of interference with contract as there was no competent evidence submitted at the hearing of any existing contracts with which defendant could interfere. It cannot be supported as a violation of confidence in the misuse of an alleged trade secret.

The trial court erred in granting a preliminary injunction, and its decision is reversed and the injunction vacated.

Reversed.

Judges CAMPBELL and HEDRICK concur.

CHARLES B. HANNAH v. WILLIAM J. HANNAH

No. 7430DC46

(Filed 17 April 1974)

Landlord and Tenant § 14— holding over — purchase agreement of original lease inapplicable

Where plaintiff and defendant entered into a written lease agreement in 1948 whereby defendant landlord agreed to purchase all stock and equipment of the filling station in question should he decide he wanted possession at the end of five years, defendant's obligation to purchase was no longer in effect when, more than twenty years thereafter, defendant nearly doubled the rent, plaintiff was forced to liquidate, and plaintiff called upon defendant to repurchase in accordance with the 1948 agreement.

APPEAL by defendant from *Leatherwood, Judge,* 21 May 1973 Session of District Court held in HAYWOOD County.

Action for breach of contract. In his complaint, plaintiff alleged:

In May 1948 defendant owned a service station and store building known as "Medford Farm Service Station" located on what was then U. S. Highway 19 and 23. In May 1948 plaintiff and defendant entered into a written agreement reading as follows:

> "This is to certify that I, Bill J. Hannah, do hereby lease one filling station to Charlie B. Hannah for a period of five years at the rate of $40.00 per month. If at the end of five years, I should want possession of said filling station, I purchase all stock and equipment at 20% discount, and not over 2 years bills."

At the time said lease was entered into in May 1948, "it was contemplated between the parties that a new highway was to be constructed and to be designated as U. S. Highway 19 and

23, which said highway when constructed would reroute and remove considerable portions of the traffic from the Medford Farm Service Station, and it was understood and agreed between the parties that when said new road was opened that the monthly rental to be paid in consideration of said lease would be reduced to compensate for loss of traffic and business." In May 1953 said new road had been completed and the parties agreed to reduce the monthly rental to $38.00 per month. Thereafter plaintiff continued in possession and continued paying $38.00 per month rent until defendant, by letter dated 4 June 1968, advised plaintiff that the rental had been increased from $38.00 per month to $75.00 per month. "[B]y giving notice of a rental increase almost double what plaintiff had been paying, said amount being grossly excessive and unreasonable, the defendant was in effect terminating his agreement with plaintiff and was forcing and demanding that he give up the leased premises, which plaintiff did in fact do." Although demand was made by plaintiff upon defendant, defendant refused to comply with the provisions of his lease agreement with plaintiff to repurchase stock and equipment at a 20% discount, including not over two-year-old accounts receivable. Because of such refusal, plaintiff was forced to liquidate the same. Plaintiff had on hand inventory valued at $1,913.45, accounts receivable not over two years old of $1,548.26, and equipment valued at $1,000.00, for a total of $4,461.71, "which less twenty (20%) per cent discount was valued at $3,569.37." After due diligence plaintiff liquidated said inventory, accounts, and equipment for $2,730.20. Because of defendant's failure to honor his agreement, plaintiff has suffered damages in the amount of the difference between $3,569.37 and $2,730.20, or $839.17, for which amount plaintiff prayed judgment against defendant.

Defendant filed answer, setting up as a first defense "[t]hat the complaint fails to state a cause of action against the defendant upon which relief can be granted."

On 21 May 1973 the trial court entered an order denying defendant's first defense. The court then heard the case without a jury and entered judgment finding facts and making conclusions of law on the basis of which the court adjudged that plaintiff recover of defendant $839.17 with interest and costs. Defendant appealed, making as his only assignment of error that the court erred in denying his first defense.

Brown, Ward & Haynes, P.A., by Gavin A. Brown for plaintiff appellee.

Holt & Haire, P.A., by Creighton W. Sossomon for defendant appellant.

PARKER, Judge.

Defendant appellant noted only one assignment of error, that the court erred in denying his Rule 12(b)(6) defense that the complaint failed to state a claim upon which relief can be granted. The appeal itself, however, is an exception to the judgment and raises the question whether the facts found support it. *Dilday v. Board of Education,* 267 N.C. 438, 148 S.E. 2d 513. In the present case the trial court, after denying defendant's first defense, heard the evidence and entered judgment making detailed findings of fact which are in all material respects substantially the same as the facts alleged in the complaint. The question presented by this appeal, therefore, is whether those facts support the judgment. In our opinion they do not.

By clear language in the 1948 written agreement defendant leased his filling station to plaintiff "for a period of five years at the rate of $40.00 per month." By not so clear language, he also agreed that "[i]f at the end of five years, [he] should want possession of said filling station," he would "purchase all stock and equipment at 20% discount, and not over 2 years bills." As matters turned out, defendant did not want possession at the end of five years. Instead, he permitted plaintiff to hold over and remain in possession as his tenant at a reduced monthly rental for more than fifteen additional years, and even then he offered to continue to lease, though at an increased rental. The question for decision is whether the obligation to purchase continued in effect throughout the hold over period. We hold that it did not.

It is true that in the absence of a statute, a provision in the original lease, or a new arrangement governing the holding over, "the general rule is that the tenancy arising from the tenants holding over with the consent of the landlord is presumed to be upon the same covenants and terms as the original lease, so far as they are applicable to the new tenancy." 49 Am. Jur. 2d, Landlord and Tenant, § 1146, p. 1100. Here, however, the express language of the original lease brought the purchase agreement into play only if "at the end of five years," the landlord

should want possession. Since the term of the original lease was also for five years, obviously the parties contemplated the possibility that there might be a holding over or an extension after the initial five-year term, but nothing in the language indicates that the parties intended the purchase obligation to remain in effect throughout whatever holdover or extended period might occur. We do not interpret, as plaintiff urges, the phrase "at the end of five years" as meaning "at the end of the term of this lease or at the end of any renewal or extension thereof, including any extension effected by the tenants holding over with the landlord's consent." On the contrary, in our opinion the words "at the end of five years" mean exactly what they say. This conclusion finds support in the reasoning employed in cases cited in Annotation in 15 A.L.R. 3d 470, § 7, p. 491, et seq.

We hold that defendant's obligation to purchase as contained in the 1948 written agreement was no longer in effect when, more than twenty years thereafter, he was called upon to fulfill it. The judgment appealed from is

Reversed.

Chief Judge BROCK and Judge BALEY concur.

DAN FOUST AND THE STATE OF NORTH CAROLINA ON RELATION OF DAN FOUST v. MICHAEL T. HUGHES, JESSE B. SMITH, SARAH W. BOSWELL, JOHN H. STOCKARD, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

No. 7315SC267

(Filed 17 April 1974)

1. **False Imprisonment § 2; Indictment and Warrant § 6— action against magistrate — failure to state claim for relief**

Plaintiff failed to state a claim for relief for false imprisonment against a magistrate by reason of any act of the magistrate in issuing warrants for plaintiff's arrest since a magistrate is an officer of the district court and performs a judicial act in issuing warrants, and a judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties even when the judge acts maliciously and corruptly. G.S. 7A-170.

2. **Arrest and Bail § 3— warrantless arrest — failure to take defendant before magistrate — liability of magistrate**

Plaintiff's allegations that his rights under G.S. 15-46 were violated in that he was not taken before a magistrate after his war-

rantless arrest prior to the issuance of warrants by the magistrate do not state a claim for relief against the magistrate since the statute is directed primarily to the arresting officer.

3. **False Imprisonment § 2; Sheriffs and Constables § 4— action against jailer — failure to state claim for relief**

Plaintiff's allegations that he was unlawfully arrested by two city police officers and that the officers delivered him into the custody of the county sheriff, who held plaintiff in jail until he was released on bail, failed to state a claim for relief against the sheriff for false imprisonment since the sheriff was merely performing his affirmative duty under G.S. 162-41 "to receive, incarcerate and retain" any prisoner brought to the county jail by any law enforcement officer of any municipality in the county until the prisoner should become entitled to be released in some manner provided by law.

APPEAL by plaintiff from *Cooper, Judge,* 16 November 1972 Session of Superior Court held in ALAMANCE County.

Civil action to recover damages for false arrest, assault, and false imprisonment. In his complaint, plaintiff in substance alleged:

About 5:00 p.m. on 5 September 1971 defendants Hughes and Smith, police officers of the City of Graham, arrested plaintiff without a warrant under circumstances requiring a warrant to make the arrest lawful. They handcuffed plaintiff, beat him, and took him to the Alamance County jail. There they delivered him into custody of defendant Stockard, Sheriff of Alamance County, who held plaintiff in unlawful imprisonment until about 8:30 p.m. on the same day, when plaintiff was released on bail. During his imprisonment plaintiff was in a beaten and bloody condition and in obvious need of medical attention, but defendant Stockard refused to provide any medical assistance despite demands from plaintiff's wife that he do so. While these events were occurring, defendant Boswell was a duly appointed, qualified, and acting Magistrate of the District Court and was on duty at the jail. Defendants Hughes, Smith, and Stockard failed to take plaintiff before a magistrate as required by G.S. 15-46, and in violation of that statute "said defendants procured the defendant Boswell to sign a paper writing purporting to be a warrant for the arrest of the plaintiff Foust on a charge of public drunkenness, and later, in the same unlawful manner, procured the defendant Boswell to add to said purported warrant a charge of illegal possession of tax paid whiskey, and sign a second paper writing purporting to be a warrant for the arrest of the plaintiff Foust on a charge of resisting arrest; and

that the defendant Boswell, knowing that the plaintiff Foust had already been arrested without a warrant and was then being held in jail, failed and neglected to require the plaintiff Foust to be brought before her as required by G.S. 15-46 and thereby continued plaintiff Foust's unlawful imprisonment, without due process of law and in violation of the Constitution of the State of North Carolina and the Constitution of the United States."

Defendant Boswell moved to dismiss pursuant to Rule 12(b)(6) and defendant Stockard and the surety on his official bond moved for summary judgment pursuant to Rule 56. Both motions were allowed and orders were entered dismissing the action as to defendants Boswell, Stockard, and the surety on Stockard's official bond. From these orders, plaintiff appealed.

Walter G. Green for plaintiff appellant.

Attorney General Robert Morgan by Associate Attorney Ann Reed for defendant Boswell, appellee.

Smith, Moore, Smith, Schell & Hunter by Larry B. Sitton and James A. Medford for defendants Stockard and Fidelity and Deposit Company of Maryland, appellees.

PARKER, Judge.

PLAINTIFF'S APPEAL FROM THE ORDER ALLOWING DEFENDANT BOSWELL'S MOTION TO DISMISS UNDER RULE 12(b)(6)

[1, 2] Plaintiff alleged that defendant Boswell was at all times mentioned in the complaint "a magistrate of the District Court, duly appointed, qualified and acting as such." A magistrate is an officer of the district court, G.S. 7A-170, and in issuing a warrant a magistrate performs a judicial act. *State v. Matthews,* 270 N.C. 35, 153 S.E. 2d 791. "A judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties." *Fuquay Springs v. Rowland,* 239 N.C. 299, 79 S.E. 2d 774. "This immunity applies even when the judge is accused of acting maliciously and corruptly, and 'it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' " *Pierson v. Ray,* 386 U.S. 547, 18 L.Ed. 2d 288, 87 S.Ct. 1213. Thus, plaintiff failed to state a claim upon which relief can be granted by

reason of any act of the magistrate in issuing the warrants. Nor do plaintiff's allegations that his rights under G.S. 15-46 were denied serve to strengthen his claim against the magistrate. That statute is directed primarily to the arresting officer, and the facts alleged in this case furnish no basis to support a claim against the magistrate. Defendant Boswell's motion to dismiss was properly allowed.

PLAINTIFF'S APPEAL FROM THE ORDER ALLOWING DEFENDANT STOCKARD'S MOTION FOR SUMMARY JUDGMENT UNDER RULE 56

The affidavits filed in support and in opposition to the motion for summary judgment were in conflict as to whether Sheriff Stockard's deputies offered plaintiff medical assistance at the jail. However, a question of fact which is immaterial does not preclude summary judgment, and in this case the question whether plaintiff was, or was not, offered medical assistance at the jail is immaterial. Plaintiff alleged no damages as result of any failure to provide him with medical assistance.

[3] Plaintiff did allege a claim for damages against the sheriff for false imprisonment. In this connection there was no genuine issue as to any material fact. As one of the duties of his office, Sheriff Stockard was the jailer of the Alamance County jail. As such, the duty was imposed upon him by statute, G.S. 162-41 (formerly codified as G.S. 153-190.1), "to receive, incarcerate and retain any prisoner brought to such county jail by any law-enforcement officer of such county or of any municipality in such county." Plaintiff was brought to the jail as a prisoner by two police officers of the City of Graham, a municipality in Alamance County. When this occurred the sheriff's duty was fixed by the statute. He had no discretion in the matter, but was under an affirmative duty "to receive, incarcerate and retain" the plaintiff until plaintiff should become entitled to be released in some manner provided by law. On the undisputed facts, this is all that the sheriff did in this case. No valid claim for relief may be maintained against him for complying with his statutory duty.

There being no genuine issue as to the material facts which establish that defendant Stockard and the surety on his official bond were entitled to judgment as a matter of law, their motion

for summary judgment dismissing plaintiff's action as to them was properly allowed.

The orders appealed from are

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. GARY STEVE SOMMERSET

No. 7427SC241

(Filed 17 April 1974)

1. **Kidnapping § 1— definition of offense**

Kidnapping is the unlawful taking and carrying away of a person against his will by force, threats, or fraud.

2. **Kidnapping § 1; Robbery §§ 1, 4— kidnapping and armed robbery — two distinct charges — no election by State required**

In a prosecution for armed robbery and kidnapping, the trial court correctly denied defendant's motion to require the State to elect between the two charges where the evidence tended to show that two distinct offenses occurred in that the victim was forced from his residence at gunpoint and transported by car for a distance of approximately eight miles at which point defendant and an accomplice robbed him.

3. **Constitutional Law § 31; Criminal Law §§ 43, 169— photograph and testimony — access by defendant prior to trial**

Trial court did not err in refusing to suppress testimony of the victim and his wife where their comments to an investigating officer were placed in a police report, a copy of which was furnished to defendant's counsel, nor was defendant prejudiced by the introduction of a photograph at trial, though defendant had not first been supplied a copy of the photograph as required by a prior court order.

4. **Criminal Law § 114; Kidnapping § 1; Robbery § 5— instructions — reference to victim**

Trial court's reference in its jury instruction to the man defendant allegedly robbed and kidnapped as "the victim" did not constitute prejudicial error since the charge as a whole was correct.

APPEAL by defendant from *Friday, Judge,* 1 October 1973 Session of Superior Court held in GASTON County.

This is a criminal action wherein the defendant, Gary Steve Sommerset, was charged in two separate bills of indictment,

proper in form, with armed robbery and kidnapping. Prior to trial defendant made a motion for the production of evidence and the disclosure of witnesses which motion was granted. Defendant also made motions to quash the bill of indictment as to kidnapping; to change the venue; and to compel the State to elect between the charges of armed robbery and kidnapping; however, each of these motions was denied. Upon arraignment the defendant tendered a plea of not guilty as to both charges and the State offered evidence tending to establish the following:

On 13 January 1973 at about 10:30 p.m. an unidentified man came to the home of Lawrence Odell Morrison and at gunpoint forced Morrison to get into a waiting vehicle in which the defendant was sitting. Defendant, who was known to Morrison because he had married Morrison's stepson's daughter, ordered Morrison to remain silent and the three men departed in the car. After driving for approximately eight miles, the defendant and his unidentified companion robbed Morrison of both his pocketbook which contained over five hundred dollars and his .38 pistol which he had with him. The three of them then returned to Morrison's house at which time the defendant and his accomplice forced Morrison and his wife to remain in the living room while they searched the bedroom for money. The unidentified man found about $3,000.00 in a dresser drawer and this sum along with approximately twelve dollars in change taken from Morrison's pocket was placed in a pillowcase. The defendant then ordered Morrison, at gunpoint, to drive him in Morrison's truck over the route which they had previously taken. After riding for a few miles, the defendant got out of the truck and told Morrison to drive on. Morrison returned home at about 12:30 a.m.

The defendant by way of cross-examination attempted to show that Morrison, who was the operator of a pool hall, was selling drugs at the pool hall and that the defendant was selling drugs to Morrison, who in turn sold them to individuals in the pool hall. It was not until Morrison tried to steal some drugs from the defendant that the alleged robbery occurred. The defendant attempted to establish through cross-examination that he was forced through fear and coercion to accompany the unidentified masked man in the alleged robbery and kidnapping and that the defendant was as much a victim of the unidentified man as was Morrison.

From a verdict of guilty as charged and a judgment thereon sentencing defendant to not less than twenty-five nor more than thirty years for the kidnapping charge and not less than fifteen nor more than twenty years on the robbery count, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General John R. Matthis for the State.

Stewart, Lowe and Funderburk by Jim R. Funderburk and Childers and Fowler by Henry L. Fowler, Jr., for defendant appellant.

HEDRICK Judge.

[1, 2] Defendant by his first assignment of error contends that the trial court erred in denying his motion to require the State to elect between the offenses of armed robbery and kidnapping; and defendant submits in support of this argument that the case at bar is controlled by *State v. Dix,* 282 N.C. 490, 193 S.E. 2d 897 (1972). In *State v. Dix, supra,* the Supreme Court by a 5 to 2 decision, determined that there was not a sufficient asportation to constitute the crime of kidnapping where defendant forced a jailer at gunpoint to go from the front door of the jail to the jail cells, a distance of some 62 feet, compelled the jailer to release two prisoners, and then locked the jailer in one of the jail cells. In the instant case the evidence introduced by the State revealed that Mr. Morrison was forced from his residence at gunpoint and transported by car for a distance of approximately eight miles at which point the defendant and his accomplice robbed Morrison. It is our view that a comparison between the present case and *State v. Dix, supra,* renders the latter case readily distinguishable from the case *sub judice* and that the construction of *State v. Dix* which defendant desires us to adopt is much too broad. Clearly, the asportation of Morrison exceeded the incidental restraint present in *State v. Dix, supra,* and the risk of harm to Morrison was over and above that necessarily present in the robbery itself. The decisions of this jurisdiction define kidnapping as the unlawful taking and carrying away of a person against his will by force, threats, or fraud, *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971) ; *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971), cert. denied, 404 U.S. 1023 (1972) ; *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118 (1962) ; and the evidence presented in this case fully satisfies the requirements of this definition as well as

the definition of armed robbery. Thus, the trial court correctly denied defendant's motion to require the State to elect between the two charges.

[3] Next, the defendant maintains that the trial court committed error in denying defendant's motions to suppress the testimony of two witnesses, namely Morrison and his wife. These motions to suppress were predicated upon defense counsel's belief that both Morrison and his wife had given written statements to the police; however, the record reveals that the statements made by Mr. Morrison and his wife were not in the form of written statements as implied by defendant but rather their comments were transcribed by an investigating officer and placed in a police report. A copy of this police report was furnished to defendant's counsel; therefore, the trial court did not err in refusing to suppress the testimony of Morrison and his wife. Similarly, defendant asserts that it was error to allow the introduction into evidence of a photograph of Mr. Morrison (the purpose of the photograph being to illustrate the testimony of Mr. Morrison relating to a pistol blow he received across the nose) when defendant had not first been supplied a copy of this photograph as required by a prior court order. Assuming *arguendo* that it was technical error to allow the admission of such evidence, the defendant has failed to demonstrate how the introduction of this photograph has prejudiced him. Thus, this assignment of error is overruled.

[4] Defendant further asserts that it was error for the trial judge in his charge to the jury to refer to Mr. Morrison as "the victim" as this constituted an expression of an opinion on the evidence and as such was in violation of G.S. 1-180. It is true that the charge does contain the language complained of; however, the trial judge also at one point included within the charge the words "the victim—the alleged victim." It is a well-established principle that the charge will be construed contextually and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965); *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1963). Also, "[i]f the charge presents the law fairly and clearly to the jury, the fact that some expressions standing alone might be considered erroneous will afford no ground for reversal." *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970). This assignment of error is governed by the foregoing principles; hence, it is without merit.

We have carefully reviewed defendant's remaining assignments of error, including those related to the charge, and find them to be nonmeritorious. The defendant was afforded a fair trial, free from prejudicial error.

No error.

Judges BRITT and CARSON concur.

ANGELUS CHAMBERS RICKENBAKER v. THOMAS C. RICKENBAKER

No. 7426DC239

(Filed 17 April 1974)

1. **Appeal and Error § 41— record on appeal — chronological order required**

Rule 19 of the Rules of Practice in the N. C. Court of Appeals expressly provides that on appeal the proceedings of the trial court and all documents be set forth in the record in the order of time in which they occurred.

2. **Divorce and Alimony §§ 18, 23— award of alimony and child support — factors to consider**

Trial court erred in awarding alimony and child support based upon the income of defendant husband without also considering the property, earnings, earning capacity, condition, and accustomed standard of living of both parties.

3. **Divorce and Alimony § 18— alimony and child support — award of attorney fees error**

Trial court in an alimony and child support case erred in awarding attorney's fees in the absence of evidence and findings of fact as to reasonable attorney's fees.

APPEAL by defendant from *Robinson, District Judge,* at the 4 September 1973 Session of MECKLENBURG District Court.

Heard in the Court of Appeals 14 March 1974.

This is a civil action, instituted by the plaintiff, Angelus Chambers Rickenbaker for permanent alimony, alimony pendente lite, custody of the minor children of the marriage, child support, possession of the home, possession of an automobile, attorney's fees, and a temporary restraining order restraining the defendant from disposing of a condominium located at

Wrightsville Beach, North Carolina. After a hearing on the matter, the trial court entered an order entitled "Judgment" awarding the plaintiff Eight Hundred Dollars ($800.00) per month in alimony pendente lite, and Fourteen Hundred Dollars ($1,400.00) per month child support, Seven Hundred Dollars ($700.00) per month for each minor child. The children at the time were three and five years old respectively. The order denominated "Judgment" also awarded plaintiff custody of the children, possession of the family home, possession of a Pontiac automobile, and attorney's fees of Thirty-Five Hundred Dollars ($3,500.00). The trial court also restrained defendant from disposing of the condominium at Wrightsville Beach, North Carolina. From said order, the defendant appealed.

DeLaney, Millette & DeArmon by Ernest S. DeLaney, Jr., for plaintiff appellee.

Warren C. Stack for defendant appellant.

CAMPBELL, Judge.

[1] Once again this Court is forced to point out that Rule 19 of the Rules of Practice in the North Carolina Court of Appeals expressly provides that on appeal the proceedings of the trial court and all documents be set forth in the record in the order of the time in which they occurred. The record in this case did not do this and is incorrect. However, we have decided to reach the merits.

The defendant contends that there was insufficient evidence to support the award. The trial court made findings of fact as to the defendant's income in 1971 being $103,327.79, with an after-tax disposable income of $64,000.00. In the year 1972 defendant had an adjusted gross income of $118,644.93 and an after-tax disposable income of $71,000.00. During the year 1973, through August, defendant had a gross income of $54,084.61. In other findings of fact the trial court stated:

> "22. The plaintiff and the minor children are residing at the home on Twiford Place, Charlotte, North Carolina, where the parties own a home as tenants by the entirety.
>
> 23. The plaintiff is entitled to have the aforesaid home sequestered for the use of her and the minor children of the marriage.
>
> * * * *

25. The defendant will be able to provide amply for the maintenance and support of the plaintiff and the minor children pending the trial of this matter.

* * * *

27. There has been no testimony concerning the financial needs of the defendant.

28. The plaintiff has testified to financial needs over Three Thousand Dollars ($3,000.00) per month, but that some of the items she has testified to should not be covered under an awarded temporary alimony, to wit: replacement of furniture, contribution to church and charity, repairs to the house and yard, repairs of appliances, replacement of appliances, and a substantial portion of vacations and camps for the children.

29. The defendant has been primarily been [sic] in charge of paying bills for the household and he testified that from January 1, 1973, to the date of this trial that he had paid an average of Fourteen Hundred Twenty-five Dollars ($1425.00) per month during this period of time.

30. That a reasonable subsistence for the plaintiff and the minor children would be Twenty-two Hundred Dollars ($2200.00) per month, allocated as Fourteen Hundred Dollars ($1400.00) child support and Eight Hundred Dollars ($800.00) for alimony. From this the plaintiff is to pay the home mortgage.

31. The plaintiff is presently driving a Pontiac automobile owned by the defendant and the plaintiff needs the same for herself and the two minor children and the plaintiff should be given possession and use of the aforesaid automobile."

Among the conclusions of law found by the trial court were:

"1. That the plaintiff is the dependent spouse and the defendant is the supporting spouse.

2. That the defendant is able to pay the amount of alimony and child support herein ordered pendente lite and attorney's fees.

3. That the home of the parties on Twiford Place and the Pontiac automobile presently used by the plaintiff should

be sequestered for the use of the plaintiff and the minor children of the marriage."

[2] Plaintiff contends that the award of alimony and child support is within the sound discretion of the trial judge and should not be disturbed except for abuse of discretion or error of law. *Harper v. Harper,* 9 N.C. App. 341, 176 S.E. 2d 48 (1970); *Swink v. Swink,* 6 N.C. App. 161, 169 S.E. 2d 539 (1969). However, the facts required by the statutes must be alleged and proved to support an order for subsistence pendente lite. *Rickert v. Rickert,* 282 N.C. 373, 193 S.E. 2d 79 (1972). In the case at bar it is clear that the trial court did not consider the needs of the wife and children and based his award upon the income of the husband. A mere finding of the husband's ability to pay is insufficient. *Dawson v. Dawson,* 211 N.C. 453, 190 S.E. 749 (1937); *Martin v. Martin,* 263 N.C. 86, 138 S.E. 2d 801 (1964). The only evidence of the needs of the plaintiff and children came from defendant and was significantly less than the amount awarded. The trial court should have considered the property, earnings, earning capacity, condition, and accustomed standard of living of both parties in determining the amount of alimony and child support to be awarded. G.S. 50-16.5(a); *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218 (1966); *Sprinkle v. Sprinkle,* 17 N.C. App. 175, 193 S.E. 2d 468 (1972). The facts required by the statutes have not been proved and the order must be vacated and remanded for further proceedings in accordance with this opinion. We note also that the automobile was awarded the plaintiff without any evidence that plaintiff needed the automobile.

[3] As to attorney's fees, the trial court made the following unsupported finding of fact.

> "33. The plaintiff has been represented by counsel in this matter from January 1973 until the date of this trial and that counsel has performed valuable, legal services for the plaintiff. The hearing in this matter consumed the better part of two (2) days of court and that the plaintiff's attorney has conferred on several occasions and exchanged correspondence with the defendant and had counseled the plaintiff. The matter involved was complex and that an attorney's fee in the amount of Thirty-five Hundred Dollars ($3500.00) for services to date are reasonable."

The order awarding $3500.00 in attorney's fees was entered 7 September 1973, whereupon the defendant appealed. On 21 Sep-

tember 1973 plaintiff's attorney filed an affidavit with the trial court estimating he had spent 60 hours working on the case. At the time of the entry of the order, there was no evidence before the trial court as to the nature and scope of the legal services rendered and the skill and time required. The lack of any evidence and findings of fact as to reasonable attorney's fees and the absence of any evidence as to the reasonable worth of attorney's fees requires that the award be vacated and remanded for further proceedings in accordance with this opinion.

Error and remanded.

Judges HEDRICK and BALEY concur.

MAURICE KAMP, DIRECTOR, MECKLENBURG COUNTY BOARD OF HEALTH v. JAMES CARROLL BROOKSHIRE AND ACCESS DEVELOPMENT CORP., A CORPORATION

No. 7426SC34

(Filed 17 April 1974)

1. **Appeal and Error § 41— record on appeal — order of proceedings**

Defendants' record on appeal which was jumbled and out of order did not comply with Rule 19(a) of the Rules of Practice in the N. C. Court of Appeals which requires that proceedings should be set forth in the record on appeal in the order in which they occurred.

2. **Health § 3; Nuisance § 4— improper sewage disposal — sufficiency of evidence to support findings and orders**

Evidence was sufficient to support the trial court's findings of fact and these in turn supported its orders that defendants not be allowed to connect to the city-county sewer system, that defendants discontinue use of their septic tank unless the system were so utilized as to prevent the discharge of waste or effluents to the surface of the ground or into the Taggart Creek tributary, and that defendants not be allowed to drill a new well on the premises in question.

APPEAL by defendants from *Snepp, Judge,* at the 11 June 1973 Civil Nonjury Session of MECKLENBURG Superior Court.

Heard in the Court of Appeals 12 March 1974.

This is a civil action wherein the plaintiff sought an injunction to prevent the defendants from operating an overloaded septic tank system which was discharging waste to the surface

of the ground and emptying into a tributary of Taggart Creek. Defendant Brookshire had on his property a septic tank system designed to accommodate 30 mobile homes. The County Board of Health had issued Mr. Brookshire a permit authorizing the servicing of 30 mobile homes by his septic tank system. At the time of the bringing of this action the system was serving 53 mobile homes and 16 businesses.

The pump in Mr. Brookshire's septic tank system which propels the sewage directly into the Taggart Creek tributary remained broken on numerous occasions from 1968 to the time of the instigation of this action and in fact was broken at that time. The expert for the County Board of Health testified that Mr. Brookshire's system removed about 11% of the waste from the effluent being discharged into the Taggart Creek tributary. The Rules and Regulations of the Mecklenburg County Board of Health require 98% removal to dump any kind of waste into streams in Mecklenburg County. Defendants' well, which served the entire mobile home park, was located 82 feet from the edge of his nitrification field in violation of the Mecklenburg County Board of Health Rules and Regulations, which require a minimum distance of 100 feet.

The history of this case goes back to 1968. On four dates, 23 April 1968, 3 April 1969, 7 August 1970, and 9 November 1970, the defendants, by registered mail, were notified that their septic tank system was not functioning properly, that the system was creating an unsanitary condition and were ordered to remedy the situation. No action was taken by Mr. Brookshire to alleviate the problem. Mr. Brookshire was asked to appear before the Mecklenburg County Water Pollution Control Advisory Committee three times before he finally attended a committee meeting. Mr. Brookshire met with the committee on four occasions, 12 January 1971, 9 February 1971, 13 April 1971, and 11 May 1971, to discuss the pollution problem and possible remedies. Mr. Brookshire was ordered to abate his sewage disposal problems and to make plans for connecting to the City of Charlotte sewer system. No action was taken by Mr. Brookshire to alleviate the problem or to connect to the city system.

In February, 1972 Mr. Brookshire was convicted in Criminal District Court for failure to maintain a sanitary system of sewage disposal so as to prevent the seepage of sewage and effluents to the surface of the ground in violation of G.S. 130-160

and the Rules and Regulations of the State Board of Health and the Mecklenburg County Board of Health.

This action was filed on 1 May 1973 and a hearing ordered at which the defendants must show cause why a preliminary injunction should not be entered. On 15 June 1973 the show cause hearing was held before Judge Snepp, and the plaintiff presented the above evidence, plus a great deal of technical data. On 21 June 1973 Judge Snepp found that defendants had failed to show cause why they should not be enjoined from continuing the operation of their septic tank system and water supply system, allowed the preliminary injunction, and ordered the parties to appear before him the next day to propose a timetable for making the necessary engineering studies and connecting defendants to the City of Charlotte sewer system.

On 26 June 1973 the defendants filed a motion seeking to have the trial court declare that the 12-inch pipe that the Charlotte-Mecklenburg Utility Department was insisting that they install was too costly ($129,940.00) and would require greater time (280 days) than it would take to construct a sewer line to tap onto the existing Mulberry Motel 8-inch pipe. The motion also asserted that the pump was now in working order.

On 27 June 1973, pursuant to the timetable hearing on 22 June 1973, Judge Snepp entered an order finding that defendants had presented no evidence in support of their motion to be allowed to connect to the city-county sewer system along Mulberry Road. They gave no evidence of having discussed the matter with the Charlotte-Mecklenburg Utility Department to determine the feasibility of such request nor did they present any timetable or preliminary engineering studies or estimates of construction cost and time of construction. The order denied the motion and ordered the defendants to discontinue the use of their septic tank system unless the system were so utilized as to prevent the discharge of waste or effluents to the surface of the ground or into the Taggart Creek tributary. This order was stayed on appeal pending certain conditions. In open court, the defendants, who had requested permission to delay appealing the 21 June 1973 order until after the 22 June 1973 hearing and their motion of 26 June 1973, appealed from the orders of 21 June 1973 and 27 June 1973 and the denial of their motion.

On 12 July 1973 defendants filed their answer to the complaint and a motion to strike a paragraph of the complaint. On 1 August 1973 the defendants filed a motion for an order allow-

ing a new well to be drilled on the same premises because the existing well which served 65 families and 16 businesses was inadequate. On 6 August 1973, Judge Snepp entered an order denying the motion upon the finding that defendants had failed to comply with the requirements prescribed by the General Statutes of North Carolina, the North Carolina State Board of Health, the North Carolina Department of Water and Air Resources, and the Mecklenburg County Board of Health for application of a permit to construct or modify a public water supply system in that the defendants had not filed proper applications with the various agencies. From this order, defendants appealed, and the appeal was heard along with their previous appeal involving the same case.

Ruff, Perry, Bond, Cobb, Wade & McNair by Hamlin L. Wade for plaintiff appellee.

Myers & Collie by Charles T. Myers for defendant appellants.

CAMPBELL, Judge.

[1] Rule 19(a) of the Rules of Practice in the Court of Appeals of North Carolina clearly states that in the record on appeal the "proceedings shall be set forth in the order of the time in which they occurred, and the processes, orders, and documents included in the record on appeal . . . shall be arranged to follow each other in the order that they were filed." The record brought up by defendant appellants is jumbled, out of order, and does not comply with our rules.

[2] At the show cause hearing, the evidence was as set out above. Defendants put on no evidence to the contrary. The trial judge's findings of fact were supported by competent evidence, and the findings of fact support the judgment entered. Defendants' assignments of error are all without merit. We find no error.

No error.

Judges HEDRICK and BALEY concur.

CHADBOURN, INC. A CORPORATION v. DANIEL KATZ AND BREVARD REALTY COMPANY, INC., A CORPORATION

No. 7426SC236

(Filed 17 April 1974)

Process § 9— breach of contract — nonresident individual — minimal contact — process by registered mail

A contract executed in this State for the sale of realty located in this State constitutes sufficient minimal contact upon which the courts of this State may assert *in personam* jurisdiction over a nonresident individual in an action for breach of the contract, and service of process by registered mail, return receipt requested, at the defendant's New York address was a proper means of acquiring personal jurisdiction over the defendant. G.S. 1-75.4(6)(a); G.S. 1A-1, Rule 4(j)(9).

APPEAL by defendant Daniel Katz from *Clarkson, Judge,* 22 October 1973 Session of Superior Court held in MECKLENBURG County. Argued in the Court of Appeals 13 March 1974.

Plaintiff, Chadbourn, Inc. (Chadbourn), is a North Carolina Corporation. Defendant, Daniel Katz (Katz), is a citizen and resident of New York.

The complaint contains two claims for relief. The first claim, seeking specific performance, alleges the execution of a contract between the parties on 24 July 1973, wherein Katz agreed to purchase from Chadbourn realty located in Charlotte, North Carolina, at a price of $350,000.00, with $25,000.00 down payment and $112,000.00 in cash payable at the closing, and the balance of $213,000.00 to be evidenced by promissory note secured by a purchase money deed of trust. The complaint further alleges that Katz informed Chadbourn that the contract had been assigned to Brevard Realty Company, Inc. (Brevard), and that conveyance should be to Brevard. Tender of the deed and other documents specified in the contract was made by Chadbourn to Katz who refused to accept tender or perform.

The second claim for relief alleges pertinent portions of the first claim for relief and prays in the alternative for the recovery of damages for expenses incurred, broker's fees, and loss of benefit of the bargain, in the amount of $135,000.00.

Service of process was completed by registered mail to the defendant in New York on 23 August 1973.

Katz, pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, filed a motion to dismiss the action, to quash

the return of service of summons by substituted service on the grounds that he was a nonresident of North Carolina and had not been properly served with process.

The trial court denied defendant's motion to dismiss. Defendant appealed from the issue of denial of his motion.

Helms, Mulliss & Johnston, by E. Osborne Ayscue, Jr. and C. Marcus Harris, for plaintiff-appellee.

Waggoner, Hasty & Kratt, by William J. Waggoner, for defendant-appellant.

BROCK, Chief Judge.

After argument of the appeal in this Court, plaintiff filed a motion to amend its complaint by deleting its claim and prayer for specific performance of the contract. That motion has been allowed by separate order.

Defendant argues that the trial court erred in denying defendant's motion to dismiss under Rule 12. Defendant contends that the trial court did not acquire jurisdiction over defendant in an *in personam* action because defendant was not personally served with process.

G.S. 1-75.4(6)(a) provides: "A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

"(6) Local Property.—In any action which arises out of:

a. A promise made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; . . . . "

Plaintiff's complaint sufficiently alleges an agreement between the parties for Katz to *acquire* and plaintiff to *dispose* of real property in North Carolina, a tender of the deed and related documents specified in the agreement, and a failure of defendant to perform as set forth in the agreement.

G.S. 1A-1, Rule 4 (j)(9) provides: "In any action commenced in a court of this State having jurisdiction of the subject

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

(9) Any party that cannot after due diligence be served within this State in the manner heretofore described in this section (j), or that is not an inhabitant of or found within this State, . . . , service upon the defendant may be made in the following manner:

"b. Any party subject to service of process under this subsection (9) may be served by mailing a copy of the summons and complaint, registered mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the addressee, . . . "

In *Trust Company v. McDaniel,* 18 N.C. App. 644, 197 S.E. 2d 556, this Court, in summarizing the holdings of *International Shoe Company v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, *McGee v. International Life Insurance Company,* 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199, and *Hanson v. Denckla,* 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228, held that " . . . a single contract executed in North Carolina or to be performed in North Carolina may be a sufficient minimal contact in this State upon which to base *in personam* jurisdiction, with respect to the parties so contracting." The contract for the sale of real property executed in North Carolina concerning real property in North Carolina was sufficient minimal contact in this case on which to base *in personam* jurisdiction.

Service of process was made upon defendant at defendant's address by registered mail, return receipt requested, in accordance with G.S. 1A-1, Rule 4(j) (9) (b).

We are of the opinion that the trial court has jurisdiction over the defendant by reason of the contract to convey land situated in North Carolina; that substituted service of process by registered mail, return receipt requested, was a proper means of acquiring personal jurisdiction over defendant; and that the requirements of due process and notice were afforded the foreign defendant by the substituted service of process in accordance with the North Carolina General Statutes.

No error.

Judges MORRIS and CARSON concur.

BENJAMIN LEWIS BARNES, BY HIS GUARDIAN AD LITEM, MRS. JAMES UNDERWOOD, AND FLOYD P. BARNES v. CURTIS McGEE, THE YOUNG MEN'S CHRISTIAN ASSOCIATION (Y.M.C.A.), AND THE GENERAL GREENE COUNCIL BOY SCOUTS OF AMERICA

No. 7418SC98

(Filed 17 April 1974)

1. **Judgments § 36— judgment in favor of employee — action against employer**

A judgment on the merits in favor of an employee precludes any action against the employer where the employer's liability is purely derivative.

2. **Judgments § 36; Rules of Civil Procedure § 41— voluntary dismissal with prejudice as to employee — action against employer**

In an action against a Y.M.C.A. and its employee to recover for injuries allegedly caused by negligence of the employee while he was acting as the servant of the Y.M.C.A., a judgment of voluntary dismissal with prejudice as to the employee was a judgment on the merits and precluded plaintiff from proceeding against the Y.M.C.A. G.S. 1A-1, Rule 41(a)(2).

APPEAL by plaintiffs from *Lupton, Judge,* 11 June 1973 Civil Session of Superior Court held in GUILFORD County.

Plaintiffs filed their complaint on 22 May 1972 to recover for damages arising out of an accident which occurred on 23 May 1969. Plaintiffs contended that the minor plaintiff was injured by the negligence of defendant McGee while McGee was acting as the servant of defendant Y.M.C.A. within the course and scope of his employment. At the close of all the evidence, defendant Y.M.C.A.'s motion for directed verdict was granted. On 15 June 1973, judgment was entered dismissing the action as to the Y.M.C.A. Defendant McGee's motion for directed verdict was denied. In open court plaintiffs announced that they submitted to a voluntary dismissal of their claim against defendant McGee. Thereafter, on 30 July 1973, the following judgment was entered:

> "THIS CAUSE COMING ON TO BE HEARD upon the motion of the plaintiffs for the entry of an order allowing plaintiffs to submit to a voluntary dismissal without prejudice as to the defendant Curtis McGee pursuant to G.S. 1A-1, Rule 41(a)(2), Rules of Civil Procedure; and it appearing to the Court that this case was duly calendared for trial and called for trial at the June 11, 1973 Civil Session of Superior

Court of Guilford County, Greensboro Division, and at the close of all the evidence and after the defendant The Young Men's Christian Association had made its motion for a directed verdict and after the said defendant's motion for a directed verdict was granted, the plaintiffs, in open court, announced to the Court that they wanted to submit to a voluntary dismissal of the action as to the defendant Curtis McGee; that at that time, the undersigned judge discussed with the attorney for the plaintiffs the effect of such a voluntary dismissal, at which time the attorney for plaintiffs gave the plaintiffs' reasons for wanting to submit to a voluntary dismissal, *i.e.*, among other things, that the defendant Curtis McGee was judgment proof; that at that time the plaintiffs understood that a dismissal of the action as to the defendant Curtis McGee might be with prejudice; that the Court allowed the plaintiffs to submit to a voluntary dismissal of the action as to the defendant Curtis McGee, dismissed the jury which had been empaneled to try the issues and, thereafter, signed the judgment, which appears of record, pertaining to the defendant The Young Men's Christian Association; that before the session adjourned, the undersigned judge instructed the attorney for plaintiffs to prepare a judgment of voluntary dismissal of the action as to the defendant Curtis McGee; that after the Court adjourned, the plaintiffs moved the Court to allow the plaintiffs to submit to a voluntary dismissal without prejudice as to the defendant Curtis McGee; and after having considered the plaintiffs' motion, the Court was of the opinion that the motion for the entry of an order allowing such dismissal to be without prejudice should be denied:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs' motion for the entry of a judgment of dismissal without prejudice as to the defendant Curtis McGee shall be and the same is hereby denied; and it is further ORDERED, ADJUDGED AND DECREED that the plaintiffs' motion for a judgment of dismissal as to the defendant Curtis McGee shall be and the same is hereby allowed; and it is further ORDERED that the plaintiffs' action against the defendant Curtis McGee is hereby dismissed with prejudice."

Plaintiffs appealed from the judgment allowing defendant Y.M.C.A.'s motion for a directed verdict but do not appeal from

the judgment entered 30 July 1973 dismissing, with prejudice, plaintiffs' action against McGee.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., and Vance Barron, Jr., for plaintiff appellants.

Henson, Donahue & Elrod by Perry C. Henson and Richard L. Vanore for defendant appellee.

VAUGHN, Judge.

[1] A judgment on the merits in favor of the employee precludes any action against the employer where, as here, the employer's liability is purely derivative. *Taylor v. Hatchery, Inc.*, 251 N.C. 689, 111 S.E. 2d 864; *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366.

[2] If the judgment dismissing plaintiffs' action against the employee, McGee, is a judgment on the merits, plaintiffs' right to proceed against the employer has been proscribed. In that event alleged errors in dismissing the action against the employer are without practical significance and should not be reviewed on appeal. *Kendrick v. Cain*, 272 N.C. 719, 159 S.E. 2d 33.

Except as provided by subsection (1) of Rule 41(a), no action or claim therein shall be dismissed at the plaintiff's instance except upon such terms as the judge may determine that justice requires. G.S. 1A-1, Rule 41(a)(2). In this case the judge determined that the dismissal was to be "with prejudice." "A judgment of dismissal with prejudice gives the defending party the basic relief to which he is entitled as to the claim so dismissed." 5 Moore, Federal Practice, § 41.05(2), p. 1066. A dismissal "with prejudice" is the converse of a dismissal "without prejudice" and indicates a disposition on the merits. It is said to preclude subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff. 46 Am. Jur. 2d, Judgments § 482, p. 645. "Dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata and is effective *not only on the immediate parties but also on their privies.*" (Emphasis added.) 9 Wright and Miller, Federal Practice and Procedure, § 2367, p. 185-86.

Plaintiffs elected to sue both the employee McGee and the employer. After all the evidence was in, they elected voluntarily

to dismiss the action against the employee and proceeded to do so with the knowledge that the dismissal could be with prejudice. It is clear that the dismissal of plaintiffs' claim against the employee "with prejudice" bars further prosecution of that claim against the employee and, insofar as he is concerned, is equivalent to a judgment on the merits in his favor. We are of the opinion that the dismissal should have the same result for the employer whose liability, if any, is derived solely from that of the employee.

There is authority contrary to our opinion in this case. *See, e.g., State of Maryland v. Baltimore Transit Co.*, 38 F.R.D. 340 (D. Md.) ; *Denny v. Mathieu*, 452 S.W. 2d 114 (Mo.). We do not, however, find the reasoning in those cases and others reaching similar results to be persuasive.

We think the words "with prejudice" are plain and should be given their plain meaning. If this practice is followed in the interpretation of all of our new Rules of Civil Procedure, much litigation can be avoided. It should not be necessary for the court in this and other cases to look behind the words "with prejudice" to determine the meaning of the court in its judgment of dismissal. The judge, in his discretion, could have dismissed the action on such other terms as he, in his discretion, determined that justice required.

For the reasons stated, the propriety of the directed verdict in favor of the employer is now academic. The appeal is, therefore, dismissed.

Appeal dismissed.

Judges BRITT and PARKER concur.

MELONESE O. HARRISON v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 738SC66

(Filed 17 April 1974)

Insurance § 38— disability — inability to engage in any occupation

Where an insurance policy issued by plaintiff provided that after fifty-two weeks following an injury, disability would be deemed total

disability only if it continuously prevented insured from engaging in any occupation or employment, and there was evidence from which the jury could legitimately find that during the period involved in this litigation plaintiff was physically and mentally qualified to engage in occupations at which she could earn wages comparable to the wages she had previously received as a waitress and cook, though because of the injury sustained she could not engage in those occupations, the trial court properly refused to set aside the jury verdict that plaintiff recover no indemnity payments during the period involved.

APPEAL by plaintiff from *Cowper, Judge,* 29 May 1972 Session of Superior Court held in WAYNE County.

This is a civil action to recover weekly indemnity payments which plaintiff alleged were due her under a disability insurance policy issued by defendant. On 4 May 1968 plaintiff, the insured under the policy, became disabled as a result of injuries to her right knee sustained in an automobile accident on that date. By its policy, which was in effect at the time, defendant agreed to make indemnity payments at the rate of $35.00 per week for the period of continuous total disability of the insured resulting directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while in, or through being struck by, an automobile, provided (1) such disability shall commence within 20 days after the accident, and "(2) any disability during the period of fifty-two weeks from its commencement shall be deemed total disability only if it shall continuously prevent the Insured from performing every duty pertaining to his occupation and (3) any disability after said fifty-two weeks shall be deemed total disability only if it shall continuously prevent the Insured from engaging in any occupation or employment for wage or profit."

Defendant paid plaintiff at the rate of $35.00 per week for the period from 4 May 1968 through 15 November 1969. In this action plaintiff seeks recovery of indemnity payments which she contends are due her for the period after 15 November 1969. Issues were submitted to the jury and answered as follows:

"1. Was the plaintiff made totally disabled as a result of her knee injury as alleged in the Complaint?

"Answer: Yes.

"2. If so, what period of continuous total disability of the plaintiff as defined in the insurance policy mentioned in the Complaint resulted from said injury?

"Answer: 11-15-69 to none."

Judgment was entered on the verdict that plaintiff take nothing by this action, and plaintiff appealed.

Sasser, Duke & Brown by John E. Duke for plaintiff appellant.

Dees, Dees, Smith, Powell & Jarrett by William W. Smith for defendant appellee.

PARKER, Judge.

By this appeal plaintiff brings forward but one assignment of error, that the court erred in refusing to grant her motion to set aside the verdict on the second issue on the grounds that the same was contrary to law and to the greater weight of the evidence. Such a motion is addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. *Glen Forest Corp. v. Bensch,* 9 N.C. App. 587, 176 S.E. 2d 851. No abuse of discretion is shown on the present record.

Prior to her injury plaintiff had been employed as a cook and as a waitress, occupations requiring prolonged standing or walking. She testified she had no training for any other type of work, and her evidence showed that the serious and painful injury to her right knee prevented her from engaging in any occupation which required that she be on her feet for extended periods of time. Defendant recognized her disability and made indemnity payments for the period of more than eighteen months following her injury. For the first fifty-two weeks of this period, defendant's policy required it to make indemnity payments to plaintiff if her disability prevented her from performing every duty *pertaining to her occupation.* Thereafter, and as applicable in this litigation, the policy provided that disability "shall be deemed total disability only if it shall continuously prevent the Insured from engaging in *any occupation or employment* for wage or profit." (Emphasis added.)

Plaintiff testified that her only claim for disability in this action was because of the injury to her knee, and her own doctor testified that she "should be able to do any type of work which does not require prolonged standing or walking." From this and other testimony the jury could legitimately find that during the period involved in this litigation plaintiff was physically and mentally qualified to engage in occupations at which she could earn wages comparable to the wages she had previously

received as a waitress and as a cook. The question was one for the jury to decide under proper instructions from the judge. *Bulluck v. Insurance Co.*, 200 N.C. 642, 158 S.E. 185. No exception was taken to the court's charge to the jury, which is not in the record on this appeal. It is presumed that the court correctly instructed the jury on every principle of law applicable to the facts of this case. *Long v. Honeycutt*, 268 N.C. 33, 149 S.E. 2d 579.

In denying plaintiff's motion to set aside the verdict on the second issue, the trial court committed

No error.

Judges BRITT and MORRIS concur.

SHIRLEY M. SAWYER v. JAMES H. SAWYER

No. 7426DC49

(Filed 17 April 1974)

1. **Divorce and Alimony § 20— absolute divorce decree — effect on appeal of denial of alimony pendente lite**

Plaintiff's appeal from an order denying alimony *pendente lite* is dismissed since all rights arising out of marriage cease after a judgment of absolute divorce, and plaintiff secured an absolute divorce from defendant while her appeal was pending.

2. **Divorce and Alimony § 23— child support — sufficiency of evidence to support findings**

Evidence with respect to defendant father's income and his ability to make child support payments, together with evidence of the average monthly household expenses for plaintiff, defendant, and the minor children while they resided together and evidence as to the needs of the minor children, was sufficient to support the trial court's award of child support.

3. **Divorce and Alimony § 23— attorney's fees for representation of infants**

Allowance of attorney's fees for the representation of the minor children in this child support case was authorized by G.S. 50-13.6.

APPEAL by both plaintiff and defendant from *Robinson, Judge*, 23 April 1973 Session of the District Court held in MECKLENBURG County.

This is a civil action, instituted by the plaintiff wife for alimony without divorce, custody and support of minor children, and an award of reasonable attorney fees. An order setting a hearing for consideration of alimony, support, and counsel fees, pendente lite, was served with the complaint. The defendant filed answer in which he charged the plaintiff with adultery.

Upon the hearing on 24 April 1973 both plaintiff and defendant were represented by counsel and submitted evidence in support of their respective contentions. After the hearing was concluded, the court found as a fact that plaintiff had committed adultery and, therefore, denied plaintiff alimony pendente lite. From this order, the plaintiff has appealed.

The court also granted custody of the three children to plaintiff and awarded child support in the amount of $825.00 per month plus a monthly car payment in the amount of $88.00, directed defendant to purchase a $600.00 color television set for use of the children, and set counsel fee for representation of the children in the amount of $750.00. From this portion of the order awarding custody, child support, and counsel fees, the defendant has appealed.

While plaintiff's appeal was pending, she secured an absolute divorce from defendant on 25 February 1974, and defendant has made a motion in this court to dismiss plaintiff's appeal.

James, Williams, McElroy & Diehl, by William K. Diehl, Jr., for plaintiff appellee.

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

BALEY, Judge.

PLAINTIFF'S APPEAL

All parties concede that on 25 February 1974 the plaintiff obtained an absolute divorce from the defendant on the ground of separation for the required statutory period.

[1] Under the terms of G.S. 50-11 all rights arising out of marriage shall cease after a judgment of absolute divorce with certain exceptions set out in the statute and not here applicable. Plaintiff had never received any award of alimony, pendente lite, and has secured her divorce on the ground of separation. The power of the court to make an award of alimony, pendente

lite, in this case has terminated. *Smith v. Smith,* 12 N.C. App. 378, 183 S.E. 2d 283; *Smith v. Smith,* 17 N.C. App. 416, 194 S.E. 2d 568. The appeal of plaintiff is moot, and the motion of defendant to dismiss is allowed.

DEFENDANT'S APPEAL

Defendant contends that there was no competent evidence to support the findings of fact of the trial court and that the facts found were not sufficient to justify the award of child support and counsel fees.

Findings of fact are conclusive on appeal if supported by competent evidence. *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649; *Andrews v. Andrews,* 12 N.C. App. 410, 183 S.E. 2d 843.

The amount allowed for the support of children by order of the trial judge will be disturbed only where there is gross abuse of discretion. *Coggins v. Coggins,* 260 N.C. 765, 133 S.E. 2d 700.

G.S. 50-13.4(c) provides:

> "Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case."

[2] There was ample evidence at the hearing to support the finding of the court that defendant had a net disposable income of approximately $1600.00 per month and that he was able to contribute the sum of $825.00 per month for the support of his three children and to arrange for the purchase of a television set and automobile for the use and benefit of his children. There was no exception to the finding of the court that the average monthly household expenses for the plaintiff, defendant, and minor children, while residing together, was approximately $1941.00—which clearly indicates the standard of living to which they were accustomed. The plaintiff testified in some detail concerning family expenses and the specific needs of the children as being in excess of $1590.00 per month and that the $713.00 being contributed monthly by the defendant was not sufficient to meet the necessary support of the minor children. The court found the facts in keeping with the evidence of the plaintiff

which was confirmed in some respects by that offered by defendant. These findings of fact provide a sufficient basis for the award of child support. The amount which defendant should pay to plaintiff for support of the minor children was a matter for the determination of the trial judge reviewable only in case of abuse of discretion—which does not here appear.

[3] The allowance of an attorney fee for representation of the minor children is authorized by G.S. 50-13.6. The present requirement in that statute that the court finds that there was a refusal to provide support by the party ordered to furnish support before any attorney fee can be ordered was not effective until July 1, 1973. We find no abuse of discretion by the court in the award of attorney fee.

In plaintiff's appeal, appeal dismissed.

In defendant's appeal, no error.

Judges CAMPBELL and HEDRICK concur.

SUE TAYLOR CREWS AND ROSCOE T. TAYLOR, JR., PETITIONERS v. THOMAS TAYLOR, RESPONDENT

No. 7415SC161

(Filed 17 April 1974)

1. **Wills § 32— "it is my desire" — mandatory words**

Where testator specifically required that property be partitioned among his three children, but he also stated that "it is my desire" that one of the children repay monies in the amount of $5000 before sharing in the partition of the real estate, testator's words with respect to repayment of the monies were mandatory and not precatory.

2. **Wills § 28— advancements — ordinary meaning given to term**

Where it is obvious that the testator was not attempting to use technical words, the words used will be given their natural and ordinary meanings; therefore, where it appears that testator did not mean to use the word "advancement" in its statutory form when referring to money given his son, the word is given its ordinary meaning.

APPEAL from *Winner, Judge*, 12 November 1973 Session of ORANGE County Superior Court. Argued in the Court of Appeals 20 February 1974.

The petitioners brought an action against the respondent alleging that the three are joint tenants of certain real property acquired by devise. They petitioned the court for a partition of said property. The respondent denied that Roscoe T. Taylor, Jr., was a tenant in common in that he had not paid the sum of $5,000.00 required to be paid by him before he could participate in the devised property. The petitioners filed a reply denying any indebtedness to the estate, alleging that the item of the will in question was precatory only, and requesting that the matters prayed for in the petition be granted. Thereupon, the petitioners moved for summary judgment and judgment on the pleadings. The trial court denied the motion for summary judgment and judgment on the pleadings and, on its own motion, awarded judgment on the pleadings to the respondent. It ordered the Clerk of Court to sell the land in question, deduct $5,000.00 from the share of Roscoe T. Taylor, Jr., and distribute the remaining funds to the petitioners and respondent. From the entry of said order, the petitioners gave notice of appeal.

Winston, Coleman and Bernholz by Alonzo Brown Coleman, Jr. for petitioner-appellant.

Graham and Cheshire by Lucius M. Cheshire for respondent-appellee.

CARSON, Judge.

Roscoe T. Taylor, Sr., devised to his wife all of his personal property in fee simple and all of his real estate to her for and during the term of her natural life. Upon her death he devised his real estate to his children, the petitioners and respondent in this matter. He directed that "[i]n the division of my real estate, I direct that the same be actually partitioned under the orders of the Court as provided by law." The fourth item of his will is the portion in controversy here. It reads as follows:

> FOURTH: I have advanced to my son, Roscoe T. Taylor, Jr., at various times $5,000.00, and it is my desire that he account to my Estate for this amount without interest and that the same be paid before he participates in the division of the real estate.

The question before us is whether this language is precatory or imperative.

[1] It is well settled in this jurisdiction that the intent of the testator is the primary consideration in determining a patent ambiguity in a will. *YWCA v. Morgan, Attorney General,* 281 N.C. 485, 189 S.E. 2d 169 (1972); *Bank v. Home for Children,* 280 N.C. 354, 185 S.E. 2d 836 (1972); 7 Strong's N. C. Index 2d, Wills, § 28, pp. 595-598. A patent ambiguity arises from the use of the words "it is my desire" as to whether these words are precatory or mandatory. They are susceptible of either interpretation depending on the connotation in which they are used. Under the circumstances of this will, we think it is clear that the testator intended them to be mandatory. The testator specifically required that the property be partitioned among his three children. Prior to such partition, however, he stated that he had made certain advancements to one child. He stated that the advancements should be accounted for without interest before the child could share in the partition of the real estate.

[2] The petitioners contend that the word "advancement" is a word of art, relates only to intestate succession, has a specific meaning, and thus does not apply here. While it is undoubtedly true that "advancement" ordinarily is a word of art having a specific meaning, it appears that the testator did not mean the word to be used in its statutory form. Where it is obvious that the testator was not attempting to use technical words, they will be given their natural and ordinary meanings. *Kale v. Forrest,* 278 N.C. 1, 178 S.E. 2d 622 (1971); *Elledge v. Parrish,* 224 N.C. 397, 30 S.E. 2d 314 (1944); 7 Strong's N. C. Index 2d, Wills, § 28, p. 603. It appears obvious in the present usage that the testator used the word "advancement" in an ordinary sense. Considering the will in its entirety, it seems that he wished item 4 to be imperative rather than precatory; and, therefore, the monies advanced to the petitioner must be accounted for before the property is partitioned.

The respondent in this matter did not move for summary judgment or judgment on the pleadings. *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971); *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425 (1970); G.S. 1A-1, Rule 56(b). Rather, the trial judge granted such on his own motion. This practice is not to be commended and was erroneous as applied to the situation in question. The petitioners denied any indebtedness existed between Roscoe T. Taylor, Jr., and the estate. This was a factual question to be answered appropriately. If he was not indebted to the estate, there would be no accounting re-

quired. If he was indebted to the estate for the monies given to him by the testator, the provisions of the will would require him to account for the $5,000.00 advanced to him or for whatever portion thereof has not been repaid.

The judgment on the pleadings is reversed and the cause remanded for a hearing.

Chief Judge BROCK and Judge MORRIS concur.

GLENN C. MORROW, EMPLOYEE-PLAINTIFF v. MEMORIAL MISSION HOSPITAL, EMPLOYER-DEFENDANT

— AND —

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, CARRIER-DEFENDANT

No. 7428IC53

(Filed 17 April 1974)

1. **Master and Servant § 56— hepatitis — failure to prove cause**

The evidence was insufficient to support a finding that plaintiff hospital employee contracted infectious hepatitis while unplugging a commode in the hospital.

2. **Master and Servant § 68— occupational disease — hospital employee — hepatitis**

The evidence was insufficient to show that infectious hepatitis is an "occupational disease" for a person employed as a master mechanic and acting sometimes as a plumber for a hospital.

APPEAL by defendants from an opinion and award filed 7 August 1973 by the North Carolina Industrial Commission. Argued in the Court of Appeals 19 March 1974.

Plaintiff was employed as a master mechanic by defendant, Memorial Mission Hospital. In February, 1971, he was asked to assist a fellow employee in unplugging a commode in a hospital room of the Memorial Mission Hospital. In the process of unplugging the commode, plaintiff and his co-worker employed an "electrical snake," a flexible metal cable with one end affixed to an electric motor, which, when engaged, turns the flexible cable so as to permit the loose end of the cable to burrow into the matter obstructing the passageway.

Plaintiff's evidence tended to show that while using the electrical snake, it tore the skin from the knuckles of his hands. Plaintiff testified that he became ill while cleaning the commode, that later the same evening his physical condition deteriorated, and that it became necessary to go to the emergency room of the hospital. Plaintiff was attended by a physician who prescribed medication for plaintiff. Three days later, plaintiff was admitted to the hospital and treated for hepatitis. Plaintiff was in the hospital for twelve days and lost approximately six weeks' work-time in convalescence.

Plaintiff filed a complaint contending that he contracted hepatitis while in the course of his employment, and that the disease contracted was a direct result of his injuries incurred in working with the electrical snake. Plantiff contends he is entitled to compensation and medical benefits under the North Carolina Workmen's Compensation Act.

A hearing was held before Deputy Commissioner Leake who awarded compensation to the plaintiff. On appeal to the Full Commission, the award of compensation was affirmed. Defendants appealed to this Court.

Cecil C. Jackson for plaintiff-appellee.

Hedrick, McKnight, Parham, Helms & Kellam, by Philip R. Hedrick and Edward L. Eatman, Jr., for defendants-appellants.

BROCK, Chief Judge.

Defendants contend the Commission erred in making findings of fact not based upon competent evidence, and entering conclusions of law not based upon findings of fact supported by competent evidence.

[1] Under Finding of Fact No. 4, the Commission made a finding based upon the testimony of Dr. John A. McLeod, Jr., a specialist in pathology. The Commission found that Dr. McLeod had expressed an opinion that plaintiff and his co-worker had both contracted infectious hepatitis.

In response to a hypothetical question, Dr. McLeod expressed his opinion that plaintiff *may* have contacted and become infected with hepatitis as a result of the process of unplugging the commode. Dr. McLeod distinguished infectious hepatitis, which plaintiff is alleged to have contracted, from

serum hepatitis, detailing the differences in incubation and in the methods of transmission. However, Dr. McLeod was unable to testify as to the *type* of hepatitis plaintiff had when hospitalized.

The finding of fact made by the Commission was not based upon competent evidence. There is evidence upon which a finding of fact could be made to the effect that plaintiff was admitted to the hospital and treated for hepatitis; however, the testimony of the expert witness, Dr. McLeod, is insufficient to make a finding that the hepatitis contracted was of the infectious type. Additional testimony by the expert witness detailed a variety of possibilities in which hepatitis could be contracted within the hospital itself. The evidence is insufficient to show that plaintiff, as an employee of the hospital, in the course of his employment, was routinely exposed to sources and carriers of either form of hepatitis. This assignment of error is sustained.

[2] The Commission, in Findings of Fact Nos. 5 and 6, also found that plaintiff contracted infectious hepatitis, and classified the disease as an "occupational disease." G.S. 97-53 enumerates diseases and conditions deemed to be "occupational diseases" under Chapter 97, Workmen's Compensation Act; hepatitis is not listed among the subdivisions. G.S. 97-53(13) does provide for:

> "[A]ny disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."

"A disease contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incidental to a particular employment, is an occupational disease, . . . "

"An 'occupational disease' suffered by a servant or employee, if it means anything as distinguished from a disease caused or superinduced by an actionable wrong or injury, is neither more nor less than a disease which is the usual incident or result of the particular employment in which the workman is engaged, as distinguished from one which is caused or brought about by the employer's failure in his duty to furnish him a

safe place to work." *Duncan v. Charlotte,* 234 N.C. 86, 66 S.E. 2d 22.

Evidence presented in this case is insufficient to show that infectious hepatitis is a disease which is characteristic of and peculiar to the occupation of a master mechanic acting, sometimes as a plumber, in the course of his employment for a hospital. Therefore, the findings of fact that infectious hepatitis is an occupational disease and that plaintiff was disabled as a result of the occupational disease arising out of and in the course of his employment, were not based upon competent evidence and must be vacated.

On this record the award is vacated and the cause is remanded to the Industrial Commission for entry of an award denying compensation.

Remanded.

Judges PARKER and BALEY concur.

IN THE MATTER OF THE CONTEMPT OF: TED G. WEST, ATTORNEY AT LAW

No. 7425SC235

(Filed 17 April 1974)

1. **Contempt of Court §§ 2, 3— direct and indirect contempt**

When contempt is direct, the court may take summary action to punish the offender, but the particulars of the offense must be specified in the record; when the contempt is indirect, the proper procedure is by order to show cause.

2. **Contempt of Court § 8— review of contempt orders**

While there is a right of appeal from an order of indirect contempt, there is no right of appeal from an order of direct contempt but review must be secured by application to another court for a writ of *habeas corpus* and petition for *certiorari* if no relief is there obtained.

3. **Contempt of Court § 4— failure of attorney to appear for trial — contempt for leaving presence of court — void order**

Where a criminal case was called for trial, defendant announced that he was represented by a certain attorney, and a member of the attorney's firm announced that the attorney was in another city inves-

tigating a murder case, order entered by the trial court summarily holding the attorney in contempt for leaving the presence of the court without permission was void *ab initio* where there was no finding that the attorney actually represented the defendant, there was no basis for a finding that the attorney was delivered a copy of the court docket or that he knew that a case in which he appeared was scheduled for trial, the record shows that the attorney was never in the actual presence of the court either before, during or after the proceedings, and there was no showing that the attorney was under any process or order of the court which required his presence before it.

APPEAL by contemner from order of *Falls, Judge,* entered at 26 November 1973 Session of Superior Court held in CALDWELL County.

The entire contempt proceedings of record are contained in the order of Judge Falls dated 6 December 1973, which is as follows:

"ORDER OF CONTEMPT (Filed 12-6-73)

"It appearing to the Court that the District Attorney called the case of State vs. Walt Watson, docket number 73 Cr 6901 and that the defendant upon the call to the bar announced that Mr. Ted West, Esqr., of the Caldwell County Bar represented him;

"That the Court inquired of Mr. Laird Jacobs, Esqr., a member of the firm of West & Groome, who announced that Mr. West is in Kannapolis, North Carolina, investigating a murder charge against some person unknown to him; that Mr. West was delivered a copy of this court docket at least ten days prior to the opening of this Court and that he knew or should have known that Mr. Walt Watson was on the docket for trial; that Mr. West did not advise the Court and did not get the Court's permission to leave the presence of this Court to go anywhere, particularly Kannapolis; that he did not advise his junior partner, Mr. Laird Jacobs, or anyone else to the Court's knowledge about this case;

"UPON THE FOREGOING the Court finds these acts of Mr. Ted G. West, in leaving the presence of the Court without any permission is contemptuous;

"It is ordered that Mr. Ted G. West be held in the custody of the Caldwell County Jail for contempt of this

Court to be purged only by posting a fine in the sum of $150.00 to the Clerk of this Court;

"This the 6th day of December 1973.

s/ B. T. FALLS, JR.
Judge Presiding"

Written notice of appeal from this Order was entered on 7 December 1973. Appeal entries were approved by Judge Falls on 12 December 1973, at which time a $500.00 appearance bond for contemner was adjudged sufficient.

Contemner appeals.

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

Wilson, Palmer & Simmons, by George C. Simmons III, for defendant appellant.

BALEY, Judge.

Proceedings for contempt are governed by Chapter 5 of the General Statutes of North Carolina and are classified as either "direct" or "indirect," depending upon whether they are committed within or beyond the presence of the court. *Galyon v. Stutts,* 241 N.C. 120, 84 S.E. 2d 822 (1954); *In Re Edison,* 15 N.C. App. 354, 190 S.E. 2d 235 (1972); *see* Snepp, *The Law of Contempt in North Carolina,* 7 Wake Forest L. Rev. 1.

To constitute direct contempt, the conduct does not have to occur in the courtroom, but "[a] direct contempt consists of words spoken or acts committed in the actual or constructive presence of the Court while it is in session . . . or during recess . . . which tends to subvert or prevent justice. An indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the court or interrupt, prevent, or impede the administration of justice." *Galyon v. Stutts, supra* at 123, 84 S.E. 2d at 824-25.

[1, 2] When the contempt is direct, the court may take summary action to punish the offender, but the particulars of the offense must be specified in the record. G.S. 5-5. When the contempt is indirect, the proper procedure is by order to show cause. G.S. 5-7; *Galyon v. Stutts, supra.* When the contempt is direct, there is no right of appeal, G.S. 5-2, and any review is

secured by application to another court for a writ of habeas corpus and petition for certiorari if no relief is there obtained. *In re Palmer,* 265 N.C. 485, 144 S.E. 2d 413 (1965). Where contempt is indirect, there is right of appeal. G.S. 5-2; *Cromartie v. Commissioners,* 85 N.C. 211 (1881).

Presumably the trial court here considered contemner in direct contempt of its authority and acted summarily; yet an appeal was granted and appeal entries made, which is the procedure for an indirect contempt. Regardless of how the matter has been considered, we take jurisdiction on appeal, and direct that the judgment be reversed.

[3] On this record, we are unable to determine any proper basis for the action of the court. There is no finding that Mr. West actually represented the criminal defendant whose case was called for trial, but only that the defendant "announced" that Mr. West represented him. There was no finding that Mr. West was in Kannapolis investigating a murder charge, but only that a member of his firm "announced" this supposed fact. There is no basis for any finding that Mr. West was delivered a copy of the court docket or that he knew that a case in which he appeared was scheduled for trial. In fact, the record shows affirmatively that contemner was never in the actual presence of the court either before, during, or after the proceedings. There is no showing that contemner was under any process or order of the court which required his presence before it, and certainly there could be no contempt for failure to be there. Since contemner was never before the court, he cannot be held for contempt for not securing permission to leave. There is nothing in the record which supports any conclusion that the court ever acquired jurisdiction over the person of the contemner in any way sanctioned by law. Without jurisdiction, any judgment imposed is void *ab initio. Marketing Systems v. Realty Co.,* 277 N.C. 230, 176 S.E. 2d 775 (1970).

The order of the trial court directing that Ted G. West be held in custody for contempt of court is reversed.

Reversed.

Chief Judge BROCK and Judge PARKER concur.

MARGARET P. HENSLEY v. JAMES T. HENSLEY

No. 7426DC277

(Filed 17 April 1974)

1. **Divorce and Alimony § 24— child custody proceedings — sufficiency of findings of fact**

Trial court's findings of fact in a child custody proceeding which were based on competent evidence will not be disturbed on appeal.

2. **Divorce and Alimony § 24— child custody order — changed circumstances required for modification**

The change in circumstances contemplated by G.S. 50-13.7(a) is a change affecting the welfare of the minor children, and the party seeking to have a custody order vacated has the burden of showing that circumstances have changed between the time of the order and the time of the hearing on his motion.

3. **Divorce and Alimony § 24— child custody order — changed circumstances — insufficiency of evidence**

Defendant failed to show a change of circumstances sufficient to warrant modification of a child custody order where the only changes he showed were that a half-brother moved out of the home where the child lived, and defendant had been attending school at the time of the original order but at the time of the motion to modify was working full time.

APPEAL from *Griffin, District Judge,* 19 February 1973 Session of MECKLENBURG County District Court.

This action for alimony without divorce and custody and child support was instituted in September 1969. On 21 May 1970, District Judge Abernathy entered an order granting temporary custody of the minor child of the marriage to the paternal grandmother, Mrs. Mildred Hensley, during the pendency of the action.

On 21 December 1971, the parties stipulated that the plaintiff take a voluntary dismissal of her alimony claim and that the only issue remaining for determination was the custody of the minor child, Windie Ann Hensley. On 7 February 1972, Judge Griffin entered an order awarding custody of Windie to Margaret P. Hensley (plaintiff).

Defendant, James T. Hensley, moved on 4 October 1972, that the court award him custody of Windie, and plaintiff was ordered to appear before Judge Griffin and show cause why the custody should not be awarded to defendant. After receiving the

testimony of the parties, Judge Griffin denied defendant's motion for custody. From the entry and signing of judgment, defendant appealed. Facts necessary for consideration of defendant's assignments of error will be set out in the opinion.

Bailey, Brackett and Brackett, by Allen A. Bailey, and Ervin, Horack & McCartha, by Woodard E. Farmer, Jr., and James M. Talley, Jr., for plaintiff appellee.

Francis O. Clarkson, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant first assigns error to the following findings of the court: That there has been no substantial change in the circumstances under which the child is being reared in the home than existed when the court entered its order on 7 February 1972; that plaintiff customarily left her daughter under the care and supervision of appropriate persons; that plaintiff was a fit person to have the care, custody, and control of the minor daughter. All these findings of fact are based upon competent evidence, and they will not be disturbed on appeal. *Music House v. Theatres,* 10 N.C. App. 242, 178 S.E. 2d 124 (1970).

G.S. 50-13.7(a) provides as follows:

> "An order of a court of this State for custody or support, or both, of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."

[2] The change in circumstances contemplated by G.S. 50-13.7(a) is a change affecting the welfare of the minor children. *Kenney v. Kenney,* 15 N.C. App. 665, 190 S.E. 2d 650 (1972); *In re Harrell,* 11 N.C. App. 351, 181 S.E. 2d 188 (1971). The party seeking to have the custody order vacated has the burden of showing that circumstances have changed between the time of the order and the time of the hearing on his motion. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967). This Court has held that in determining matters of child custody, the trial court is vested with wide discretion, and its decision should not be upset absent a clear showing of an abuse of discretion. *Jarman v. Jarman,* 14 N.C. App. 531, 188 S.E. 2d 647 (1972); *In re Custody of Mason,* 13 N.C. App. 334, 185 S.E. 2d 433 (1971).

[3] Defendant contends that he has shown changes in circumstances sufficient to warrant modification of the custody order. The son of plaintiff by a previous marriage had been living with plaintiff at the time of the original order, but he had moved into the home of plaintiff's parents at the time of the hearing on the motion to modify the order. Defendant had been attending school at the time of the original order; but at the time of the motion to modify, he was working full time. We cannot sustain the contention that such a showing of a change of circumstances mandates modification of the custody order. There was sufficient evidence presented from which the trial court was justified in finding that circumstances affecting the welfare of the child had not changed. The plaintiff, the minor child, and a half-sister of the minor child continued to live at the same residence; plaintiff continued to earn a living by babysitting for neighborhood children; plaintiff continued to be a good mother; and she had not conducted herself in any manner other than as a lady. As we have stated, the movant has the burden of showing that circumstances have changed; and the trial court had wide discretion in matters of child custody. No abuse of discretion has been shown, and the trial court's finding that circumstances have not changed will not be disturbed.

Defendant assigns error as well to the conclusions of law in Judge Griffin's order. A careful review of the record reveals that the conclusions are supported by the findings of fact, all of which are based on competent evidence. Findings of fact are conclusive if supported by competent evidence and will not be disturbed on appeal even though there is evidence contra. *Music House v. Theatres, supra.*

No error.

Chief Judge BROCK and Judge CARSON concur.

ELIZABETH BLUE BREWER AND RUSSELL BREWER v. ERNEST DAVIS

No. 7316DC86

(Filed 17 April 1974)

Fixtures; Landlord and Tenant § 20— removal of items at termination of lease

What constitutes a "trade fixture" attached to the demised premises by a tenant and removable by him at the end of his term, either as a matter of right or by special agreement, depends upon the facts of each particular case; however, the trial court in this case made factual findings as to the amount of damages due plaintiffs for items taken from the premises and for injury to the structure in the process of removal when there was not sufficient evidence to support those findings.

APPEAL by defendant from *Britt, Judge,* 11 September 1972 Session of District Court held in ROBESON County.

Civil action tried by the judge without a jury.

In 1962 defendant Davis rented from one Nye a building on the outskirts of Fairmont, N. C., in which Davis operated a restaurant. Nye died shortly thereafter, and Davis continued to rent from Nye's heirs until the summer of 1968, when plaintiffs, Elizabeth Blue Brewer and Russell Brewer, purchased the property. Plaintiffs took over occupancy of the building from Davis in July 1968, and this dispute arose out of the condition of the premises at that time.

When Davis began renting in 1962, the building contained an old style drink fountain, a hot water heater, and a kitchen sink. During the time of his occupancy, Davis made significant changes, adding removable shelves, counters, an ice maker, a carbonated water system, a water pump, and two window air-conditioning units, as well as replacing the hot water heater and kitchen sink. The Brewers also intended to operate a restaurant in the building, and while negotiating with the owner for its purchase in 1968 they also negotiated with Davis about purchasing from him the equipment he had placed in the building, but no agreement was reached. Davis subsequently left the premises and took with him the equipment which he had installed, in the process cutting the pipes which connected the hot water heater, sink and ice maker to the plumbing and removing all light bulbs and tubes from the lighting fixtures and the wiring which connected the air-conditioning units to the electrical sys-

tem. The Brewers entered the premises and made significant expenditures in readying the building for operation as a restaurant.

The Brewers brought this suit against Davis in the District Court of Robeson County, alleging that Davis had removed permanent fixtures which passed with the realty and had injured the building's floors, walls, plumbing and wiring in the process. Following trial without a jury, the trial judge entered judgment for the plaintiffs in the sum of $950.00, and defendant appealed.

Bruce W. Huggins for plaintiff appellees.

W. Earl Britt for defendant appellant.

PARKER, Judge.

What constitutes a "trade fixture" attached to the demised premises by a tenant and removable by him at the end of his term, either as a matter of right or by special agreement, depends upon the facts of each particular case. *Springs v. Refining Co.*, 205 N.C. 444, 171 S.E. 635. In the present case, the trial court found "the facts specially," as required by G.S. 1A-1, Rule 52(a)(1). Included were specific findings that certain of the items of equipment installed upon the premises by Davis during the period of his occupency as tenant remained his property and were subject to be removed by him, while other items were found by the court "to be attached in such a way as to become an integral part of the property and not subject to be removed by the defendant from the premises." Although the evidence was conflicting, there was some evidence to support the court's factual findings insofar as these related to which items were, and which were not, subject to be removed by Davis.

In other respects, however, the court's factual findings were not sufficiently supported by the evidence. Mrs. Brewer did testify to a long list of payments which the Brewers had made to various persons who had furnished goods or services to the Brewers after they had acquired ownership and possession of the premises. The list, however, failed to indicate what goods and services the various payees were being compensated for, and under examination by the court as well as by the parties, Mrs. Brewer was unable to furnish much clarification. Her

testimony was at best extremely confused. Though the testimony of Mr. Brewer was in some respects more precise, we find that the entire evidence was simply not sufficient to support the court's detailed factual findings as to the amount of damages awarded to the plaintiffs.

For failure of the evidence to support the factual findings as to the amount of damages awarded, the judgment is reversed and this cause is remanded for a

New trial.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. BILLY EUGENE CAPEL AND FRANKLIN DEWAYNE WRIGHT

No. 7326SC156

(Filed 17 April 1974)

Robbery § 5— armed robbery — failure to submit lesser included offense — no error

Where the State's evidence, if believed, would establish that defendants were guilty of a completed armed robbery, while defendants' evidence, if believed, would establish that they were not guilty of any crime, the trial court did not err in failing to charge the jury as to the lesser included offense of assault.

APPEAL by defendants from *Grist, Judge,* 7 August 1972 Session of Superior Court held in MECKLENBURG County.

Defendants were charged in separate bills of indictment, proper in form, with armed robbery of one James Trent. They pled not guilty. The State offered evidence tending to show that on the evening of 8 August 1971, Trent, the owner and operator of Rips Lounge in Charlotte, N. C., heard raised voices inside the Lounge, and, looking towards the commotion, saw defendant Franklin Wright holding a cocked revolver to a customer's head. Trent pulled out his own .32 caliber automatic pistol, walked over, and, pressing the pistol to Wright's ribs, took Wright's revolver and ordered him out of the Lounge. Wright left. Trent then asked Wright's friends, including defendant Billy Capel, to leave and ushered them to the door.

When Trent opened the door, however, Wright reappeared and pointed a 12-gauge shotgun at Trent's stomach, and Capel, at Wright's request, took Wright's revolver and Trent's pistol from Trent's person. Trent then grabbed the shotgun, which discharged into the ceiling, and the defendants fled. In the early morning of 9 August 1971, Wright was arrested in the living room of a residence on Academy Street, at which time Trent's pistol was discovered inside a record player located two feet from the chair Wright was sitting in. The jury found the defendants guilty as charged, and from judgment imposing prison sentences, defendants appealed.

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

T. O. Stennett and John Plumides for defendant appellants.

PARKER, Judge.

In their first assignment of error, defendants contend that the trial court erred in failing to charge the jury as to the lesser included offense of assault. The trial judge is required to submit to the jury a lesser included offense "only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545. A careful review of the present record fails to reveal any evidence suggesting the crime of simple assault. As summarized above, the State's evidence tended to show that Capel took Trent's revolver at Wright's request while Wright pointed a loaded shotgun at Trent's stomach. Defendants, sharply disputing this narrative, testified that Wright and Capel had been engaged in an argument with other persons while sitting at a table, but had drawn no guns; that Trent, taking Wright's holstered pistol, had made them leave the Lounge at gunpoint; that while they were leaving, one Michael Williams held a shotgun on Trent and made him put both revolvers on the table; that Trent hit the shotgun Williams was holding, causing it to discharge into the ceiling; and that Wright and Capel then left the Lounge, taking no guns with them. The jury was thus given two versions of events from which to choose, one describing armed robbery, one no crime at all. The State's evidence, if believed, would establish that defendants were guilty of a completed armed robbery. Defendants' evidence, if believed, would establish that they were not guilty of any crime. Through no reasonable selection of

evidence could the jury have found the defendants guilty of assault rather than either guilty as charged or not guilty. "Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice" to require submission to the jury of a lesser included offense. *State v. Hicks, supra.* Defendants' suggestion that the State's evidence would warrant a jury finding that defendants, when they assaulted Trent by disarming him at gunpoint, lacked the intent to steal requisite to conviction for armed robbery, is simply not warranted by the evidence in this case. *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194. Defendants' first assignment of error is without merit.

In their second assignment of error, defendants challenge the propriety of numerous questions asked by the solicitor upon cross-examination of defense witnesses. The challenged questions sought information either relevant to the crime at trial or proper for impeachment purposes, and none prejudiced defendants' right to a fair trial.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

FLEMING PRODUCE CORPORATION, A CORPORATION v. COVINGTON DIESEL, INC., A CORPORATION

No. 7429DC108

(Filed 17 April 1974)

1. **Appeal and Error § 30— broadside motion to strike testimony**

The trial court erred in striking testimony of a witness where the motion to strike failed to point out the specific portions of the testimony which were objectionable and some of the testimony was competent and some was incompetent.

2. **Appeal and Error § 36— preparation of record on appeal — duty of appellee**

While an appellant has the primary responsibility for the preparation of the record on appeal, an appellee has the responsibility of ascertaining that the record clearly sets forth things favorable to him that the appellate court is called upon to review.

3. **Negligence § 2— negligence arising from performance of contract**

Plaintiff's evidence was sufficient for the jury in an action to recover for damages to plaintiff's tractor allegedly caused by defend-

ant's breach of contract by failing to replace all hoses related to the motor when defendant overhauled the motor.

APPEAL by plaintiff from *Hart, Judge,* 28 August 1973 Session of District Court held in HENDERSON County.

In this action plaintiff seeks to recover for damages to its Mack tractor allegedly resulting from failure of defendant to make proper repairs. In its complaint, plaintiff alleged: On or about 3 February 1971, plaintiff employed defendant to overhaul completely the motor in its tractor and particularly to replace all hoses related to the motor. Approximately two weeks later, defendant advised plaintiff the work had been completed, returned the tractor to plaintiff, and was paid $1,609.28 by plaintiff for its services. Some 90 days later, while the tractor was being used in the regular course of operations, one of the hoses comprising the cooling system of the motor burst, resulting in damage to the motor. Plaintiff determined that the hose that burst had not been replaced by defendant. Because of defendant's breach of contract and the results aforesaid, plaintiff had to have the motor overhauled again at a cost of $2,518.89. Plaintiff asks for judgment in that amount.

At the conclusion of plaintiff's evidence, defendant moved that certain testimony be stricken, and the motion was allowed. Defendant then moved for directed verdict under G.S. 1A-1, Rule 50(a) on the ground that the evidence was insufficient to permit a recovery. That motion was allowed and plaintiff appealed from judgment dismissing the action.

Redden, Redden & Redden, by Monroe M. Redden and Monroe M. Redden, Jr., for plaintiff appellant.

Prince, Youngblood & Massagee, by Boyd B. Massagee, Jr., for defendant appellee.

BRITT, Judge.

Plaintiff's first assignment of error relates to the striking of testimony offered by plaintiff. The record discloses:

"At the conclusion of the evidence of witness Fred Fleming, witness for the Plaintiff, the Defendant moves the Court to strike such portions of his testimony as follows:

"1. The truck which was the subject of litigation was being operated in North Carolina and a hose in said truck

burst; that as a result, the truck motor heated up and was damaged in North Carolina.

"2. The hoses offered into evidence came off of said truck after the damage occurred.

"The grounds of said motion are as follows:

"1. The testimony above set out was promptly objected to by the defendant.

"2. Witness Fleming on cross-examination stated that his knowledge of the testimony complained of was based on what he was told by his driver or others not parties hereto, and that he remained in Florida during all matters complained of herein."

The record then discloses: "The Motion is allowed and said evidence is stricken."

[1] The assignment of error is sustained. Although the record on appeal contains a stipulation "that the evidence objected to, as indicated by the motion to strike on page 19, was timely made by the defendant," we are unable to identify the "portions" of Fleming's testimony alluded to in the motion to strike. The only specific objection appearing in the record to any part of Fleming's testimony is to the last question asked on redirect examination. Several parts of his testimony relate to the bursting of a hose, resulting in the motor heating up, and the tractor being in North Carolina at the time; some of the testimony is competent, some is incompetent. Fleming's testimony on cross-examination tended to show that George Everett was driving the vehicle in Raleigh, or ten miles south of Raleigh, at the time the hose burst and that the motor heated up immediately thereafter. Certainly, defendant does not contend that his motion to strike included testimony brought out on cross-examination.

[2] While an appellant has the primary responsibility for the preparation of a record on appeal, an appellee has the responsibility of ascertaining that the record clearly sets forth things favorable to him that the appellate court is called upon to review. If the parties are unable to agree on the record on appeal, provision is made for the trial tribunal to settle the record.

On the record before us in the instant case, we hold that defendant's motion to strike was broadside and that the court erred in allowing it. 7 Strong, N. C. Index 2d, Trial, § 15, 277-281 (1968).

[3] Plaintiff assigns as error the allowance of defendant's motion for directed verdict and the entry of judgment dismissing the action. This assignment of error is also sustained.

Considering the admissions in the pleadings and the evidence presented in the light most favorable to plaintiff, particularly in view of our sustaining the first assignment of error, we hold that the trial court erred in allowing defendant's motion for directed verdict and dismissing the action. No useful purpose would be served in summarizing the admissions and testimony here.

For the reasons stated, the judgment appealed from is

Reversed.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. DONALD EDWARD YOUNG

No. 749SC209

(Filed 17 April 1974)

1. **Criminal Law § 145.1— revocation of probation — findings required**

The principle stated in *State v. Foust*, 13 N.C. App. 382, that, before a suspended sentence or probation judgment can be revoked and the active sentence imposed, there must be a finding of fact from competent evidence that defendant had the financial capability to comply, or had failed to make a reasonable effort to make payments required by the terms of suspension or probation, was an inadvertent application in a criminal case of the rule in civil cases applicable to hearing on notice to show cause why a party should not be held in contempt of court for failure to make specified payments ordered by the court, and that principle is disapproved.

2. **Criminal Law § 145.1— probation revocation — burden of showing inability to make payments**

If, upon a proceeding to revoke probation or a suspended sentence, a defendant wishes to rely upon his inability to make payments as required by its terms, he should offer evidence of his inability to pay for consideration by the judge; otherwise, evidence establishing that defendant has failed to make payments as required by the judgment may justify a finding by the judge that defendant's failure to comply was wilful or without lawful excuse.

3. **Criminal Law § 145.1— probation revocation hearing — consideration of defendant's evidence**

Order revoking defendant's probation is vacated and the cause is remanded for a new hearing where the defendant offered evidence

which tended to show that he was unavoidably without the means to make payments as required by his probationary judgment, but the record does not show that the trial judge considered and evaluated the evidence.

APPEAL by defendant from *McLelland, Judge,* 24 September 1973 Session of Superior Court held in VANCE County. Argued in the Court of Appeals 14 February 1974.

The defendant pleaded guilty at the 2 March 1972 Session of Vance County Superior Court to the felony of embezzlement. He was sentenced to seven years in the State's prison by the presiding judge. This sentence was suspended, and the defendant was placed on probation for a period of five years under the supervision of the N. C. Probation Commission and its officers subject to certain rules and conditions set forth. The defendant was ordered to make restitution in the amount of $5,912.42 plus court cost of $75.00. He was directed by the probation officer to pay not less than $110.00 each month with the first payment to begin 1 April 1972. He was further ordered to report to the probation officer at certain times.

A bill of particulars and a report of the probation officer were served on the defendant on 27 September 1973. The bill of particulars alleged that the defendant had not made the payments as ordered and that the defendant had failed to appear before the probation officer in Massachusetts where his probation had been transferred. A hearing was conducted at which the probation officer and the defendant offered testimony. The probation officer testified that the defendant had made some payments but then stopped. He further testified that by paying $110.00 per month beginning 1 April 1972, the defendant would amortize the full amount of the indebtedness within four years and six months, leaving him approximately six months during the five years in which he was on probation that he could miss a payment and still repay the full amount within the five year period. The payments were made through July 1972, at which time they stopped. A probation violation order and capias to the State of Massachusetts were mailed on 9 April 1973. The defendant commenced making partial payments in June 1973, and continued up until the time of the hearing.

The defendant testified that he broke his ankle in the latter part of 1972 and had been unable to work regularly since that time. He testified that he had been hospitalized on several occa-

sions following that, spending a total of approximately three months in the hospital from the end of 1972 until the hearing in 1973. He further testified that he was under almost constant medication and medical supervision and was unable to work regularly during that period of time. The payments that he was able to make were as a result of some part-time work he was able to perform.

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

Perry, Kittrell, Blackburn and Blackburn, by Bennett H. Perry, Jr., for the defendant.

BROCK, Chief Judge.

Defendant excepts to the entry of the order of the trial court revoking the probation and ordering the sentence into effect. The defendant argues that the court did not make specific findings of fact and make conclusions of law based thereon. The court merely concluded that the defendant had willfully violated the terms and conditions of probation in failing to report and refusing to make regular payments. Defendant contends that more detailed findings of fact should have been made to allow appellate review of the trial court's order.

[1] The defendant relies upon the cases of *State v. Huntley,* 14 N.C. App. 236, 188 S.E. 2d 30 (1972) ; *State v. Neal,* 14 N.C. App. 238, 188 S.E. 2d 47 (1972) ; and *State v. Foust,* 13 N.C. App. 382, 185, S.E. 2d 718 (1971). *Foust* holds that, before a court can determine whether a defendant's failure to comply with the terms of a suspended sentence or probationary judgment, requiring the payment of money, was willful or without lawful excuse, two essential questions must be answered by the appropriate findings of fact. These questions are stated in *Foust* as follows: "Has he had the financial ability to comply with the judgment at any time since he became obligated to pay? If not, has his continued inability to pay resulted from a lack of reasonable effort on his part or from conditions over which he had no control?" *Huntley* and *Neal* relied upon the wording of *Foust* without full reconsideration of the principle there announced.

We have reviewed the following cases which seem to have been relied upon in Foust: *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476; *State v. Morton,* 252 N.C. 482, 114 S.E. 2d 115; *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376; *State v.*

Butcher, 10 N.C. App. 93, 177 S.E. 2d 924; and *State v. Caudle*, 7 N.C. App. 276, 172 S.E. 2d 231 *(rev'd on other grounds,* 276 N.C. 550, 173 S.E. 2d 778). We will not engage in a discussion of the principles applied in each of the cited cases. Suffice it to say, in our opinion, none of the cited cases directly supports the principle here under review, and the opinion in *Foust* does not specifically cite them as supporting that principle. It appears, therefore, that the principle stated in *Foust* that, before a suspended sentence or probation judgment can be revoked and the active sentence imposed, there must be a finding of fact, from competent evidence, that defendant had the financial capability to comply, or had failed to make a reasonable effort to make payments required by the terms of suspension or probation, was an inadvertent application in a *criminal* case of the rule in *civil* cases applicable to hearing on notice to show cause why a party should not be held in contempt of court for failure to make specified payments ordered by the Court. As we view it, there are sound reasons for a difference in the rules in civil cases and those in criminal cases. These reasons will be hereinafter discussed.

Obviously, if the court must answer questions such as required in *Foust* by findings of fact, there must be competent evidence to support the findings. If there must be such competent evidence, the defendant could cast the burden of producing such evidence upon the State by merely offering no evidence himself. He could not be compelled to testify.

The primary reason for a difference in the rule applicable to criminal cases is the fact that an order suspending a sentence or the entry of a probationary judgment is an act of grace. Defendant is not required to accept a suspended sentence or probationary judgment; but, if he does, he voluntarily assumes the obligations imposed.

On the other hand, an order entered in a civil action requiring one party to make specified payments to or for the benefit of another party is not an act of grace and the obligation is not voluntarily accepted. It is the enforcement of rights of one party against another. Therefore, before the obligated party should be adjudged in contempt of court for failure to make payments as required by the court's order, the movant should be required to make a showing by evidence that the obligated party possessed the means to comply during the period when he was in default, and the court must find as a fact that the obligated party

possessed the means to comply during the period when he was in default. See, *Cox v. Cox,* 10 N.C. App. 476, 179 S.E. 2d 194. In such case, the movant can discover the evidence by interrogatories, adverse examination, orders for production of documents, and other means.

"When a person accused of crime has been tried, defended, sentenced, and, if he desires, has exhausted his rights of appeal, the period of contentious litigation is over. Although revocation of probation results in the deprivation of a probationer's liberty, the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty. The inquiry of the court at such a hearing is not directed to the probationer's guilt or innocence, but to the truth of the accusation of a violation of probation. The crucial question is: Has the probationer abused the privilege of grace extended to him by the court? When a sentence of imprisonment in a criminal case is suspended upon certain valid conditions expressed in a probation judgment, defendant has a right to rely upon such conditions; and as long as he complies therewith, the suspension must stand. In such a case, defendant carries the keys to his freedom in his willingness to comply with the court's sentence.

"A proceeding to revoke probation is not a criminal prosecution, and we have no statute in this State requiring a formal trial in such a proceeding. Proceedings to revoke probation are often regarded as informal or summary. The courts of this State recognize the principle that a defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an opportunity to be heard. (Citation omitted.) Upon a hearing of this character, the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. (Citations omitted.)" *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476.

[2] If, upon a proceeding to revoke probation or a suspended sentence, a defendant wishes to rely upon his inability to make payments as required by its terms, he should offer evidence of his inability for consideration by the judge. Otherwise, evidence establishing that defendant has failed to make payments as required by the judgment may justify a finding by the judge that defendant's failure to comply was willful or was without lawful

excuse. We disapprove the principle announced in *Foust, supra,* and followed in *Huntley* and *Neal, supra.*

[3] In the case presently under review, the defendant offered evidence which tended to show that he was unavoidably without the means to make payments as required by his probationary judgment. The trial judge, as the finder of the facts, is not required to accept defendant's evidence as true. However, in this case, it is not clear whether the trial judge proceeded under an erroneous assumption that the fact of failure to comply required revocation of probation, or whether he considered defendant's evidence and found that defendant had offered no evidence worthy of belief to justify a finding of a legal excuse for failure to comply with the judgment. Obviously, defendant is entitled to have his evidence considered and evaluated. Because it appears that this was not done, the order revoking probation is vacated and the cause is remanded for a new hearing upon the Report of the Probation Officer and the Bill of Particulars.

New hearing.

Judges MORRIS and CARSON concur.

HPS, INC. v. ALL WOOD TURNING CORPORATION

No. 7426DC38

(Filed 17 April 1974)

1. **Uniform Commercial Code § 20— acceptance of goods — liability for contract price — breach of warranty**

If a buyer accepts the goods, the buyer must pay the contract price for the goods accepted; however, the buyer retains the right to counterclaim for breach of warranty by the seller and the burden shifts to the buyer to establish such breach of warranty.

2. **Uniform Commercial Code § 20— acceptance of goods**

The trial court should have submitted an issue as to whether the buyer accepted the goods where the evidence disclosed that the seller installed a boiler plant conversion system in the buyer's plant, that the system was operated for some time although the seller was unable to correct the system so that the buyer could burn its wood refuse without smoke as allegedly warranted by the seller, and that the buyer refused to allow the seller to remove the system when the seller offered to return the buyer's boiler to its pre-conversion status.

3. **Uniform Commercial Code § 22— acceptance of goods — recovery by seller**

An acceptance of goods entitles the aggrieved seller to recover the contract price of the goods as well as any expenses reasonably incurred as a result of the breach. G.S. 25-2-709; G.S. 25-2-313(1)(a).

4. **Sales § 18; Uniform Commercial Code § 21— issues as to breach of express warranty**

The trial court should have submitted to the jury issues as to whether the seller of a boiler conversion system expressly warranted that the system would permit the burning of wood refuse without smoke, whether the seller breached the express warranty, and the amount of damages recoverable for breach of the express warranty.

5. **Uniform Commercial Code § 21— breach of express warranty — measure of damages**

The measure of damages for breach of express warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless circumstances show damages of a different amount, plus any incidental damages which may be proven and such consequential damages as were within the contemplation of the parties. G.S. 25-2-714(2); G.S. 25-2-715.

APPEAL by defendant from *Johnson, Judge,* 11 June 1973 Session of District Court held in MECKLENBURG County.

This is a civil action wherein the plaintiff, HPS, Inc., seeks to recover $4,574.00 from defendant, All Wood Turning Corporation, which sum allegedly represents the agreed contract price owed to plaintiff for the installation of a boiler plant conversion system.

The uncontroverted evidence of plaintiff and defendant tends to establish the following:

In September of 1971 the plaintiff and defendant entered into a written contract the terms of which required the plaintiff to install a boiler conversion system for the agreed price of $4,574.00. In this contract the plaintiff promised that the installed system would permit the defendant to burn its wood refuse without smoke; however, despite repeated adjustments by plaintiff, the system was never able to produce the smokeless burning of wood refuse.

Plaintiff billed defendant for the contract price of $4,574.00; but in light of the fact that the plaintiff was unable to produce the smokeless burning, defendant refused to pay. Plaintiff then offered to cancel its invoice for billing, remove its equipment,

and return defendant's boiler to its original condition, but the defendant refused either to pay the invoice bill or to allow plaintiff to return defendant's boiler to its pre-conversion status.

Thereafter, in April of 1972, the present action was commenced with the filing of a complaint by plaintiff. Defendant filed an answer and counterclaim alleging that the plaintiff had breached an express warranty and as a consequence of this breach was liable to the defendant in the amount of $5,000.00.

Four issues were submitted to and answered by the jury as follows:

"1. Was there a Contract between the parties?

ANSWER: Yes.

2. Was the Contract breached by the plaintiff?

ANSWER: No.

3. What amount, if any, is the plaintiff entitled to recover for the reasonable value of labor performed and materials and equipment furnished to and for the defendant?

ANSWER: $4,574.00.

4. What amount, if any, is the defendant entitled to recover from the plaintiff?

ANSWER: None."

From a judgment entered on the verdict, defendant appealed.

Mraz, Aycock, Casstevens & Davis by John A. Mraz for plaintiff appellees.

Cagle and Houck by Joe N. Cagle and William J. Houck for defendant appellant.

HEDRICK, Judge.

Defendant contends that the trial court committed error when it failed to grant defendant's motions for a directed verdict and for a judgment notwithstanding the verdict on the issue of plaintiff's breach of the contract and the warranties. The motions were providently denied as there is plenary, competent evidence present in the record to require submission of this case to the jury.

The transaction in question is one which is governed by the Uniform Commercial Code (Code), G.S. 25-2-102 and G.S. 25-2-105; hence, it is necessary in formulating the legal issues arising on the pleadings and evidence of this case to develop these issues by giving proper regard to the apposite provisions of the Code. In the instant case the four issues submitted to the jury reflect a failure on the part of the trial court to consider the relevance of the Code; and as a result of these issues failing to present the determinative questions, a new trial must be awarded. *Anderson v. Cashion,* 265 N.C. 555, 144 S.E. 2d 583 (1965). It is our view that there are five essential questions which must be submitted to the jury in order to insure that there will be a proper disposition of all the material controversies which arise in this case. A brief discussion of each of these issues follows.

The first issue which must be submitted is: Whether the defendant accepted the goods? Acceptance in Code terminology is a term of art which is unrelated to the question of passage of title from seller to buyer and is "only tangentially related to buyer's possession of goods." White and Summers, *Uniform Commercial Code,* § 8-2, p. 249 (1972). In *Motors, Inc. v. Allen,* 280 N.C. 385, 395, 186 S.E. 2d 161, 167 (1971) our Supreme Court offered this cogent statement about acceptance:

> "Acceptance is ordinarily signified by language or conduct of the buyer that he will take the goods, but this does not necessarily indicate that the goods conform to the contract. G.S. 25-2-606(1)(a). Acceptance may also occur by failure of the buyer to 'make an effective rejection' after a reasonable opportunity to inspect. G.S. 25-2-606(1)(b). Effective rejection means (1) rejection within a reasonable time after delivery or tender and (2) seasonable notice to the seller. G.S. 25-2-602. Acceptance precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. G.S. 25-2-607(2). Thus the buyer may *revoke his acceptance* if (1) 'the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured,' G.S. 25-2-607(2), and (2) the nonconformity substantially impairs the value of the goods. G.S. 25-2-608(1). Revocation of acceptance must be made within a reasonable time after the buyer

discovers, or should have discovered, the ground for it, [citation omitted], and it is not effective until the buyer notifies the seller of it. G.S. 25-2-608(2)."

[1, 2] If in applying the foregoing principles to the evidence of this case, the net result is an affirmative answer to the first question, then several consequences follow: (1) the buyer (defendant) must pay the contract price for the goods accepted; (2) the buyer retains his right to counterclaim for a breach by seller; (3) the burden of establishing a breach of any warranty shifts to the buyer. *White and Summers, supra,* at pp. 249-50. The uncontroverted facts of this case disclose that the seller installed the boiler plant conversion system in the buyer's plant; that the system was operated for some time although the seller was unable to correct the system so that the buyer could burn its wood refuse without smoke; and, that the buyer refused to allow the seller to remove the system when the seller made an offer to return the buyer's boiler to its pre-conversion status.

[3] Therefore, since all of the evidence tends to show that the buyer accepted the goods, and if the jury should believe the evidence and determine that the buyer did in fact accept the goods and answer the first issue in the affirmative, then the jury must consider the second issue, namely: What damages, if any, is seller (plaintiff) entitled to recover of buyer as a result of the acceptance of the goods? An acceptance of the goods entitles the aggrieved seller to recover the contract price of the goods as well as any expenses reasonably incurred as a result of the breach. G.S. 25-2-709 and G.S. 25-2-710.

[4] The third, fourth, and fifth issues all relate to express warranties. In the third issue, a determination must be made as to whether the seller expressly warranted the goods. Under the facts of this case it would seem that G.S. 25-2-313(1)(a), which reads as follows, would control:

> "(1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

[5] A positive finding as to the third issue prompts the need to answer the fourth issue, to wit: Was there a breach of the

express warranty? An affirmative answer to the fourth issue, in turn, gives rise to the last question, which is: What damages are recoverable for the breach of an express warranty? The measure of damages for such breach is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless circumstances show damages of a different amount," G.S. 25-2-714(2), plus any incidental damages which may be proven and such consequential damages as were within the contemplation of the parties. G.S. 25-2-715; *Motors, Inc. v. Allen, supra; Hendrix v. Motors, Inc.*, 241 N.C. 644, 86 S.E. 2d 448 (1955). The burden of proving the (1) value the goods would have had if they had been as warranted and (2) the value of the goods as accepted, is on the buyer; and, "[this] burden of proof as to damages from breach of the sales contract cannot be met by mere conjecture." Anderson, *Uniform Commercial Code*, Vol. 2, § 2-714:8, p. 448 (1971). Under the facts of the case now before us the contract price will serve as strong evidence of the value of the goods as warranted; however, upon retrial of this case the defendant (buyer) must bear the burden of proving the value of the goods accepted.

Because of the failure of the trial court to submit to the jury issues which frame the essential questions of fact, a new trial must be awarded. 7 Strong, N. C. Index 2d, Trial, § 40, p. 351. The issues which are suggested in this opinion and the discussion which accompanies them will hopefully provide guidelines in the retrial of this case.

New trial.

Judges CAMPBELL and BALEY concur.

CHARLES B. PRICE v. IRVIN CONLEY

No. 7427DC155

(Filed 17 April 1974)

1. **Rules of Civil Procedure § 50— judgment n.o.v. for party with burden of proof**

Though defendant had the burden of proving waiver or estoppel on the part of plaintiff, the trial court's granting of defendant's

motion for judgment n.o.v. was procedurally correct even in the absence of any evidence from defendant since the pleadings, plaintiff's testimony, and stipulations showed that there was no genuine issue of fact for jury consideration.

2. **Landlord and Tenant § 18— default in payment of rent increase — waiver by landlord of right to terminate lease**

In a lessor's action to recover possession of leased premises for failure of the lessee to pay a $5.00 monthly increase in rent, the trial court properly granted defendant's motion for judgment n.o.v. since, by quietly accepting the lesser amount of rent for ten months, plaintiff waived his right to terminate the lease by reason of defendant's past failure to pay the increased amount.

3. **Registration § 3— lease recorded — constructive notice**

Plaintiff's testimony that he obtained a copy of the lease between his devisor and defendant from the courthouse showed that the lease was recorded, and plaintiff was thereby provided with constructive notice.

APPEAL by plaintiff from *Bulwinkle, Judge,* 27 August 1973 Session of District Court held in CLEVELAND County.

Plaintiff instituted this action to have a lease declared null and void on the ground that defendant had breached his lease with plaintiff's devisor, and to have defendant ejected from the leased premises. At the call of his case, plaintiff moved to amend his complaint by striking his prayer for ejectment. Without objection, the amendment was allowed.

Admissions in the pleadings, stipulations and plaintiff's evidence tended to show:

Myrl Price Jones, plaintiff's devisor, and her husband, E. D. Jones, entered into a lease with defendant on 26 July 1967 for the lease of property located on the corner of Grover and First Streets in Shelby. The period of the lease was from 26 July 1967 to 10 August 1969, at a rental of $35 per month. Defendant had the right to renew the lease for an additional ten year period, beginning 10 August 1969, at a rental of $40 per month. The lease provided that if the monthly rental payment for any one month was in arrears for as much as 15 days, the lessors would have the right to terminate the lease and retake possession. Defendant breached the lease by failure to increase the rental payments from $35 to $40 per month for the period from 10 August 1969 through 1 June 1970.

As a witness for himself, plaintiff's testimony showed: His mother, Mrs. Myrl Jones, died on 9 January 1969 and he quali-

fied as executor of her estate a month or two later. Thereafter, as executor of the estate and sole devisee under Mrs. Jones' will, he went by the subject property on the first of each month and collected the rent from defendant. The first ime he saw a copy of the lease was in late May or in June of 1970 when he obtained a copy from the courthouse records. It was then that he learned that defendant should have been paying rent at the rate of $40 per month. He accepted rental payments of $35 per month from defendant from the time he qualified as executor (in January or February of 1969) until late May or June of 1970 when he told defendant "to terminate the lease."

When plaintiff rested, defendant moved for directed verdict under G.S. 1A-1, Rule 50, which motion was denied. Defendant declined to present evidence and renewed his motion for directed verdict, and that motion was also denied. After a verdict in favor of plaintiff, defendant moved under Rule 50 for judgment notwithstanding the verdict and the motion was allowed. From the allowance of that motion and judgment predicated thereon, plaintiff appealed.

Horn, West, Horn & Wray, by C. A. Horn, for plaintiff appellant.

Yelton & Lamb, P.A., by Robert W. Yelton, for defendant appellee.

BRITT, Judge.

The sole issue submitted to the jury was: "Did the plaintiff, by his action, condone the action of defendant, and thereby waive his right to assert the breach on the part of the defendant?" The jury answered the issue in the negative.

[1] In his answer, defendant pled waiver or estoppel on the part of plaintiff. G.S. 1A-1, Rule 8(c) makes waiver an affirmative defense; on an affirmative defense, the burden of proof lies with the defendant. Therefore, it would appear at first glance that the allowance of the motion for judgment notwithstanding the verdict in this case violated the rule laid down in *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971). A further examination, however, shows that this case lies within the distinction set forth in *Wyche v. Alexander,* 15 N.C. App. 130, 189 S.E. 2d 608 (1972). Justice Sharp in *Cutts v. Casey, supra,* at 421, 314, says: "The established policy of this State—declared in both the constitution and statutes—is that the credibility of

testimony is for the jury, not the court, and that a genuine issue of fact must be tried by a jury unless this right is waived. [Citation.] Whether there is a 'genuine issue of fact' is, of course, a preliminary question for the judge."

Here, as in *Wyche,* the pleadings, evidence, and stipulations show that there was no "genuine issue of fact" for jury consideration. The only evidence in this case supplementing the admissions and stipulations was plaintiff's own testimony; therefore, if defendant's burden was met, it was met for him by plaintiff. In such instance, it is permissible to grant a Rule 50 motion in favor of a party with the burden of proof. *Charles F. Curry and Company v. Hedrick,* 378 S.W. 2d 522 (Mo. 1964); *Coulthard v. Keenan,* 256 Iowa 890, 129 N.W. 2d 597 (1964); and *Smith v. Burleson,* 9 N.C. App. 611, 177 S.E. 2d 451 (1970). Thus, at least procedurally, the granting of the motion was correct and leaves us to determine if the granting was substantially correct.

[2] A previous action between the parties, involving the same subject matter, was before this court in the Fall of 1971, the opinion being reported in *Price v. Conley,* 12 N.C. App. 636, 184 S.E. 2d 405 (1971). The present action was instituted on 23 January 1973 and, this being another case, we do not decide if the former opinion established "the law of the case." It suffices to say that we think Judge Parker accurately stated the law applicable to this case when he wrote at page 640:

> "A provision in a lease for termination at the option of the lessor upon breach of the lessee's obligation to pay rental is not self-executing. Such a provision may be waived by the landlord, for whose benefit it was inserted, and he may elect to treat the lease as continuing in effect. Moreover, the purpose of such a provision is not to provide a forfeiture with which to surprise an unwary tenant, but to secure the landlord in his right to receive the rental called for in the lease. 'Provisions for the forfeiture of a lease for nonpayment of rent, whether contractual or statutory, are considered in equity as securing the rent, and not as providing for the forfeiture of the lease where the tenant acts in good faith and pays promptly on demand.' 49 Am. Jur. 2d, Landlord and Tenant, § 1034, p. 1002.
>
> "In the present case the plaintiff landlord, by quietly accepting monthly payments of rental in the amount of

> $35.00 for many months after August 1969, recognized the lease as continuing in effect and waived, not his right to collect monthly rental in the increased amount of $40.00 as called for in the lease, but his right to terminate the lease by reason of his lessee's past defaults. This waiver continued until the lessor made demand upon the lessee to pay the amount by which he was in arrears and until the lessee, after being given a reasonable opportunity to do so, should fail to make such payment."

Plaintiff argues that, at the trial of this action, he showed that he did not have knowledge of the lease provision for an increase in rental payments until after he had accepted some ten payments; therefore, his acceptance did not amount to "quietly" accepting erroneous payments with the result that he recognized the lease as continuing in effect and waived his right to terminate the lease.

[3] We feel that regardless of this showing, knowledge was imputed to plaintiff. Plaintiff's testimony that he obtained a copy of the lease from the courthouse showed that the lease was recorded, and that provided plaintiff with constructive notice. See 6 Strong, N. C. Index 2d, Registration, § 3, at 649 (1968). Therefore, we hold that the trial court was substantively correct in granting defendant's motion.

We have examined plaintiff's other assignment regarding the refusal of the trial court to allow the attorney who prepared the lease to testify that he did so at the request of defendant. We do not think that testimony would be relevant to the question of waiver under the facts in this case. This assignment is likewise overruled.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. WALTER LEE HUFFMAN

No. 7427SC97

(Filed 17 April 1974)

1. **Homicide §§ 26, 28— second degree murder — self-defense — instructions proper**

In a prosecution for second degree murder, the trial court's instruction was proper where it accurately recounted a witness's testimony and adequately apprised the jury as to the law arising on the evidence in the case, particularly as it related to defendant's contention that he shot deceased only in self-defense.

2. **Criminal Law § 117; Homicide § 26— testimony of accessory after the fact — request for instructions — denial proper**

Trial court did not err in failing to instruct the jury, as defendant requested, that they "should scrutinize and look carefully into the testimony" of a witness who was an accessory after the fact but not an accomplice to the crime charged.

APPEAL by defendant from *Friday, Judge,* 30 July 1973 Session of Superior Court held in GASTON County.

Defendant was indicted for the murder of Loyd Anderson Barrett. Upon arraignment, the State elected to try defendant for second-degree murder, to which he pled not guilty. The State's evidence showed: On the night of 12 May 1973 defendant, his girl friend, Opal Hicks, Barrett, and one Humphries were together in Humphries's trailer in Ranlo Trailer Park. About 4:30 a.m., defendant, Barrett and Humphries left to visit a nearby trailer park. They took a .22 caliber rifle with them, About fifteen minutes later, Opal Hicks, who had remained in the trailer, heard three shots. On opening the trailer door, she saw defendant, with the rifle in hand, standing on the trailer steps. Barrett, breathing heavily, was leaning against the fender of a car parked about ten feet away. Defendant said: "I shot him. He kept coming at me." Shortly thereafter, an investigating officer found Barrett's corpse, with a knife in its left hand, lying beside the car. A subsequent autopsy revealed that Barrett died as a result of three .22 caliber gunshot wounds in his chest.

Defendant testified that he shot Barrett only after Barrett, large, drunk, and belligerent, and who had previously threatened him, attacked him with a knife.

The jury found defendant guilty of second-degree murder, and judgment was entered sentencing defendant to prison for not less than 12 nor more than 15 years.

Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey for the State.

William G. Holland for defendant appellant.

PARKER, Judge.

There was ample evidence to justify submitting this case to the jury and the trial court did not err in denying defendant's motion for nonsuit.

[1] Defendant assigns error to several portions of the court's charge to the jury. First, defendant contends that the trial court, in recapitulating Opal Hicks's testimony, expressed an opinion about a critical fact. Comparing the evidence with this portion of the charge, however, it is clear that the trial court accurately recounted her testimony and nothing more. Next, defendant contends that the trial court inadequately charged the jury concerning (1) the bearing of Barrett's reputation as a violent and fighting man on the defendant's reasonable apprehension of death or great bodily harm at the time Barrett allegedly attacked him and (2) the law of self-defense and its application to the facts of the case. Reading the instruction as a whole and taking the portions of the charge complained of in their proper context, we find no prejudicial error. Considering the charge as a whole, the jury was adequately apprised as to the law arising on the evidence in this case, particularly as it related to defendant's contention that he shot only in self-defense.

[2] Finally, defendant contends that the trial court erred in failing to instruct the jury, as defendant requested, that they "should scrutinize and look carefully into the testimony of Opal Lee Hicks." In this connection, however, Hicks was not an accomplice, though she was charged as being an accessory after the fact. An accessory after the fact is not considered as an accomplice, *State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165, and there was no error in the court's failure to give the requested instruction.

No error.

Chief Judge BROCK and Judge BALEY concur.

JESSE O. BOWMAN v. THE TOWN OF GRANITE FALLS

No. 7425DC121

(Filed 17 April 1974)

1. **Appeal and Error § 41— record on appeal — chronological order**

The proceedings of the trial court must be set forth in the record on appeal in the order of the time in which they occurred, and the processes, orders and documents in the record on appeal must follow each other in the order in which they were filed. Court of Appeals Rule 19.

2. **Municipal Corporations § 14— failure to keep streets in safe condition**

Under G. S. 160A-296 a municipality may be held liable for negligent or wanton failure to keep its streets in proper repair and in a reasonably safe condition.

3. **Municipal Corporations § 14— liability for tree falling on car**

In this action against a city to recover for damages to plaintiff's automobile when a tree allegedly under defendant's control fell on it, defendant's motion for directed verdict should have been allowed where the evidence showed that the tree was located in an area left by the land developer for street purposes but which had not been accepted by the city and that the city had no notice that the tree presented a hazard.

APPEAL by defendant from *Dale, District Judge,* at the 30 July 1973 Session of CALDWELL District Court.

Heard in the Court of Appeals 19 March 1974.

This is a civil action instituted to recover for damages to plaintiff's automobile when a tree, allegedly under the control of defendant, fell on plaintiff's automobile. Plaintiff's car was parked in his lower driveway on Woodlane Street in Granite Falls, North Carolina, directly across the street from the tree in question. The developer had left an area for street purposes; but the total width was not used, and the Town of Granite Falls had accepted and maintained the right of way for Woodlane Street only between the curbs. The tree was six to eight feet off the curb and on the side next to the property of Mr. John Cole. Plaintiff's evidence showed that Mr. Bowman and Mr. Cole mowed the grass up to the curb line and that the town did not do so, and the town had not accepted any part of the land where the tree stood. Mr. Bowman testified that his property line and that of Mr. Cole went down to the curb. Plaintiff's evidence also tended to show that neither he nor anyone else contemplated the tree's falling and that no one had notified the town that the

tree was a hazard. Mr. Bowman further testified that the tree had not rotted off at the base by virtue of any dirt which had been put around it. In his complaint, he had alleged that defendant, through its agents, had made certain improvements to Woodlane Street and in doing so, had filled in dirt around the tree causing it to die. From a judgment awarding the plaintiff $1,000.00, defendant appealed.

West & Groome by Ted G. West for plaintiff appellee.

L. H. Wall and L. M. Abernathy for defendant appellant.

CAMPBELL, Judge.

[1] Rule 19 of the Rules of Practice in the North Carolina Court of Appeals specifies that the proceedings of the trial court shall be set forth in the record on appeal in the order of the time in which they occurred, and the processes, orders, and documents in the record on appeal shall follow each other in the order in which they were filed. The record in the case at bar was not properly arranged. Nevertheless, we have decided to reach the merits.

Defendant assigns as error the denial by the trial court of its motion for directed verdict. The stated grounds of the motion were that governmental immunity existed and that plaintiff had failed to show that a hazard existed or that the town knew a hazard existed.

[2, 3] In the absence of a statutory provision to the contrary, a municipality may not ordinarily be held liable for torts committed in the performance of a governmental function. *Stone v. City of Fayetteville,* 3 N.C. App. 261, 164 S.E. 2d 542 (1968). Under G.S. 160A-296 a municipality may be held liable for negligent or wanton failure to keep its streets in proper repair and in a reasonably safe condition. *McClelland v. City of Concord,* 16 N.C. App. 136, 191 S.E. 2d 430 (1972). However, in the case at bar the tree was not located in the street or any part of Woodlane Street which the city had accepted. The tree was in the area left by the land developer for street purposes, but that part had not been accepted and was still private property over which the city had no control and to which it owed no duty. See *Taylor v. Hertford,* 253 N.C. 541, 117 S.E. 2d 469 (1960).

Furthermore, notice of the defect, actual or constructive, and a failure to act on the part of the municipality to remedy

the situation are prerequisites to recovery in an action involving a municipality. *Faw v. North Wilkesboro*, 253 N.C. 406, 117 S.E. 2d 14 (1960). *McClelland v. City of Concord, supra.* The plaintiff testified, " . . . I did not say anything to the street committee about the hickory tree being dead . . . . I had several conversations with them but nothing was ever said about the tree. I did not think the tree was as rotten as it was or I would not have parked there. . . . " The record is clear that the defendant had no actual notice that the tree presented a hazard to travel on Woodlane Street. The evidence clearly showed that no one living in the vicinity considered the tree to be a hazard. It would be unreasonable to hold that a municipality must discover a hazard on private property when residents of the immediate area had not done so.

We hold that the trial court erred in failing to grant the defendant's motion for directed verdict.

Reversed.

Judges MORRIS and VAUGHN concur.

THE GASTONIA REDEVELOPMENT COMMISSION v. COXCO, INC., J. T. SANDERS, TRUSTEE, AND FIRST FEDERAL SAVINGS & LOAN ASSOCIATION

No. 7427SC227

(Filed 17 April 1974)

Attorney and Client § 7; Costs § 4— condemnation proceeding — reasonable attorney fee — factors

In this condemnation proceeding instituted by Redevelopment Commission the award of attorney fee is reversed, and the cause is remanded for the allowance of a reasonable attorney fee based on the considerations outlined in *Redevelopment Commission v. Hyder*, 20 N.C. App. 241.

APPEAL by petitioner from *Friday, Judge,* 8 October 1973 Session of Superior Court held in GASTON County.

This appeal is from an award of an attorney fee in a condemnation proceeding brought by petitioner, the Gastonia Redevelopment Commission, under the Urban Redevelopment Law,

Article 22 of Chapter 160A of the General Statutes of North Carolina.

The facts were stipulated for the purpose of this appeal. In substance these facts disclose that commissioners appointed by the clerk of court of Gaston County assessed the damage to respondents for the taking of their property at $55,500.00. The report of the commissioners was confirmed by the clerk, and petitioner-Redevelopment Commission appealed to the superior court for trial upon the issue of damages.

The stipulation provided:

> "10. The Appellee Respondents' attorney, Grady B. Stott, associated Henry M. Whitesides, Esquire, for purposes of the trial. Additional appraisal witnesses were retained by the Appellee Respondent and Messrs. Stott and Whitesides met with the witnesses and property owner approximately three times prior to trial for preparation and settlement purposes. Mr. Whitesides participated in all aspects of the trial.
>
> "11. That the trial of the case on the issue of damages began at 9:30 a.m. October 10, 1973, and continued until 4:00 p.m., October 11, 1973. The jury deliberated until 5:00 p.m., October 11, 1973 and from 9:30 a.m., until 10:30 a.m. on October 12, 1973, when they returned the verdict."

The verdict of the jury granted respondents the sum of $40,125.00 as damages.

Judgment was entered upon the verdict awarding the respondents the sum of $40,125.00, plus interest, and directing respondents to refund the difference between the amount awarded and the $55,500.00 previously deposited by petitioner and disbursed upon court order to the respondents. The judgment also provided:

> "3. That the Petitioner pay to the Respondents' attorney, Grady B. Stott for reasonable attorney's fees, the amount of $8,500.00."

From that portion of the judgment relating to the attorney fee, petitioner has appealed to this Court.

Charles D. Gray III, for petitioner appellant.

Hollowell, Stott & Hollowell and Henry M. Whitesides, by Grady B. Stott, for respondent appellees.

BALEY, Judge.

The award of attorney fee in this case was prior to the decision in *Redevelopment Comm. v. Hyder,* 20 N.C. App. 241, 201 S.E. 2d 236, filed December 19, 1973, which interprets the identical statute here involved.

On this record the award of attorney fee is reversed, and the cause is remanded for the allowance of a reasonable attorney fee based upon the considerations outlined in *Redevelopment Comm. v. Hyder.*

Reversed and remanded.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. FREDDIE LEE

No. 741SC309

(Filed 17 April 1974)

Constitutional Law § 32— indigent defendant — denial of counsel error

Trial court in a common law robbery case erred in concluding that defendant was not indigent and in denying him an attorney at his trial.

APPEAL by defendant from *Martin (Perry), Judge,* 29 October 1973 Session of Superior Court held in PERQUIMANS County.

By indictment proper in form, defendant was charged with common law robbery. He pleaded not guilty, a jury found him guilty as charged, and he appeals from judgment imposing prison sentence of not less than eight nor more than ten years.

Attorney General Robert Morgan, by Associate Attorney Robert R. Reilly, for the State.

Merrill Evans, Jr., for defendant appellant.

BRITT, Judge.

Defendant's assignment of error that the trial court erred in failing to provide him with an attorney at his trial must be sustained.

The record discloses:

On 25 August 1973, a warrant was issued charging defendant with common law robbery on that date. The warrant was executed on 31 August 1973. On 19 September 1973, defendant executed an "Affidavit of Indigency" declaring that he was financially unable to employ counsel and requesting the appointment of counsel. In his affidavit he listed no resources but stated that his income was $100 to $150 per week and that he had posted a cash bond in amount of $500. The district court denied the request for appointment of counsel, found probable cause and bound defendant over to superior court.

Indictment was returned in superior court on 29 October 1973. On 31 October 1973, defendant executed another "Affidavit of Indigency" in which he listed no resources but stated that he was employed in Norfolk, Virginia, that his income was from $70 to $300 per week, that his $500 cash bond was posted by a friend, and that he owed a $300 hospital bill. Again defendant declared that he was financially unable to employ counsel and requested that counsel be assigned for him. Judge Martin found that defendant was not indigent and refused to assign counsel. Defendant was placed on trial without counsel on 1 November 1973, and a verdict of guilty was returned and judgment entered on the same date.

Following the entry of judgment, the court advised defendant of his right to appeal and, if indigent, to have a transcript of the trial and an attorney provided at State expense. Defendant stated his desire to appeal, again stated that he was unable financially to employ counsel, and requested that counsel be appointed to perfect his appeal. The court entered an order reviewing the proceedings in the case, concluded that "defendant is now indigent within the meaning of the law," and appointed counsel to represent defendant on appeal. Among other things, the order contains the following: " * * * and it appearing to the Court that the defendant had been incarcerated for some period of time prior to his trial in the superior court of Perquimans County * * * . "

We recognize the difficulty the trial courts have in determining whether a defendant is indigent. In this case, the district court judge no doubt thought that defendant himself posted the $500 cash bond and, therefore, was financially able to employ counsel. However, later indications are that a friend posted the

bond, and that the bond was rescinded and defendant incarcerated "some time" prior to his trial in superior court. Obviously, the statement in the 31 October 1973 affidavit that defendant's "present" income was from $70 to $300 a week referred to weeks when defendant was working and not when he was in jail. We hold that the court erred in concluding that defendant was not indigent and denying him an attorney at his trial.

For the reasons stated, the judgment appealed from is vacated and this cause is remanded for a

New trial.

Judges HEDRICK and CARSON concur.

PATRICIA H. KOHLER v. J. RUDOLF KOHLER

No. 7414DC50

(Filed 17 April 1974)

1. **Courts § 2— jurisdiction of court over plaintiff**

Trial court properly denied defendant's motion to dismiss for lack of jurisdiction over the plaintiff in that plaintiff was not domiciled in N. C. and lacked capacity to bring an action in N. C. since plaintiff's uncontested testimony was that she was a resident of Durham.

2. **Appearance § 2— extension of time to plead — waiver of improper service of process**

Even if there had not been proper service of process on defendant, defendant made a general appearance by obtaining extensions of time in which to appear and plead, thereby giving the court jurisdiction over his person.

3. **Divorce and Alimony § 18— alimony pendente lite — scope of hearing**

The purpose of a hearing for alimony *pendente lite* is to give the dependent spouse reasonable subsistence pending trial and without delay, not to determine property rights or finally determine what alimony the wife may receive if she wins her case on the merits; therefore, evidence as to the parties' financial transactions and relating to plaintiff's claim for an accounting was irrelevant, and that part of the court's order requiring defendant to deposit with the clerk of court all stock bearing joint names of plaintiff and defendant is vacated.

4. **Divorce and Alimony § 18; Infants § 6— alimony pendente lite — scope of hearing — determination of minor's rights**

Trial court's order in an alimony *pendente lite* hearing which required defendant to deposit with the clerk of court all assets of the

minor child of the parties is vacated, since the question of ownership of the assets was beyond the scope of the hearing, and the minor's rights in the assets could be determined only by appearance through a guardian or guardian *ad litem* but not by plaintiff in her individual capacity.

APPEAL by defendant from *Lee, District Court Judge,* 25 April 1973 Session of District Court held in DURHAM County.

This is an action for alimony without divorce, custody, child support and an accounting for assets allegedly owned by plaintiff, the child of the parties, and plaintiff and defendant jointly. Plaintiff alleged that she was a resident of Durham County and that defendant was in Philadelphia, Pennsylvania. The parties stipulated that the summons and complaint were "properly served" on defendant. Defendant moved for and was granted an extension of time within which to answer or otherwise plead to the complaint. Defendant has not filed answer. At the request of defendant and his counsel, the hearing on plaintiff's application for alimony pendente lite was postponed to a day certain. Defendant caused plaintiff to be served with a subpoena to produce certain records and securities at the time and place set for that hearing. Defendant did not attend the hearing but was represented by counsel who participated in the hearing. An order was entered awarding plaintiff custody of the child, child support, alimony pendente lite and counsel fees. Defendant was further ordered to deposit with the clerk of the court all the assets of the minor child whether in the name of defendant or otherwise and all stock bearing joint names of plaintiff and defendant. Defendant appealed.

Bryant, Lipton, Bryant & Battle, P.A., by Alfred S. Bryant for plaintiff appellee.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by O. William Faison, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendants' fourth assignment of error (record p. 164) is that the court denied his motion to dismiss "for lack of jurisdiction over the plaintiff . . . because the plaintiff is not domiciled in North Carolina and lacks capacity to bring an action in this State." This assignment of error is overruled. Plaintiff's uncontested testimony was that she lives at 2312 Pratt Avenue, Durham, North Carolina, has lived in Durham since 2 Septem-

ber 1971 and at the time plaintiff and defendant separated plaintiff, defendant and their child resided in the home owned by them in Durham.

[2] There is no assignment of error in the record on appeal with reference to the contention, which defendant attempts to raise for the first time in his brief, that the court lacks personal jurisdiction over the defendant. We hold, nevertheless, that the court had personal jurisdiction over the defendant. Even if there had not been proper service of process, and we think there was, defendant invoked the jurisdiction of the court when he obtained extensions of time in which to appear and plead. This constituted a general appearance which waived any defect in the jurisdiction of the court for lack of proper service.

[3, 4] The case was before the court on plaintiff's application for alimony pendente lite, custody and child support. We note, however, that most of the testimony at trial and findings of fact brought forward in the record containing 185 pages was devoted to the parties' financial transactions and related to plaintiff's claim for an accounting. Except as related to the needs of the child, plaintiff's needs for support until there could be a trial on the merits, and defendant's ability to supply those needs, this evidence was totally irrelevant to the questions before the court on a hearing for alimony pendente lite. Provisions for temporary subsistence pending trial on the merits do not involve an accounting between husband and wife. The purpose of a hearing for alimony pendente lite is to give the dependent spouse reasonable subsistence pending trial and without delay. It is not to determine property rights or finally determine what alimony the wife may receive if she wins her case on the merits. *Harrell v. Harrell*, 253 N.C. 758, 117 S.E. 2d 728. Plaintiff also alleged and the court purported to find that defendant has certain assets which are the property of the minor. Quite aside from the fact that the question of the alleged ownership of these assets by the infant was also beyond the scope of a hearing for alimony pendente lite, an infant must appear by guardian or guardian ad litem. Plaintiff could not have these rights determined in her individual capacity.

Those parts of the order awarding custody of the child to plaintiff, directing defendant to pay $250.00 per month for child support, $80.00 per month for alimony, $107.32 per month for car payments, and ordering defendant to pay counsel fees are based on proper findings of fact which are supported by

competent evidence. These parts of the order are affirmed. For the reasons stated, the remainder of the order is vacated.

Affirmed in part.

Vacated in part.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. HAYWOOD E. HONEYCUTT

No. 7412SC83

(Filed 17 April 1974)

Criminal Law §§ 40, 89—transcript of testimony at former trial — admissibility to show bias

Where a witness testified at two earlier trials of defendant at which the jury was unable to agree, the trial court did not err upon a third trial in allowing into evidence a transcript of the witness's testimony at a former trial, since, at the time of the third trial, the witness was a fugitive from justice; however, the trial court did commit prejudicial error in refusing to allow defendant to testify about an earlier altercation he had had with the witness, since that evidence was admissible to show bias.

APPEAL by defendant from *Braswell, Judge*, 11 June 1973 Criminal Session of Superior Court held in CUMBERLAND County.

Defendant was tried for murder. Two earlier trials for the homicide had resulted in mistrials after the jury could not reach a verdict. At both of the earlier trials one DeBerry, the State's only witness to the killing, testified. DeBerry was not present at the trial from which defendant now appeals. Testimony on *voir dire* tended to show that DeBerry was a fugitive from justice. After appropriate findings, the court allowed the transcript of his testimony at the earlier trials to be read to the jury. Defendant contended that deceased, without provocation, made a deadly assault on him with a tractor crank and that he shot and killed in self-defense. The testimony of DeBerry tended to show that deceased had neither made nor threatened an assault on defendant. Defendant was found guilty of voluntary manslaughter and judgment imposing a prison sentence was entered.

Attorney General Robert Morgan by Ralf F. Haskell, Assistent Attorney General, for the State.

Rose, Thorp and Rand by Herbert H. Thorp; Smith, Patterson, Follin & Curtis by Norman B. Smith for defendant appellant.

VAUGHN, Judge.

It is obvious that the credibiltiy of DeBerry is critical in this case. At two earlier trials when DeBerry testified, the jury was unable to agree. At this trial, when DeBerry was not present but when the transcript of his earlier testimony was read to the jury, defendant was convicted. Because of the facts as found by the trial judge, it was not error to allow the transcript to be used even though it did deprive defendant of the opportunity to further cross-examine the witness and have the jury observe his demeanor. Defendant's burden was prejudicially compounded, however, by the refusal of the court to allow him to testify about an earlier altercation he had had with the witness. The evidence should have been admitted for the purpose of showing bias.

The record discloses that DeBerry was apprehended by federal officers after defendant's trial. Every reasonable effort should be made to have the witness present at the retrial of this case.

New trial.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. SHELTON LUCAS AND TERRY BARNES

No. 747SC339

(Filed 17 April 1974)

Criminal Law § 161— exception to judgment — review of record

An exception to the judment presents the face of the record proper for review, and, ordinarily, such review is limited to the questions of whether error of law appears on the face of the record and whether judgment is regular in form.

State v. Lucas

APPEAL by defendants from *Webb, Judge,* 22 October 1973 Session of Superior Court held in NASH County.

In separate indictments, proper in form, defendants were charged with armed robbery. They pleaded not guilty and a jury found them guilty as charged. As to defendant Barnes, the court entered judgment imposing prison sentence of 25 years with credit to be given for time spent in jail awaiting trial. As to defendant Lucas, the court entered judgment imposing prison sentence of 20 years with credit given for time spent in jail awaiting trial. Both defendants appealed.

Attorney General Robert Morgan, by Deputy Attorney General Jean A. Benoy, for the State.

Roy C. Boddie for defendant appellant Shelton Lucas.

Fields, Cooper & Henderson, by Roy A. Cooper, Jr., for defendant appellant Terry Barnes.

BRITT, Judge.

The sole assignment of error presented by each defendant is to the entry of judgment against him.

An exception to the judgment presents the face of the record proper for review; and, ordinarily, such review is limited to the questions of whether error of law appears on the face of the record and whether the judgment is regular in form. *State v. Shelly,* 280 N.C. 300, 185 S.E. 2d 702 (1972); *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Strickland,* 10 N.C. App. 540, 179 S.E. 2d 162 (1971).

We have examined the record proper and detect no error in law and the judgments are regular in form. Furthermore, we have reviewed the evidence and conclude that it fully supports the verdicts and the judgments, and the sentences imposed are within the limits prescribed by statute.

No error.

Judges HEDRICK and CARSON concur.

IN RE: JOHN THOMAS NEWSOME

No. 741SC238

(Filed 17 April 1974)

Automobiles § 2— habitual offender statute — constitutionality

N. C. General Statutes, Article 8, Section 20 (G.S. 20-220 et seq.) dealing with habitual offenders of the motor vehicles laws is constitutional.

APPEAL by the State from *Martin (Perry), Judge,* at the 3 December 1973 Session of Superior Court held in DARE County.

This action was instituted by the solicitor of the First Solicitorial District pursuant to Article 8 of Chapter 20 of the General Statutes (G.S. 20-220 et seq.) to have respondent declared a habitual offender of the motor vehicle laws of this State and to have him barred from operating a motor vehicle upon the highways of this State. When the cause came on for hearing, the trial court ruled that Article 8 of Chapter 20 is unconstitutional and dismissed the action.

The State appealed pursuant to G.S. 15-179.

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

No counsel on appeal for respondent-appellee.

BRITT, Judge.

Did the trial court err in ruling that Article 8 of Chapter 20 of the General Statutes of North Carolina is unconstitutional and dismissing the action?

The question was answered in the affirmative in *State v. Carlisle,* 20 N.C. App. 358, 201 S.E. 2d 704 (1974), wherein this court upheld the constitutionality of said Article; the decision of this court was affirmed by the Supreme Court of North Carolina on 10 April 1974. No useful purpose would be served in repeating here the reasoning given in *Carlisle.*

In fairness to the able trial judge, who was also the trial judge in *Carlisle,* we point out that the opinion in *Carlisle* was filed on 9 January 1974, subsequent to the entry of judgment in this cause on 3 December 1973.

For the reasons stated, the judgment appealed from is reversed and the cause is remanded for hearing.

Reversed.

Judges HEDRICK and CARSON concur.

JAMES A. DUGGER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 7410SC90

(Filed 17 April 1974)

PURPORTED appeal by defendant from an order entered by *Bailey, Judge,* on 29 October 1973, in chambers, in the Superior Court of WAKE County.

Sanford, Cannon, Adams & McCullough by Robert W. Spearman; Everett, Everett & Creech by William G. Hancock, attorneys for plaintiff appellee.

Attorney General Robert Morgan by Walter E. Ricks III, Assistant Attorney General, for respondent appellant.

VAUGHN, Judge.

The purported appeal is from an interlocutory order and the appeal is dismissed. Certiorari is denied.

Appeal dismissed.

Certiorari denied.

Judges BRITT and PARKER concur.

CHARLIE C. NOLAN, SR., PLAINTIFF v. GEORGIA BOULWARE AND EMMITT RUSSELL MOXLEY, ORIGINAL DEFENDANTS v. LUMBERMENS MUTUAL CASUALTY COMPANY, THIRD PARTY DEFENDANT;

— AND —

ELIZA McLAURIN NOLAN, PLAINTIFF v. GEORGIA BOULWARE AND EMMITT RUSSELL MOXLEY, ORIGINAL DEFENDANTS v. LUMBERMENS MUTUAL CASUALTY COMPANY, THIRD PARTY DEFENDANT

No. 7322DC437

(Filed 1 May 1974)

1. **Automobiles § 103— agency of driver for owner — sufficiency of complaint**

A complaint alleging that the negligent acts and omissions of defendant driver were "imputed to" defendant owner was sufficient to support submission to the jury of an issue as to whether the driver was acting as agent of the owner.

2. **Automobiles § 105— agency of driver for owner — sufficiency of evidence**

The evidence was sufficient to support a jury finding that defendant driver was operating a car as the agent of defendant owner for the purpose of having repairs made to the car where the owner admitted she was the owner of the car at the time of the collision, the owner testified that the driver was her boyfriend and that early on the morning of the accident she had left her car and keys with him at an unopened service station where she had arranged to have some repair work done on her car, and the service station proprietor testified that he had allowed the driver and others to use his lot for working on automobiles on their own, that on the day prior to the accident the owner and the driver had come to the station together and the proprietor told the owner he would check her car if she would bring it by, and that on the day of the accident the driver had twice driven the car by the station but had not left it there.

3. **Automobiles § 106— agency of driver for owner — refusal to give peremptory instruction**

The trial court properly refused to give a peremptory instruction in favor of defendant owner on the issue of the agency of defendant driver for the owner.

4. **Insurance § 69; Trial § 11— uninsured motorist coverage — defending in name of motorist or company — explanation of company's position in case**

Where defendant insurance company, a third party defendant which issued a policy to plaintiffs providing protection against uninsured motorists, stated in its answers that it elected to defend cases arising out of an automobile collision in the name of defendant uninsured driver pursuant to G.S. 20-279.21(b)(3)a, but counsel for the insurance company announced at a pretrial conference that he would defend in the name of the insurance company, it was proper for

the insurance company's counsel during his jury argument to explain the position of his client in the cases, and counsel's statements did not have the effect of calling the jury's attention to possible liability insurance coverage for the defendant owner.

5. **Trial § 45— acceptance of verdict after hesitation expressed by juror**

The trial court did not err in accepting the verdict after one juror expressed some hesitation about the verdict on one issue during a poll of the jury where the juror's final statement clearly signified his assent to the verdict as rendered and nothing suggests that he was unduly influenced either by his fellow jurors or by the court.

APPEAL by defendant, Georgia Boulware, from *Hughes, District Judge,* 16 January 1973 Session of District Court held in DAVIDSON County.

These civil actions arise from a two-car collision which occurred on 6 May 1970. Charlie C. Nolan, Sr., was the owner and his wife, Eliza McLaurin Nolan, was the driver of one of the cars. Georgia Boulware was the owner and Emmitt Russell Moxley was the driver of the other car. In one action Charlie C. Nolan, Sr. seeks recovery for damages to his automobile and in the other his wife seeks recovery for her personal injuries. The two cases were consolidated for trial and all questions presented on this appeal are common to both.

Plaintiffs brought their actions initially against the original defendants only, alleging in their complaints that defendant Moxley operated defendant Boulware's automobile in a negligent manner in certain specified respects. The complaints contained no allegations as to family purpose, master and servant, or agency. In paragraphs 7 of the complaints, plaintiffs alleged that the negligent acts and omissions of the defendant Moxley, "which is (sic) imputed to the defendant Boulware," were the sole proximate cause of the damage and injuries sustained by the plaintiffs. Defendant Boulware answered and admitted ownership of her car, but alleged that "someone, without her knowledge, consent or permission, unlawfully took the automobile and wrecked it at some place and time unknown to her." She denied paragraphs 7 of the complaints and denied knowledge or information sufficient to form a belief as to the remaining material allegations of the complaints.

Summons was personally served on defendant Moxley, but he failed to answer or otherwise plead in apt time. These facts being shown by affidavit, on 17 August 1971, default was entered against him. Thereafter on plaintiffs' motions, Lumber-

mens Mutual Casualty Company (Casualty Co.) was made a third party defendant and plaintiffs filed third party complaints in which they alleged that the Casualty Co. had issued to plaintiffs a policy of automobile liability insurance which included protection against an uninsured motorist. Plaintiffs prayed for judgment against the Casualty Co. for all sums which they might be adjudged entitled to recover against the original defendants. On 29 October 1971, Casualty Co. filed answers, in which it stated that "pursuant to G.S. 20-279.21, (it was) electing to defend in the name of the defendant Emmitt Russell Moxley." In these answers it was admitted that defendant Moxley had operated defendant Boulware's automobile and that a collision had occurred between said automobile and plaintiffs' car, but all allegations in the complaints as to negligence on the part of defendant Moxley were denied. In answer to paragraphs 7 of the complaints, Casualty Co. "admitted that the defendant Moxley was operating the automobile of defendant Boulware as the agent and servant of the defendant Boulware," but denied all remaining allegations of paragraphs 7. Casualty Co. also alleged that plaintiffs had failed to serve it with a copy of the suit papers as provided in G.S. 20-279.21 prior to causing default to be entered against defendant Moxley, and prayed that the entry of default be set aside and that plaintiffs recover nothing of defendant Moxley. At a pretrial conference, the plaintiffs voluntarily vacated the entry of default which had been entered against the defendant Moxley, and all parties stipulated that the accident occurred through the negligence of defendant Moxley and that his negligence was the sole proximate cause of the property damages and the personal injuries sustained by the plaintiffs.

The cases were submitted to the jury on issues of damages and agency. The jury answered all issues in favor of the plaintiffs. From judgment that each plaintiff recover of the original defendants amounts in accord with the verdict, defendant Boulware appealed.

Klass & Beeker by Ned A. Beeker for plaintiff appellees.

Walser, Brinkley, Walser & McGirt by Charles H. McGirt and G. Thompson Miller for defendant appellant Georgia Boulware.

Hudson, Petree, Stockton, Stockton & Robinson by James H. Kelly, Jr. for additional defendant appellee Lumbermens Mutual Casualty Company.

PARKER, Judge.

[1] Appellant Boulware first assigns as error the denial of her motion for a directed verdict on the issue of agency, contending that submission of such an issue was supported neither by allegation nor proof. Considering first the sufficiency of the allegation, it is clear that under our former practice when a plaintiff sought to hold a defendant liable for the negligence of another, it was necessary to allege in the complaint facts sufficient to make respondeat superior apply, else upon demurrer the complaint was held fatally defective. *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765. Now, however, since the effective date of our new Rules of Civil Procedure, such a complaint need contain in this regard only a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." G.S. 1A-1, Rule 8(a)(1). The complaints now before us do contain allegations as to the negligent acts and omissions of the defendant Moxley which plaintiffs contend were the sole proximate cause of their injuries and refer to these negligent acts and omissions as being "imputed to the defendant Boulware." The word "imputed" has been defined as follows:

> "As used in legal phrases, this word means attributed vicariously; that is, an act, fact, or quality is said to be 'imputed' to a person when it is ascribed or charged to him, not because he is personally cognizant of it or responsible for it, but because another person is, over whom he has control or for whose acts or knowledge he is responsible." Black's Law Dictionary, 4th Ed.

We hold that the complaints were sufficient to give defendant Boulware fair notice that plaintiffs intended to prove facts to establish that Boulware was legally responsible for the negligent acts of her codefendant Moxley. If for purposes of preparing her defense she wished to know more specifically exactly what facts plaintiffs intended to rely upon to accomplish that objective, other tools, such as discovery proceedings under Rule 26 or perhaps a motion for more definite statement under Rule 12(e), were at her disposal. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161. The new rules, of course, do not prevent a prudent pleader from serving a bit more meat with the bare bones than

was done in the present cases. To have done so would have made the dish a bit more palatable to those of us who had become accustomed to the fact pleading of our former practice. We hold only that it was not essential that this be done in order to support submission of the agency issue to the jury.

[2] We also find the evidence sufficient to withstand defendant Boulware's motion for a directed verdict on the agency issue. Defendant Boulware admitted she was the owner of the car driven by Moxley at the time of the collision, thereby making the statutory rule of evidence created by G.S. 20-71.1(a) applicable. Although she testified that she had never given Moxley permission to drive her car and that at the time of the collision he was not on any trip or errand for her, she admitted that Moxley was her boyfriend and that early on the morning of the accident she had left her car and keys with him at an unopened service station where she had arranged to have some repair work done upon the car. The proprietor of the service station testified that Moxley had never worked for him, but that he had allowed Moxley and others to use his lot for purposes of working on automobiles on their own, that he had seen Moxley drive Boulware's car several times before, that on the day prior to the accident Moxley and Boulware had come to his station together and asked him about checking her car, that he had told her that if she would bring her car by, he would check it out and find what the trouble was, and that on the day of the accident Moxley had twice driven the car by the station but had not left it there. On this evidence the jury could find that at the time of the accident, Moxley was driving the Boulware automobile as her agent for the purpose of having repairs made to the automobile. Defendant Boulware's motion for a directed verdict on the agency issue was properly denied.

[3] What we have said above also disposes of appellant Boulware's second assignment of error, which was directed to the refusal of the court to give a peremptory instruction in her favor on the agency issue. Cases cited by appellant, such as *Belmany v. Overton,* 270 N.C. 400, 154 S.E. 2d 538, and *Passmore v. Smith,* 266 N.C. 717, 147 S.E. 2d 238, are not here applicable. In those cases the plaintiff relied solely on G.S. 20-71.1 to take the issue of agency to the jury and the only positive evidence on the issue of agency was that offered by the defendant which tended to show that the driver was on a purely personal mission at the time of the collision. In such a

case the defendant is entitled to a peremptory instruction, related directly to the particular facts shown by defendant's positive evidence, to answer the issue of agency in the negative if the jury should find the facts to be as defendant's positive evidence tended to show. In the present cases plaintiffs were not forced to rely solely upon G.S. 20-71.1 to take the issue of agency to the jury. The positive evidence was conflicting and was sufficient to support a finding of the issue in the affirmative. Under these circumstances, the peremptory instruction was properly denied. The court did correctly instruct the jury that if they found that at the time of the collision Moxley "was making the trip solely for his own personal purposes, and not on a mission or errand of any kind for the defendant Mrs. Boulware," it would be their duty to answer the issue in the negative. This was as strong an instruction on this question as appellant Boulware was entitled to receive.

[4] Appellant contends she suffered prejudicial error when the court permitted counsel for the third party defendant, Lumbermens Mutual Casualty Co., during the course of his argument to the jury, to explain the position of his client in these cases. In its answer the Casualty Co. stated it was "electing to defend in the name of the defendant Emmitt Russell Moxley," and defendant Boulware contends that the Casualty Co. should have been bound by this election. G.S. 20-279.21(b)(3)a, however, merely provides that an insurer situated as was the Casualty Co. in these cases "may defend the suit in the name of the uninsured motorist or in its own name," and we find nothing in the statute which requires that its decision as to which name it will defend in, once made, must be irrevocable. In the present cases counsel for the Casualty Co. announced in a pretrial conference his decision to defend in the name of the Casualty Co., and having done so it was proper for him to explain to the jury the position of his client in these cases. We do not interpret his statements to the jury, as appellant seeks to do, as having any reference or calling the jury's attention to any possible liability insurance coverage for appellant Boulware. Appellant's objections to the jury argument made by counsel for the Casualty Co. were properly overruled.

Appellant has attempted to assign as error portions of the court's instructions to the jury. The exceptions to the charge on which this assignment of error is based appear either at the end of a paragraph in the instructions or, in some instances, in

the middle of a paragraph, without indicating clearly what portions of the charge are excepted to; nor does the assignment of error itself set out clearly the portions of the instructions excepted to and assigned as error. These are at best broadside exceptions, *Yandle v. Yandle,* 17 N.C. App. 294, 193 S.E. 2d 768. We have, nevertheless, reviewed the charge as a whole and find it free from prejudicial error.

[5] After the verdict was returned, counsel for appellant requested that the jury be polled as to the third issue. Eleven jurors responded that their answer was "Yes" and that they still assented thereto. One juror responded as follows:

"ASSISTANT CLERK: Your foreman has returned a verdict of 'yes' to the third issue. Is this your verdict?

JUROR: No. (After a pause) It was my verdict.

ASSISTANT CLERK: Did you understand the question?

JUROR: Yes.

THE COURT: What was the answer, sir?

JUROR: This was my verdict, as was rendered.

THE COURT: O.K.

ASSISTANT CLERK: Is this your verdict?

JUROR: Yes, ma'am.

ASSISTANT CLERK: Do you still assent thereto?

JUROR (after a pause): May I ask a question?

THE COURT: No, just answer the question.

JUROR: (There is a pause and no answer.)

THE COURT: Do you understand the question?

JUROR: Yes, sir, I understand the question. I'm sorry, I don't mean to—I misunderstand some aspects of this case. I will have to admit that, and I'm sorry, I'm not very sure, I rendered a verdict. I said 'yes,' and I guess I will stand before it.

THE COURT: Would you repeat the question again, please.

ASSISTANT CLERK: Your foreman has returned a verdict of 'yes' to the third issue. Is this your verdict?

JUROR: Yes, ma'am.

ASSISTANT CLERK: Do you still assent thereto?

JUROR: Yes, ma'am."

While expressing some hestitation, the juror clearly and unequivocally stated that his verdict on the third issue was "Yes" and that he still assented thereto. Nothing suggests that he was unduly influenced either by his fellow jurors or by the court, and he was not prevented from making a statement as to his verdict. His final statement clearly signified his assent to the verdict as rendered, and we find no error in the court's action in accepting the verdict. *Trantham v. Furniture Co.*, 194 N.C. 615, 140 S.E. 300; *Lowe v. Dorsett*, 125 N.C. 301, 34 S.E. 442; *State v. Godwin*, 27 N.C. 401; *Sheppard v. Andrews*, 7 N.C. App. 517, 173 S.E. 2d 67. The case cited by appellant, *In re Sugg*, 194 N.C. 638, 140 S.E. 604, is distinguishable; in that case the Supreme Court affirmed an order of the trial judge setting aside a verdict and ordering a new trial as a matter of law after the trial judge found facts from which it was apparent that one juror did not assent to the verdict as accepted by the clerk. Nothing in this present record suggests that the verdict rendered was not assented to by all twelve jurors.

No error.

Judges BRITT and MORRIS concur.

TOWN OF ROLESVILLE v. JESSE J. PERRY AND MARY CATHERINE PERRY, HIS WIFE

No. 7310SC498

(Filed 1 May 1974)

1. **Rules of Civil Procedure § 41— trial without jury — motion for involuntary dismissal**

Defendants' motion for a directed verdict made in a case without a jury is treated by the court as a motion for an involuntary dismissal under Rule 41(b).

2. **Nuisance § 9; Injunctions § 7— garage near well — insufficiency of evidence of nuisance**

Plaintiff's evidence was insufficient to entitle it to an injunction against defendants' use of their property for the operation of a garage

on the ground that such use would constitute a public nuisance in that such use would entail the placing on defendants' lot of toxic substances which could be carried by drainage or seepage through rock crevices into the town well where plaintiff's evidence, at most, showed only a remote possibility that under special circumstances substances from defendants' lot might in times of heavy pumping be drawn toward plaintiff's well.

APPEAL by plaintiff from *Hobgood, Judge*, 15 January 1973 Session of Superior Court held in WAKE County.

Plaintiff, the Town of Rolesville, is a municipal corporation. In September 1971, defendants purchased a lot in the Town, their lot being rectangular in shape and having 300 feet frontage and a depth of 280 feet. About 160 feet north from the north line of this lot, and on the other side of a small stream from the lot, is located one of the Town wells which supplies drinking water for its citizens.

Prior to 4 December 1972, defendants made preparations to construct on their lot a building to be used as an automotive repair garage. The Town of Rolesville has no zoning ordinance. Prior to 4 December 1972, it had no ordinance requiring any kind of building permit. On that date, the Board of Commissioners of the Town enacted an ordinance providing that no person shall commence or proceed with construction of any building within the Town without first obtaining from the Board a written permit containing a finding by the Board that the proposed construction or the use to be made of the building when completed "will not be detrimental, dangerous, or prejudicial to the public health and safety." The ordinance defines any construction or use of property in violation of its provisions as a public nuisance. On 6 December 1972, defendants were notified of passage of this ordinance, but they did not apply to the Town for a building permit. On 14 December 1972, the Town commenced this action seeking to restrain defendants from proceeding with construction of their building and to enjoin them permanently from using any portion of their property as an automotive garage.

In its complaint the Town alleged that "the terrain inclines downwardly from [defendants'] said lot in a northerly direction to said well, the soil is rocky with the probability of cracks in the large rocks above the water table"; that "construction on said lot of a building to be used as an automotive garage with the attendant use on said premises of such toxic substances

as lead gas, kerosene, solvents, and cleaning fluids . . . would be detrimental, dangerous, and prejudicial to the public health and safety of the citizens of the plaintiff, in that said toxic substances could be carried by drainage or by seepage through said rock crevices into the said well, thereby contaminating and polluting the water used by the citizens of said plaintiff"; and that "the use of said property as threatened by said defendants would constitute a public nuisance." Defendants filed answer denying these allegations and alleging as a defense that they had purchased their land and begun construction of a garage, a legitimate enterprise, prior to enactment of the ordinance on 4 December 1972; that prior to beginning construction they had complied with all laws and rules then applicable and had received permits from the proper authorities; that operation of the garage by the defendants would not contaminate or pollute the water of the Town or become a nuisance; that "any oil or other substances located around the garage, if operating, would be stored, sold and recycled; that there would be no runoff of said substances from the garage and the Town water supply would not be endangered."

After issuance of a temporary restraining order and a preliminary injunction, the matter came on for trial in the Superior Court. Neither party requested a jury, and the matter was heard without objection by the judge without a jury. At close of plaintiff's evidence, defendants made a motion for a directed verdict under Rule 50(a) of the Rules of Civil Procedure. This motion was allowed, and judgment was entered in which the court made findings of fact, set forth conclusions of law, and adjudged that the plaintiff be denied the relief sought and the action be dismissed. Plaintiff gave notice of appeal, and the court, finding that the status quo should be preserved pending the appeal, continued the preliminary injunction in effect until final disposition of the appeal.

Harris & Harris by Jane P. Harris for plaintiff appellant.

Edward Paschal for defendant appellees.

PARKER, Judge.

[1] Motion for a directed verdict is appropriate only in a jury trial. This case having been tried without a jury, the proper motion by which to test the sufficiency of plaintiff's evidence to establish a right to relief was a motion for involuntary dis-

missal under Rule 41(b). *Bryant v. Kelly,* 10 N.C. App. 208, 178 S.E. 2d 113, *rev'd* on other grounds in 279 N.C. 123, 181 S.E. 2d 438. We will treat the defendants' motion for a directed verdict as a motion for an involuntary dismissal under Rule 41(b). *Mills v. Koscot Interplanetary,* 13 N.C. App. 681, 187 S.E. 2d 372.

> "In ruling on a motion to dismiss under Rule 41(b), applicable only 'in an action tried by the court without a jury,' the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover." *Knitting, Inc. v. Yarn Co.,* 11 N.C. App. 162, 180 S.E. 2d 611.

Plaintiff does not rest its claim for an injunction to prohibit defendants from erecting an automotive repair garage on their lot upon the provisions of any valid zoning ordinance or upon an ordinance prohibiting operation of all such garages within the Town limits. In its complaint plaintiff did refer to the ordinance adopted by its Town Board on 4 December 1972 which purported to prohibit any person from commencing or proceeding with construction of any building within the Town without first obtaining from the Town Board a written permit which contained a finding by the Board that the proposed construction or use to be made of the building when completed "will not be detrimental, dangerous, or prejudicial to the public health and safety." This ordinance, by its terms, defined as a public nuisance any construction or use of property in violation of the ordinance. It is manifest, however, that mere enactment of the ordinance and refusal to issue a permit under it cannot give the Town Board lawful authority to make a public nuisance out of what in fact is not one, and no such arbitrary power is claimed by appellant on this appeal. Further, no contention has been made that the building which defendants propose to erect on their lot would in itself be in any way unsafe or "detrimental, dangerous, or prejudicial to the public health and safety." Rather, plaintiff rests its case for an injunction entirely upon its claim that the use which defendants propose to make of their building would constitute a public nuisance, in that such use would entail the placing on defendants' lot of toxic substances which could be carried by drainage or seepage through rock crevices into the Town well. The question presented by this

appeal, therefore, is whether plaintiff's evidence was sufficient to establish that the use which defendants propose to make of their lot would constitute a public nuisance in the respects claimed so as to entitle plaintiff to the requested injunction. We agree with the trial judge that it was not.

The evidence showed the following: Plaintiff's Town well is about 160 feet north from the north line of defendants' lot. The lot is separated from the well by a small stream, which flows between the lot and the well and in a northwest direction, defendants' lot being approximately 40 to 50 feet southwest of the stream at its closest point, and the well being northeast of the stream. Proceeding northwardly from defendants' lot, the ground slopes downward until it reaches the banks of the stream, and then on the other side of the stream it slopes upward to the well. Plaintiff's witness Berry, a ground water geologist with the State Department of Water and Air Resources, who was allowed by the court to testify as an expert in geology and ground water, testified that the soil at this location varies from two to five feet deep, below which there is a substratum of weathered granite until a total depth of nine or ten feet, below which "you will get into solid rock with very few fractures." This witness testified that the fractures in the granite slope in a northwest direction, going down into the earth, and sloping in the same direction that the little stream flows. In his opinion, if any oil or other substances ran into the stream, "it would have a normal tendency to go on with the stream . . . instead of seeping into the rocks." This witness also testified that if solvents, spent oil, gasoline or other materials used in an automotive garage operation were in a "sufficient amount," by which the witness meant "enough to saturate the soil," and "if it were to saturate the soil and go into the rock crevices, it would probably eventually pollute the water table in the area, and this would be drawn toward the well during times of heavy pumping." There was no evidence that defendants' contemplated use of their property would ever entail the discharge or spilling upon the land of such "solvents, spent oil, gasoline and other materials" in quantities sufficient to saturate the soil, or that if it did, that such materials would then "go into the rock crevices."

[2] In the judgment allowing defendants' motion and dismissing plaintiff's action, the trial judge made findings of fact, including the following:

"That the plaintiff has not offered competent evidence to substantiate the allegations of the complaint that the water would be polluted by the operation of an automotive garage on the premises and that the same would be a nuisance."

We agree. The burden was on the plaintiff to introduce evidence to establish a right to the requested injunctive relief. At most, plaintiff's evidence showed only a remote possibility that under special circumstances, which the evidence failed to show would ever exist and which in all probability never will exist, substances from defendants' lot might in times of heavy pumping be drawn toward plaintiff's well.

Plaintiff's evidence failed to show any substantial probability that the contemplated use by the defendants of their property would constitute a public nuisance. The judgment appealed from is

Affirmed.

Judges BRITT and MORRIS concur.

RUFUS C. TAYLOR v. MARGARET J. CRISP, ROY PAYNE, GLEN THOMAS, W. E. MITCHELL, AND FRANK BURNETT, AS MEMBERS OF THE SWAIN COUNTY BOARD OF EDUCATION, AND THE SWAIN COUNTY BOARD OF EDUCATION

No. 7430SC52

(Filed 1 May 1974)

Schools § 13— teachers — consideration for career status — recommendation of superintendent

Where plaintiff had been employed since 1966 as principal of a county school and served in that capacity during the 1972-1973 school year, plaintiff was a probationary teacher who was ready for immediate consideration for career status, and the county board of education had authority to refuse to renew plaintiff's contract for the 1973-1974 school year without a recommendation to that effect by the superintendent of the county schools. G.S. 115-142(c).

APPEAL by defendants from *Thornburg, Judge,* judgments entered 17 July 1973, Session of Superior Court held in HAY-

WOOD County, and 16 August 1973, Session of Superior Court held in SWAIN County.

This is an action brought by plaintiff, who was principal of the Bryson City Elementary School, seeking an injunction to require the Board of Education of Swain County to renew his contract as school principal for the 1973-1974 academic year.

From the stipulation entered into by the parties it appears that plaintiff was employed in 1966 as principal of the Bryson City Elementary School in Swain County. He served in this capacity through the 1972-1973 school year. At a regular meeting of the Swain County Board of Education on 9 April 1973, Thomas Woodard, the Swain County Superintendent of Schools, recommended that the contract of the plaintiff be renewed for 1973-1974. The Board of Education rejected the superintendent's recommendation, and by a majority vote refused to renew the plaintiff's contract.

Plaintiff brought this action against the Board of Education and its members contending that under G.S. 115-142 the Board had no authority to ignore the superintendent's recommendation and refuse to renew his contract. The case was heard upon motion for summary judgment filed by plaintiff.

The trial court ruled that the Board of Education could not refuse to renew the contract of plaintiff without a recommendation to that effect from the superintendent of the Swain County schools. Judgment was entered which ordered the Swain County Board of Education to renew the contract of the plaintiff as principal of the Bryson City Elementary School in Swain County for the 1973-1974 school year. From this judgment defendants have appealed.

Adams, Hendon & Carson, by Philip G. Carson and Herbert L. Hyde, for plaintiff appellee.

Coward, Coward & Jones, by Roger L. Dillard, Jr., for defendant appellants.

BALEY, Judge.

The legal question for determination by this Court is whether the Swain County Board of Education had the authority under the provisions of G.S. 115-142 to refuse to reemploy the plaintiff and renew his teaching contract for the

academic year 1973-1974. The answer to this question involves the interpretation of Chapter 883, Session Laws of North Carolina, 1971, which completely rewrote the state statutes governing the dismissal and rehiring of teachers. Chapter 883 (codified as General Statutes 115-142) became effective 1 July 1972 and was in effect on 9 April 1973 when the Board refused to renew the plaintiff's contract.

A statute should always be construed in accordance with 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. In determining the legislative intent, "parts of the same statute . . . dealing with the same subject, are to be considered and interpreted as a whole and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment. . . . " *State v. Barksdale,* 181 N.C. 621, 625, 107 S.E. 505, 507; *accord, State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706; *In re Hickerson,* 235 N.C. 716, 71 S.E. 2d 129; *Walker v. Bakeries Co.,* 234 N.C. 440, 67 S.E. 2d 459. The courts may appropriately take into account the circumstances under which the statute was enacted and the conditions it was designed to correct. *Milk Commission v. Food Stores,* 270 N.C. 323, 154 S.E. 2d 548; *Board of Education v. Mann,* 250 N.C. 493, 109 S.E. 2d 175; *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797.

Prior to the passage of Chapter 883 the contracts of public school teachers were terminable at the end of each school year. A county board of education had full authority to refuse to renew a teacher's contract for any reason it considered appropriate. *See Still v. Lance,* 279 N.C. 254, 182 S.E. 2d 403.

Tenure in employment has long been a laudable objective of the teaching profession, and Chapter 883 provides teachers with much greater security than they have heretofore had. It classifies all teachers into two groups: career teachers and probationary teachers. They are defined as:

> "(5) 'Career teacher' means any teacher who has been regularly employed by a public school system for a period of not less than three successive years and who has been reemployed by a majority vote of the board of such public school system for the next succeeding school year.

"(6) 'Probationary teacher' means any teacher employed by a public school system who is not a career teacher."

A career teacher may not be dismissed except upon certain specified grounds. G.S. 115-142(e)(1). The procedure for dismissal requires the recommendation of the superintendent and makes provision for an investigation by a "professional review committee" created by statute, G.S. 115-142(g),(i). The career teacher is entitled to a hearing before the board of education and has a right of appeal to the superior court.

Since the statute does confer upon career teachers additional security in their employment, it does *not* grant instant career status to all teachers presently employed but provides appropriate methods through which a teacher may acquire career status. In this case, even though plaintiff had been serving as principal of the Bryson City school since 1966, he was not a career teacher within the meaning of the statute when considered for reemployment on 9 April 1973. All teachers when considered for reemployment "for the next succeeding school year" were *probationary* teachers.

There are two sections of Chapter 883 which relate to the dismissal and rehiring of probationary teachers. The first section amended G.S. 115-142(c) to provide:

"(c) Election of career teachers. After a teacher has been employed by the same public school system in this State for a period of three consecutive years, the board of that system is required to vote upon that teacher's employment for the next succeeding year. If a majority of the board votes to reemploy the teacher, he or she becomes a career teacher. If a majority of the board votes against reemployment of the teacher, the teacher remains a probationary teacher whose rights are set forth in G.S. 115-142(M)(2). If the board fails to vote, but reemploys the teacher for the next successive year, then the teacher automatically becomes a career teacher. All teachers employed by a public school system of this State at the time this act takes effect who, at the end of the last school year, will either have been employed by that school system (or a successor system if the system has been consolidated) for a total of four consecutive years or will have been employed by a public school system of this State for a

> total of five consecutive years shall automatically be career teachers if employed for a second year following the effective date of this act. All other teachers employed by a public school system of this State at the time this act takes effect shall be probationary teachers."

Subsection (c) concerns the election of a probationary teacher to career status after the eligibility period of service is met. This section clearly requires a vote of the board of education upon the employment of the teacher for the next school year. It does not provide for any recommendation or participation of the superintendent in this action.

The second section relating to dismissal or rehiring of a probationary teacher is G.S. 115-142(m)(2) which reads:

> "The board, upon recommendation of the superintendent, may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any cause it deems sufficient; provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons."

This section concerns the renewal of a contract of a probationary teacher without reference to career status and does involve the recommendation of the superintendent. It is applicable to those teachers who are serving the first and second years of their probationary period when they are not then eligible to be considered for career status.

The plaintiff was a probationary teacher who was ready for immediate consideration for career status. Under subsection (c) a teacher like plaintiff who had taught for more than three years prior to 1972-1973 and was teaching during the 1972-1973 school year was to be treated the same way as a teacher completing his third year in 1972-1973. Such a teacher would be voted on by the Board of Education at the end of the 1972-1973 school year and, if rehired for 1973-1974, would then become a career teacher. This was the plaintiff's case. He was not a probationary teacher under subsection (m)(2), which appears to be the section upon which the trial court based its ruling, but a probationary teacher being considered for career status. The subsection applicable to him is G.S. 115-142(c). Under this section the Board of Education shall vote upon the continued employment of a probationary teacher when such reemployment has the effect of granting career status. This is not simply a

matter of renewing the contract of a probationary teacher who will again be considered before being granted career status. Here the Board of Education is reaching a decision which confers career status, and the legislature has determined under subsection (c) that this decision shall be made by the elected board, which has ultimate "control and supervision of all matters pertaining to the public schools." G.S. 115-27.

While this case is governed by G.S. 115-142(c) as effective on 9 April 1973, it is not amiss to point out that Chapter 782, Session Laws of North Carolina, 1973, effective 23 May 1973, which amended this section, clarified the legislative intent by providing specifically:

> "(1) Status of teachers employed on July 1, 1972. No teacher may become a career teacher before July 1, 1973."

and in

> "(2) Normal election of a teacher to career status. . . .
>
> "If a majority of the board votes against reemploying the teacher, he shall not teach beyond the current school term."

We do not reach the question of whether or not a probationary teacher not eligible for tenure may be dismissed at the end of the first or second year of service only if the superintendent recommends dismissal, and the Board accepts such recommendation. This involves an interpretation of subsection (m) (2) which is not here applicable.

Under subsection (c) the Swain County Board of Education did have the power on 9 April 1973 to refuse to renew plaintiff's contract. This was the year when the Board was required to determine whether he should be given tenure. If he were rehired, he would become a career teacher. The Board was not required to consider the recommendation of superintendent Woodard that plaintiff be rehired, but was free to refuse to rehire him as it chose.

The judgment of the Superior Court is reversed.

Reversed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. IRIS THOMAS LASH

No. 7318SC320

(Filed 1 May 1974)

1. **Searches and Seizures § 2— consent to search vehicle — applicability to trunk**

That defendant gave a police officer only her ignition key and professed not to have the key to the car's trunk in her possession did not compel a finding that permission to search the vehicle which she gave the officer extended only to the body and did not include the trunk of the car; therefore, pillowcases of clothing seized by officers from the trunk were admissible in a prosecution of defendant for receiving stolen property.

2. **Criminal Law § 34; Receiving Stolen Goods § 4— merchandise stolen from Belk's — Sears merchandise found in defendant's vehicle admissible**

In a prosecution of defendant for felonious larceny and felonious receiving of clothing from Laurie's Incorporated and Belk Department Store, the trial court did not err in allowing into evidence testimony that seven men's suits with Sears Roebuck tags attached were found in defendant's vehicle upon her arrest, since the evidence was relevant to show the accused's knowledge of the stolen character of the goods which she was charged with having knowingly received and to show a plan or design to commit the offense charged by leaving her vehicle parked in the shopping center lot to serve as a convenient receptacle into which others might deposit stolen goods.

3. **Receiving Stolen Goods § 4— receiving stolen clothing — evidence as to inventory tags**

In a prosecution for felonious larceny and felonious receiving, the trial court did not err in allowing employees of the stores from which goods were allegedly taken to testify that, when a garment is sold in their stores, a part of the tag is removed and that the tags on the garments found in defendant's car were intact, thus indicating that the garments had not been sold.

4. **Receiving Stolen Goods § 5— receiving stolen clothing — sufficiency of evidence**

In a prosecution for the felonious receiving of stolen goods evidence was sufficient to withstand defendant's motion for nonsuit where it tended to show that a witness saw someone other than defendant place some goods in defendant's car, defendant subsequently entered the car with the goods in plain view and drove away, and, when she was arrested a short while later, she had no key to the trunk, but the trunk was filled with new clothing which was rolled up on store hangers with inventory tags intact.

APPEAL by defendant from *Crissman, Judge,* 9 October 1972 Criminal Session of Superior Court held in GUILFORD County.

Defendant was charged in a bill of indictment with (1) the felonious larceny of four particularly described lady's pants suits having a total value of $378.00, the property of Laurie's Incorporated, and (2) the felonious receiving of the same property. In a second bill of indictment defendant was charged with (1) the felonious larceny of two particularly described men's suits and two particularly described lady's pants suits having a total value of $354.00, the property of Belk Department Store, a corporation, and (2) the felonious receiving of the same property. The cases were consolidated for trial and defendant pled not guilty to all counts.

The State's evidence in substance showed the following: At approximately 2:00 p.m. on 13 June 1972 the manager of a men's wear shop in the Friendly Shopping Center called the security force after he had observed a woman in his store attempting to shoplift merchandise. At approximately the same time he observed a 1970 Pontiac Firebird automobile parked in the shopping center parking lot near the rear of Belk's Department Store. He kept this automobile under observation for approximately forty minutes, during which time he saw a woman, who was not the defendant, come out of the front door of the Belk Store, walk to the Pontiac automobile, open the back door, dump merchandise onto the floorboard, and walk away from the vehicle and into the rear door of the Belk Store. A Greensboro police officer, who arrived at approximately 3:30 p.m., observed "two pillowcases with clothes in it (sic) and some folded up pillowcases on the floorboard of the car" behind the driver's seat. Police officers continued to keep the car under observation until approximately 4:25 p.m., when defendant walked up, opened the door on the driver's side, got in, and drove away. The officers followed and stopped defendant a short distance away. She was arrested for driving without a driver's license and for failing to have proper registration for her vehicle. The officers picked up the clothing contained in a pillowcase on the floorboard behind the driver's seat and found that this consisted of two men's and two women's suits from Belk's Department Store. These clothes were on hangers and the Belk tags were attached intact. A subsequent search of the trunk of the car revealed four women's pants suits valued at $378.00 from Laurie's, Incorporated, another clothing store at the shopping center, as well as seven men's suits with Sears Roebuck tags attached in the total amount of $569.46. The Belk's and Laurie's suits were rolled up and still attached to

their hangers, and no sales slips or wrapping paper, bags, or other packaging were discovered in the vehicle. Employees of Belk's and Laurie's testified that the intact condition of the price tags and inventory control pull tickets on the Belk's and Laurie's suits indicated that this merchandise had not been sold in the normal course of business.

Defendant offered no evidence. The jury found her not guilty of the two charges of larceny and guilty of each of the two charges of felonious receiving. The cases were consolidated for judgment, and defendant was sentenced to prison for the term of not less than seven nor more than ten years, the sentence to commence at the expiration of a sentence for manslaughter imposed in Forsyth County.

Attorney General Robert Morgan by Special Consultant Wade E. Brown for the State.

William G. Pfefferkorn for defendant appellant.

PARKER, Judge.

[1] Appellant's first assignment of error is directed to the overruling of her objections to evidence concerning the merchandise found in the trunk of her car. Prior to admitting this evidence, the trial court conducted a voir dire examination of the police officer who searched the car. On the basis of competent evidence, the court found that defendant gave the officer permission to search her car, including its trunk, and that this permission was granted after defendant had been fully advised of and understood her rights. That she gave the officer only the ignition key and professed not to have the key to the car's trunk in her possession did not, as appellant now seems to contend, compel a finding that the permission to search extended only to the body and did not include the trunk of the car. The officer obtained access to the trunk through the rear seat, and the search having been made with defendant's permission, her objections to the evidence obtained as a result of the search were properly overruled.

[2] Appellant contends that at least the evidence concerning the Sears Roebuck suits should have been excluded, since this tended to show defendant guilty of an unrelated crime. If this be so, the evidence was not inadmissible. "Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy

is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury's N. C. Evidence, Brandis Revision, § 91, p. 289. Here, the evidence concerning the Sears Roebuck suits was relevant both to show the accused's knowledge of the stolen character of the goods which she was charged with having knowingly received and to show a plan or design to commit the offense charged by leaving her vehicle parked in the shopping center parking lot to serve as a convenient receptacle into which others might deposit stolen goods. There was no error in admission of the testimony concerning the Sears Roebuck suits. *State v. Murphy,* 84 N.C. 742; 1 Stanbury's N. C. Evidence, Brandis Revision, § 92.

[3] There was no error in permitting employees of the Belk's and Laurie's stores to testify that when a garment is sold in their stores a part of the tag is removed for the purpose of inventory control to record the sale of the particular garment by color, size, style and manufacturer, and to testify that the tags on the garments found in defendant's car were intact, which indicated the garments had not been sold. These were facts within the knowledge of the witnesses, and their testimony did not invade the province of the jury, which still had the task of determining whether the garments had been stolen.

[4] Defendant's motions for nonsuit were properly denied. "The essential elements of the crime of receiving stolen goods are: '(a) The stealing of the goods by some other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods; and (c) continued such possession or concealment with a dishonest purpose.' " *State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214. When the evidence is viewed in the light most favorable to the State and the State is given the benefit of every reasonable inference which may be legitimately drawn therefrom, there was substantial evidence to support a jury finding of all material elements of the offenses of which they found defendant guilty. The physical condition of the substantial number of new garments found in defendant's car, rolled up as they were on the store hangers and with inventory tags intact, gave rise to a reasonable inference that they had been stolen. An eyewitness testified that he saw someone other than the accused place part of these goods in defendant's

car, supporting a finding that someone other than the defendant had committed the thefts. These goods were in plain view in defendant's car where she could have seen them when she got in her car to drive away, and nevertheless she did drive away. When arrested a short while later, she did not have a key to the trunk, but it is obvious that someone had such a key, for the trunk was filled with the clothing from Belk's and Sears Roebuck. All of the evidence taken together supports the inference which the jury might reasonably draw that defendant, after giving the trunk key to some other person, left her automobile parked at a convenient location in the shopping center parking lot for a sufficient length of time that others might use it as a depository for stolen goods, and that when she drove away in her car she both knew that it contained stolen goods and intended to continue to possess such goods with a dishonest purpose. There was no error in overruling the motions for nonsuit.

We have carefully reviewed appellant's remaining assignments of error, which are directed to portions of the court's charge to the jury and to the court's control over a portion of argument of counsel to the jury, and find no prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES LLOYD YOUNG

No. 7412SC210

(Filed 1 May 1974)

1. **Searches and Seizures § 1— automobile in plain view — warrantless search and seizure**

Officers were justified in concluding that defendant's car constituted evidence of a crime where a murder had been committed, defendant was the last person seen with the victim, defendant's trailer had just burned down under the most suspicious circumstances, and defendant's car had blood on the door handles and bumper, and officers properly seized the car without a warrant since it was in plain view when they went to defendant's trailer park to find him for interrogation purposes.

2. **Criminal Law § 77— "confidential statement" of defendant — admissibility**

Where defendant made two statements to a police officer, the first a statement which the officer agreed to keep confidential and the second a signed confession, the trial court in a prosecution for murder did not err in admitting into evidence the confidential statement, since additional information contained therein did not relate to the guilt or innocence of defendant and was not of sufficient significance to have affected the jury's verdict.

3. **Criminal Law § 102— jury argument of solicitor — no prejudice**

In this murder case the district attorney's remarks in his jury argument were not of such an inflammatory character as to form the basis for prejudicial error, and the trial court did not abuse its discretion in allowing him to proceed with his argument.

APPEAL by defendant from *Braswell, Judge,* 24 September 1973 Session of Superior Court held in CUMBERLAND County.

Defendant was charged with the murder of Cecelia Finch (Ce Ce) Kvist.

The State's evidence at the trial tended to show that on the night of 16 May 1973, defendant was with Ce Ce Kvist in the Frontier Lounge in Fayetteville. At 11:00 that night he told Mary Harrison, who lived with Ce Ce at 825 Calhoun Drive, that Ce Ce was ready to go home. He and Ce Ce then left, but Miss Harrison did not return home until 2:00 in the morning of May 17. When she arrived, she found that the house had been ransacked, the bathroom and nearby rooms were covered with blood, and Ce Ce's dead body was in the bathtub. She had received skull fractures and brain hemorrhage caused by being beaten with a hard object; she had been scalped with a knife; and she had suffered numerous other wounds. Near the house at 825 Calhoun Drive, police officers found two brick fragments that fit together to form a single brick. The bricks were stained with a reddish material which was examined and found to be human blood.

At 3:45 a.m. on 17 May 1973 police officers went to defendant's house trailer in the Brookwood Trailer Park. They found that it had burned down and defendant was not there. They went to defendant's mother-in-law's house, arrested him there, and brought him to the police station. The police officers washed defendant's feet, and when the material washed off was examined, it was found to contain human blood. Defendant's fingerprints were taken, and they were found to be identical to some

latent fingerprints found on a bloody spray can in Ce Ce's house. An inked impression of defendant's footprint was taken, and it proved to be identical in size and appearance to the bloody footprints found on the floor in Ce Ce's house.

One of the police officers who discovered that defendant's trailer had burned down also observed defendant's car and noticed that there were reddish stains, which appeared to be blood, in and around the door and near the door handles and bumper. He called a wrecker and had the car towed to a garage. At the garage, the car was searched and the floor was cleaned with a vacuum cleaner. An expert forensic chemist examined the sweepings from the vacuum cleaner and found that they contained minute brick scrapings. He determined that these scrapings probably came from the bloodstained brick found near Ce Ce's house.

At the police station defendant was given the *Miranda* warnings, including the warning that anything he said could be used against him, and was interrogated by W. A. Newsome of the Fayetteville police department. He made two lengthy statements. Before making the first statement, he requested that it be kept confidential, and Newsome agreed. The second statement was dictated to a secretary and defendant signed it after the secretary typed it up. In both statements defendant confessed to the killing of Ce Ce Kvist. He said that after he took Ce Ce home from the Frontier Lounge, they had an argument and he beat her to death with a brick. The first statement contained additional material relating to certain unpleasant details of defendant's personal life. The first statment will hereinafter be referred to as the "confidential statement," and the second statement as the "signed confession."

The State introduced defendant's signed confession at the trial, and a voir dire hearing was held to determine whether it was admissible in evidence. While cross-examining Officer Newsome on voir dire, counsel for defendant asked a number of questions about the confidential statement. The court held that the signed confession was admissible. Subsequently, on rebuttal after defendant had testified, the State introduced the confidential statement.

Defendant testified that he did not kill Ce Ce and that his signed confession was false. He stated that after taking Ce Ce to her house on May 16, he left and began driving home. On the

way he realized that he had left his glasses at Ce Ce's house, and he turned around and drove back to pick up the glasses. When he came back to Ce Ce's house he found her there dead.

The jury found defendant guilty of second degree murder. From the court's judgment imposing a prison term of 30 years, defendant appealed.

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

Smith & Geimer, P.A., by Kenneth Glusman, for defendant appellant.

BALEY, Judge.

[1] Defendant contends that the police acted illegally in seizing his car on 17 May 1973, and that the brick scrapings and other items of evidence found in the car should not have been admitted. This contention cannot be upheld. When police officers discover evidence of a crime in plain view, without the necessity of a search, they may seize the evidence without obtaining a search warrant. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Fry,* 13 N.C. App. 39, 185 S.E. 2d 256, *cert. denied and appeal dismissed,* 280 N.C. 495, 186 S.E. 2d 514. In this case defendant's car was in plain view when the police officers went to Brookwood Trailer Park to find defendant. A murder had been committed; defendant was the last person seen with the victim; defendant's trailer had just burned down under the most suspicious circumstances; and defendant's car had blood on the door handles and bumper. Clearly, the officers were justified in concluding that the car constituted evidence of a crime and should be seized.

In *Coolidge v. New Hampshire, supra,* the Supreme Court held that the "plain view" rule does not apply unless the police have a right to be at the place where the evidence is discovered. Here the officers went to defendant's premises looking for him for interrogation concerning a brutal murder when he was a logical suspect, and they had a right to be on the premises and seize any evidence in plain view. The bloodstained car was easily visible from the street, front entrance, or other portions of defendant's premises which were open to the public. *Cf. Smith v. VonCannon,* 283 N.C. 656, 197 S.E. 2d 524. The seizure

was inadvertent, since the officers were intending to look for defendant rather than to search for evidence. The items found in the car were properly admitted into evidence.

[2] Defendant assigns as error the admission in evidence of the confidential statement which he made to Officer Newsome. This statement concerned certain information about his personal life which was not mentioned in the signed confession, but this information did not relate to the guilt or innocence of the defendant and was not of sufficient significance to have affected the verdict of the jury. The signed confession which the trial court found to be freely and voluntarily made was admitted into evidence, and its admissibility is not challenged on this appeal. The additional information in the confidential statement bears primarily on the issue of premeditation and deliberation—an issue which the jury resolved in the defendant's favor. We find no error in admission of the alleged confidential statement.

[3] Defendant argues that the trial court erred in overruling his objection to certain remarks made by the district attorney in arguing the State's case to the jury. However, "the argument of counsel must be left largely to the control and discretion of the presiding judge." *State v. Westbrook,* 279 N.C. 18, 39, 181 S.E. 2d 572, 584, *vacated and remanded on other grounds,* 408 U.S. 939; *accord, State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432. In this case the district attorney's remarks were not of such an inflammatory character as to form the basis for prejudicial error, and the trial court did not abuse its discretion in allowing him to proceed with his argument.

Defendant has brought forward a number of other assignments of error concerning the admission or exclusion of evidence, and there may have been instances when the court erred in either admitting or excluding some evidence of minor probative weight. We have carefully examined each of the assignments and are of the opinion that the action of the trial court, if error, could not have affected the outcome of the trial. For example, the testimony offered by defendant to account for the presence of the brick scrapings in his car was perhaps relevant and admissible, but its exclusion could not have affected the jury's verdict.

The evidence of defendant's guilt in this case is overwhelming. Ce Ce Kvist was killed by being beaten with a brick, and defendant had been in possession of the brick which killed her.

He was the last person seen with Ce Ce, and he was found a few hours after the killing with human blood on his feet. His latent fingerprints, and his bloody footprints, were found at the scene of the crime. Furthermore, defendant made a complete and detailed confession of the crime. In view of this very strong evidence, it is totally unlikely that defendant would have been acquitted, or convicted only of manslaughter, if the trial court had ruled correctly on all evidentiary questions presented to it. Not every error relating to the admission and exclusion of evidence requires a new trial. *State v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39; 1 Stansbury, N. C. Evidence (Brandis rev.), § 9. When error is harmless beyond a reasonable doubt, defendant is not entitled to a reversal. *Chapman v. California,* 386 U.S. 18 (1967); *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858; *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677.

Although defendant has not received a perfect trial, he has received a fair one. The investigation of the case was thorough and the presentation of the State's evidence complete and convincing. The defendant was well represented by counsel, and his defense was fully documented for the jury. Except as to the issue of premeditation and deliberation, the jury believed and accepted the State's version of the facts, and accordingly they convicted defendant of second degree murder. Defendant has not shown the existence of any prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. PALMER WATSON

No.745SC264

(Filed 1 May 1974)

1. **Constitutional Law § 32— written waiver of counsel in district court — appeal to superior court**

Where defendant executed a written waiver of counsel prior to his trial in the district court and the district judge certified that defendant had been fully informed of the charges against him and of his right to counsel, and upon his appeal to superior court the judge of the superior court reviewed the written waiver and district judge's certificate and informed defendant of his right to court-

appointed counsel if he were indigent, it was not necessary for defendant to execute another written waiver of counsel or for the superior court judge to make findings of fact since G.S. 7A-457 does not require successive written waivers at each court level of the proceeding and the burden was on defendant to show that he desired to withdraw the waiver and have counsel assigned for him.

2. **Constitutional Law § 30— speedy trial**

Defendant was not denied the right of a speedy trial upon three assault charges where the offenses occurred on 29 February 1972, the warrants were issued on that day but were not served until 15 June 1973, and defendant was tried on 3 October 1973.

3. **Criminal Law § 83— assault on wife — wife's testimony against husband**

In a trial of defendant for assault upon his wife and assault with a deadly weapon upon two other persons, the trial court properly permitted defendant's wife to testify against defendant as to the assault on her.

4. **Assault and Battery § 17— simple assault**

Sentence in excess of 30 days for simple assault was erroneous.

APPEAL by defendant from *Cohoon, Judge*, 7 October 1973 Session of NEW HANOVER Superior Court.

Heard in the Court of Appeals 16 April 1974.

Defendant was tried on three warrants: No. 72CR17199, being a charge for a simple assault upon his wife, Annie Watson; No. 72CR17200, being an assault with a deadly weapon, a pocketknife, upon Norma Jean Eason, cutting her on both arms and hitting her on the head; No. 72CR17198, being an assault with a deadly weapon, a pocketknife, on William Hawkins by stabbing him in the back. These three warrants were issued 29 February 1972, and the offenses charged were on that date. The three warrants were served on 15 June 1973.

On 20 July 1973, the defendant wrote the district court requesting that he be brought back from prison and tried on the warrants because with the warrants outstanding, he was not eligible for either work release or parole.

On 3 September 1973, the defendant filed a paper entitled Habeas Corpus for Dismissal of Charges.

On 3 October 1973, the defendant was tried in the district court and at that time in writing executed a waiver of his right to have counsel assigned to him. This waiver was as follows:

"WAIVER OF RIGHT TO HAVE ASSIGNED COUNSEL

The undersigned represents to the Court that he has been informed of the charges against him, the nature thereof, and the statutory punishment therefor, or the nature of the proceeding, of the right to assignment of counsel, and the consequences of a waiver, all of which he fully understands. The undersigned now states to the Court that he does not desire the assignment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do.

PALMER WATSON

(Sworn to this 3 day of Oct., 1973.)

CERTIFICATE OF JUDGE

I hereby certify that the above named person has been fully informed in open Court of the nature of the proceeding or of the charges against him and of his right to have counsel assigned by the Court to represent him in this case; that he has elected in open Court to be tried in this case without the assignment of counsel; and that he has executed the above waiver in my presence after its meaning and effect have been fully explained to him.

This the 3 day of Oct., 1973.

GILBERT H. BURNETT
Signature of Judge"

In the district court, judgment was entered imposing a sentence upon the defendant in one case of two years to commence at the expiration of a sentence he was then serving; in another case, two years to commence at the expiration of the first two-year sentence; and in the simple assault case, a sentence of 30 days to commence at the expiration of the second two-year sentence.

From the imposition of the sentences in the district court, the defendant appealed to the superior court.

Prior to his arraignment in the superior court, the record discloses the following:

"Prior to Arraignment the Trial Judge, the Honorable Walter W. Cohoon, reviewed the written waiver of counsel

executed by the defendant in District Court and the Certificate of the Honorable Gilbert H. Burnett, District Court Judge, which stated that the defendant had been advised of his right to counsel, the nature of the charges against him, and that notwithstanding this the defendant waived his right to counsel. The Honorable Walter W. Cohoon then advised the defendant, in Open Court, that he had the right to have an attorney represent him in Superior Court even though he had waived counsel in the District Court. The Judge also advised the defendant that an attorney would be appointed to represent him if he was not able to afford one.

The defendant indicated in Open Court that he understood this right and that he did not want an attorney to represent him."

The defendant entered a plea of not guilty to each of the three charges. The three cases were consolidated for trial, and the defendant was found guilty in each case. In the case charging assault with a deadly weapon on William Hawkins, the defendant was sentenced to imprisonment for not less than 20 nor more than 24 months to begin at the expiration of any and all sentences previously imposed and which the defendant was serving at that time. In the case charging assault with a deadly weapon upon Norma Jean Eason, the defendant was sentenced to imprisonment for not less than 12 nor more than 18 months, this sentence to commence at the expiration imposed in the preceding case. In the case charging him with simple assault upon Annie Watson, a sentence was imposed committing the defendant to imprisonment for not less than three nor more than six months, this sentence to commence at the expiration of the preceding sentence.

From the three judgments imposed, the defendant appealed.

The evidence on behalf of the State was to the effect that on 29 February 1972, the defendant and his wife, Annie Watson, were living in a state of separation and had been separated for approximately four months. At that time Annie Watson was living with her mother. On that night, the defendant came by the mother's home and picked up some dinner. Later that evening, Annie Watson went with Norma Jean Eason and William Hawkins to a banquet which lasted until about midnight. William Hawkins was driving the automobile in which they went to the banquet; and after the banquet, William Hawkins brought

Annie Watson back to her mother's home. When Annie Watson got out of the automobile and was thanking William Hawkins and Norma Jean Eason for taking her and bringing her home, the defendant struck her on the left side of her face and knocked her unconscious. When she regained consciousness, she was in the house, and she observed Norma Jean Eason washing blood off her arms and William Hawkins was also there. The defendant was not there.

Norma Jean Eason, after Annie Watson had been knocked unconscious, got out of the automobile to go to her assistance. At that time, the defendant cut Norma Jean Eason with a knife in the back of the head and on the arms. William Hawkins also got out of the automobile to go to the assistance of the two women. While he was engaged in trying to get the two women away from the defendant, the defendant cut him in the back. Hawkins took Norma Jean Eason to the hospital where 43 stitches were taken to close her cuts.

The defendant testified that he was at the home waiting for Annie Watson to return as he wanted to discuss a matter with her, and she had told him to meet her there. He stated that when she arrived in the automobile, she got out and was drunk and that she grabbed him. He was trying to get loose from her; and in the ensuing scuffle, she fell to the ground and he might have hit her. He then stated that he started to leave and get in his automobile when William Hawkins came up behind him and knocked him down and got on top of him. He stated that he then took out his knife and cut William Hawkins and that Norma Jean Eason came to the aid of William Hawkins and she got cut by accident while he was fighting with Hawkins.

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

Parker, Rice and Myles by Jeffrey T. Myles for defendant appellant.

CAMPBELL, Judge.

[1] The defendant assigns as error the failure of the trial court to comply with G.S. 7A-457. This statute in pertinent part reads as follows:

> "(a) An indigent person who has been informed of his right to be represented by counsel at any in-court pro-

ceeding, may, in writing, waive the right to in-court representation by counsel, if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged."

We think that in the instant case the waiver in writing and the certificate attached thereto entered by Judge Burnett in the district court was adequate and sufficient. In our opinion the statute does not require successive waivers in writing at every court level of the proceeding. The trial in the district court and the further trial of the case in the superior court on appeal together constituted one in-court proceeding. The waiver in writing once given was good and sufficient until the proceeding finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. The burden of showing the change in the desire of the defendant for counsel rests upon the defendant. In the instant case, the trial judge in the superior court again called the attention of defendant to the fact that he could have court-assigned counsel to represent him if he so desired. This was all that was required, and, in fact, more than was required, and we find this assignment of error without merit.

[2] The defendant assigns as error the fact that he did not receive a speedy trial. The record reveals that the offense occurred on 29 February 1972, and warrants were issued on that day. The warrants, however, were not served until 15 June 1973, and the defendant was tried on 3 October 1973. We do not believe that the defendant has shown any prejudice in this regard, and we find this assignment of error without merit. Compare *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969).

[3] The defendant assigns as error the fact that his wife was permitted to testify against him. It is to be noted that the wife only testified to those matters pertaining to the assault upon her by the defendant. This did not constitute error. *State v. Robinson,* 15 N.C. App. 362, 190 S.E. 2d 270 (1972), *cert. denied,* 281 N.C. 762, 191 S.E. 2d 363 (1972).

[4] The defendant assigns as error the sentence in excess of 30 days in the case involving the assault on Annie Watson. The

record discloses that the defendant was placed on trial for a simple assault and not an assault on a female by a male. The verdict of the jury was for a simple assault. We think this exception is well-taken, and that the sentence in excess of 30 days was erroneous. *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966).

This case will, therefore, be remanded for the entry of a proper judgment in this one case.

We have reviewed the other assignments of error brought forward by the defendant, and we do not find it necessary to discuss them seriatim. There was no prejudicial error in any of them.

Remanded for proper judgment in the case of Annie Watson, No. 72CR17200. In all other respects,

No error.

Judges MORRIS and VAUGHN concur.

BEN W. SMITH, EMPLOYEE-PLAINTIFF v. MEMORIAL MISSION HOSPITAL, EMPLOYER-DEFENDANT AND EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, CARRIER-DEFENDANT

No. 7428IC55

(Filed 1 May 1974)

1. **Master and Servant § 56— infectious hepatitis — unstopping commode — causal relationship**

The evidence was insufficient to support a finding that plaintiff hospital employee contracted infectious hepatitis while unstopping a commode in the hospital.

2. **Master and Servant § 68— infectious hepatitis — hospital employee — occupational disease**

The conclusions of law that infectious hepatitis is an occupational disease and that plaintiff was disabled as the result of contracting infectious hepatitis while performing the duties of his employment are not supported by sufficient evidence and must be vacated.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission dated 7 August 1973. Argued in the Court of Appeals 19 March 1974.

Plaintiff, an employee of Memorial Mission Hospital as a maintenance mechanic helper, assisted a fellow employee in unstopping a commode in one of the hospital rooms of Memorial Mission Hospital. Plaintiff and his co-worker used an "electric eel" in the process of unstopping the commode. An "electric eel" is a flexible metal cable with one end affixed to an electrical motor. When the motor is engaged, the flexible cable is turned so that the loose ends of the cable burrow into the debris plugging the passageway sought to be unplugged. This work was being done during the second or third week of February, 1971. In early March, plaintiff became ill and his illness was diagnosed as hepatitis. His co-worker also became ill with the same disease. Each filed a claim contending entitlement to compensation and medical benefits under the North Carolina Workmen's Compensation Act by reason of the benefits provided by G.S. 97-53(13), claiming that the hepatitis he contracted is an occupational disease.

After hearing, an award was made by Deputy Commissioner Leake. On appeal to the full Commission, his award was affirmed. Defendants appealed.

No appearance for plaintiff appellee.

Hedrick, McKnight, Parham, Helms and Kellam, by Edward L. Eatman, Jr., for defendant appellants.

MORRIS, Judge.

[1] Defendants contend that the award of the Industrial Commission is not supported by competent evidence and is contrary to law. Defendants' position is well taken.

Plaintiff's father testified that he was Chief Engineer for the Memorial Mission Hospital, that he was familiar with the method of unstopping a commode with an "electric eel," that the mechanic must run his hands down through a pipe which is extremely coarse, and that the mechanic must "damage his hands"—"You are striking your knuckles." There was no evidence whatever either from this witness or from plaintiff himself that he did in any way damage his hands or sustain any type of cut or abrasion. Counsel for plaintiff was allowed, over objection, to ask Dr. Woodard Farmer who treated plaintiff, the following question:

> "Now, doctor, if the Commission should find that he did work in a sewer, cleaning out a sewer, and received cuts on

> his hands, do you have an opinion satisfactory to yourself as to whether or not this infectious hepatitis might or could have come from his work on the sewer line?"

Dr. Farmer answered: "I think it is technically *possible* to receive a case of hepatitis by being associated with the connection of a toilet." (Emphasis supplied.)

Plaintiff's counsel was allowed, over objection, to ask Dr. John A. McLeod, a specialist in pathology, the following question:

> "If the Commission should find that these two men had worked on a commode in sewage transmittal, that is a sewer line in the hospital, and received some cuts and injuries from their work there on this sewage line, do you have an opinion satisfactory to yourself as to whether they might or could have contacted and become infected with this hepatitis as a result of this work?"

Dr. McLeod also answered that "it is entirely *possible* . . ." (Emphasis supplied.)

Assuming, arguendo, that the hypothetical questions asked of the expert witnesses assumed only facts which were established by the evidence either directly or by fair and necessary implication, *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E. 2d 827 (1971), it is the rule in this jurisdiction that a hypothetical question should ask the expert witness whether "a particular condition could or might have produced the result in question . . ." 3 Strong, N. C. Index 2d, Evidence, § 50, and cases there cited. Counsel followed this rule. However, the "could" or "might" refers to probability and not mere possibility. *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541 (1964). The expert's opinion should be based on the reasonable probabilities known to him from scientific learning and experience. In the case before us, both experts, in their response to the hypothetical question, expressed a mere possibility. That this is not sufficient is indicated by Justice Moore in *Lockwood v. McCaskill, supra,* at 668 and 669, where he said:

> "The expert may express the opinion that a particular cause 'could' or 'might' have produced the result—indicating that the result is capable of proceeding from the particular cause as a scientific fact, *i.e.*, reasonable probability in the particular scientific field. If it is not reasonably probable, as

> a scientific fact, that a particular effect is capable of production by a given cause, and the witness so indicates, the evidence is not sufficient to establish *prima facie* the causal relation, and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be admitted and, if admitted, should be stricken."

This assignment of error is sustained.

Defendants also assign as error that the crucial findings of fact were not supported by competent evidence and the conclusions of law, therefore, were erroneous. With this position, we also agree.

In finding of fact No. 3, the Commission found as a fact that "[i]n the opinion of Dr. McLeod, both Smith and Morrow had infectious hepatitis." The record reveals that Dr. McLeod testified: "I do not know what kind of hepatitis Mr. Smith had." This finding of fact also stated: "Dr. McLeod was of the opinion that the plaintiff could or might have contacted hepatitis through having his hands in commodes as heretofore set out." As we have already pointed out, Dr. McLeod's answer was not "could or might have" but only a mere possibility.

[2] The Commission, upon the findings of fact, concluded that "[w]hile performing the duties of his employment on or about February 11, 1971, or February 18, 1971, the plaintiff became infected with an *occupational disease,* to wit: Infectious hepatitis" and "[a]s a result of said *occupational disease,* the plaintiff was temporarily totally disabled from March 13, 1971, through April 23, 1971, both dates inclusive." (Emphasis supplied.)

G.S. 97-53 provides:

> "The following diseases and conditions *only* shall be deemed to be occupational diseases within the meaning of this Article:" (Emphasis supplied.)

Infectious hepatitis is not listed. G.S. 97-53(13) provides:

> "Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding

all ordinary diseases of life to which the general public is equally exposed outside of the employment."

If plaintiff is entitled to an award for infectious hepatitis, assuming the findings are supported by competent evidence and support the conclusions of law, the recovery must be based upon the provisions of the above-quoted provisions. We are in accord with the conclusion reached by Judge Brock in the companion case, *Morrow v. Hospital*, 21 N.C. App. 299, 204 S.E. 2d 543 (1974), that "evidence presented in this case is insufficient to show that infectious hepatitis is a disease which is characteristic of and peculiar to the occupation of (maintenance mechanic helper) acting, sometimes as a plumber, in the course of his employment for a hospital." The conclusions of law that infectious hepatitis is an occupational disease and that plaintiff was disabled as the result of contracting infectious hepatitis "while performing the duties of his employment," must be vacated.

On the record before us, the award must be vacated and the cause remanded to the Industrial Commission for entry of an award denying compensation.

Remanded.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. JUDY BARRETT NEWTON

No. 7427SC95

(Filed 1 May 1974)

1. **Criminal Law § 31; Narcotics § 2— Desoxyn and methamphetamine — same substance — judicial notice**

It was proper for the trial judge to take notice that Desoxyn, which defendant was charged with possessing with intent to distribute, is the trade name for methamphetamine hydrochloride, a drug classed as a controlled substance by G.S. 90-91; therefore, there was no variance between the indictment which charged possession of Desoxyn and the proof which tended to show that defendant possessed methamphetamine.

2. **Narcotics § 1; Health § 2— methamphetamine — reclassification by State Board of Health — simple possession as felony**

Since the N. C. State Board of Health on 23 March 1972, acting pursuant to G.S. 90-88, rescheduled methamphetamine from Schedule III

to Schedule II of the Controlled Substances Act, defendant's possession of methamphetamine with intent to distribute on 10 February 1973 constituted a felony, and defendant's sentence of imprisonment for not less than three nor more than five years upon conviction of the lesser included offense of possession of methamphetamine was proper.

APPEAL by defendant from *Friday, Judge,* 4 June 1973 Session of Superior Court held in Gaston County. Argued in the Court of Appeals 19 March 1974.

In case number 73CR3234, defendant was charged in a bill of indictment with possession of, with intent to distribute, "Desoxyn, being controlled substance set forth in Schedule II of the North Carolina Controlled Substances Act." In this case, she was convicted of the lesser included offense of possession of the controlled substance. She was sentenced to a term of imprisonment of not less than 3 nor more than 5 years.

In case number 73CR3233, defendant was charged in a bill of indictment with possession of, with intent to distribute, more than 25 tablets of a controlled substance, "Desoxyn in a container other than original container in which said substance was sold." This prosecution was under G.S. 90-95(a)(1) and the definition of manufacture contained in G.S. 90-87(15). Defendant was found guilty of possession of a controlled substance in a container other than the original container in which the substance was sold. In this case, an order was entered that prayer for judgment be continued. No final judgment was entered and defendant does not undertake to appeal in case number 73CR3233.

Defendant has perfected her appeal in case number 73CR3234.

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

Daniel J. Walton for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that she was entitled to a nonsuit because there was a fatal variance between the charge and the proof. The bill of indictment charged defendant with possession of "Desoxyn." The evidence tended to establish that she possessed methamphetamine. Because there was no evidence offered at trial to establish that "Desoxyn" contained methamphetamine,

defendant argues that the State failed to prove the charge contained in the bill of indictment.

The trial judge instructed the jury that Desoxyn and methamphetamine were the same thing. Defendant assigns this instruction as error on the ground that there is no evidence offered at trial to support the instruction.

Chapter 919 of the 1971 Session Laws, codified as G.S. 90-91, classed methamphetamine as a controlled substance. Desoxyn does not appear by name as a controlled substance under the North Carolina Controlled Substances Act. However, our courts are not required to be ignorant of a fact which is generally and reliably established merely because evidence of the fact is not offered. The Courts will take judicial notice of subjects and facts of general knowledge, and also of facts in the field of any particular science which are capable of demonstration by resort to readily accessible sources of indisputable accuracy, and judges may inform themselves as to such facts by reference to standard works on the subject. 3 Strong, N. C. Index 2d, Evidence, § 3, p. 596. Each of the Schedules of the Controlled Substances Act provides that it "includes the controlled substance listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated." We take notice that Desoxyn is a trade name used by Abbott Laboratories, North Chicago, Illnois, for methamphetamine hydrochloride. In a like manner, it was proper for the trial judge to take such notice and to instruct the jury that Desoxyn and methamphetamine are the same thing. Because Desoxyn and methamphetamine are the same thing, there was no variance between the charge in the bill of indictment and the proof. It was made clear by the defendant's own testimony that she knew the tablets were drugs. These assignments of error are overruled.

[2] Defendant assigns as error the entry of the judgment in this case and moves in arrest thereof on the grounds that methamphetamine was listed under Schedule III of the Controlled Substances Act at the time of her alleged offense on 10 February 1973. She argues that she was convicted of possession with intent to distribute and that simple possession of a Schedule III substance constitutes a misdemeanor, but that judgment was entered imposing punishment for a felony.

The Controlled Substances Act as enacted in 1971 listed methamphetamine under Schedule III (G.S. 90-91(a)(3)). The

same enactment provided in G.S. 90-95(a)(3) that it was unlawful to possess a controlled substance, and in G.S. 90-95(d) that any person who violates G.S. 90-95(a)(3) with respect to a controlled substance included in Schedule III, for the first offense, shall be guilty of a misdemeanor. At the same time, G.S. 90-95(c) provided that simple possession of a substance included in Schedule II constituted a felony. However, G.S. 90-88 granted to the North Carolina State Board of Health (now under the North Carolina Commission for Health Services) authority, under the guides set forth in the statute, to add, delete, or reschedule substances within Schedules I through VI of the Controlled Substances Act. The State Board of Health, on 23 March 1972, acting under authority of G.S. 90-88, rescheduled methamphetamine from Schedule III to Schedule II. This was almost a year prior to the offense alleged against defendant. This assignment of error is overruled and the motion in arrest of judgment is denied.

No error.

Judges PARKER and BALEY concur.

HENRY H. STOUT AND STOCO, INC. v. WILLIAM CRUTCHFIELD AND VEORA CRUTCHFIELD

No. 7418DC337

(Filed 1 May 1974)

1. **Landlord and Tenant § 2— term of lease uncertain — tenancy at will**

When a lease is of indefinite or uncertain duration, it will be treated as a tenancy at will, which can be terminated at any time by either party.

2. **Landlord and Tenant § 15— term of lease not stated — tenancy at will**

Defendants were tenants at will where they rented a house from individual plaintiff under an agreement whereby plaintiff agreed to rent to male defendant "until such time that he decides to buy same house," since the term of the lease was not stated.

3. **Landlord and Tenant §§ 15, 18— tenancy at will — termination — notice not required**

Plaintiffs were not required to comply with G.S. 42-3 which requires that a tenant be given ten days' notice before his lease can be forfeited for nonpayment of rent, since plaintiffs' right to evict

defendants, who were tenants at will, did not depend on whether defendants failed to pay their rent.

APPEAL by defendants from *Haworth, Judge,* 7 October 1973 Session of District Court held in GUILFORD County.

Plaintiffs brought this summery ejectment action before a magistrate to recover possession of a house and lot in Oak Ridge township of Guilford County which had been rented to defendants. Defendants denied plaintiffs' ownership of the property in question, and the case was transferred to the district court, where it was tried without a jury. The court made findings of fact and conclusions of law and entered judgment in favor of plaintiffs.

In its findings of fact, the court determined that prior to 1963 defendant William Crutchfield had been the owner of the house and lot. On 1 July 1963 he conveyed the property by a deed of trust to Douglas P. Dettor as trustee for Stokesdale Commercial Bank, as security for a loan. Crutchfield defaulted in his payments on the loan, and a foreclosure sale was held. The bank purchased the property at the foreclosure sale and shortly thereafter conveyed it to plaintiff Stoco, Inc. Stoco rented the property to defendants for a number of years. In addition to the facts found by the court, plaintiffs' uncontradicted evidence shows that in December 1972 plaintiff Henry H. Stout, president of Stoco, informed defendants that Stoco would no longer rent the house and lot to them and that they were to vacate the premises.

The court concluded that Stoco was the owner of the property in question; that defendants were merely tenants at will, and that their tenancy had terminated; and that Stoco was entitled to immediate possession of the property. From a judgment of eviction, defendants appealed to this Court.

Dees, Johnson, Tart, Giles & Tedder, by J. Sam Johnson, Jr., for plaintiff appellees.

Smith, Carrington, Patterson, Follin & Curtis, by Norman B. Smith, for defendant appellants.

BALEY, Judge.

Defendants contend that the trial court erred in holding that they were tenants at will. They take the position that they

have the right to possession of the house and lot in question by virtue of a document signed by Henry H. Stout on 9 January 1966.

William Crutchfield testified without contradiction that after Stoco purchased the property, Stout offered to sell it to defendants. Defendants were unable to purchase it, but they agreed to rent it at $68.00 per month. Stout then offered the property for sale to the public, and defendants were annoyed by prospective purchasers who came at all hours of the day and night asking to be shown around the house. They complained to Stout, and he gave them the following handwritten document:

> "I agree to rent to William Crutchfield a house in Oak ridge Township on Dunbar Rd. for 68.00 per month until such time that he decides to buy same house. I will not offer for sale this house until I have first offered the house to him at appraisal value.
>
> HENRY H. STOUT
>
> Received 68.00 rent for Jan. on house.
> Jan. 19, 1966.
>
> HENRY H. STOUT"

[1, 2] Defendants argue that this agreement gives Crutchfield an option to purchase the house, and the right to occupy it, as a tenant for years, until he decides to exercise the option. In our view this is not a proper interpretation of the agreement. Every lease must contain some definite provision enabling the parties and the courts to determine when the lease will end. *Barbee v. Lamb,* 225 N.C. 211, 34 S.E. 2d 65; *Sappenfield v. Goodman,* 215 N.C. 417, 2 S.E. 2d 13; *Rental Co. v. Justice,* 212 N.C. 523, 193 S.E. 817. In this case, the rental agreement would end if Crutchfield bought the house, but there is no indication when it would end if he did not. Under the contention of defendants, if Crutchfield never bought the house, he could claim the right to rent it for his entire life. Construing the agreement as a whole, it is obvious that Stout did not intend to grant Crutchfield a life estate in the property or the right to occupy it for any definite term. He reserved the right to sell and was attempting to do so when he executed the agreement. When a lease is of indefinite or uncertain duration, it will be treated as a tenancy at will, which can be terminated at any time by either party. *Barbee v. Lamb, supra; Sappenfield v. Goodman, supra; Rental*

Co. v. Justice, supra; Webster, Real Estate Law in North Carolina, § 96. Thus the district court correctly held that defendants were tenants at will, and their tenancy was terminated by Stout in December, 1972.

[3] Defendants point out that plaintiffs have not complied with G.S. 42-3, which requires that a tenant be given ten days' notice before his lease can be forfeited for nonpayment of rent. However, in this case plantiffs' right to evict defendants does not depend on whether defendants have failed to pay their rent. When Stout told defendants to vacate the premises, their tenancy at will instantly expired, regardless of whether they had defaulted on the rent. Since defendants' tenancy had expired, plaintiffs had the right to bring an immediate action for summary ejectment under G.S. 42-26(1).

The judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

MATILDA C. BENNETT v. WILLIAM F. BENNETT

No. 743DC180

(Filed 1 May 1974)

1. **Contempt of Court § 6; Divorce and Alimony § 21— failure to comply with court order — wilful disobedience**

To constitute wilful disobedience within the meaning of G.S. 50-13.4(9) there must be an ability to comply with the court order and a deliberate and intentional failure to do so.

2. **Contempt of Court § 6; Divorce and Alimony § 21— failure to comply with child support order — finding that father possesses means to comply**

A defendant may not deliberately divest himself of his property and in effect pauperize himself for appearance at a hearing for contempt and thereby escape punishment because he is at that time unable to comply with the court order; therefore, the trial court did not err in committing defendant for a definite term for violation of its child support order, though defendant was unemployed at the time of the hearing, where the evidence tended to show that he had been employed during a large portion of the period when the default in support payments occurred at sufficient compensation to permit him

to make the payments, and defendant had openly stated to plaintiff that he did not intend to remain employed or to earn sufficient income to make the support payments.

APPEAL by defendant from *Roberts, Judge,* 19 November 1973 Session of District Court held in CRAVEN County.

Plaintiff was awarded custody of the four minor children born of the marriage of plaintiff and defendant by decree entered 27 August 1973 in the District Court of Craven County. In the order awarding custody defendant was directed to pay plaintiff the sum of $62.50 per week for support of the children. Alleging failure of defendant to comply with this support order, plaintiff secured an order to show cause why defendant should not be punished as for contempt.

At the hearing on 8 November 1973 both parties presented evidence. The court found as a fact that defendant was in arrears in the amount of $312.50 for child support having made no payment whatsoever during the months of October and November, 1973. Among additional findings by the court were the following:

"4. That prior to the hearing of 13 August 1973 the defendant advised the plaintiff that he was leaving his job with Weyerhaeuser in New Bern, North Carolina, for the reason that he did not want to pay plaintiff support for said minor children. That the defendant while employed at Weyerhaeuser earned a net income of between $150 and $200 per week, depending on the number of hours worked per week.

"That following his employment with Weyerhaeuser in New Bern, North Carolina, the defendant began operating a Service Station on Oaks Road in New Bern, North Carolina. That the defendant voluntarily left said Service Station and became employed with Gregory's Small Engine Repairs in New Bern, North Carolina, where he earned approximately $80 per week. That subsequent to his employment with Gregory's Small Engine Repairs the defendant became employed with a construction company at Cherry Point, North Carolina. That the defendant's employment with such construction company was terminated on Friday, November 2, 1973.

"6. That the defendant's income on each and every week subsequent to the Order of 13 August 1973 and prior to the week of November 5, 1973, has been in excess of $62.50 per week. That in addition to the defendant's weekly income the defendant rents an apartment located in the house in which he lives for approximately $65 per month; that the defendant has had the means with which to comply with the terms of the Order of 13 August 1973 each and every week since its entry.

* * *

"8. That the defendant has stated to the plaintiff since August 13, 1973, that he does not intend to remain employed or to earn a sufficient amount of income so as to comply with the Order of 13 August 1973.

"9. That since 13 August 1973 the defendant has not been ill, has not been attended to by a physician and has not been hospitalized.

"10. That the defendant's failure to make payments as set forth above has been wilful and without legal justification or excuse."

Defendant was adjudged in contempt of court for wilful failure to make child support payments as directed by the order of the court, and was ordered into custody of the sheriff of Craven County for a period of thirty days or until the arrearage of $312.50 was paid. In any event, even though the $312.50 was not paid before 7 December 1973, defendant was to be released from custody upon that date.

Defendant has appealed from this judgment.

Beaman, Kellum & Mills, by James C. Mills, for plaintiff appellee.

Robert G. Bowers for defendant appellant.

BALEY, Judge.

[1] Defendant contends that the facts found by the court were not sufficient to support the conclusion that he had wilfully failed to comply with the order for child support. He further maintains that there must be a specific finding by the court that he presently possesses the means to comply with the court order before he can be committed as for contempt.

G.S. 50-13.4(9) provides:

> "The wilful disobedience of an order for the payment of child support shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9."

Wilful disobedience has been interpreted by our court as disobedience "which imports knowledge and a stubborn resistance." *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E. 2d 391, 393. In *Lamm v. Lamm*, 229 N.C. 248, 250, 49 S.E. 2d 403, 404, the court stated:

> "Manifestly, one does not act wilfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered."

To constitute wilful disobedience there must be an ability to comply with the court order and a deliberate and intentional failure to do so.

[2] The facts found by the trial court in the present case showed that defendant was employed during a large portion of the period when the default in support payments occurred at sufficient compensation to permit him to make the payments. Indeed, his employment with a construction company was terminated less than a week prior to the contempt hearing. The court found that defendant had openly stated to the plaintiff that he did not intend to remain employed or to earn sufficient income to make the support payments. Defendant was able to pay at the time payment was required and wilfully failed to comply with the court order. Past contempt cannot be ignored by the court even if at the exact time of the contempt hearing the defendant does not have means to comply. A defendant may not deliberately divest himself of his property and in effect pauperize himself for appearance at a hearing for contempt and thereby escape punishment because he is at that time unable to comply with the court order. The action of the trial court in punishing defendant by commitment for a definite term for past conduct constituting a violation of its order was entirely proper. *Cox v. Cox*, 10 N.C. App. 476, 479, 179 S.E. 2d 194, 197 (Brock, J., concurring).

When a defendant has the present means to comply with a court order and deliberately refuses to comply, there is a present and continuing contempt and the court may commit such defendant to jail for an indefinite term, that is, until he com-

plies with the order. Under such circumstances, however, there must be a specific finding of fact supported by competent evidence to the effect that such defendant possesses the means to comply with the court order. Our Supreme Court has indicated in *Vaughan v. Vaughan,* 213 N.C. 189, 193, 195 S.E. 351, 353, as reaffirmed in *Gorrell v. Gorrell,* 264 N.C. 403, 141 S.E. 2d 794, that "the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition"—so that there will be convincing evidence that the failure to pay is deliberate and wilful.

The findings of the trial court are sufficient to show wilful failure to comply with its prior order for child support, and its commitment of defendant as for contempt is affirmed.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. GEORGE C. CORDON, JR.

No. 742SC71

(Filed 1 May 1974)

1. **Criminal Law § 145.1— consent to probation — abandonment of appeal**

When a defendant consents to the terms of probation, he abandons his right to appeal on the issue of guilt or innocence and commits himself to abide by the stipulated conditions.

2. **Criminal Law § 145.1— probation revocation — appeal to superior court — question presented**

Upon appeal from district court for a *de novo* hearing in superior court on the revocation of defendant's probation, defendant may not challenge his adjudication of guilt and the superior court is not required to review the record of defendant's original trial.

3. **Criminal Law § 145.1— revocation of probation**

The evidence supported the trial court's determination that defendant had violated conditions of his probation by failing to be employed, by associating with disreputable persons, by failing to make payments on the fine imposed by the district court, and by being under the influence of marijuana.

APPEAL by defendant from *Godwin, Special Judge,* 13 August 1973 Session of Superior Court held in BEAUFORT County.

State v. Cordon

This is an appeal from an order revoking probation. Defendant was tried on 11 August 1972 in the District Court of Beaufort County for possession of marijuana. He entered a plea of guilty and the court, under authority of G.S. 90-96 and with the consent of defendant, deferred entry of judgment of guilt and placed defendant on probation for a term of two years. The order of probation provided:

"3. That as a condition of probation the aforesaid defendant shall:

(a) Avoid injurious or vicious habits;

(b) Avoid persons or places of disreputable or harmful character;

. . . .

(e) Work faithfully at suitable, gainful employment as far as possible . . .

. . . .

(h) Violate no penal law of any state or the Federal Government and be of general good behavior;

. . . .

(m) . . . Pay the cost and a fine of $300.00 at the direction of the Probation Officer."

In April 1973 defendant was convicted of a traffic offense, but instead of revoking his probation the court continued it and imposed additional conditions.

On 10 July 1973 defendant's probation officer reported that defendant had again violated the conditions of his probation. The District Court held a hearing, entered judgment against defendant, revoked his probation, and sentenced him to six months in prison. Defendant appealed to the Superior Court, and a de novo hearing upon the revocation of his probation was held. At this hearing the probation officer appeared as a witness for the State, and defendant's parents testified in his behalf. The Superior Court found that defendant had failed to comply with the terms of his probation and affirmed the judgment of the District Court. Defendant appealed to this Court.

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

Leroy Scott and Franklin B. Johnston for defendant appellant.

BALEY, Judge.

Defendant contends that the Superior Court erred in failing to review the record of his original trial in the District Court at which he entered a plea of guilty to possession of marijuana. He also asserts that the evidence was not sufficient to support the finding of the Superior Court that he had violated the terms of his probation. We find no merit in either of these contentions.

G.S. 90-96 in cases involving possession of marijuana provides:

> " . . . [T]he court may without entering a judgment of guilt and *with the consent of such person,* defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. . . . " (Emphasis added.)

[1] G.S. 90-96 is applicable only to first offenders and is clearly for the purpose of permitting the trial court to grant probation under conditions favorable to defendant. When defendant consents to the terms of the probation, he abandons his right to appeal on the issue of guilt or innocence and commits himself to abide by the stipulated conditions. *State v. Miller,* 225 N.C. 213, 34 S.E. 2d 143.

In this case defendant signed an attachment to the order of the District Court which certified to his understanding of its meaning and his consent to its terms. The terms imposed as a part of the two years' probation were of such character that they constituted punishment. Defendant was required to pay court costs and a fine of $300.00 in addition to other provisions of the probation concerning good behavior. He consented to these terms upon which entry of judgment of guilt was deferred and waived or abandoned his right of appeal. *State v. Griffin,* 246 N.C. 680, 100 S.E. 2d 49.

[2] When the district court revokes a defendant's probation and sentences him to prison, the defendant may then appeal to superior court for a de novo hearing upon the revocation of his probation. G.S. 15-200.1; *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736. However, the only issue before the superior court on such appeal is "whether or not there has been a violation

of the terms of probation." G.S. 15-200.1. A defendant on appeal from an order revoking probation may not challenge his adjudication of guilt. *See State v. Noles,* 12 N.C. App. 676, 184 S.E. 2d 409; *State v. Caudle,* 276 N.C. 550, 173 S.E. 2d 778. Thus the Superior Court of Beaufort County was not required to review the record of defendant's original trial for possession of marijuana.

[3] The decision to revoke defendant's probation is clearly supported by competent evidence. Charles Hough, the probation officer in charge of defendant, testified that defendant had not been employed since he graduated from high school; that he had not made payments on the fine imposed by the District Court; that he had associated with Phil Foreman and Carol Selby, two disreputable persons who used drugs; and that on one occasion when Hough saw defendant, in his opinion defendant was under the influence of marijuana. This testimony amply supports Judge Godwin's findings of fact and his conclusion that defendant had violated the terms of his probation.

The order of the Superior Court revoking the probation of defendant is affirmed.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

JAMES RODMAN v. CAM H. RODMAN AND JOHN C. RODMAN, ADMINISTRATORS C.T.A. OF THE ESTATE OF MISS OLZIE RODMAN; ELEANOR R. MAY; CAMILLA W. MOORE; BETH RODMAN; DIANE RODMAN; ELLEN RODMAN, MINOR; JOHN C. RODMAN, INDIVIDUALLY; DOUG RODMAN, MINOR; JOHN RODMAN, NEPHEW OF MISS OLZIE RODMAN; OWEN RODMAN; CLARK RODMAN; CAM H. RODMAN, INDIVIDUALLY; ORAL ROBERTS, EVANGELIST; SALVATION ARMY IN WASHINGTON, NORTH CAROLINA; BEAUFORT COUNTY HUMANE SOCIETY; THE HUMANE SOCIETY OF THE UNITED STATES, AND MRS. SALLIE BROWN

No. 742SC64

(Filed 1 May 1974)

Wills § 52— residuary clause — disposition of one-fourth of estate

Provision in the testatrix' will that "all the rest and residue of my estate . . . I give, devise, and bequeath as follows: Twenty-five

per cent to be divided equally among" six named beneficiaries was a clear and explicit disposition of one-fourth of testatrix' residuary estate, and there was no testamentary disposition of the remaining three-fourths of the estate.

APPEAL by plaintiff and by defendant Roberts from *Fountain, Judge,* 6 August 1973 Session of Superior Court held in BEAUFORT County.

Action under the Declaratory Judgment Act for construction of the Will of Miss Olzie Rodman, who died on 17 January 1972 leaving an attested Will which has been duly admitted to probate. By Item Two of the Will, the testatrix devised and bequeathed all of her property to her mother, who predeceased her. Items Three and Four of the Will are as follows:

"ITEM THREE: If my mother, Mrs. John C. Rodman, Sr., should predecease me, then and in that event I give and bequeath all of my personal things such as furniture, books, pictures, china, silver to my following named nieces and nephews: Beth Rodman, Diane Rodman, Ellen Rodman, John Rodman, Cam Rodman and Doug Rodman, to be theirs, share and share alike, except that if one of my brothers, namely, John Rodman, Owen Rodman, Clark Rodman and Cam Rodman should desire some of these family items, that they shall have the right to select for themselves respectively such items as they desire.

"ITEM FOUR: All the rest and residue of my estate, real, personal and mixed, and conditioned on my said mother, Mrs. John C. Rodman, Sr., predeceasing me, I give, devise, and bequeath as follows:

"TWENTY-FIVE PER cent to be divided equally among Oral Roberts, Evangelist, Tulsa, Oklahoma, for his work in the salvation of souls; the Salvation Army in Washington, North Carolina, to be used for the needy colored citizens of our city; the Beaufort County Humane Society of Washington, North Carolina, to be used by Robert A. (Buck) Andrews, if living, of Rosedale, Washington, North Carolina, Dog Catcher of the Humane Society, to help relieve the suffering of the stray and mistreated dogs in Beaufort and surrounding counties; The Humane Society of the U. S., 1145 - 19th St., NW, Washington, D. C., to be used to help eliminate the overbreeding of dogs; Mrs. Sallie Brown,

411 Gladden St., Washington, North Carolina, and Mr. James Rodman, Route 1, Box 97-B, Bath, N. Car."

The Will contains no other dispositive provisions, the remaining items merely providing for a funeral, payment of debts, and the naming of an executor. There was evidence that the plaintiff, James Rodman, did occasional yard work at the residence of the testatrix, and that Sallie Brown was employed in the residence of the testatrix as a cook.

The trial court, sitting without a jury, found as a fact:

"That it was the intention of the testatrix that twenty-five percent of her residuary estate be divided into six equal parts and that Oral Roberts, the Beaufort County Humane Society, The Humane Society of the U. S., the Salvation Army in Washington, N. C., Sallie Brown and James Rodman should each receive one part, that is to say, that each of the foregoing named persons and organizations would receive a 1/24th part of testatrix's residuary estate, and that the remaining 75% of the residuary estate is vested in the heirs at law of the testatrix as specified in Chapter 29 of the General Statutes of North Carolina."

From judgment that each of the six parties named in Item Four of the Will is entitled to a 1/24th part of the residuary estate of Olzie Rodman and that the remaining 75% of her residuary estate is vested in her heirs at law as specified in G.S., Chap. 29, the plaintiff, James Rodman, and the defendant, Oral Roberts, appealed.

Turner & Harrison by Fred W. Harrison for plaintiff appellant, James Rodman.

White, Allen, Hooten & Hines by Thomas J. White III, for defendant appellant, Oral Roberts.

Rodman, Rodman & Archie by Edward N. Rodman for defendant appellees.

PARKER, Judge.

Appellants contend that the trial judge erred in his interpretation of Item Four of the Will and urge upon us either of two alternative constructions: first, that the Beaufort County Humane Society and The Humane Society of the U. S. be grouped together as one class, that Sallie Brown and James

Rodman, the former domestic servants, be grouped together as another class, and that these two classes be considered with Oral Roberts and the Salvation Army, each being taken separately, to reduce the number of separate groups or classes named in Item Four from six to four, thereby permitting the transfer of 25% of the entire residuary estate to each; second, and in the alternative, that the words "twenty-five percent," as they appear in Item Four be treated "as a mathematical or grammatical error on the part of the testatrix," and that effect be given to the remaining language in Item Four by determining that each of the six beneficiaries named therein be entitled to a one-sixth of the entire residuary estate. Either construction urged by appellants requires a degree of redrafting of the Will which is not the proper function of the courts to perform.

The plain fact is that the testatrix, by clear and explicit language, disposed of twenty-five percent of her residuary estate and then failed to make any testamentary disposition whatever of the remaining seventy-five percent. This was the finding of the able trial judge and with that finding we are in full accord. G.S. 31-42, cited by appellants, is not applicable. There was no lapse of any bequest; there was simply no bequest as to seventy-five percent of the residuary estate. Testatrix made it clear she wanted twenty-five percent of her residuary estate "to be divided equally among" six named beneficiaries. She never said what she wanted done with the remaining seventy-five percent.

While each case involving interpretation of a Will must necessarily depend upon its own particular facts, our determination here finds support in the reasoning of the following cases, which have been cited in appellees' brief: *Duffield v. Morris,* 8 W. & S. 348 (Pa. 1845); *In re Watkins Estate,* 166 N.Y. Supp. 2d 855; *Todd v. St. Mary's Church,* 45 R.I. 282, 120 A. 577.

Affirmed.

Chief Judge BROCK and Judge BALEY concur.

ALVIN QUICK, MARY COLEY, JOHN PIERCY, TOMMY MORALES, AND CLYDE HOPKINS v. CITY OF CHARLOTTE, NORTH CAROLINA, A MUNICIPAL CORPORATION

No. 7326SC698

(Filed 1 May 1974)

Constitutional Law § 20— Relocation Assistance Act — equal protection

The Relocation Assistance Act, G.S. 133-5 *et seq.*, did not unconstitutionally discriminate against plaintiffs by granting assistance to persons who moved on or after 1 January 1972 from property acquired for airport expansion while failing to provide assistance for plaintiffs who moved from such property prior to 1 January 1972.

APPEAL by plaintiffs from *Snepp, Judge,* 11 June 1973 Schedule "C" Civil Session of Superior Court held in MECKLENBURG County.

The facts in this case are not in dispute. During 1968, the City of Charlotte embarked upon a five-year plan for the renovation and expansion of its Douglas Municipal Airport. Construction of additional runway facilities necessitated the acquisition, on 23 March 1971, of adjacent property owned by E. O. and Lillian Hudson and T. A. and Virginia Freeman. At the time of purchase, plaintiffs were month-to-month tenants of five houses located thereon. Plaintiffs continued to live on the Hudson-Freeman property until runway construction required the demolition of their rented houses in late November 1971.

There were, however, other rental units located on the Hudson-Freeman property which were not razed until 1972. The tenants of these dwellings were not forced off the Hudson-Freeman property until after 1 January 1972, and, by qualifying as "displaced persons" under G.S. 133-7(3), received assistance in the form of funds and services under the provisions of The Uniform Relocation Assistance and Real Property Acquisition Policies Act (Relocation Assistance Act), G.S. 133-5 et seq. Because the Relocation Assistance Act extends its benefits only to persons who, under the requisite circumstances, are forced to move themselves or their personalty from real property "on or after January 1, 1972," plaintiffs were denied such assistance.

On 25 September 1972, plaintiffs, alleging that the Relocation Assistance Act violated the equal protection clauses of the United States and North Carolina Constitutions, filed suit

against defendant City of Charlotte to enjoin permanently "further application and disbursement of funds" under the Act and to recover actual and punitive damages resulting from their being denied the statutory benefits. The parties, stipulating to the above facts and waiving jury trial, submitted the case for trial solely upon the constitutional issue. Because the constitutionality of the North Carolina statute was at issue, the Attorney General of North Carolina successfully moved the court to be made a party to the action. The trial court, incorporating the stipulation of facts into its judgment, held that the Relocation Assistance Act was constitutional both on its face and as applied and dismissed plaintiffs' action. Plaintiffs appealed.

Donald M. Tepper for plaintiff appellants.

W. A. Watts for defendant appellee.

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

PARKER, Judge.

As defined by statute, the purpose of the Relocation Assistance Act, G.S. 133-5 et seq. is "to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of public works programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole and to insure continuing eligibility for federal aid funds to the State and its agencies and subdivisions," G.S. 133-6. The Relocation Assistance Act attempts to carry out this purpose by providing, in specified circumstances, moving and related expenses, G.S. 133-8, replacement housing for homeowners and tenants, G.S. 133-9, 10, relocation assistance advisory services, G.S. 133-11, and expenses incidental to property transfer, G.S. 133-12, to qualifying displaced persons. Insofar as it relates to plaintiffs, G.S. 133-7(3) defines "displaced person" as "any person who, on or after January 1, 1972, moves from real property or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property for a program or project undertaken by an agency. . . . " The parties agree that defendant City of Charlotte and its airport renovation project respectively satisfy the statutory definitions

of "agency" and "program or project"; see G.S. 133-7(1) and (6).

Plaintiffs contend that the above quoted definition of "displaced person" unconstitutionally discriminates against them by denying to them but granting to others who moved from the Hudson-Freeman property "on or after January 1, 1972" assistance under the various provisions of the Relocation Assistance Act. We disagree. Quite simply, a statute which attempts to relieve a given form of public hardship must begin at some point. In this case, the Legislature decided to extend relief to those caused discomfiture on or after the effective date of the Act, 1 January 1972. See 1971 Session Laws, Chapter 1107, Section 3. The practical reasons justifying such a beginning point are at once numerous and obvious, and appellants have cited no authority to the contrary. While in terms of missed statutory benefits plaintiffs have indeed suffered a hardship by being forced from their homes only weeks before 1 January 1972, their hardship is not of constitutional dimension. The trial court was correct in upholding the constitutionality of the Relocation Assistance Act, and its judgment is accordingly

Affirmed.

Judges BRITT and HEDRICK concur.

JOHN B. MacKENZIE v. DIANE COX MacKENZIE

No. 7426DC165

(Filed 1 May 1974)

Divorce and Alimony § 22— child custody — foreign action pending — court's refusal to exercise jurisdiction — temporary custody and attorney's fees

Where the trial court refused to exercise jurisdiction in a child custody proceeding on the ground that a court in another state had assumed jurisdiction to determine the matter and the best interests of the children and the parties would be served by having the matter disposed of in that jurisdiction, the trial court was not thus deprived of authority to award temporary custody of the children and to award attorney's fees for the hearing held in this State. G.S. 50-13.5.

Judge BRITT dissents.

MacKenzie v. MacKenzie

APPEAL by plaintiff from *Abernathy, District Judge,* 10 September 1973 Session of District Court held in MECKLENBURG County.

In June 1973, plaintiff John B. MacKenzie and his wife, the defendant in this case, separated. At the time, the parties were living in Fairfield, Connecticut. Shortly before their separation the parties entered into a consent agreement which gave defendant custody of the couple's three minor children and obligated plaintiff to pay child support and temporary alimony. Plaintiff had the right to remove the children from Connecticut for visitations.

In August 1973, defendant filed an action against plaintiff in Fairfield, Connecticut, seeking an absolute divorce, permanent custody of and support for the minor children, as well as both permanent and pendente lite alimony. Plaintiff was personally served with process in Connecticut, and the case was set for hearing in September 1973.

On 6 September 1973, plaintiff, who had moved to North Carolina in late July 1973, instituted this custody action in North Carolina. Defendant retained local counsel and personally appeared in the proceeding. When the North Carolina action was commenced, the minor children were visiting plaintiff in Charlotte, and plaintiff refused to let them return to Connecticut.

A hearing was held on 10 September 1973 and, in part, the judge found, concluded and ordered as follows:

> "(19) At the time the Plaintiff filed his Complaint in this action, the children born of said marriage, while actually present in this state, were here simply for the purpose of visiting with the Plaintiff, and were, therefore, neither citizens nor residents of this state, but were actually domiciled in the State of Connecticut.
>
> (20) While the Plaintiff has enrolled said children in the Mecklenburg County Schools, and the said children had, in fact, attended several days of school here in Mecklenburg County, North Carolina, the said children were also enrolled in the Fairfield County, Connecticut, schools and, in fact, the two oldest children were enrolled in the same schools to which they had been attending in the past. Moreover, the Fairfield County School System began its term on

September 6, 1973, so that the children had only missed two days of school in Connecticut as of the time of this hearing.

(21) From the evidence presented, and the pleadings filed in this action, the Court finds as a fact that all of the necessary witnesses for both the Plaintiff and the Defendant are either in Connecticut or some state other than North Carolina, and the only party in interest in said litigation that is actually domiciled in North Carolina is the Plaintiff.

(22) The Defendant alleges, and the Plaintiff admits, that a bona fide action has been filed by the Defendant in Connecticut raising the issues alleged in the Plaintiff's Complaint, that the said Court in Connecticut has gained personal jurisdiction of the Plaintiff, and that that action is presently pending.

(23) The Defendant does not have sufficient means to defray the expense of this action and therefore, pursuant to the provisions of NC GS 50-13(6), the Plaintiff should pay the Defendant's attorney a reasonable fee for representing the Defendant in this action, and the Court finds as a fact that a reasonable amount for the Plaintiff to pay to the Defendant's attorney is $500.00.

Based upon the foregoing FINDINGS OF FACT, the Court makes the following CONCLUSIONS OF LAW:

(1) Pursuant to NC GS 50-13(d)(2), this action was properly set for hearing before the undersigned Judge on September 7, 1973, since the welfare of the children born of the marriage required the Court, in its discretion, to hear the matter pending the service of process or notice requirements as provided in NC GS 50-13.5(d)(1).

(2) Pursuant to the provisions of NC GS 50-13.5(c)(5), the Court, in its discretion, hereby refuses to exercise jurisdiction in the Plaintiff's action, inasmuch as a court in another state has assumed jurisdiction to determine the matter, and that the best interest of the children and the parties would be served by having this matter disposed of in said jurisdiction.

(3) It is in the best interest of the children born of said marriage to be returned to Connecticut to begin their

school term, to be in the temporary custody of the Defendant, pending a final determination of this issue in the action filed by the Defendant in Connecticut, as hereinbefore set forth.

(4) Pursuant to the provisions of NC GS 50-13(6), the Court, in its discretion, hereby concludes as a matter of law that the Plaintiff should defray the Defendant's attorney's fees in the amount of $500.00 in defending the Plaintiff's action.

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

(1) That the Plaintiff's action be and the same is hereby DISMISSED.

(2) That the Plaintiff immediately return the children born of said marriage to the Defendant, and defray their travel expenses to Connecticut.

(3) The Plaintiff is hereby ordered and directed to pay to A. Marshall Basinger, II, the sum of $500.00 for representing the Defendant in said action, said sum to be paid directly to the said A. Marshall Basinger, II, on or before September 20, 1973."

Plaintiff appealed.

John G. Newitt, Jr., and Roger H. Bruny for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by A. Marshall Basinger II, for defendant appellee.

VAUGHN, Judge.

The question presented is aptly posed by appellee as follows:

"Can the trial court refuse to exercise jurisdiction in a child custody action pursuant to NC GS 50-13.5(c)(5), and thereby dismiss the Plaintiff's action, and at the same time award the temporary custody of the children to either party . . . and award attorney's fees. . . . "

G.S. 50-13.5 is as follows:

> "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."

Appellant's position is that the court may either decline to exercise jurisdiction or exercise jurisdiction and adjudicate the right of the parties but that it cannot do both.

We are of the opinion that the question as posed by the appellee should be answered in the affirmative and that the action taken by Judge Abernathy was proper. A court having jurisdiction of children located within the state surely has the inherent authority to protect those children and make such temporary orders as their best interests may require. Even without the statute, the court could have ordered that the children be placed in the temporary custody of appellee under such conditions and for such period of time as the court found to be in the best interests of the children. That order could have forecasted that the court, its jurisdiction continuing, would modify the order at a later time based upon, among other things, the actions taken by the Connecticut court.

Moreover, if under the statute the court must either undertake a plenary disposition of the question of custody at the outset or refuse to enter any order for the protection of the children, the words "at any time" in G.S. 50-13.5(c)(5) appear to be without significance. It is more likely that the legislature understood that children could well need the temporary protection of our courts even though the best interest of the children could be served by having a more permanent disposition of the case made in another jurisdiction and thus allowed our court to decline to exercise further jurisdiction "at any time." Furthermore, there are many cases where it does not initially appear that the best interest of the children would be served by further adjudication in another state but does so appear at later stages of the proceedings. Under appropriate circumstances, the court

may decline to exercise further jurisdiction at any stage of the proceeding and may yield to the court of another state that has assumed jurisdiction.

Affirmed.

Judge PARKER concurs.

Judge BRITT dissents.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION, CITY OF DURHAM, MONROE-UNION COUNTY CHAMBER OF COMMERCE, AND ROBERT MORGAN, ATTORNEY GENERAL v. GENERAL TELEPHONE COMPANY OF THE SOUTHEAST

No. 7410UC228

(Filed 1 May 1974)

Telephone and Telegraph Companies § 1; Utilities Commission § 6— fair value of property — inadequacy of service — specific finding as to effect

In a telephone rate case in which the Utilities Commission stated that it had considered the inadequacy of service in determining the fair value of the company's property, the Commission erred in failing to make a specific finding showing the effect it gave the factor of inadequate service in determining fair value.

APPEAL by defendant General Telephone Company of the Southeast from an order of the North Carolina Utilities Commission, issued 22 October 1973. Argued in the Court of Appeals 13 March 1974.

The defendant is a Virginia corporation engaged in providing telephone service in six southeastern states. It provides service in North Carolina to the municipalities of Durham and Monroe. On 5 November 1971, General Telephone filed an application with the North Carolina Utilities Commission seeking an increase in rates and charges. The Attorney General of North Carolina, the City of Durham, and the Monroe-Union County Chamber of Commerce, Inc., have filed applications for leave to intervene; and said applications have been granted. On 22 October 1973, the Commission issued an order denying the application of General for rate increase. The order determined the fair

value rate base for General and held that a fair rate of return would be between 8.02% and 8.24%. It further found that the overall quality of service afforded by General was not adequate and efficient. It concluded that a rate of return of 6.65% was a fair rate of return, considering the inadequacy of the service. One of the three Commissioners hearing this case dissented, finding that the service was reasonable and adequate and that the record did not support the finding of the majority.

Edward B. Hipp, Maurice W. Horne and John R. Molm for the North Carolina Utilities Commission.

Attorney General Morgan, by Assistant Attorneys General Lake, Gruber and Rutledge, for the Using and Consuming Public.

Claude V. Jones for the City of Durham.

Ward W. Wueste, Jr.; Newsom, Graham, Strayhorn, Hedrick, Murray and Bryson, by A. H. Graham, Jr., and K. Byron McCoy; Power, Jones and Schneider, by John Robert Jones and William R. White, for the General Telephone Company of the Southeast.

MORRIS, Judge.

In its order the Commission found the fair value of General's property used and useful to be $57,201,810. In making this finding the Commission stated that it had "considered the original cost depreciated and adjusted for excess margins and excess profits, and reasonable replacement cost, General's high station density and rapid increase in plant investment per station during the past five years, the plant inefficiency as indicated by the high plant maintenance expense, *the inadequacy of telephone service provided by the plant,* and the additions to plant since the last rate proceeding." (Emphasis supplied.) The Commission further found:

> "12. That assuming adequate service were being provided, a rate of return between 8.02% and 8.24% on the fair value rate base, and a rate of return on General's common book equity in the range of 10.5% to 11.0%, based on test year operations and the present capital structure would represent a fair rate of return on fair value and a reasonable rate of return on the end of test year common equity investment; that the rate of return in the range of 8.02%

to 8.24% on the fair value rate base would provide a rate of return in the range of 9.87% to 10.34% on common equity as adjusted for the increment by which fair value exceeds original cost, which would be a reasonable rate of return on said adjusted common equity, if adequate service were being provided.

13. *That because of General's presently inadequate service, a rate of return of 6.65% on the fair value rate base is just and reasonable;* that said 6.65% rate of return on the fair value rate base will produce a 7.34% rate of return on test period common equity and a rate of return of 6.90% on common equity as adjusted for the fair value increment; . . ." (Emphasis supplied.)

At oral argument counsel for the Commission conceded that General had been twice penalized for its inadequate service but took the position that this was within the power of the Commission.

In *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972), at page 361, Justice Lake said:

"It is obvious that consistently poor service, attributable to defective or inadequate or poorly designed equipment or construction, justifies a subtraction from both the original cost and the reproduction cost of the existing plant before weighing these factors in ascertaining the present 'fair value' of the properties. *City of Alton v. Illinois Commerce Commission,* 19 Ill. 2d 76, 165 N.E. 2d 513, 518. *The Commission must, however, make a specific finding showing the effect it gave this relevant factor, if it made such deduction on that account. Utilities Commission v. Morgan, Attorney General, supra,* at pp. 268-269. As the Supreme Court of Appeals of Virginia said, in *Alexandria Water Co. v. City Council of Alexandria,* 163 Va. 512, 563, 177 S.E. 454: 'The fact that a plant or a unit thereof is not well adapted to, or is inappropriate for, its present and/or reasonably to be anticipated future use tends materially to reduce its value below its reproduction new cost. One of the forms of inappropriateness is inappropriate engineering layout.' " (Emphasis supplied.)

Here the Commission failed to make a specific finding showing the effect it gave the factor of inadequate service. The Commission failed to do this in *Utilities Comm. v. Morgan, Attorney*

General, (generally referred to as the Lee Telephone case) 277 N.C. 255, 177 S.E. 2d 405 (1970), and the Court remanded. In *Lee,* Justice Lake said at page 274:

> "The Commission said in its order that it had considered the substandard quality of the service being rendered by Lee as an element bearing upon the value of its property and upon the rate of return it should be permitted to earn thereon. Nothing in its order indicates the effect given thereto by the Commission. The order does not show wherein, or the extent to which, the determination of the fair value of the properties or of the rates for service are different from what they would have been had the service been excellent and had the properties been in a high state of efficiency and maintenance."

It is true that Chapter 62 of the General Statutes confers upon the Utilities Commission the power and the duty to compel a public utility to render adequate service, and it also confers upon the Commission the duty to fix reasonable rates for the rendering of adequate service. If the inadequate service is attributable to defective or inadequate or poorly designed equipment or construction or obsolete equipment, then, as was said in *Utilities Comm. v. Telephone Co., supra,* certainly the Commission is justified in reducing the present fair value of the utilities' properties. In such a case, this is not a penalty, and a reduction of the rate arrived at by way of penalty for inadequate service is justified. But if the reduction from fair value of the utilities' properties is because of inadequate service by reason of inefficient personnel and human error, then the reduction amounts to a penalty, and a further penalty for inadequate service by reduction of rate is not justified by statute or by decided cases.

Since the Commission failed to find facts with respect to the effect it gave the factor of inadequate service in reducing the fair value of the properties, the case is remanded for further specific findings of fact.

Remanded.

Chief Judge BROCK and Judge CARSON concur.

EARL H. HUDSON v. DIXIE G. HUDSON

No. 7428DC166

(Filed 1 May 1974)

1. **Appeal and Error § 48— testimony as to what witness believed — no prejudice**

Admission of defendant's daughter's testimony that she believed plaintiff assaulted defendant in 1955, if erroneous, was rendered harmless by the overwhelming evidence of assaults by plaintiff on the person of defendant.

2. **Appeal and Error § 30— failure to make motion to strike**

Plaintiff's exception to the admission of testimony by defendant as to what her daughter had told her concerning acts of incest committed by plaintiff is deemed abandoned, since plaintiff made no motion to strike.

3. **Divorce and Alimony §18— wife as dependent spouse — sufficiency of evidence**

Evidence that defendant had not been regularly employed for 18 or 19 years prior to the separation of the parties, that she was completely supported by her husband, and that her time was devoted to housework and rearing her children was sufficient to establish that defendant was a dependent spouse within the purview of G.S. 50-16.1(3).

4. **Divorce and Alimony § 8— abandonment — sufficiency of evidence**

The trial court in an action for absolute divorce properly submitted the issue of abandonment to the jury, though defendant left the home, where there was substantial evidence of acts of cruelty inflicted upon defendant by the plaintiff.

5. **Appeal and Error § 31— assignments of error to charge — specificity required**

Plaintiff's assignments of error to the court's charge to the jury which do not specify the objectionable portion of the charge or state what the court should have charged are deemed abandoned.

6. **Trial § 38; Divorce and Alimony § 4— condonation — failure to request instruction**

Trial court in an action for absolute divorce was not required to instruct the jury on condonation, since that issue was not raised in the pleadings and plaintiff did not request a special instruction.

APPEAL from *Allen, District Judge*, 21 May 1973 Session of BUNCOMBE County District Court. Argued in the Court of Appeals 19 March 1974.

This action for absolute divorce based on one year's separation was instituted by plaintiff on 20 April 1971. Defendant, alleging abandonment, incest, and adultery on many occasions,

counterclaimed for alimony, custody, child support and attorney's fees.

The action was tried before a jury at the 21 May 1971 Session of Buncombe County District Court. The evidence presented was to the effect that the parties were married in 1948 and lived together until April 1970. Two children were born of the marriage, only one of whom was a minor at the time of the complaint. Plaintiff admitted that he had been indicted for, but not convicted of, incest with his daughter.

Plaintiff's daughter testified that plaintiff forced her to have intercourse with him on four or five occasions in 1969-1970, and that in November 1970 she became pregnant by him. She testified further that she had seen plaintiff assault defendant on many occasions. Defendant offered testimony which tended to corroborate her daughter's testimony of the incest. Defendant also testified that plaintiff had beaten her many times, was constantly in the company of other women, and that after plaintiff announced his intention to leave her, defendant left the house and took her belongings.

Plaintiff's motion to dismiss the counterclaim was denied, and all issues, including one as to dependency, were answered in favor of defendant.

The court thereupon found that the defendant was the dependent spouse, and that she was unable to pay her attorney's fees. Defendant was awarded permanent alimony and support and possession of the home.

Plaintiff's motion to set aside the verdict was denied, and from the entry and signing of judgment, plaintiff appealed.

Bruce A. Elmore, by George W. Moore, for plaintiff appellant.

Wade Hall for defendant appellee.

MORRIS, Judge.

[1, 2] Plaintiff's first assignment of error is to the admission of certain evidence offered by defendant. Defendant's daughter testified that she *believed* an assault occurred in 1955. The error, if any there be, is rendered harmless by the overwhelming evidence of assaults by plaintiff on the person of defendant. As we have stated many times, it does not suffice that appellant

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). Appellant excepts as well to the admission of defendant's testimony concerning what her daughter had told her concerning the acts of incest committed by plaintiff. Even if this evidence could not be sustained as corroborating the previous statement of defendant's daughter, the exception is deemed abandoned, for plaintiff made no motion to strike. *Brown v. Green,* 3 N.C. App. 506, 165 S.E. 2d 534 (1969).

[3] The trial court properly denied the motions to dismiss the defendant's claims and to set aside the verdict. There is no merit to plaintiff's contention that defendant has failed to establish that she was a dependent spouse. The uncontradicted evidence shows that defendant had not been regularly employed for 18 or 19 years prior to the separation, that she was completely supported by her husband and that her time was devoted to housework and rearing her children. It is clear from this evidence that plaintiff is a dependent spouse within the purview of G.S. 50-16.1(3).

[4] Plaintiff contends that the trial court erred in submitting the issue of abandonment to the jury inasmuch as defendant left the home during plaintiff's absence. This contention is untenable.

> "It is unnecessary for a husband to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him. This, under our decisions, would constitute abandonment by the husband." *Blanchard v. Blanchard,* 226 N.C. 152, 154, 36 S.E. 2d 919 (1946).

The record before us is replete with evidence of acts of cruelty inflicted upon the defendant by the plaintiff. The trial court properly submitted the issue of abandonment to the jury.

[5] Plaintiff excepts to the court's instruction on the provocation that would be required to justify the alleged acts of cruelty perpetrated on defendant. Inasmuch as plaintiff fails to specify the objectionable portion of the charge or state what the court should have charged, this assignment of error is deemed abandoned. *Investment Properties v. Allen,* 281 N.C. 174, 188 S.E. 2d 441 (1972); *Motors, Inc. v. Allen,* 20 N.C. App. 445, 201

S.E. 2d 513 (1974). For the same reasons, the assignment of error to the portion of the charge regarding the jury's answers to the issues submitted must fail.

[6] Plaintiff further assigns error to the court's failure to instruct the jury on condonation. Condonation is an affirmative defense, and as such, it must be alleged. *Cushing v. Cushing,* 263 N.C. 181, 139 S.E. 2d 217 (1964). The issue of condonation was not raised in the pleadings, and plaintiff did not request a special instruction as required by G.S. 1A-1, Rule 51(b). Where the court has charged adequately on the material aspects of the case arising on the evidence and has fairly applied the law to the factual situation, the charge will not be held error for failure of the court to instruct on subordinate features absent a request. *Koutsis v. Waddel,* 10 N.C. App. 731, 179 S.E. 2d 797 (1971).

Plaintiff's final assignment of error is to the remarks of the defendant's attorney in the presence of the jury regarding additional instructions. Since plaintiff made neither an objection nor an exception to these statements at the time they were made, the assignment of error is ineffectual. *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968).

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. NORMAN HABIB AKEL

No. 745SC321

(Filed 1 May 1974)

1. **Criminal Law § 84; Searches and Seizures § 3— validity of search warrant — information outside affidavit — sworn testimony**

In conducting a *voir dire* to determine the legality of a search of defendant's apartment the trial court did not err in accepting from a police officer rather than from the issuing magistrate testimony with respect to evidence that was presented to the magistrate and not included in the affidavit supporting the search warrant; furthermore, testimony by the officer that he gave the magistrate information after he was "sworn" was sufficient to support the trial court's finding that the issuing magistrate was informed under oath as to the reliability of an informant.

2. Criminal Law § 89— impeachment of defendant — similar offense

In a prosecution for possession of opium the trial court did not err in allowing the prosecution to cross-examine defendant with reference to marijuana found on the same night and in the same container as the opium and with reference to defendant's subsequent plea of guilty of possessing the marijuana, since, for the purpose of impeachment, defendant could be asked about his prior convictions.

APPEAL by defendant from *Cohoon, Judge,* 4 September 1973 Session of Superior Court held in NEW HANOVER County.

Defendant was tried upon a bill of indictment, proper in form, charging him with possession of the controlled substance opium, a violation of G.S. 90-95(a)(3). Defendant entered a plea of not guilty, the jury returned a verdict of guilty as charged, and the court entered judgment imposing a prison sentence of three years. Defendant appealed.

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

Goldberg & Anderson, by Aaron Goldberg and Frederick D. Anderson, for defendant appellant.

BRITT, Judge.

Defendant first assigns as error the conclusion of the court that the search warrant issued in this case was valid, contending that there was an insufficient basis for a finding of probable cause by the magistrate. The warrant was issued upon an affidavit of John H. Ward, Chief, Wrightsville Beach Police, and Chief Ward's oral testimony before Magistrate Fred G. Beach. The affidavit, after properly describing the place to be searched and the purpose of the search, stated:

> " * * * The facts which established probable cause for the issuance of a search warrant are as follows: Affiant was contacted by a confidential and reliable source who advised that he was in the apartment described above (#8 Sunset St.) and he had observed a quantity of Marihuana in the above mentioned apartment on this date and that he had been in the same apartment on other dates when he observed Norman Akel and Barry Alpert and others smoking Marihuana. Source has provided the affiant with information in the past that has led to the arrest of persons in the past for violation of the North Carolina Controlled Sub-

stances Act. Source stated that there is Marihuana in the above mention Apt. at this time, on this I pray that that (sic) a search warrant be issued."

On offer of the products of the search into evidence, defendant moved to suppress and a *voir dire* hearing was conducted to determine the validity of the search. Defendant argued on his motion that the underlying facts contained in the affidavit did not sufficiently establish the credibility of the undisclosed informant. Chief Ward testified that he told the magistrate of two cases in which information from this informant led to convictions in narcotic cases. After completion of the *voir dire*, the court concluded "that while it would have been better practice for the aforesaid information given the magistrate to have been put in writing in the affidavit, that the magistrate was informed sufficiently under oath with respect to the basis of the reliability of the informant referred to by the officer at the time in his affidavit and his sworn statement which was the basis for the issuance of the search warrant."

[1] Defendant recognizes the principle declared in *State v. Howell*, 18 N.C. App. 610, 197 S.E. 2d 616 (1973), that all of the evidence presented to a magistrate to support his findings of probable cause to issue a search warrant does not have to be set forth in the affidavit supporting the search warrant. However, defendant contends the trial court erred in accepting from a police officer, rather than from the magistrate as was done in *Howell*, testimony with respect to evidence that was presented to the magistrate and not included in the affidavit. Defendant also contends that the court erred in its conclusion because there was no evidence that the testimony given to the magistrate was under oath. He further contends that without the additional information, the warrant is invalid, being issued upon an insufficient affidavit.

Apparently, the court based its conclusion that the reliability of the informant was not sufficiently established in the affidavit, upon the fact that the affidavit did not state that the informant had given information in the past leading to arrests *and convictions*. This is indicated by the court's comment that the *voir dire* would have been unnecessary if the affidavit had contained "two more words" and the direction that the *voir dire* examination took. Our research does not reveal any case which requires that both arrest and conviction be shown in order to establish an informant reliable as required by the test established

in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). At least one jurisdiction has held that where past information has led to arrests and has been accurate, that the affidavit was sufficient. See *People v. Dumas,* 9 Cal. 3d 871, 109 Cal. Rptr. 304, 512 P. 2d 1208 (1973). Even assuming that this is a requirement, thus making the affidavit here insufficient, we do not find that it has been held, in this jurisdiction, that only the magistrate can testify as to any additional facts necessary for a finding of probable cause. Certainly it would be much better practice to have the magistrate testify. As to whether the additional information was given under oath, Chief Ward testified that he related the information after he was "sworn." This was sufficient to support the trial court's finding. The assignment of error is overruled.

[2] On his fourth assignment of error, defendant contends that it was error for the court to allow the prosecution to cross-examine defendant with reference to marijuana found on the same night and in the same container as the opium, and his subsequent plea of guilty of possessing the marijuana. The assignment is without merit. In *State v. Cook,* 280 N.C. 642, 647, 187 S.E. 2d 104, 108 (1972), we find: "It is well established in this State that when the defendant in a criminal action becomes a witness in his own behalf, he is subject to cross-examination like any other witness and, for the purpose of impeachment, may be asked about his prior convictions, including those for offenses similar to that for which he is presently on trial." Furthermore, we think, under the evidence in this case, the question of possession of marijuana was relevant to the question of actual possession of the opium.

We have carefully examined the other assignments of error brought forward and argued in defendant's brief but conclude that they also are without merit.

No error.

Judges HEDRICK and CARSON concur.

ELIJAH PLUM ALLIGOOD v. SEABOARD COASTLINE RAILROAD

No. 742SC199

(Filed 1 May 1974)

1. **Railroads § 7— crossing accident — contributory negligence of truck driver**

In an action to recover damages for personal injuries sustained when plaintiff's truck and defendant's train collided, the trial court properly granted defendant's motion for a directed verdict where the evidence tended to show that plaintiff observed signs and knew that he was approaching a railroad crossing, plaintiff did not reduce his speed, and plaintiff collided with the train after it entered the crossing.

2. **Rules of Civil Procedure § 50— directed verdict for party with burden of proof**

Trial court did not err in granting defendant's motion for a directed verdict on the grounds that the evidence failed to establish negligence on the part of defendant but did establish contributory negligence as a matter of law on the part of the plaintiff, since the granting of a directed verdict for the party with the burden of proof is permissible when the only evidence is plaintiff's own evidence and defendant's burden is met for him by the plaintiff.

APPEAL by plaintiff from *Martin (Harry C.), Judge* at the 8 October 1973 Session of BEAUFORT Superior Court.

Heard in the Court of Appeals 11 April 1974.

This is a civil action for the recovery of damages for personal injuries and damages sustained to plaintiff's truck in a collision with a train owned by the defendant Seaboard Coastline Railroad.

On 22 May 1972, the plaintiff loaded his pickup truck with some seventy sheets of tin or iron and five or six hundred pounds of nails at Moore's Building Supplies in Washington, North Carolina. Plaintiff then proceeded from Moore's Building Supplies out Fifth Street to Clark's Neck Road (State Road 1403) where he turned left and proceeded south down Clark's Neck Road.

The railroad tracks in question are perpendicular to Clark's Neck Road and are located five hundred feet south down Clark's Neck Road from Fifth Street. Sixty-nine feet north of the tracks on the western side of the road is located a warehouse. The warehouse is 22.5 feet wide, 413 feet long, is parallel to the tracks and was 28 feet from the western edge of the road.

Plaintiff testified that he had been over this crossing at other times. He further testified that as he proceeded south along Clark's Neck Road, he noticed the railroad crossing sign located 300-340 feet north of the tracks on Clark's Neck Road and the sign located at the crossing itself and that he knew he was approaching a railroad crossing. The plaintiff testified that after he turned onto Clark's Neck Road, he built up his speed to 20-25 miles per hour and did not slow down at any time before he applied his brakes. Plaintiff further testified that it was 3:55 p.m. on a "pretty, sunshiny day." He testified:

> "When I cleared the building, I heard the whistle on the train. The train then was in the edge of the road, coming around the building, is the only time I heard any whistle blow.
>
> I run into it. I locked the wheels on my truck and just eased right into it, just did touch the tank on the train, and it tore my truck, throwed it over in the ditch with me and Mr. Waters in it.
>
> * * * *
>
> The train was going between 25 and 30, somewhere along in there."

At the close of plaintiff's evidence, defendant moved for a directed verdict on the grounds the evidence, even when taken in the light most favorable to the plaintiff, failed to establish actionable negligence on the part of the defendant and that the evidence taken in the light most favorable to the plaintiff established contributory negligence as a matter of law on the part of the plaintiff. From the granting of defendant's motion and dismissal of the action, plaintiff appealed.

Wilkinson, Vosburgh & Thompson by John A. Wilkinson for plaintiff appellant.

Rodman, Rodman & Archie by Edward N. Rodman and Frederick N. Holscher for defendant appellee.

CAMPBELL, Judge.

[1, 2] We have considered all the evidence in the light most favorable to the plaintiff and hold that there was no error in the trial court's granting the motion for directed verdict. As to the contributory negligence of the plaintiff driver, we hold that

this case falls within the exception to *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971), as outlined in *Wyche v. Alexander*, 15 N.C. App. 130, 189 S.E. 2d 608 (1972), and *Price v. Conley*, filed in the Court of Appeals on 17 April 1974, in that the granting of a directed verdict for the party with the burden of proof is permissible when the only evidence was plaintiff's own evidence and defendant's burden is met for him by the plaintiff. Compare with *Brown v. R. R. Co.* and *Phillips v. R. R. Co.*, 276 N.C. 398, 172 S.E. 2d 502 (1970).

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROBERT LEE HICKMAN

No. 743SC221

(Filed 1 May 1974)

1. **Assault and Battery § 15; Criminal Law § 118— failure to instruct on self-defense — error**

In a prosecution for assault with a deadly weapon with intent to kill, the defendant's evidence, even though contradicted by the State, raised an issue of self-defense, and the trial court erred in failing to give an instruction on that defense.

2. **Assault and Battery § 15— failure to define assault — error**

Trial court in a prosecution for assault with a deadly weapon with intent to kill erred in failing to define or otherwise explain to the jury the meaning of the legal term "assault."

APPEAL by defendant from *Cowper, Judge*, at the 15 October 1973 Session of CRAVEN Superior Court.

Heard in the Court of Appeals 10 April 1974.

The indictment charged defendant with assault with a deadly weapon with the intent to kill and inflicting serious injury not resulting in death. The State's evidence tended to show that the defendant was playing cards with Clayton Fenner and a man called Boot Jack. The defendant was losing money and accused Fenner of cheating. Everyone got up, and the defendant left the room. As Clayton Fenner was walking out, the defendant came

back into the room and stabbed Fenner with a knife—once in the back of the head and twice more in the back after he fell to the floor. The defendant then ran out of the house, got in his car and drove off.

The defendant, Robert Lee Hickman, testifying in his own behalf, stated that he and Fenner argued about the cheating accusation before he left the room. The defendant testified that when he reentered the room, Fenner came at him with something in his hand which he was swinging. The defendant testified he then pulled out his knife and hit Fenner, knocking him back into a chair. As Fenner rose to come at him again, the defendant struck him two more times, then left the house. From a verdict of guilty of the lesser offense of assault with a deadly weapon inflicting serious injury, the defendant appealed.

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

Ernest C. Richardson III for defendant appellant.

CAMPBELL, Judge.

[1] The defendant assigns as error the failure of the trial court to charge on self-defense and the failure of the trial court in its charge to explain and define the element of assault. Under G.S. 1-180 it is the duty of the trial court to declare and explain the law arising from the evidence even without a special request for instruction. The defendant's evidence, even though contradicted by the State, raised an issue of self-defense. Whether the defendant's evidence is less credible than the State's evidence is an issue for the jury, not the trial judge. The failure of the trial court to charge on self-defense was error. *State v. Greer,* 218 N.C. 660, 12 S.E. 2d 238 (1940); *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154 (1965); *State v. Chaney,* 9 N.C. App. 731, 177 S.E. 2d 309 (1970); *State v. Broadnax,* 13 N.C. App. 319, 185 S.E. 2d 442 (1971).

The defendant was convicted of the offense of an assault with a deadly weapon inflicting serious injury. In instructing on this offense, the trial judge charged the jury:

> "Now, I instruct you that if the State has satisfied you beyond a reasonable doubt that on or about 8:00 P.M., January 27, 1973, the defendant, Robert Hickman, assaulted Clayton Fenner with a knife, a deadly weapon

thereby inflicting serious bodily injury upon him, it would be your duty to return a verdict of guilty of the lesser offense of assault with a deadly weapon with intent—inflicting serious injury. If you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty."

To this instruction the defendant excepted and assigned it as an error.

[2] At no place in the charge did the trial judge instruct the jury as to what the term "assault" means or what constitutes an assault. An assault is a legal term with which jurors are not apt to be familiar. We think it incumbent upon the trial judge to define or otherwise explain to a jury the meaning of the legal term "assault."

In *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572 (1965), the North Carolina Supreme Court stated:

"The only instruction given with respect to the law of the case consisted of a reading of the pertinent statute, G.S. 14-87. In giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon. 1 Strong: N. C. Index, Criminal Law, §§ 105, 107. Ordinarily the reading of the pertinent statute, without further explanation, is not sufficient."

For the errors pointed out we grant a new trial.

New trial.

Judges MORRIS and VAUGHN concur.

MORGAN YOUNG v. PAULINE YOUNG

No. 7428DC54

(Filed 1 May 1974)

Divorce and Alimony § 14; Judgments § 37— adultery — prior judgment — res judicata — acts occurring after judgment

In the husband's action for divorce based on a one-year separation, the wife was barred on the ground of *res judicata* from asserting as a plea in bar or counterclaim acts of adultery by the husband alleged to have occurred prior to the date of a judgment dismissing with prejudice the wife's prior action for alimony without divorce based on adultery; however, the wife was not barred from asserting claims of adultery alleged to have occurred subsequent to the date of the judgment in the prior action.

APPEAL by defendant from *Weaver, District Judge,* at the 10 August 1973 Session of BUNCOMBE District Court.

Heard in the Court of Appeals 19 March 1974.

This action for divorce based on a one-year separation was instituted by the plaintiff, Morgan Young, on 10 October 1972. The defendant counterclaimed for divorce from bed and board, alimony and possession of the home. As a plea in bar, she alleged adultery, allegedly committed by the plaintiff with one Mrs. Tuton before and after 9 April 1971. Plaintiff moved to strike the counterclaim and the defense of adultery on the grounds of *res judicata.* Plaintiff's evidence at the hearing on the motion consisted of the complaint of Pauline Young in a prior action by her for permanent alimony without divorce, alimony pendente lite, counsel fees, and possession of the home. As grounds for the relief requested, the complaint of Pauline Young had alleged the adultery of Morgan Young with one Mrs. Tuton before and after 17 January 1971. In support of his motion in this action, plaintiff, Morgan Young, also introduced the 25 August 1972 judgment of Judge Winner in the wife's action which dismissed her case with prejudice at the close of her evidence, making the order of Judge Winner, in effect, a directed verdict. The trial court in this action granted plaintiff's motion, barred the defendant's counterclaim, and struck her defense of adultery on the grounds of *res judicata.*

Robert S. Swain and Joel B. Stevenson for plaintiff appellee.

Herbert L. Hyde for defendant appellant.

CAMPBELL, Judge.

The doctrine of *res judicata* applies to divorce actions as well as other civil actions. *Garner v. Garner*, 268 N.C. 664, 151 S.E. 2d 553 (1966). No appeal having been taken therefrom, the judgment entered by Judge Winner 22 August 1972, became and is a final judgment upon the merits and a determination of the rights of the parties as they existed at the time of the judgment. *Bowen v. Murphrey*, 256 N.C. 681, 124 S.E. 2d 882 (1962). In *Bowen v. Murphrey, supra*, the court stated:

> "A final judgment, which adjudicates upon the merits the issues raised by the pleadings, 'estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward.' *Bruton v. Light Co.*, 217 N.C. 1, 7, 6 S.E. 2d 822, and cases cited; *King v. Neese*, 233 N.C. 132, 136, 63 S.E. 2d 123, and cases cited; *Hayes v. Ricard*, 251 N.C. 485, 494, 112 S.E. 2d 123."

In *King v. Neese*, 233 N.C. 132, 63 S.E. 2d 123 (1951), the court stated:

> "Where a second action or proceeding is between the same parties as a first action or proceeding, the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding. *Distributing Company v. Carraway*, 196 N.C. 58, 144 S.E. 535; *Moore v. Harkins*, 179 N.C. 167, 101 S.E. 564, rehearing denied in 179 N.C. 525, 103 S.E. 12; *Clothing Co. v. Hay*, 163 N.C. 495, 79 S.E. 955; *Tuttle v. Harrill*, 85 N.C. 456."

In the case at bar defendant has counterclaimed and pleaded in bar the grounds of adultery. Any instances of adultery by the husband up to the time of trial were relevant to her original action and in the exercise of due diligence could have and should have been brought forward. Thus we hold that, despite the pleading in this action of adultery by the husband after 9 April 1971, a date subsequent to that alleged in her complaint in her original action, this portion of defendant's answer is covered by

and bound by the 22 August 1972 judgment of Judge Winner. *Garner v. Garner, supra; Bowen v. Murphrey, supra; Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123 (1960); *King v. Neese, supra.*

Defendant is, of course, not barred on the grounds of *res judicata* from asserting any claims of adultery alleged to have occurred subsequent to 22 August 1972, and it was error for the trial court to strike her defense and counterclaim as it related to events subsequent to 22 August 1972.

Affirmed in part.

Reversed in part.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. TONEO SMITH

No. 7412SC205

(Filed 1 May 1974)

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

Where the evidence is clear and convincing that an in-court identification of defendant originated with observation of the defendant at the time of the robbery and was not tainted by a subsequent police station showup, failure of the trial court to conduct a *voir dire* must be deemed harmless error; therefore, the trial court's failure to conduct a *voir dire* in this case was not prejudicial where the evidence tended to show that the robbery took place in daylight and that the victim observed defendant as defendant stood within two feet of him.

APPEAL by defendant from *Canaday, Judge,* 15 October 1973 Session of Superior Court held in CUMBERLAND County.

This is a criminal action wherein the defendant was charged in a bill of indictment, proper in form, with armed robbery. Upon arraignment, the defendant entered a plea of not guilty. The State offered evidence which tended to establish the following.

On 11 June 1973 at approximately 6:30 p.m. James Lester Britt, a trusty in the Fayetteville jail, was given permission to

leave the jail for the purpose of purchasing paper, envelopes, and stamps. After purchasing these items the trusty started to return to the jail when he was approached by three men. Britt then testified as to the following events:

> "Two of them grabbed me. They held me at knife point. I seen two knives. One was right at my neck. * * * The tall one had my arm up and he had the knife around my neck. Toneo Smith was present when this happened; he was standing in front of me. Another person was standing on my right side. That is when they started robbing me. The man on the left cut this pocket and tore it off; tore it clear off and just left it hanging there. He also got my billfold . . . . The defendant was standing in front of me at that time. The same time that the man was going through my back pocket and getting my billfold, the defendant was going through my front pocket."

After completion of the robbery, the victim immediately notified the police. Shortly thereafter, a police officer observed three males running in a westerly direction from the scene of the crime and the officer pursued them. The officer, after a brief chase, was able to apprehend the defendant.

From a jury verdict of guilty and a judgment thereon imposing a sentence of not less than five years nor more than seven years, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General James L. Blackburn for the State.

Cherry and Grimes by Donald W. Grimes for defendant appellant.

HEDRICK, Judge.

By his first assignment of error the defendant contends that the trial court erred in denying his motion for a voir dire hearing as to the legality of the prosecuting witness' in-court identification of the defendant. Although the better practice dictates "that the trial judge, even upon a general objection only, should conduct a voir dire in the absence of the jury, find facts, and thereupon determine the admissibility of in-court identification testimony . . . [f]ailure to conduct the voir dire . . . does not necessarily render such evidence incompetent." *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1971).

In the instant case the evidence discloses that during the robbery, which took place in daylight, the prosecuting witness was within two feet of the defendant. The witness testified, "I didn't have any difficulty seeing Smith. He was in front of me." Other testimony reveals that the prosecuting witness did observe the defendant in the booking room of the Fayetteville Police Department approximately fifteen minutes after the robbery; however, where as here, the evidence is clear and convincing that the in-court identification of the defendant originated with observation of the defendant at the time of the robbery and was not tainted by the subsequent police station showup, the failure to conduct a voir dire must be deemed harmless error. *State v. Stepney, supra.*

Defendant's second assignment of error challenges the failure of the trial court to grant his motion to set aside the verdict as being against the weight of the evidence. Such a motion is addressed to the sound discretion of the trial judge; and, there having been no showing of a manifest abuse of this discretion, the ruling of the trial court denying the defendant's motion is not reviewable on this appeal. *State v. Massey,* 273 N.C. 721, 161 S.E. 2d 103 (1968); *Grant v. Artis,* 253 N.C. 226, 116 S.E. 2d 383 (1960).

Defendant was afforded a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and BALEY concur.

STATE OF NORTH CAROLINA v. ROBERT LEE LITTLE

No. 7419SC373

(Filed 1 May 1974)

Criminal Law § 90— State's witness — cross-examination by solicitor

The trial judge did not abuse his discretion in declaring a State's witness hostile and in permitting the solicitor to cross-examine him where the solicitor began his cross-examination, whereupon the jury was excused, the solicitor then brought out a number of contradictions in the witness's testimony, and the court thereupon declared the witness hostile and allowed him to be cross-examined in the presence of the jury.

ON *certiorari* to review judgment of *Seay, Judge,* 14 May 1973 Session of Superior Court held in CABARRUS County.

Defendant was tried on a bill of indictment charging that on 19 February 1973, he did "unlawfully, willfully and feloniously commit an assault on one Mary Alice Carter, a female, with intent feloniously, by force and against her will to ravish and carnally know the said Mary Alice Carter." The alleged victim was 12 years old. Defendant pleaded not guilty, the jury returned a verdict of guilty as charged, and the court adjudged that he be imprisoned for a term of 15 years. We allowed defendant's petition for a writ of certiorari to perfect a late appeal.

Attorney General Robert Morgan, by Assistant Attorney General James L. Blackburn, for the State.

Johnson & Jenkins, by Cecil R. Jenkins, Jr., for defendant appellant.

BRITT, Judge.

Defendant's sole assignment of error concerns whether the court abused its discretion in allowing the prosecuting attorney to cross-examine and impeach his own witness, Tim Cauble [Cauble]. Cauble testified: He (Cauble) was employed by the State Highway Commission as a truck driver and was hauling rock from a gravel pit on the day in question and had passed the shack (the alleged scene of the assault) where defendant was stationed to count the loads hauled; that he picked up the last load of the day and went by the shack; that defendant was inside when he stopped but defendant came right out; that he thinks the door to the shack was closed when he drove up; that the door had been closed "off and on" all day; that defendant raked the rock on the truck while he (Cauble) was outside the truck; and that he saw nothing unusual, or any other person, about the shack on this occasion. On cross-examination by defense counsel, he testified that he went into the shack to see how many loads he had hauled that day and that he saw no one else in the building.

After defendant's cross-examination of Cauble, the prosecuting attorney began questioning him about a conversation the witness had with SBI Agent Giles Berrier two days after the alleged assault. At that point the jury was excused from the courtroom. The State then brought out a number of contradic-

tions in the witness' testimony, including that he had stated that it was unusual for the door of the shack to be closed and for defendant not to rake the gravel on the truck, which he did not do, and that he had not told Berrier about being in the shack but rather indicated that he had not stopped. The court then declared Cauble a hostile witness and permitted him to be cross-examined by the solicitor in the presence of the jury. On the solicitor's cross-examination, the witness admitted that two days after the incident he told Agent Berrier that defendant was not outside the shack as he usually was when Cauble approached with his load of gravel; that the door to the shack was shut which was unusual; that after stopping momentarily defendant came out of the shack but did not smooth down the loose gravel; and that he (Cauble) drove away from the shack and saw nothing further regarding the alleged assault. Agent Berrier was then called as a witness for the State and related, for purpose of corroboration, statements made to him by Cauble two days after the alleged assault.

In another of his classical opinions, *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954), Justice Ervin succinctly states the law on the question presented. We quote from page 251: "The trial judge has the discretionary power to permit a party to cross-examine his own witness for a legitimate purpose. [Citatations.] Accordingly, the trial judge may let a party cross-examine his own witness, who is hostile or who surprises him by his testimony, for the purpose of refreshing the recollection of the witness and enabling him to testify correctly. [Citations.] In so doing, the trial judge may permit the party to call the attention of the witness directly to statements made by the witness on other occasions. [Citations.]"

We hold, under the facts appearing in this case, that the trial judge did not abuse his discretion in declaring Cauble a hostile witness and permitting the solictor to cross-examine him.

No error.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. LYMAN EUGENE GRANT

No. 748SC341

(Filed 1 May 1974)

Criminal Law § 131— new trial for newly discovered evidence — denial proper

The trial court did not abuse its discretion in denying defendant's motion for a new trial on the ground of newly discovered evidence where that evidence consisted of affidavits of a co-defendant and an accessory after the fact which stated that defendant was not involved in the crimes for which he was convicted.

APPEAL from order of *James, Judge,* entered at the 26 November 1973 Session of Superior Court held in GREENE County.

Defendant appeals from order denying his motion for a new trial on ground of newly discovered evidence. The motion, verified on 16 October 1973, is summarized in pertinent part as follows:

Defendant and Ernie Tomlinson were tried jointly at the 26 June 1972 Session of Superior Court held in Greene County, and convicted of two counts of armed robbery and one count of felonious breaking and entering. Defendant received a 30 years prison sentence and Tomlinson received a 20 years prison sentence. At defendant's trial, the two alleged victims of the robbery positively stated that defendant was a participant in the crimes. Subsequent to defendant's trial, Amos Stroud was tried for, and convicted of, being an accessory after the fact of the same robberies and received a prison sentence. Tomlinson and Stroud now say that defendant was not involved in the crimes for which he was convicted; that to have given testimony to that effect at defendant's trial would have required their taking the witness stand and incriminating themselves. Affidavits of Tomlinson and Stroud are attached to the motion.

Following a hearing on the motion, the trial court entered an order in which it found certain facts, made conclusions of law, and, in its discretion, denied the motion for a new trial. Defendant appealed.

Attorney General Robert Morgan, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorneys General Jones P. Byrd and Alfred N. Salley, for the State.

Turner and Harrison, by Fred W. Harrison, for defendant-appellant.

BRITT, Judge.

This case was before this court in July of 1973 when defendant appealed from the judgments imposed at his trial. In an opinion reported in 18 N.C. App. 722, 197 S.E. 2d 898 (1973), this court found no error in the trial. The Supreme Court denied certiorari. 284 N.C. 122, 199 S.E. 2d 661 (1973).

It is well settled in this jurisdiction that a motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and its order denying the motion will not be disturbed unless abuse of discretion appears. 3 Strong, N. C. Index 2d, Criminal Law, § 131, page 53; *State v. Dixon,* 259 N.C. 249, 130 S.E. 2d 333 (1963); *State v. Chambers,* 14 N.C. App. 249, 188 S.E. 2d 54 (1972). A careful review of the record filed in this appeal, as well as the record filed in the former appeal, impels us to conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

The order appealed from is

Affirmed.

Judges HEDRICK and CARSON concur.

EUGENE V. GRACE v. BOBBY G. JOHNSON

No. 7415DC28

(Filed 1 May 1974)

Process § 5— process running from wrong county — amendment

Where the summons commanded the defendant to appear and answer in a county other than the one in which the action was pending, the summons could not be amended to show the proper county and defendant's motion to quash the summons should have been allowed. G.S. 1A-1, Rule 4(i); G.S. 1A-1, Rule 12(b)(4).

APPEAL by defendant from *Peele, District Court Judge,* 11 June 1973 Session of District Court held in CHATHAM County.

The complaint was filed in the District Court Division of the General Court of Justice in Chatham County on 16 March 1973. The original summons and the copy thereof served on

defendant ran from Durham County. Plaintiff discovered this error on 27 March 1973, some eight days after defendant had been served, and immediately mailed notification of the error to defendant and his attorney. On 17 April 1973, plaintiff moved to amend the summons to run from Chatham rather than Durham County. Defendant moved to quash the summons as insufficient and defective. Plaintiff's motion to amend was granted, and defendant's motion to quash summons was denied.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by O. William Faison, Jr., for plaintiff appellee.

White, Allen, Hooten & Hines, P.A., by Thomas J. White III, for defendant appellant.

VAUGHN, Judge.

Rule 4(i) of the Rules of Civil Procedure empowers the court to allow amendment of the summons at any time in its discretion unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued. A comment by the General Statutes Commission states that the rule "in terms, does not provide for any greater liberality of amendment than did former G.S. 1-163." We agree. The question, therefore, is whether an amendment to the summons to correct the name of the court in which the action was commenced would have been allowable under former G.S. 1-163. This question was answered in *Brantley v. Sawyer*, 5 N.C. App. 557, 169 S.E. 2d 55. In that case the trial court allowed plaintiff to amend the name of the court in which the action was pending. On appeal, this court held that the amendment should not have been allowed because of the fatal variance between the place where defendant was commanded to appear and the place where the suit was pending. In the case before us now, the action was pending in Chatham County. The original and copy of the summons directed defendant to appear and answer in Durham County. Defendant's motion under Rule 12(b)(4) should have been allowed.

Reversed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ARCHIE CURTIS BOND

No. 741SC360

(Filed 1 May 1974)

Indictment and Warrant § 3— jurisdiction of grand jury — crimes committed in another county

The grand jury of Pasquotank County had no jurisdiction to indict defendant for crimes allegedly committed in Tyrrell County and an indictment returned by the grand jury of Pasquotank County for such crimes was void.

ON *certiorari* to review the order of *Copeland, Special Judge*, entered on 1 October 1973 in PASQUOTANK County.

Defendant was indicted by a Tyrrell County grand jury for felonious breaking and entering and felonious larceny. Both offenses allegedly occurred in Tyrrell County. The case was later transferred to Pasquotank County. A Pasquotank County grand jury indicted defendant for the same offenses specified in the Tyrrell County bill.

Defendant pled guilty to both charges in Pasquotank County Superior Court and was sentenced to 10 years imprisonment.

On 12 September 1973, defendant petitioned for a writ of habeas corpus. He contended that the Pasquotank County bill of indictment was void and that his detention was illegal since he had not been tried under a proper indictment. Defendant's petition was granted. On return of the writ, judgment was entered directing that defendant be discharged.

The State's petition for certiorari was granted by this Court in an order dated 9 January 1974.

Attorney General Robert Morgan by Ralf F. Haskell, Assistant Attorney General, for the State.

Forrest V. Dunstan and Richard E. Railey for defendant appellee.

VAUGHN, Judge.

There is nothing in the record to show that the removal to Pasquotank County was with written consent of defendant as required by G.S. 15-135, and there is no argument that there was a defect in the original indictment which, after a valid

removal, would have permitted the Pasquotank grand jury to return a new bill under G.S. 15-136. Except for these and other statutory provisions not material here, the grand jury of Pasquotank County has no jurisdiction to indict for crimes committed in Tyrrell County. Since the grand jury had no jurisdiction, the indictment upon which defendant was tried is void and the judgment of Judge Copeland must be affirmed. *State v. Beasley,* 208 N.C. 318, 180 S.E. 598; *State v. Mitchell,* 202 N.C. 439, 163 S.E. 581. This discharge will not, however, preclude defendant from being tried upon a valid indictment in Tyrrell County, since jeopardy does not attach on a void indictment. *State v. Beasley, supra.*

Affirmed.

Judges CAMPBELL and MORRIS concur.

LOU ANNA BROWN v. ARTHUR W. BROWN

No. 7415DC58

(Filed 1 May 1974)

Divorce and Alimony § 21; Judgments § 51— foreign judgment — army retirement pay — division of community property — enforcement

Although plaintiff's complaint stated no claim for relief under G.S. 50-16.9(c) to modify a Texas judgment in a divorce action granting plaintiff one-half of defendant's army retirement pay since Texas, a community property state, does not award permanent alimony and the division of the retirement pay was not an award of alimony but was a division of community property, the complaint did state a claim for relief for enforcement of the Texas judgment, and the trial court erred in the allowance of defendant's motion to dismiss the complaint for failure to state a claim for relief.

APPEAL by plaintiff from *Horton, District Judge,* at the 23 July 1973 Session of ALAMANCE District Court.

Heard in the Court of Appeals 19 February 1974.

This is a civil action instituted pursuant to G.S. 50-16.9(c) to enforce or modify a Texas judgment granting to plaintiff an absolute divorce and, among other relief, one-half of all defendant's retirement pay from the United States Army to be based upon any and all retirement benefits to which he would be en-

titled if he retired on or before 1 April 1973. The Texas judgment was entered 22 December 1972. Defendant received an honorable discharge from the Army 31 January 1973. Both parties subsequently moved to North Carolina. On 27 April 1973, plaintiff was notified by the Army that retirement pay was immune from civil process and that retirement checks would be sent only to the "retired member." Plaintiff then instituted this action. Defendant answered and moved under G.S. 1A-1, Rule 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted on the grounds that Texas, a community property state, did not permit awards of permanent alimony and that this action was not properly instituted under G.S. 50-16.9(c). The trial court granted defendant's motion and plaintiff appealed.

W. R. Dalton, Jr., for plaintiff appellant.

Long, Ridge & Long by James E. Long for defendant appellee.

CAMPBELL, Judge.

The North Carolina Supreme Court laid down the rule to be followed in ruling on motions under Rule 12(b)(6) in *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970) where the Court stated:

> "Under the 'notice theory of pleading' a statement of claim is adequate if it gives sufficient notice of the claim asserted 'to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought. . . .' Moore § 8.13. 'Mere vagueness or lack of detail is not ground for a motion to dismiss.' Such a deficiency 'should be attacked by a motion for a more definite statement.' Moore § 12.08 and cases cited therein.
>
> "In further appraising the sufficiency of a complaint Mr. Justice Black said, in *Conley v. Gibson, supra* at 45-46, '[W]e follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' 'This rule,' said the Court in *American Dairy Queen Corporation v. Augustyn*, 278 F. Supp. 717, 'generally

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

* * * *

"[G]enerally speaking, the motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action but not to one which was formerly labeled a 'defective statement of a good cause of action.' . . . "

In the case at bar the complaint reads:

"The plaintiff, complaining of the defendant, alleges:

1. That the plaintiff is a citizen and resident of Alamance County, North Carolina, and the defendant is a citizen and resident of Wake County, North Carolina.

2. That on the 21st day of December 1972 a Judgment was entered in the Court in El Paso County, Texas, having jurisdiction of the parties. That copy of said Judgment is attached hereto as Exhibit A and made a part hereof.

3. That among the provisions of said Judgment as a requirement that the defendant, by way of alimony to his wife, was required to sign over to the wife, the plaintiff herein, one-half of his retirement pay from the United States Army, which he would be entitled to if he retires on or before April 1, 1973. That the defendant retired from the United States Army prior to the 1st day of April, 1973.

That the defendant has failed and refused to cause the Army to pay one-half of the retirement benefits to the

plaintiff as shown by plaintiff's Exhibit B, a copy of which is attached hereto and made a part hereof.

WHEREFORE the plaintiff, pursuant to the provisions of G.S. 50-16.9(c) requests the Court to enter an Order either in words and figures as shown by the Texas judgment or by the same modified to such an extent as will permit the plaintiff to realize the benefits that the defendant is obligated to give her.

This 10th day of May, 1973.

DALTON & LONG
By: s/ W. R. Dalton, Jr.
Attorney for Plaintiff

(Verified by LOU ANNA BROWN this 10th day of May 1973)"

Plaintiff instituted this action under G.S. 50-16.9(c) for modification of the Texas judgment apparently to provide for payment of one-half of the retirement pay by defendant to the plaintiff since the Army refused to make any payments to anyone other than the retired member. The defendant answered that no relief should be granted plaintiff under G.S. 50-16.9(c) since there had been no showing of changed circumstance and since Texas allowed only alimony pendente lite and not permanent alimony (unless there is no community property.) The crux of defendant's argument is that since Texas courts could not modify their own judgments to provide for permanent alimony, Vernon's Ann. Tex. Civ. Stat., Art. 4637, then the North Carolina courts could not so modify the Texas judgment. G.S. 50-16.9(c).

However, modification of the Texas judgment is not necessary. Retirement pay and the division thereof is not alimony in Texas but under certain circumstances is community property. In *Davis v. Davis,* 495 S.W. 2d 607 (Tex. Civ. App. 1973), the Texas Civil Court of Appeals examined the history of the treatment of military retirement pay in Texas divorce cases. Normally, retirement pay property rights earned during marriage are not considered vested and thus not community property unless the serviceman retired prior to the divorce, or, at the time of divorce, had completed the twenty years of service needed to entitle him to retirement benefits even though he had not yet retired. *Kirkham v. Kirkham,* 335 S.W. 2d 393 (Tex. Civ. App. 1960); *Mora v. Mora,* 429 S.W. 2d 660 (Tex. Civ.

App. 1968); *Busby v. Busby*, 457 S.W. 2d 551 (Texas 1970). In *Miser v. Miser*, 475 S.W. 2d 597 (Tex. Civ. App. 1971), the Texas Court of Civil Appeals held that the serviceman's rights to retirement pay had vested and thus could be considered community property where the serviceman had served eighteen and one-half years, and had reenlisted prior to divorce, which term of enlistment would carry him beyond the twenty-year period required to make him eligible for retirement benefits.

Texas courts clearly have allowed the division of retirement pay and do not consider such awards as alimony. In the case at bar defendant was discharged from the Army just one month after the Texas judgment, and that judgment provided for the wife to have "one-half of the Respondent's retirement pay from the United States Army, to be based upon any and all retirement benefits which he would be entitled to if he retires on or before April 1, 1973." Plaintiff is entitled to seek enforcement of the Texas judgment by the North Carolina courts. We therefore reverse and remand for further proceedings in accordance with this opinion.

Reversed.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. WILLIE LEE NEELY

No. 7427SC158

(Filed 1 May 1974)

Criminal Law § 154— unavailability of trial transcript — record on appeal — no right to new trial

The superior court was without authority to order a new trial for defendant for the reason that a transcript of his trial was unavailable because the court reporter died before transcribing her record of the trial and other persons were unable to transcribe the reporter's record, since defendant could have filed with the appellate court a record on appeal, as agreed to by the solicitor or settled by the court, in which was included a statement that the reporter is unable to provide a transcript and, in lieu of a narrative statement of the evidence, a statement of the facts upon which the appeal is based, any defects appearing on the face of the record and the errors he contends were committed at the trial; if the circumstances so justify, defendant could also assert as an assignment of error that he is unable

to obtain an effective appellate review of errors committed during the trial because of the reporter's inability to prepare a transcript.

ON *certiorari* to review an Order entered by *Snepp, Judge,* 16 July 1973 Session of Superior Court held in GASTON County. Argued in the Court of Appeals 9 April 1974.

Defendant was tried and found guilty of the felony of armed robbery at the 20 November 1972 Session of Superior Court held in Gaston County. He was sentenced to a term of imprisonment not to exceed 25 years. Defendant timely gave notice of appeal and ordered a transcript of his trial proceedings. Mrs. Roberta Wilkie, the Court Reporter at defendant's trial, died before she transcribed her record of the trial. Efforts by others to transcribe Mrs. Wilkie's records were unavailing. Because of the Reporter's inability to prepare a transcript of his trial proceedings, defendant has not perfected his appeal.

Defendant filed in the Superior Court in Gaston County a motion for a new trial grounded upon the inability of the Reporter to prepare a transcript. Judge Snepp found the facts to be substantially as alleged by defendant, but denied the motion for a new trial upon the grounds that the Superior Court was without authority to order the new trial.

Upon petition by defendant, this Court issued the writ of certiorari to review Judge Snepp's Order.

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

Ramseur & Gingles, by Ralph C. Gingles, Jr., for the defendant.

BROCK, Chief Judge.

Judge Snepp was correct in concluding that the Superior Court was without authority to order a new trial for defendant under the facts summarized above.

Defendant should have proceeded to compile his record on appeal to the extent possible. If the Reporter is unable to furnish a transcript, a statement of that fact, agreed to by the Solicitor or settled by the judge, should be included in the record on appeal. In lieu of the usual narrative statement of evidence, defendant should set out the facts upon which his appeal is

based, any defects appearing on the face of the record, and the errors he contends were committed at the trial. If the circumstances so justify, defendant might also assert as an assignment of error that he is unable to obtain an effective appellate review of errors committed during the trial proceeding because of the inability of the Reporter to prepare a transcript. As agreed upon by counsel, or as settled by the trial judge, the record on appeal as above compiled should be docketed in this Court.

If defendant had proceeded as outlined above, this Court would be in a position to determine whether fair and proper administration of justice required a new trial.

It is possible, if he feels so advised, for defendant now to prepare such a record on appeal and present it to this Court with a proper petition for writ of certiorari seeking a review.

However, upon consideration of Judge Snepp's Order, which is the only thing properly before us in the present proceedings, we find that Judge Snepp was correct and his Order is

Affirmed.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. CLARENCE EDWARD WIGGINS

No. 7414SC226

(Filed 1 May 1974)

1. **Constitutional Law § 34; Robbery § 1— conspiracy to rob — accessory before fact of robbery — double jeopardy**

Defendant was not placed in double jeopardy when he was convicted of conspiracy to commit robbery and of being an accessory before the fact to the same robbery.

2. **Indictment and Warrant § 18; Robbery § 2— robbery indictment — trial as accessory before the fact on same indictment**

Insufficiency of the evidence to support a conviction for robbery did not entitle defendant to his discharge, and the State properly tried defendant on the same indictment as an accessory before the fact to the robbery.

ON *certiorari* to review trial before *Webb, Special Judge,* 19 March 1973 Session of Superior Court held in DURHAM County.

Defendant was convicted of being an accessory before the fact of armed robbery. We allowed certiorari to perfect a late appeal.

In a prior trial of this case defendant was convicted of conspiracy to commit armed robbery and armed robbery. Upon appeal, this court affirmed the conspiracy conviction but directed a new trial on the indictment for armed robbery. *See State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680, where this court held that the evidence was insufficient to go to the jury on armed robbery but would support a conviction of accessory before the fact to armed robbery.

As set out in the record of the earlier appeal, the evidence tended to show that although defendant was neither actually nor constructively present during the commission of the robbery, he instigated the robbery, helped plan it, supplied the gun used by the active participants, arranged for their transportation and shared in the proceeds of the crime.

Attorney General Robert Morgan by Roy A. Giles, Jr., Assistant Attorney General, for the State.

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

VAUGHN, Judge.

[1] Defendant contends that "[a] careful consideration as to the elements of conspiracy and accessory before the fact will lead to the inevitable conclusion that defendant . . . was twice placed in jeopardy." We disagree. A defendant may be convicted for both conspiracy to commit robbery and the commission of that same robbery. To support the plea of double jeopardy, it is of no consequence that the earlier prosecution grew out of the same transaction. It must have been the same offense both in fact and in law.

[2] Upon an indictment for the principal offense a defendant may be convicted of a lesser degree of the same crime. The crime of accessory before the fact to robbery is included in the indictment for robbery. As we held on the earlier appeal, the insuffi-

ciency of the evidence to support a conviction for robbery did not entitle defendant to his discharge, and the State properly tried defendant on the same indictment as an accessory before the fact to the robbery.

Defendant's remaining assignments of error are also without merit.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. MARY MANN PATTERSON

No. 742SC125

(Filed 1 May 1974)

1. **Criminal Law § 21— trial without preliminary hearing**

A defendant may be brought to trial on the basis of an indictment without the necessity of a preliminary hearing.

2. **Criminal Law § 26; Narcotics § 5— possession and distribution — separate offenses — no double jeopardy**

Possession and distribution of a controlled substance are separate and distinct offenses, and a defendant may be prosecuted for both without violating the constitutional prohibition against double jeopardy.

3. **Criminal Law § 88— cross-examination — civil action against another witness**

In a trial for possession and distribution of heroin, the trial court properly refused to permit defendant to ask a State's witness on cross-examination about a civil action which defendant had filed against another State's witness in a federal court.

APPEAL by defendant from *Fountain, Judge,* 20 August 1973 Session of Superior Court held in BEAUFORT County.

On 7 May 1973 defendant was arrested on a warrant charging her with distribution of heroin. She demanded a preliminary hearing, and one was scheduled for 31 May 1973. However, on May 21 the grand jury indicted defendant for distribution of heroin, and the preliminary hearing was not held. Subsequently defendant was also indicted for possession of heroin.

At the trial the State presented evidence tending to show that defendant had been in possession of heroin, and that she had sold a "bundle" of it (a large packet containing 25 smaller packets of heroin) to a government undercover agent for $90.00. Defendant testified that she had never possessed or sold any illegal drugs. The jury found defendant guilty as charged, and she was sentenced to prison terms totaling 8 to 10 years. She appealed to this Court.

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

Frazier T. Woolard for defendant appellant.

BALEY, Judge.

[1] Defendant contends that she was entitled to a preliminary hearing as a means of discovering the State's case against her. However, the North Carolina Supreme Court has repeatedly held that there is no constitutional right to a preliminary hearing. A defendant may be brought to trial on the basis of an indictment without the necessity of a preliminary hearing. *State v. Harrington,* 283 N.C. 527, 196 S.E. 2d 742, *cert. denied,* 38 L.Ed. 2d 249; *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320; *State v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778.

[2] The trial court did not err in allowing the State to try defendant for possession of heroin and also for distribution. Possession and distribution are separate and distinct offenses, and a defendant may be prosecuted for both without violating the constitutional prohibition against double jeopardy. *State v. Thornton,* 283 N.C. 513, 196 S.E. 2d 701; *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481.

[3] Among the witnesses testifying for the State were Ray Eastman and W. H. Thompson. While cross-examining Eastman, counsel for defendant asked him about a civil action which defendant had filed against Thompson in a federal court. The trial court properly excluded this question. The federal action was only remotely relevant to the issues involved in the present case, and on cross-examination the trial judge has discretion to exclude questions which are "of only tenuous relevance." 1 Stansbury, N. C. Evidence (Brandis rev.) § 35, at 108; *see State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20; *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227, *vacated and remanded on other*

grounds, 408 U.S. 940. Furthermore, when Thompson testified, counsel for defendant was allowed to cross-examine him about the federal lawsuit as fully as he desired.

Defendant has shown no prejudicial error at her trial.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. LESLEY SPENCER

No. 742SC134

(Filed 1 May 1974)

Homicide §§ 10, 28— defense of family member — failure to instruct

Trial judge in a murder case committed prejudicial error in failing to instruct the jury on the right to use force in defense of one's family.

APPEAL by defendant from *Fountain, Judge,* 20 August 1973 Session of Superior Court held in BEAUFORT County.

Defendant was indicted and tried for the murder of Harvey Ward. The jury found him guilty of manslaughter, and he was sentenced to a prison term of 12 to 15 years. He appealed to this Court.

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

McMullan, Knott & Carter, by W. B. Carter, Jr., for defendant appellant.

BALEY, Judge.

The State contends that Harvey Ward was shot and killed by defendant's brother, Respess Spencer, and that defendant aided and abetted in the killing. Defendant could not be convicted as an aider and abettor, however, unless the jury first found that Respess Spencer was guilty of murder or manslaughter. Defendant contends (and his evidence tends to show) that Respess Spencer could not be guilty, because when he shot Harvey Ward he did so to protect defendant, who was being attacked by Ward.

North Carolina law recognizes that "a person may not only take life in his own defense, but he may also do so in defense of another who stands in a family relation to him." *State v. Carter,* 254 N.C. 475, 478, 119 S.E. 2d 461, 464; *accord, State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154; *State v. Holloway,* 7 N.C. App. 147, 171 S.E. 2d 475. But the trial judge did not instruct the jury on this issue. He charged extensively on the right of self-defense, but he made no mention of the right to use force in defense of one's family. The failure to instruct the jury on this fundamental issue of the case constitutes prejudicial error. *State v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271; *State v. Dills,* 196 N.C. 457, 146 S.E. 1; *State v. Spencer,* 18 N.C. App. 499, 197 S.E. 2d 232; *State v. Spencer,* 18 N.C. App. 323, 196 S.E. 2d 573.

Because of this error in the court's charge, defendant is entitled to a new trial.

New trial.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. RICHARD STEVEN FELDSTEIN

No. 743SC189

(Filed 1 May 1974)

Criminal Law § 102— length of jury argument

Defendant is granted a new trial where he was entitled to at least two hours of jury argument by G.S. 84-14, but the trial court limited him to only one hour.

APPEAL by defendant from *Cowper, Judge,* at the 7 August 1973 Session of PITT Superior Court.

Heard in the Court of Appeals 10 April 1974.

The defendant in this criminal action was charged in two bills of indictment with possession of cocaine and with possession with the intent to distribute marijuana. Policemen, with a valid search warrant, entered the defendant's unoccupied residence and seized, among other items, 2,914.1 grams of marijuana and two plastic bags containing something less than one gram

of cocaine. Prior to jury argument and over defendant's objection, the trial court limited defense counsel and the Solicitor to one hour each for jury argument. From a verdict of guilty as to both charges, defendant appealed.

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

Hatch, Little, Bunn, Jones, Few & Berry by David H. Permar for defendant appellant.

CAMPBELL, Judge.

The trial court in the case at bar was in error in limiting the jury arguments to one hour. G.S. 84-14 provides in pertinent part:

> " . . . In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: To not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. . . . "

The language of the statute is clear. Defense counsel was entitled to at least two hours for jury argument in this, a felony case. See *State v. Campbell*, 14 N.C. App. 596, 188 S.E. 2d 558 (1972). We, therefore, grant a new trial. Defendant's other assignments of error need not be discussed as they may not recur on retrial.

New trial.

Judges MORRIS and VAUGHN concur.

WILLIAM HARRY CHIPPS, JR. v. MONTY DAVIS RACKLEY AND JO ANN GAINEY RACKLEY

No. 745DC174

(Filed 1 May 1974)

Automobiles § 90— automobile collision case — insufficiency of instructions

Trial court's application of the law to the facts in this automobile collision case was not sufficient to instruct the jury properly.

Judge CAMPBELL dissents.

APPEAL by plaintiff from *Barefoot, District Court Judge,* 30 July 1973 Session of District Court held in NEW HANOVER County.

Plaintiff brought this action to recover damages for personal injuries resulting from an automobile accident. One of the vehicles involved was driven by defendant Monty Rackley and owned by his stepmother, defendant Jo Ann Rackley. Defendants counterclaimed for damages for personal injury and property damage, respectively.

Plaintiff offered evidence tending to show the following. Plaintiff, a Wilmington police officer, was responding to an emergency call to assist a fellow officer and traveling north on Carolina Beach Road at approximately 55 miles an hour. The police cruiser's blue light and siren were on. Carolina Beach Road has two northbound lanes, two southbound lanes and a center lane for left and right turns. Just prior to the accident, plaintiff's vehicle was in the inside northbound lane. Defendant Monty Rackley was proceeding north in a parking lane in front of a drive-in restaurant located on the east side of Carolina Beach Road. Defendant turned left and headed west across Carolina Beach Road into the path of plaintiff's vehicle. Plaintiff's car struck defendant's car in the left side resulting in serious injuries to plaintiff.

Defendants' evidence indicated the following. Defendant Monty Rackley who was driving an automobile owned by defendant Jo Ann Rackley turned right onto Carolina Beach Road from a drive-in restaurant parking lane. He gradually eased into the inside northbound lane and then into the turn lane. Defendant flashed his left signal light in conjunction with each lane change. Again after giving a left turn signal, defendant finally proceeded to turn left from the center lane and was struck by plaintiff's

vehicle. Defendant denied seeing a blue light or hearing a siren before the accident. As a result of injuries sustained in the wreck, defendant Monty Rackley incurred medical expenses and was unable to work for a week. Defendant Jo Ann Rackley's automobile was badly damaged.

The jury found plaintiff was not entitled to recover any amount. It awarded Jo Ann Gainey Rackley $3,000.00 on her counterclaim but did not award damages to Monty Rackley.

William K. Rhodes, Jr., by Jay D. Hockenbury for plaintiff appellant.

Smith & Spivey by Jerry L. Spivey for defendant appellees.

VAUGHN, Judge.

Plaintiff's motion for a directed verdict on the counterclaim was properly denied. The case was one for the jury. Careful consideration of the charge, however, leads us to the conclusion that, although the judge fully recapitulated the evidence and properly declared the law in general terms, there was an insufficient application of the law to the facts of the case then being tried. Additionally, upon retrial, since the application of the family purpose doctrine has been admitted, the judge should make it clear that any negligence of defendant Monty Rackley bars recovery by Jo Ann Rackley.

New trial.

Judge MORRIS concurs.

Judge CAMPBELL dissents.

STATE OF NORTH CAROLINA v. EDDIE J. WARREN

No. 7418SC333

(Filed 1 May 1974)

Criminal Law § 161— exception to entry of judgment

Exception to the entry of judgment presents the face of the record for review.

State v. Chambers

APPEAL by defendant from *Crissman, Judge,* 24 September 1973 Session of Superior Court held in GUILFORD County.

Defendant was indicted for the first degree murder of Jerry McCoy. The State elected to try defendant for second degree murder. He was convicted of that crime, and judgment imposing a prison sentence of not less than 15 nor more than 20 years was entered.

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

Bob Scott for defendant appellant.

VAUGHN, Judge.

The only exception in the record is to the entry of the judgment. This exception presents the question of whether error appears on the face of the record. *State v. Williams,* 235 N.C. 429, 70 S.E. 2d 1. Defendant was tried on a proper indictment in a court of competent jurisdiction. The verdict supports the judgment, and the sentence imposed is within the applicable statutory limits. We find no error.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. WILMA CHAMBERS

No. 7426SC317

(Filed 1 May 1974)

Homicide § 30— submission of manslaughter to jury — error favorable to defendant

Even if the court in a trial for second degree murder erred in submitting involuntary manslaughter as a possible verdict to the jury, such error was favorable to defendant, and she is without standing to challenge the verdict finding her guilty of that offense.

APPEAL by defendant from *Chess, Judge,* 12 November 1973 Schedule "D" Criminal Session of Superior Court held in MECKLENBURG County.

Although charged with the first-degree murder of Carolyn Louise Scott, defendant was tried for second-degree murder. The trial court submitted the case to the jury with instructions to return a verdict of guilty of second-degree murder, guilty of voluntary manslaughter, guilty of involuntary manslaughter, or not guilty. The jury found defendant guilty of involuntary manslaughter, and from judgment imposing prison sentence of 10 years, she appealed.

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

T. O. Stennett for defendant appellant.

BRITT, Judge.

The sole assignment of error presented by defendant is that the trial court erred in charging the jury that they might return a verdict of involuntary manslaughter and providing instructions on that offense. Defendant argues that there was no evidence to support the offense of involuntary manslaughter.

The assignment has no merit. Assuming, *arguendo,* that there was no evidence to support the offense of involuntary manslaughter, the error was favorable to defendant and she is without standing to challenge the verdict finding her guilty of that offense. *State v. Vestal,* 283 N.C. 249, 195 S.E. 2d 297 (1973), cert. den. 414 U.S. 874, 94 S.Ct. 157, 38 L.Ed. 2d 114; *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525 (1968); *State v. Simpson,* 14 N.C. App. 456, 188 S.E. 2d 535 (1972).

No error.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. LEROY PIERCE

No. 744SC146

(Filed 1 May 1974)

APPEAL by defendant from *Tillery, Judge,* 10 September 1973 Session of Superior Court held in ONSLOW County. Argued in the Court of Appeals 16 April 1974.

Defendant was tried upon a bill of indictment charging him with assault with intent to rape.

The State's evidence tended to show that on 13 July 1973, defendant ordered the prosecuting witness, defendant's thirteen-year-old daughter, to disrobe in his presence; that defendant attempted to have intercourse with the prosecuting witness who resisted; that defendant slapped the prosecuting witness; and that the prosecuting witness fled when the mother returned to the home.

Defendant testified in his own behalf that he had consumed two beers that evening, but was not intoxicated; that defendant and his wife had been having marital difficulties; and that he did not assault the prosecuting witness, force her to disrobe, or get into bed with her.

From a sentence of not less than twelve years nor more than fifteen years, defendant appealed to this Court.

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

William J. Morgan for the defendant.

BROCK, Chief Judge.

Defendant's counsel states that he is unable to find arguable prejudicial error, but requests this Court to review the record for possible prejudicial error.

We have fully reviewed the record of defendant's trial, and defendant's supplemental argument. In our opinion, defendant had a fair trial, free from prejudicial error.

No error.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. FRANK BOYETTE

No. 742SC72

(Filed 1 May 1974)

APPEAL by defendant from *Godwin, Judge,* 13 August 1973 Session of Superior Court held in BEAUFORT County. Argued in the Court of Appeals 9 April 1974.

Defendant was charged in a warrant (1) with a second offense of driving a motor vehicle upon a public highway while under the influence of intoxicating liquor, and (2) with resisting arrest.

Defendant was found guilty of both charges in the District Court. He appealed to Superior Court where he was tried *de novo* upon the warrant. He was found guilty by the jury.

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

LeRoy Scott and Franklin B. Johnston for the defendant.

BROCK, Chief Judge.

We have reviewed defendant's assignments of error. They present no new or novel question. In our opinion, defendant received a fair trial which was free from prejudicial error.

No error.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. RAY THOMAS TILLEY

No. 7417SC246

(Filed 1 May 1974)

APPEAL by defendant from *Long, Judge,* 4 September 1973 Session of Superior Court held in ROCKINGHAM County.

Defendant was indicted for the murder of Onie Bullins Orander. At the 14 August 1972 Session of Rockingham County Superior Court he was convicted of murder in the second degree. On appeal from that conviction, he was granted a new trial for error in the judge's instruction to the jury. *State v. Tilley,* 18 N.C. App. 300, 196 S.E. 2d 816. At his new trial he was again found guilty and appealed.

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

No counsel on appeal for defendant.

VAUGHN, Judge.

Defendant was represented at trial by able and experienced court appointed counsel. After his conviction he petitioned the trial judge to allow him to appeal as an indigent. He also petitioned the court to be allowed to handle his case on appeal without the assistance of counsel. The petitions were allowed. We have carefully examined the record and find no prejudicial error in the trial from which defendant appealed.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. GREGORY A. LANFORD AND RICHARD D. OLDCORN

No. 744SC249

(Filed 1 May 1974)

APPEAL by defendants from *Tillery, Judge,* 10 September 1973 Session of Superior Court held in ONSLOW County.

Defendants were tried on their pleas of not guilty to the charges contained in a bill of indictment, proper in form, charging the offenses of felonious breaking and entering and felonious larceny. The jury found both defendants guilty of both charges. From judgments on the verdict imposing prison sentences, defendants appealed.

Attorney General Robert Morgan by Assistant Attorney General Millard R. Rich, Jr. for the State.

William J. Morgan for defendant appellants.

PARKER, Judge.

Defendants' counsel, after diligently examining the transcript, has been unable to assign error. We have also carefully examined the record and find

No error.

Chief Judge BROCK and Judge BALEY concur.

LONNIE G. COLLINS, EMPLOYEE PLAINTIFF v. JAMES PAUL EDWARDS, INC. EMPLOYER; OHIO CASUALTY INSURANCE COMPANY, CARRIER; WOOTEN ASPHALT COMPANY, EMPLOYER; AETNA CASUALTY & SURETY COMPANY, CARRIER; DEFENDANTS

No. 7311IC511

(Filed 15 May 1974)

1. **Master and Servant § 53— workmen's compensation — dual employment — liability of special employer**

In order for a special employer to become liable under the Workmen's Compensation Act for injuries to a lent employee, the employee must have expressly or impliedly made a contract of hire with the special employer.

2. **Master and Servant § 53— workmen's compensation — dual employment — insufficiency of evidence**

In an action by a truck driver for a contract hauler of asphalt to recover workmen's compensation benefits for injuries received while hauling asphalt for a paving contractor, the evidence was insufficient to support a determination by the Industrial Commission that an additional special employment relationship was entered into between plaintiff driver and the paving contractor such as to make the paving contractor jointly liable with plaintiff's general employer for the compensation payments where it tended to show that the paving contractor paid an agreed rate per ton mile for use of the truck and driver and plaintiff's general employer paid for the expenses of operating the truck, including wages of the driver, that the paving contractor told plaintiff driver where to take the asphalt and what route to take, and that employees of the paving contractor supervised weighing of the truck and asphalt.

APPEAL by defendants Wooten Asphalt Company and its compensation insurance carrier from opinion and award of the North Carolina Industrial Commission dated 12 February 1973.

Claimant, Lonnie G. Collins (Collins) was injured in an accident on 4 November 1970 while driving a truck belonging to his employer, James Paul Edwards, Inc. (Edwards). On 8 March 1971 Collins, Edwards, and Edwards's compensation insurance carrier signed Industrial Commission Form 21, "Agreement for Compensation for Disability," by which they stipulated that they were bound by the North Carolina Workmen's Compensation Act and that Collins sustained an injury by accident arising out of and in the course of his employment. By this agreement Edwards and its insurance carrier agreed to pay compensation to Collins. This agreement was approved by the

Industrial Commission on 15 March 1972. On 29 October 1971, the same parties signed Form 26, "Supplemental Memorandum of Agreement as to Payment of Compensation," by which they stipulated the extent of Collins's disability and the rate and period for which he was entitled to compensation. This supplemental agreement was approved by the Industrial Commission on 8 February 1972.

In the meantime, on 12 October 1971, a hearing was held before a Deputy Commissioner of the N. C. Industrial Commission on the question whether, at the time of the accident on 4 November 1970, Collins was an employee of Edwards or was an employee jointly of Edwards and Wooten Asphalt Company. Attorneys for Edwards and its insurance carrier and for Wooten Asphalt Company and its insurance carrier participated in this hearing, and the parties stipulated that both Edwards and Wooten were subject to and bound by the provisions of the Workmen's Compensation Act. Evidence was presented on behalf of both Edwards and Wooten. There was no substantial conflict in the evidence, which in substance showed the following:

Edwards is engaged in business as a grading contractor. Collins was employed by Edwards as a truck driver and was paid on an hourly basis. Edwards owns five trucks, and when these are not needed in the grading business, Edwards uses them in contract hauling of sand and asphalt for other people. Wooten Asphalt Company is engaged in business as a paving contractor and operates a batch plant in which asphalt is mixed according to State specifications. To haul the asphalt from the batch plant to the location where paving is being done, Wooten uses its own trucks and also uses trucks of other truck owners under an arrangement by which Wooten pays an agreed rate per ton mile for use of the truck and driver, the truck owner paying for gasoline and other expenses of operating the truck, including the wages of the driver.

On 4 November 1970, about fifteen trucks were hauling asphalt from the batch plant to the paving site. Three or four of these belonged to Edwards, others belonged to a Mr. Denning, one or two may have been Wooten trucks, and the remainder were individually owned. On the morning of 4 November 1970, the president of Edwards told Collins to report to Wooten Asphalt Company, where they would tell him what to do. Collins drove an Edwards truck to Wooten Asphalt Company's plant, where it was first weighed empty. Collins then drove the truck

to the asphalt chute, which was manned by Wooten employees, where it was loaded with asphalt. He drove the truck back onto the scales, where it was again weighed, and a Wooten employee told him where to take the load, drawing a map and showing him what route to take to get there. On the first load out, Collins was injured when the Edwards truck he was driving collided with a train at the Wooten crossing.

Other evidence will be referred to in the opinion.

Following the hearing before the Deputy Commissioner, and on 7 December 1971, the Deputy Commissioner filed his opinion and award, in which he made findings of fact, including the following:

"5. Edwards instructed plaintiff Collins to report to Wooten Asphalt Company to haul asphalt and get instructions from Wooten Company regarding details of hauling. Edwards never gave instructions, supervised or controlled plaintiff Collins in his work with Wooten. It was Wooten's responsibility to control.

"6. Wooten Company supervised hauling by plaintiff, which included loading, weighing and disposing of materials, number of loads to haul, where to deliver, details and map of route to travel, when to start and stop hauling, and any other instructions concerning hauling of Wooten's materials. Plaintiff ate lunch when and if other Wooten crew members ate. The Wooten office manager kept all records of truck hauling operations such as trips, weighing, mileage, and time worked hauling asphalt for Wooten. However, he was paid his wages by Edwards and Edwards received payment from Wooten for the truck driver, plaintiff Collins, and the use of the truck at ninety-six cents per ton-mile.

"7. During the time that plaintiff Collins worked at Wooten Asphalt Company he was subject to the direction and control of Wooten supervision. Plaintiff Collins was subject to be relieved of his work for Wooten Company by said company but not discharged from employment as a truck driver for Edwards. Plaintiff Collins was also working under the indirect direction and control of Edwards and could be discharged by Edwards at any time. Plaintiff was working for the benefit of both Edwards and Wooten

and he was a joint employee of such employers at an average weekly wage of $100.00."

On these findings of fact, the Deputy Commissioner concluded as a matter of law that at the time of Collins's injury a joint employment relationship existed between plaintiff Collins and the defendants James Paul Edwards, Inc., and Wooten Asphalt Company, and entered an award that both employers and their compensation insurance carriers jointly pay compensation to Collins. On appeal, the Full Commission adopted as its own the opinion and award of the Deputy Commissioner. From the opinion and award of the Full Commission, Wooten Asphalt Company and its compensation insurance carrier appealed.

Young, Moore & Henderson by B. T. Henderson, II and R. Michael Strickland for defendant appellants, Wooten Asphalt Company and Aetna Casualty & Surety Company.

Smith, Anderson, Blount & Mitchell by John L. Jernigan for defendant appellees, James Paul Edwards, Inc. and Ohio Casualty Insurance Company.

PARKER, Judge.

By executing Industrial Commission Forms 21 and 26, Edwards and its compensation insurance carrier admitted their liability to pay compensation to the injured employee. The question presented by this appeal is whether the Industrial Commission was correct as a matter of law in ruling that Wooten Asphalt Company and its compensation insurance carrier must share in that liability. More precisely, the question is whether the facts disclosed by the record support the Commission's conclusion of law that a joint employment relationship existed such as to make both Edwards and Wooten and their respective carriers liable to pay compensation to the injured employee. We hold that they do not.

Certainly situations may exist under which an employee may properly be considered to be in the joint employment of two employers so that both become jointly responsible to pay compensation if the employee is injured by accident arising out of and in the course of such employment. *Leggette v. McCotter*, 265 N.C. 617, 144 S.E. 2d 849, and certain of the cases noted in Annotation, "Workmen's compensation: liability of general or special employer for compensation to injured employee," 152

A.L.R. 816, illustrate such situations. One authority analyzes the "lent employee" problem as follows:

> "When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if
>
> "(a) the employee has made a contract of hire, express or implied, with the special employer;
>
> "(b) the work being done is essentially that of the special employer; and
>
> "(c) the special employer has the right to control the details of the work.
>
> "When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation." 1A, Larson, Workmen's Compensation Law, § 48.00.

By statutory definition, the term "employee" for purposes of the Workmen's Compensation Act means "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written. . . ." G.S. 97-2(2). Because of this statutory requirement that the employment be under an "appointment or contract of hire," Larson states that the first question which must be answered in determining whether a lent employee has entered into an employment relationship with a special employer for Workmen's Compensation Act purposes is: Did he make a contract of hire with the special employer? If this question cannot be answered "yes," the investigation is closed, and "[t]his must necessarily be so, since the employee loses certain rights along with those he gains when he strikes up a new employment relation." 1A, Larson, Workmen's Compensation Law, § 48.10. Further discussing the matter in the same section, the author states:

> "In one sense, the lent-employee doctrine is not a separate doctrine at all. Theoretically, the process of determining whether the special employer is liable for compensation consists simply of applying the basic tests of employment set out earlier in this chapter. If they are satisfied, the presence of a general employer somewhere in the background cannot change the conclusion that the special employer has qualified as an employer of this employee for compensation purposes.

"What gives the lent-employee cases their special character, however, is the fact that they begin, not with an unknown relation, but with an existing employment relation. The conflict of interest becomes one not between employer and employee (who is assured of recovering from someone) but between two employers and their insurance carriers. There is here no place for presumptions based on the beneficent purposes of the act. The only presumption is the continuance of the general employment, which is taken for granted as the beginning point of any lent-employee problem. To overcome this presumption, it is not unreasonable to insist upon a clear demonstration that a new temporary employer has been substituted for the old, which demonstration should include a showing that a contract was made between the special employer and the employee, proof that the work being done was essentially that of the special employer, and proof that the special employer assumed the right to control the details of the work; failing this, the general employer should remain liable." Pages 8-208, 8-210, and 8-211.

Here, the general employer, Edwards, has stipulated that it is liable to pay compensation to its employee, Collins, and no question is raised as to Collins's right to receive compensation payments from Edwards and its compensation insurance carrier. In our opinion, however, the facts do not support the Commission's conclusion of law that an additional special employment relationship was entered into between Collins and Wooten Asphalt Company such as to make Wooten jointly liable with Edwards for compensation payments to Collins.

[1, 2] As noted above, entering into any such special employment relationship would result in Collins losing certain rights while gaining others, and such a relationship could not arise without his express or implied consent. As pointed out by Larson in the treatise above cited:

"The necessity for the employee's consent to the new employment relation stems, of course, from the statutory requirement of 'contract of hire,' discussed in the preceding section. The consent may be implied from the employee's acceptance of the special employer's control and direction. But what seems on the surface to be such acceptance may actually be only a continued obedience of the general em-

ployer's commands." 1A, Larson, Workmen's Compensation Law, § 48.10, pages 8-214, 8-215.

Here, there was no evidence nor is there any contention that Collins and Wooten ever expressly consented to enter into any employment relationship with each other, and certainly there was no express "appointment or contract of hire" entered into between them. In our opinion the facts in this case do not show such acceptance by Collins of control and direction by Wooten employees over his activities as a truck driver for Edwards as to warrant the conclusion that he impliedly consented to enter into a new and special employment relationship with Wooten. It is true that a casual reading of the findings of fact, especially numbers 5, 6 and 7, made by the Deputy Commissioner, might leave the impression that Collins was subject to extensive and detailed supervision and control by Wooten employees. When these findings are examined more closely, however, and particularly when they are viewed in the light of the testimony upon which they are based, it is apparent that in actuality the supervision and control exercised by Wooten employees over Collins was minimal. Driving the truck during the loading and weighing operations was a simple procedure with which Collins was already familiar, and no supervision and control over his operation of the truck during those operations was required or given. The record keeping functions were performed entirely by Wooten employees and these involved no element of supervision over Collins. The records were of no concern to Collins, but were kept for purposes of settling the accounts between his employer, Edwards, and Wooten, and in connection with the latter's paving contract with the State. The fact that a Wooten employee told Collins where to deliver the first load of asphalt and drew him a route map to show him how to get there, hardly amounts to such supervision and control over his activities as to justify implying therefrom that Collins, by asking for and receiving such directions, was thereby consenting to enter into some type of special employment relationship with Wooten. As the matter turned out, the accident occurred on the first trip which Collins made, but had this not happened, he would not again have needed to ask for directions as to where to deliver the asphalt or the route to follow in doing so.

The facts here distinguish this case from *Leggette v. McCotter, supra.* In Leggette, the general employer assigned its employee to work at the job site of the special employer continuously

for a period of six months prior to the accident. The employee operated a front-end loader, a versatile machine capable of doing a number of diverse jobs. The machine and its operator were furnished by the general employer to the special employer at a rate of $10.00 per hour to perform whatever tasks the special employer's supervisor requested, and the employee performed these different tasks with the machine as the supervisor from time to time directed. As quoted in the Supreme Court opinion, the special employer's supervisor testified:

> "We used the machine as a multi-purpose machine, not for just digging dirt. It does anything you need if you pay ten bucks an hour. Mostly, Mr. Leggette moved earth. If I told him to move something else he did if he could. He loaded trucks, pulled them out of the ditch, even poured concrete with the bucket. I told him to pour concrete. * * * I directed him what I wanted him to do." *Leggette v. McCotter*, 265 N.C. @ p. 619.

Our Supreme Court held that the facts in Leggette were sufficient to support the Commission's conclusions of law upon which it based its decision splitting the workmen's compensation award between the general and special employer defendants and their carriers.

In the present case, the employee was not assigned to work at the Wooten Asphalt Company for any extended period of time or to perform a number of different operations as Wooten's superintendent might direct. On the contrary, he was sent there by his general employer to perform one specific task, hauling asphalt, which his general employer had contracted with Wooten to perform. He was injured on the morning of the first day he was engaged in carrying out his general employer's contract with Wooten. Had he not been injured, nothing in the evidence suggests that any of the parties involved contemplated that he would be assigned to hauling Wooten's asphalt except on a temporary basis and for a short period of time. His general employer retained the right to withdraw him and the truck which he drove from the Wooten job at any time the other business of the general employer might require. As above noted, such directions as were given him by Wooten's employees were minimal, and in following them he was only carrying out the instructions of his general employer, on whose payroll he remained and who alone retained the right to determine the terms and conditions of his employment. There was no express "appoint-

ment or contract of hire" between Wooten and Collins, and the facts are not sufficient to give rise to any implied appointment or contract of hire between them.

We think the present case is controlled not by *Leggette v. McCotter, supra,* but by *Perley v. Paving Co.,* 228 N.C. 479, 46 S.E. 2d 298. In that case the owner-driver of a truck contracted with defendant Paving Company, for an agreed price per load, to haul sand and gravel from its source to defendant's mixer. He was killed when his truck was struck by a train at a crossing, and claims for compensation under the Workmen's Compensation Act were filed against the Paving Company. The evidence presented at the hearing disclosed that the arrangements between the Paving Company and the truck owners, including the deceased, and the degree of direction and control which the Paving Company exercised over the hauling activities, were essentially the same as those which existed in the present case between Wooten and the several parties who were hauling asphalt under contract with it. The Industrial Commission in that case, as here, found an employment relationship to exist and awarded compensation against the Paving Company. On appeal to the Superior Court, the findings of fact and conclusions of the Industrial Commission were affirmed. On further appeal, our Supreme Court reversed, reaching the conclusion after careful analysis of the testimony that "the evidence characterizes the relationship of the decedent to the defendant, at the time of the injury, as that of an independent contractor, and not an employee within the purview of the Workmen's Compensation Act." Had Collins in the present case owned his own truck, as several of the other contract haulers who were hauling asphalt for Wooten did, he would have been in precisely the same legal position as was occupied by the deceased truck driver in *Perley v. Paving Co.* The fact that Collins was not himself the independent contractor but was an employee of the independent contractor in this case furnishes no basis for distinguishing the situation here presented from the situation in *Perley v. Paving Co., supra.*

Since we find that the conclusion of the Industrial Commission that an employment relationship existed between Collins and Wooten was not supported by the facts in this case, we do not pass upon appellants' remaining contentions that in any event the Industrial Commission lacked jurisdiction in this proceeding to enter an award against them. In this connection we

do observe, however, that the record does not reveal any claim filed by Collins against appellants, and appellants did not sign and cannot be bound by stipulations signed by others that Collins sustained an injury by accident arising out of and in the course of his employment.

The award of the Industrial Commission is reversed and this matter is remanded to the Commission for entry of an award not inconsistent with this opinion.

Reversed and remanded.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. CALVIN LOUIS BRANNON

No. 7421SC66

(Filed 15 May 1974)

1. **Larceny § 7— larceny of dogs — insufficiency of evidence**

In a prosecution for larceny of dogs evidence was insufficient to be submitted to the jury with respect to dogs belonging to one Frazier where the evidence tended to show that the dogs were found several days after they were reported stolen in a pen located somewhere between lots owned by defendant's mother and sister, there was no evidence that defendant had control over the premises and therefore was in constructive possession of the dog lot, and defendant could not be placed around the lot within the month preceding the theft.

2. **Criminal Law §§ 89, 95— evidence admissible for impeachment only**

An out-of-court statement allegedly made by a witness was admissible as a prior inconsistent statement, but it was not admissible as substantive evidence against defendant and could not be considered in ruling on defendant's motion for nonsuit.

3. **Larceny § 7— larceny of dogs — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury as to the larceny of dogs belonging to one Gunter where the evidence tended to show that one month prior to the theft defendant ran from Gunter's dog pen upon being discovered there, defendant was seen on the morning of the theft within 100 yards of the prosecuting witness's house, and on the day following the theft, a homemade leash which had been on Gunter's dogs when they were stolen was found in defendant's car.

4. **Criminal Law § 84; Searches and Seizures § 2— search of vehicle — voir dire held — no findings or conclusions made**

Where a lengthy *voir dire* was held to determine admissibility of items seized from defendant's car and there was conflicting evidence

as to whether permission to search was given and whether the objects were in plain view, failure of the trial court to make findings of fact and conclusions of law was error requiring a new trial.

APPEAL by defendant from *Collier, Judge*, 4 June 1973 Session of FORSYTH County Superior Court. Argued in the Court of Appeals 16 January 1974.

The defendant was charged with two separate warrants for the misdemeanor of larceny of dogs. The cases were consolidated for trial. From a jury verdict of guilty as to each charge and from an active sentence pronounced thereon, the defendant appealed.

Hobert Frazier testified that on 11 October 1972, he owned three beagle dogs which he used for rabbit hunting. On the previous night he had fed the dogs in the pen where he kept them. When he came home from work the following day, he discovered that his dogs were missing. He reported the theft to the sheriff's department. On 22 October 1972, he went to Rowan County as a result of a telephone call he received from Deputy Sheriff Weaver, a deputy of Forsyth County. He was taken to the defendant Brannon's home and discovered his dogs in a dog pen near the house where Brannon lived.

George Gunter, also a resident of Forsyth County, testified that on 22 October 1972, he owned one walker dog and his brother owned two black and tan dogs. All three of the dogs were in his possession on the date in question. The dogs were in a dog box on his pickup truck, which was parked in his yard. His brother had come by early on that day and asked him if he wanted to go hunting. All three dogs were placed in the pickup truck, and the men went into the house for 15 to 20 minutes in preparation for the hunt. When they came to the truck, they discovered that the three dogs were missing. Also missing was a homemade leather leash which was on one of the dogs.

George Gunter went with Deputy Weaver to East Spencer in Rowan County. They met with Chief Wilson of the East Spencer Police and went to the defendant's home. They had a warrant for the defendant's arrest for attempting to steal the Gunter dogs on a previous occasion. They arrived at the home of Hattie Brannon about 10:00 p.m. The defendant lived there with his mother, Hattie H. Brannon. The defendant's sister, Mary B. Thompson, lived in the house next door. There was a

dog pen located between the houses of Hattie Brannon and Mary Thompson. The defendant was not home when the group arrived.

There is a sharp conflict in the testimony of the sequence of events following the arrival of Chief Wilson and the others who accompanied him. A motion to suppress evidence was made, and a voir dire was conducted. The State's evidence was to the effect that the defendant was not home but that his mother gave them permission to search the house and premises for the defendant. While Chief Wilson was searching the house, Deputy Sheriff Weaver and George Gunter searched the yard around the house. There was a 1965 Oldsmobile which was known to be the property of the defendant parked in the yard. The two men approached the car and shined the light on the seats. They then proceeded to the rear of the car and noticed that there was a small hole in the trunk where it appeared to have been pried open on a previous occasion. They shined a flashlight into the hole and saw some dog collars and dog leashes in the trunk. Upon seeing these items, they decided that they would procure a search warrant before proceeding further. They reported this fact to Chief Wilson. He went before a magistrate and obtained a search warrant. They returned to the Brannon residence after having received the search warrant and opened the trunk of the car. There, they found about twenty collars and a number of leashes. One of the leashes was the leash which Charles Gunter had made for the Gunter dogs and which was on the dogs and was stolen with them on the morning in question. When Chief Wilson returned with the search warrant, the defendant had already arrived at the scene. He was arrested, and his hands were handcuffed behind his back. Chief Wilson testified that the defendant gave them permission to search the car and that the defendant assisted with the search.

The defendant's mother testified that the police came to the house and asked to see the defendant. Upon being told that he was not there, they rushed into the house and began searching. They also searched the yard and the immediate area surrounding the house. She further testified that she did not give permission to anybody to search anything. Other corroborating evidence to the same effect was given by the defendant's two sisters. In addition, the defendant testified that he did not give anyone permission to search his car or any other place.

Following the voir dire, the motion to suppress was denied. Neither findings of fact nor conclusions of law were entered.

Although the court stated that the search warrant was probably invalid, no ruling was made on the disputed arrest warrant. Neither was any ruling made on the permissiveness of the search.

The State introduced into evidence the leash found in the trunk of defendant's car. It was positively identified as the one stolen with the Gunter dogs. Testimony by the defense tended to show that the dogs were not on the property of Hattie Brannon but were located on the property of Mary Thompson, her daughter. Mary Thompson testified that the pen was leased to Fred Ingram for $80.00 a year and that the dogs in the pen belonged to Fred Ingram. Fred Ingram also testified to the same effect. He stated he had bought the Frazier dogs from a man in a red pickup truck.

In rebuttal, Chief Wilson was recalled to the witness stand. He testified that Hattie Brannon previously told him that the dog pen was under the control of the defendant Calvin Louis Brannon. He further stated that she had told him that Calvin Brannon was the only person who put dogs there, or had anything to do with them, and that he fed the dogs and took care of them in the lot.

Attorney General Robert Morgan by Richard F. Kane, Associate Attorney General for the State.

Blanchard, Tucker, Denson and Cline by Irvin B. Tucker, Jr., for the defendant.

CARSON, Judge.

[1] The defendant moved for a judgment as of nonsuit as to each count at the end of the State's evidence and again at the end of all the evidence. We hold that the motion as to the charge of larceny of the Frazier dogs should have been allowed. The State contends that the defendant was in constructive possession of the Frazier dogs and that the doctrine of possession of recently stolen property would be sufficient to take the larceny charge to the jury. However, the facts do not support the constructive possession of the dogs by the defendant. The uncontradicted testimony showed that the defendant's mother, Hattie Brannon, owned one of the lots and that the defendant's sister, Mary B. Thompson, owned the other lot. Furthermore, the dog pen was located somewhere between the two lots. In neither event would the lot have been owned or controlled by

the defendant, absent further proof. The only other evidence relating to the defendant's control over the lot was testimony by Chief Wilson that he had seen the defendant approximately one month earlier back by the dog pen "handling a dog through the fence."

To invoke the doctrine of constructive possession, it is necessary that the defendant be shown to have the right of control over the premises in question. If the defendant could and did command the use of the dog lot, it would have been in his constructive possession. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Meyers,* 190 N.C. 239, 129 S.E. 600 (1925). However, there is no competent subtantive evidence that the defendant did, in fact, have command of the lot. It was not on the defendant's property, and he could not be placed around the lot within the month preceding the theft. At best, the defendant's connection with the lot would be speculation and conjecture. This type of evidence has been held to be insufficient to uphold the doctrine of constructive possession. *State v. Glenn,* 251 N.C. 156, 110 S.E. 2d 791 (1959); *State v. McLamb,* 236 N.C. 287, 72 S.E. 2d 656 (1952).

[2] The State relies on the out of court statement allegedly made by Hattie Brannon to Chief Wilson. This was introduced by Chief Wilson as a prior inconsistent statement by the witness Hattie Brannon. While the statement was admissible for the specified purpose, it was not substantive evidence against the defendant. *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972); *Hubbard v. R. R.,* 203 N.C. 675, 166 S.E. 802 (1932); *State v. Neville,* 51 N.C. 423 (1859); 1 Stansbury's North Carolina Evidence (Brandis Revision, 1973), § 46. Hattie Brannon denied making such a statement and denied its veracity. Thus, it could not be considered on the question of nonsuit.

Considering all the evidence in the light most favorable to the State, we hold that there was insufficient evidence to submit to the jury the charge of larceny of the Frazier dogs. The evidence only gave rise to suspicion or conjecture, and nonsuit should have been allowed.

[3] The defendant had been seen in the dog pen belonging to George Gunter approximately one month before the theft occurred. Upon being discovered there, he jumped over the fence and ran. The defendant was also seen on the morning of the theft within 100 yards of the prosecuting witness' house in

the same car in which the homemade leash was subsequently discovered. The leash was positively identified as being on the dogs which were stolen. It was found in the defendant's car the following day. There is enough circumstantial evidence to be submitted to the jury on the charge of the larceny of the Gunter dogs if the evidence was admissible.

[4] The defendant strenuously contends that the leash was seized as a result of an unlawful search and was thus inadmissible in evidence. A motion to suppress the evidence was duly made during the trial. A lengthy voir dire was conducted by the trial court. At the end of the voir dire, the court overruled the motion to suppress. The trial court expressed an opinion that the search warrant was unlawful but stated that it did not matter inasmuch as the leash was in plain view.

The items in the trunk of the defendant's car were seen by the Deputy Sheriff of Forsyth County while Chief Wilson was inside searching the house. He could not identify the leashes or collars that he saw but went to get a search warrant upon their discovery. The trial court held that the search warrant was invalid because of technical defects, but was unnecessary inasmuch as the objects were in plain view. Conceding, arguendo, that the items were, in fact, in plain view, there is still an unresolved question as to whether or not Deputy Sheriff Weaver had a right to be searching the defendant's yard and car. The State contends that permission to search was given by the defendant's mother who owned the property. The defendant's mother strongly denies that she gave permission to anybody to search anywhere. Although a lengthy voir dire was held, the trial court did not make any findings of fact or conclusions of law based thereon. We believe that the failure to make the findings of fact and the conclusions of law required in this case was erroneous. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344 (1965). The failure to make such findings and conclusions deprives us of the necessary information needed to adjudicate the legality of the search and the correctness of the ruling of the trial court, making it necessary that a new trial be awarded. As to the charge of larceny of the Frazier dogs, the judgment is reversed. As to the charge of larceny of the Gunter dogs, a new trial must be awarded.

New trial.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM CARR AND WILLIAM BENJAMIN DAVIS

No. 745SC143

(Filed 15 May 1974)

1. **Larceny § 4— indictment — owner of property — no variance**

   There was no fatal variance between indictment and proof where the indictment charged defendants with larceny of an automobile owned by William Brad Crowell but the evidence showed that the vehicle was registered in the name of "Crowell's T.V.", since William Brad Crowell had possession and control of the vehicle and considered it as his own at the time it was stolen.

2. **Criminal Law § 84; Searches and Seizures § 1— warrantless seizure of items in plain view — admissibility**

   Items seized without a warrant from one defendant's home were admissible at defendants' larceny trial where the officer entered the home to execute a valid arrest warrant and found the items in plain view.

3. **Criminal Law § 95— evidence from one defendant's home — admissibility as to both defendants**

   Trial court properly refused to instruct the jury to consider items of evidence seized from one defendant's house against that defendant only, since the evidence was relevant to the case against each defendant.

4. **Criminal Law § 92— two defendants — consolidation for trial proper**

   Trial court did not err in consolidating for trial cases against defendants for larceny of an automobile.

5. **Criminal Law § 80— business records — authentication testimony sufficient.**

   Testimony by a witness that she was familiar with the record keeping system of an apartment complex and that the records offered into evidence were made in accordance with that system was sufficient to authenticate the records, even though the witness was not employed by the apartment complex until a time subsequent to the date of the records offered.

APPEAL by defendants from *Rouse, Judge*, 25 June 1973 Session of Superior Court held in NEW HANOVER County.

Defendants were charged in separate indictments with the larceny on 25 August 1972 of a 1965 Ford van automobile owned

by William Brad Crowell. The defendants pled not guilty, and, upon motion of the State, the cases were consolidated for trial.

The evidence for the State tended to show that William Brad Crowell was in possession of a Ford van, which was decorated on the outside with Thrush side pipes. The car was registered in the name of "Crowell's T.V.", a business owned by Crowell's father, but Crowell regarded it as his car, took it to college with him, and was in possession of it at all times. On 25 August 1972 Crowell discovered that his locked car had disappeared from the parking lot at Country Club Apartments where he resided. Two days later it was found on Murrayville Road abandoned and heavily damaged.

On 10 September 1972 C. H. Page, a Wilmington police officer, secured an arrest warrant for the defendant Carr and went to his house to arrest him. Carr was not at home but Page saw a box of tapes in the house and outside in the yard he found a set of Thrush side pipes. These items were seized and were later identified by Crowell as having come from his car. They were introduced in evidence at the trial.

Quinton Brown, an accomplice, testified for the State that he and the defendant stole the Ford van on the night of 24 August 1972 and drove it to Murrayville Road where they stripped it of many parts, including the side pipes, and abandoned it. Brown later saw the side pipes at Carr's house.

Defendant Carr testified for himself and denied that he had taken any part in the theft of Crowell's car.

Defendant Davis offered testimony from two witnesses that he had been visiting them in their apartment on the night the theft occurred and that Davis had an adjoining apartment of his own.

In rebuttal, the State introduced records of the Country Club Apartments which tended to show the eviction of Davis from his apartment prior to 24 August 1972. These records were authenticated by the manager of the Country Club Apartments.

The jury found defendants guilty of felonious larceny, and each was sentenced to a prison term of three to five years. Defendants appealed.

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

Charles E. Rice III for defendant Carr.

Stephen E. Culbreth for defendant Davis.

BALEY, Judge.

[1] Defendants contend that since the indictments named William Brad Crowell as the owner of the stolen car, while the evidence showed that it was registered in the name of "Crowell's T.V.," there was a fatal variance between indictment and proof. It is true that an indictment must correctly specify the owner of the stolen property. *State v. Jessup,* 279 N.C. 108, 181 S.E. 2d 594; *State v. Law,* 227 N.C. 103, 40 S.E. 2d 699; *State v. Jenkins,* 78 N.C. 478. But the person named in the indictment may be either the person having a "general interest" in the stolen property—that is, the actual owner—or the person with a "special interest" in the property—that is, the person who had possession and control of it at the time when it was stolen. *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165; *State v. Law,* 228 N.C. 443, 45 S.E. 2d 374. Here it is clear that Crowell had a special interest in the stolen automobile.

[2] The trial court did not err in admitting into evidence the side pipes and box of tapes found by Officer Page in defendant Carr's house and yard. Before allowing the State to introduce these items, the court held a voir dire hearing to determine their admissibility and issued findings of fact. In its findings of fact, the court held that Page had entered Carr's house to execute a valid arrest warrant, and that he had found the tapes and pipes in plain view. In view of these findings, the tapes and pipes were admissible in evidence even though Page had no search warrant when he seized them. When police officers lawfully enter a person's premises and observe evidence of a crime in plain view, they may seize it without obtaining a search warrant. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Fry,* 13 N.C. App. 39, 185 S.E. 2d 256, *cert. denied and appeal dismissed,* 280 N.C. 495, 186 S.E. 2d 514.

[3] Defendant Davis contends that even if the pipes and tapes were properly admitted, the court should have instructed the jury to consider these items of evidence only against defendant

Carr and not against Davis. The court properly refused to give such an instruction, for the pipes and tapes were relevant to the case against each defendant. Quinton Brown testified that he and Carr and Davis stole Crowell's car and removed many of the parts, and that some of the parts, including the pipes, were taken to Carr's house. The discovery of the pipes and tapes at Carr's house strongly corroborated Brown's testimony and tended to establish its truth.

[4] Defendants argue that the court erred in granting the State's motion to consolidate their cases for trial, but this argument is without merit. When two defendants are charged with offenses arising out of the same transaction, and the State does not intend to use the confession of one as evidence against the other, the court may in its discretion consolidate the cases for trial. *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858; *State v. Pearson,* 269 N.C. 725, 153 S.E. 2d 494; *State v. Walker,* 6 N.C. App. 447, 170 S.E. 2d 627, *cert. denied,* 277 N.C. 117. Defendants have not shown that the trial court abused its discretion.

[5] Defendant Davis contends that the records of the Country Club Apartments should not have been admitted into evidence, since the authenticating witness, Gloria Todd, did not begin her work as manager of the apartment complex until April 1973. The witness Todd did testify, however, that she was familiar with the record-keeping system used by the Country Club Apartments, and that the records offered in evidence were made in accordance with this system. This testimony was sufficient to authenticate the records. *State v. Springer,* 283 N.C. 627, 197 S.E. 2d 530. There is no requirement that business records be authenticated by the person who made them, or by the supervisor of the person who made them. *State v. Franks,* 262 N.C. 94, 136 S.E. 2d 623. If the records themselves indicate that they were made at or near the time of the transaction in question, the authenticating witness need not testify from personal knowledge that they were made at that time. *See State v. Shumaker,* 251 N.C. 678, 111 S.E. 2d 878 (bank deposit slips prepared by defendant, authenticated by another bank employee; no indication that authenticating witness had personal knowledge of when slips were prepared); *Flowers v. Spears,* 190 N.C. 747, 130 S.E. 710 (bank ledger prepared by bookkeeper in Kannapolis branch office, authenticated by cashier whose office was in Concord); *State v. Dunn,* 264 N.C. 391, 141 S.E. 2d 630; *Edgerton v. Perkins,* 200 N.C. 650, 158 S.E. 197.

Defendants were convicted by a jury in a trial that was free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. BAXTER EUGENE LISK

No. 743SC266

(Filed 15 May 1974)

1. **Constitutional Law § 31— failure to require disclosure of informant — no error**

In a prosecution for possession of marijuana with intent to distribute and possession of amphetamines, the trial court did not err in failing to require disclosure of the identity of the State's confidential informant, since defendant did not show that the informant was a participant in the offense or that the identity was essential or relevant or helpful to his defense.

2. **Constitutional Law § 7— Controlled Substances Act — delegation of authority proper**

G.S. 90-88 is not an unconstitutional delegation of legislative authority in that it allows the N. C. Commission of Health Services to define crimes; rather, the statute delegates to the Commission the authority, within specified and adequate guidelines, to reschedule controlled substances.

3. **Criminal Law § 158— omission of warrant from record on appeal**

The Court of Appeals cannot review the trial court's conclusion that a warrant to search defendant's premises was valid where the warrant and supporting affidavit are not in the record on appeal.

4. **Criminal Law § 50; Narcotics § 3— substance as marijuana — opinion evidence of officer — competency**

An officer's opinion that material seized from defendant's premises was marijuana was competent in defendant's trial for possession of marijuana with intent to distribute.

5. **Constitutional Law § 37— waiver of rights — sufficiency of evidence**

Evidence was sufficient to support the trial court's finding that defendant was fully advised of his rights, though they were not read to him from a card, and that he knowingly and intelligently waived them.

State v. Lisk

APPEAL from *Rouse, Judge,* 1 October 1973 Criminal Session, PITT County Superior Court. Argued in the Court of Appeals 10 April 1974.

Defendant was charged with possession of marijuana with intent to distribute and possession of amphetamines. Prior to the plea, defendant moved for disclosure of the identity of the confidential informant upon whose information the State had obtained a warrant to search defendant's premises. Defendant also moved to quash the bill of indictment on the ground that the statute upon which it was based was unconstitutional. Both motions were denied, and defendant entered a plea of not guilty.

Defendant objected to the introduction of the items seized from defendant's premises, and a voir dire examination was conducted. Officer Nobles testified on voir dire that he obtained the warrant on information from an informant he had used before and whose prior information had resulted in the arrest and conviction of others. Officer Nobles performed a field test on the materials seized and determined that they were marijuana and amphetamines. The materials were then taken to the SBI laboratory where the officer's analysis was confirmed. The court found that the search was valid, and the items of contraband were admitted into evidence.

Officer Nobles testified that when he arrested defendant, he advised defendant fully of his rights. Defendant stated that he understood his rights and told Officer Nobles that the tablets were mostly flour and did not contain much amphetamine.

At the conclusion of the State's case, defendant's motion for nonsuit was denied, and he presented no evidence. The jury returned a verdict of guilty on both counts. From the signing and entry of judgment, defendant appealed.

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

Smith and Geimer, P.A., by W. S. Geimer, for defendant appellant.

MORRIS, Judge.

[1] Defendant contends that the trial court erred in failing to require disclosure of the identity of the State's confidential informant. We do not agree. Defendant is correct in his position

that the privilege of non-disclosure must give way when the informant's identity is essential or relevant or helpful to the defense or is essential to a fair determination of the cause. *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957); *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). Furthermore, the State is compelled to disclose the identity of the informant if it appears that he is a participant as opposed to a "mere tipster." *McLawhorn v. North Carolina,* 484 F. 2d 1 (4th Cir. 1973). The case before us does not fall within the rule of the cases cited, for defendant has made no showing either that the informant was a participant in the offense or the manner in which the identity of the informant would be essential to his defense. This assignment of error is overruled.

[2] Defendant next assigns error to the failure of the court to quash the bill of indictment which, he contends, is based upon an unconstitutional statute, G.S. 90-88. Among the several grounds for defendant's challenge to the constitutionality of G.S. 90-88 is his position that it represents an unauthorized delegation of legislative authority, viz: the authority to define crimes. His specific objection is that G.S. 90-88 empowers the North Carolina Commission of Health Services to add, delete, or reschedule a substance as a controlled substance.

Our Supreme Court addressed the issue of the delegation of legislative authority in the leading case of *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 60-61, 74 S.E. 2d 310 (1952):

> "However, it is not necessary for the Legislature to ascertain the facts of, or to deal with, each case. Since legislation must often be adapted to complex conditions involving numerous details with which the Legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the Legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the Legislature shall apply. *Provision Company v. Daves, supra.* Without this power, the Legislature would often be placed in the awkward situation of possessing a power over a given subject without being able to exercise it.

> 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.
>
> . . .
>
> Nevertheless, the legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law. . . . 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."

It should be apparent that the General Assembly is not constantly in session, and, therefore, even if its members were all trained chemists and pharmacists, which they are not, it is impossible for them to keep abreast of the constantly changing drugs and medications and their inherent dangers which appear on the pharmaceutical scene. G.S. 90-88 does not delegate the authority to define crimes; rather it is a delegation of authority 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." *Coastal Highway v. Turnpike Authority, supra,* at 61. An examination of the statute reveals that the Legislature has imposed guidelines upon the rescheduling of controlled substances that are more than adequate within the purview of *Coastal Highway, supra.* We have carefully reviewed defendant's other attacks on the constitutionality of G.S. 90-88, and we find them to be without merit.

[3] Defendant assigns error to the admission into evidence of items seized pursuant to the search warrant on the ground that the warrant was not valid. However, he has failed to include the warrant in the record. As we stated in *State v. Haltom,* 19 N.C.

App. 646, 199 S.E. 2d 708 (1973), we cannot review the trial court's conclusion that the warrant was valid where the warrant and supporting affidavit are not in the record on appeal.

[4] There is no merit to defendant's contention that Officer Nobles' opinion that the vegetable material seized was marijuana is incompetent. Officer Nobles testified that he had attended schools on the identification of marijuana, and that he had performed a field test on the substance. Even if this were not enough to qualify the officer's expert testimony, defendant has waived his exception, for he made no motion to strike the testimony.

[5] Likewise, without merit is defendant's assignment of error to the court's finding that defendant was fully advised of his rights and knowingly and intelligently waived them. Defendant specifically contends that the evidence is not sufficient inasmuch as the finding is not supported by competent evidence that defendant's rights were read to him from a card. Defendant offers no authority for his position that a defendant's rights must be read from a card in the presence of witnesses, and we hold that there is no such requirement. The evidence on voir dire was uncontradicted to the effect that there was a voluntary, understanding statement. The court's findings are conclusive since they are supported by competent evidence. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970).

There is no merit to the contention that defendant's motion for nonsuit was improperly denied. The test for sufficiency of the evidence in a criminal prosecution is well established, and we hold that the State has presented ample evidence to go to the jury.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. ULYSSES PERRY

No. 748SC265

(Filed 15 May 1974)

1. Criminal Law § 99— questions by court — clarification of testimony

In a prosecution for larceny of a taxicab and a radio therein, the court's questioning of an officer concerning the stolen radio tended only

to clarify the testimony of the witness and did not constitute an expression of opinion.

2. **Larceny § 8— instructions — inaccurate statement as to value — absence of prejudice**

In a prosecution for larceny of a taxicab and a radio therein, defendant was not prejudiced by the court's inaccurate statement in the charge that the value of the vehicle and radio was $800 when the testimony showed the value of the radio alone was $800.

3. **Larceny § 8— instructions — felonious intent**

The trial court's instructions on the elements of felonious larceny were sufficient although the court did not use the term "felonious intent."

4. **Criminal Law § 122— additional instructions urging verdict**

The trial court did not coerce the jury into returning a guilty verdict when the jury foreman indicated to the court that they were in doubt and the court further instructed the jury on reasonable doubt and the possible verdicts and explained that if the jurors could not reach an agreement without doing violence to their individual judgments, they should report that fact to the court.

APPEAL from *James, Judge,* 29 October 1973 Session of WAYNE County Superior Court. Argued in the Court of Appeals 16 April 1974.

Defendant was charged in a valid bill of indictment with the larceny of a 1967 Buick taxicab and a radio therein valued at $800. Johnnie Mickens, the driver of the cab in question, testified that he left his cab at the taxi stand at around 12 midnight on the night in question. At the time he left his cab, the radio was inside the cab. The next morning, he found the cab abandoned behind a building four blocks from the taxi stand with the wires connecting the radio cut and the radio missing. He gave no one permission to take his cab or to take the radio therefrom.

Judy Jones testified that she observed Ulysses Perry driving away from the Safety Cab Stand in the early morning hours of the date in question in the cab of Johnnie Mickens. The street on which he was driving the cab was well lighted, and she was 15 to 18 feet away from him when she observed him. William Johnson testified that he saw defendant drive away from the cab stand in Mickens's cab at 1:00 a.m. on the date in question and that defendant stopped for a red light six feet away from where he was standing.

Detective Hart of the Goldsboro Police Department testified that he searched the area of the theft and discovered the radio in an outhouse behind a church on the path leading from the location where the car was abandoned to the defendant's house.

At the conclusion of State's evidence, defendant's motion for nonsuit was denied and defendant presented evidence tending to show that he had been with friends until about 11:30 p.m. at which point he went to his mother's residence and went to bed. Defendant's 13-year-old nephew testified that he remained awake watching television until 2:00 a.m., and defendant did not leave the house before he went to bed. Defendant took the stand and testified that he had, in fact, gone to his mother's house at 11:30 p.m. Defendant denied stealing the cab or the radio, and he testified that the cab stand—with which he was familiar was not well lighted.

Defendant's renewed motion for nonsuit was denied and the jury returned a verdict of guilty. From the signing and entry of the judgment, defendant appealed.

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

J. Faison Thomson, Jr., for defendant appellant.

MORRIS, Judge.

The court's denial of defendant's motion for nonsuit made at the close of all the evidence was proper. The evidence on the entire record, considered in the light most favorable to the State, giving the State the benefit of all reasonable inferences and resolving all doubts in its favor tends to establish the guilt of defendant, and is therefore sufficient for submission to the jury. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971).

[1] Defendant assigns error to the court's questioning Detective Hart concerning the stolen radio. This questioning was conducted pursuant to the trial court's well-established authority to examine witnesses in order to ascertain the truth. Defendant complains that upon this questioning testimony was elicited—not previously introduced by the State—that two radios had been recovered. Detective Hart testified in response to the solicitor's questions that *radios* were recovered. Any further questions asked by the court tended only to clarify the testimony of the witness, and defendant is not prejudiced thereby.

[2] The assignment of error to various portions of the court's instructions is without merit. The court was not entirely accurate when it stated that ". . . the approximate value of those articles, automobile and radio was about $800." The testimony was in fact that the radio alone had a value of $800. We fail to perceive the manner in which defendant was prejudiced by this slight discrepancy. Larceny of goods of value greater than $200 is a felony. G.S. 14-73; *State v. Cooper*, 256 N.C. 372, 124 S.E. 2d 91 (1962). The court correctly instructed the jury to return a verdict of guilty of felonious larceny if it found that the defendant stole the automobile and radio, and that they had a value greater than $200.

[3] Defendant further contends that the court was in error in failing to define felonious intent. The following portion of the instruction is sufficient to apprise the jury of the elements of felonious larceny.

> "Felonious larceny is the taking and carrying away of more than $200.00 worth of personal property of another without his consent intending at that time to deprive the owner of its use permanently, the taker knowing that he was not entitled to take the property. Now, in order for you to find the defendant guilty of felonious larceny with which he is here charged the State has the burden of satisfying you beyond a reasonable doubt of six things: first, that the defendant took the property belonging to Johnnie Mickens; second, that the defendant carried away the property. By carrying away I do not mean he must take it 100 or ten miles or even one mile, but the slightest carrying away from where its owner left it is sufficient; third, that Johnnie Mickens did not consent to the taking and carrying away of his automobile, his taxicab and radio, and fourth, that at the time of the taking, the defendant intended to deprive the owner of its use permanently; fifth, that the defendant knew he was not entitled to take the property, and sixth, that the property was worth more than $200.00."

Larceny is the felonious taking and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. *State v. Booker*, 250 N.C. 272, 108 S.E. 2d 426 (1959). Felonious intent as applied to the crime of larceny is "the intent which exists where a person knowingly takes and

carries away the personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property . . ." *State v. Wesson*, 16 N.C. App. 683, 193 S.E. 2d 425 (1972). No exact words are required to instruct the jury as to the meaning of felonious intent. *Id.* The instruction, viewed in its entirety, sufficiently explained the law of larceny to the jury.

[4] Defendant contends that the court coerced the jury into returning a verdict of guilty at a point where the foreman indicated to the court that they were in doubt. There is no merit to this position, for the court at this point further instructed the jury on reasonable doubt and further explained what possible verdicts they could return and clearly suggested that if they could not reach an agreement without doing violence to their individual judgments, they should report to the court if they could not reconcile their differences.

This instruction was a correct statement of the law regarding the duty of the jury. In no way can it be deemed prejudicial to the defendant, for it clearly states that if the jury is unable to reach a unanimous verdict it is bound to report that fact to the court.

Defendant has received a fair and impartial trial, and we are able to perceive no prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

J. PERRY JONES REALTY, INCORPORATED v. ARIEL McLAMB AND WIFE, DORCAS McLAMB

No. 744DC237

(Filed 15 May 1974)

Corporations § 23— corporate deed — necessity for attestation by secretary

In a corporation's action to remove cloud from title, the trial court erred in holding that a deed signed by the corporation's president but not attested by its secretary was a valid corporate deed; however, the cause must be remanded for a determination as to whether the corporation ratified the deed or is estopped to deny its validity and whether the instrument might be construed as a contract to convey.

APPEAL by plaintiff from *Crumpler, District Judge,* at the 17 December 1973 Session of SAMPSON District Court.

Heard in the Court of Appeals 18 April 1974.

This is a civil action under G.S. 41-10 to remove a cloud on plaintiff's title to certain land located in Sampson County, North Carolina. Corporate plaintiff contends that a certain paper writing purporting to be a deed of conveyance to the land in question from the plaintiff to the defendants is null and void and of no effect in that it was not executed in compliance with North Carolina law pertaining to execution of deeds by corporations. Plaintiff asserts that the instrument in question was not signed in the name of the corporation and that it was not attested by the corporation's secretary. The instrument is dated 11 March 1968 and was recorded in the Office of the Sampson County Register of Deeds on 13 March 1968. This action was tried without a jury before Judge Crumpler with the sole issue being the legal effect of the instrument in question. From a judgment that the plaintiff had no interest in the land in question and that the land was conveyed on 11 March 1968 to the defendants by the instrument in question, plaintiff appealed.

Harry M. Lee and David J. Turlington, Jr., for plaintiff appellant.

Warren & Fowler by Miles B. Fowler for defendant appellees.

CAMPBELL, Judge.

The instrument in question reads:

"NORTH CAROLINA,
SAMPSON COUNTY.

THIS DEED, Made this the 11 day of March, 1968, by J. PERRY JONES REALTY, INC., a corporation organized and existing under and by virtue of the laws of the State of North Carolina, with its principal office in the City of Dunn, County of Harnett, State of North Carolina, party of the first part, to ARIEL MCLAMB and wife, DORCAS D. MCLAMB, of the County of Sampson, State of North Carolina, parties of the second part; WITNESSETH:

That the said party of the first part for and in consideration of the sum of TEN DOLLARS ($10.00) and other

valuable considerations to it in hand paid by the said parties of the second part, the receipt of which is hereby acknowledged, has bargained and sold, conveyed and confirmed, and by those presents does hereby grant, bargain, sell and convey unto the said parties of the second part, their heirs and assigns, all that certain lot or parcel of land, lying and being in South Clinton Township Sampson County, North Carolina, adjoining the lands of Ariel McLamb, F. H. Fussell, State Highway No. 24, and others, and described as follows:

BEGINNING at an iron stake in the Southeastern edge of the right-of-way of State Highway No. 24, 30 feet from the center of the pavement thereof a corner with Ariel McLamb and runs thence along the line of Ariel McLamb S. 0° 45' W. 620 feet to a new stake and corner; thence leaving the Ariel McLamb line and running thence N. 66° 35' E. 20 feet to a stake and corner with the F. H. Fussell land; thence with the F. H. Fussell land N. 0° 45' E. 620 feet to a stake and corner in the Southeastern edge of the right-of-way of State Highway No. 24, 30 feet from the center of the pavement thereof; thence along the Southeastern edge of State Highway No. 24, S. 66° 35' W. 20 feet to the BEGINNING corner, and being a small parcel of land lying between the F. H. Fussell land and the Ariel McLamb land, as appears on a map made by L. C. Kerr, Jr., Registered Surveyor, dated December 16, 1967.

TO HAVE AND TO HOLD said land and premises together with all the privileges and appurtenances thereto belonging or in anywise appertaining unto them, the said parties of the second part, their heirs and assigns, in fee simple forever.

And the said party of the first part, for itself, its successors and assigns, covenants to and with the said parties of the second part, their heirs and assigns, that it is the owner and lawfully seized of said premises in fee and has the right to convey the same in fee simple; that the same is free and clear of all encumbrances whatever and that it does hereby warrant and will forever defend the title to the same against the lawful claims of any and all persons whomsoever.

IN TESTIMONY WHEREOF, the said party of the first part, has hereunto set it's (sic) hand and seal, the day and year first above written.

J. PERRY JONES
President

NORTH CAROLINA,
SAMPSON COUNTY.

This the 12 day of March, 1968, personally came before me J. PERRY JONES, president of J. PERRY JONES REALTY, INC., who, being by me duly sworn, says, that he is President of the said company, and that the seal affixed to the foregoing deed of conveyance in writing is the corporation seal of the company, and that said writing was signed and sealed by him in behalf of said corporation by it's (sic) authority duly given. And the said J. PERRY JONES, President, acknowledged the said writing to be the act and deed of said corporation.

Witness my hand and notarial seal, this the 12 day of March, 1968.

P. D. Herring
Notary Public
My Commission Expires:
9-24-68"

The instrument also contained the corporate seal of J. Perry Jones Realty, Inc., immediately after the name of the President, and the seal of the Notary was also affixed.

G.S. 55-36(a) reads:

"*Execution of corporate instruments; authority and proof.*—(a) Notwithstanding anything to the contrary in the bylaws or charter, any deed, mortgage, contract, note, evidence of indebtedness, proxy, or other instrument in writing, or any assignment or indorsement thereof, whether heretofore or hereafter executed, *when signed in the ordinary course of business on behalf of a corporation by its president or a vice president and attested or countersigned by its secretary, or an assistant secretary,* (or, in the case of a bank, attested or countersigned by its secretary, assistant secretary, cashier, or assistant cashier), not acting in dual capacity, shall with respect to the rights of innocent

> third parties, be as valid as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation. The foregoing shall not apply to parties who had actual knowledge of lack of authority or of a breach of fiduciary obligation or to the execution of corporate securities which are required, by a corporate regulations or resolutions formally adopted, to be signed or countersigned by a transfer agent or registrar who has agreed to act in that capacity." (Emphasis supplied.)

The statute is clear. Nothing else appearing, the instrument fails in that it was not attested by the corporate secretary. G.S. 55-36(a), Webster, *Real Estate Law in North Carolina*, § 139, p. 171 (1971). See also *Caldwell v. Mfg. Co.*, 121 N.C. 339, 28 S.E. 475 (1897); *Tuttle v. Building Corp.*, 228 N.C. 507, 46 S.E. 2d 313 (1948). It was error to hold that the instrument in question was a valid corporate deed.

However, there was insufficient evidence to determine whether the corporation ratified or was estopped to deny the validity of the deed, or whether the instrument might be construed as a contract to convey. There was no testimony as to the regular duties of the president, as to whether the corporation was engaged in the business of buying and selling real estate, whether the corporation or the president received the consideration, if any existed, or whether the instrument was executed with the knowledge and approval of a majority of the stockholders. In fact, there was no evidence at all other than the instrument itself. Although the pretrial conference order provided that there would be no witnesses offered by either plaintiff or defendants, the defendants did plead estoppel in their answer, and we think they are entitled to offer evidence thereof if any they have. We, therefore, remand for further proceedings in accordance with this opinion.

Reversed and remanded.

Judges MORRIS and VAUGHN concur.

Woodard v. McGee and Little v. McGee

W. ROY WOODARD v. MARY POPE McGEE, ADMINISTRATRIX OF THE ESTATE OF RICHARD L. McGEE

— AND —

MARY ELLA LITTLE v. MARY POPE McGEE, ADMINISTRATRIX OF THE ESTATE OF RICHARD L. McGEE

No. 746SC107

(Filed 15 May 1974)

1. **Evidence § 11— conversations with decedent — Dead Man's Statute**

In an action to recover for services allegedly rendered decedent upon the understanding that upon his death he would leave to each plaintiff $6,000 in stock in a company owned by decedent, the trial court properly excluded in accordance with G.S. 8-51 testimony of conversations between the decedent and plaintiffs with respect to what decedent had promised them.

2. **Executors and Administrators § 27— services rendered decedent — evidence of value — no expectation of payment**

The trial court did not err in the exclusion of opinion testimony as to the reasonable value of services allegedly rendered by plaintiffs to decedent where there was no evidence that decedent accepted the services under the assumption that the plaintiffs expected to be paid for the services.

3. **Executors and Administrators § 24— action for services rendered decedent — insufficiency of evidence**

Plaintiffs' evidence was insufficient for the jury in an action to recover for services allegedly rendered to decedent upon the understanding that upon his death he would leave to each plaintiff $6,000 in stock in a company owned by decedent.

APPEAL by plaintiffs from *Rouse, Judge,* 13 August 1973 Session of Superior Court held in HALIFAX County. Argued in the Court of Appeals 17 April 1974.

Plaintiff-appellants had both been employed by McGee Oil Company for several years prior to the death of the owner, Richard McGee, on 16 October 1971. Plaintiff Woodard was employed as a Transport Driver, paid by the load, and made runs from Weldon, North Carolina, Seaboard, North Carolina, and Norfolk, Virginia. Plaintiff Little was employed by McGee Oil Company as a secretary to the company.

Plaintiff Woodard testified that in addition to hauling loads, he worked on trucks and equipment, waited on customers, stayed on holidays and waited on customers, collected payments from customers, delivered barrels of oil, picked up stoves and

well curbing for the company, took part of his vacation to go to Greensboro to purchase a truck for the company, and assisted in the preparation of billing statements and mailing them. All of this testimony was stricken by the trial court on the basis that they were services performed for the company rather than for Richard McGee individually.

Woodard also testified that he performed personal services for McGee such as taking McGee to the hospital and picking him up in Woodard's automobile at Woodard's expense; taking Mrs. McGee to Richmond, Virginia, to visit Mr. McGee while Mr. McGee was hospitalized; and running personal errands for McGee.

Plaintiff Little offered testimony indicating that she performed services outside the scope of her employment such as repairing pumps that were broken, putting acid in batteries and charging them, cleaning the offices and company yard, waiting on customers, painting the office walls, waiting on customers after business hours and disbursing and reconciling checks from McGee's personal checking account.

Both plaintiffs testified they performed the additional services for McGee upon the understanding that, upon McGee's death, he would leave to each plaintiff $6,000.00 in stock in the McGee Oil Company.

At the close of plaintiffs' evidence, defendant in each case moved for a directed verdict under Rule 50 on the grounds that there is insufficient evidence taken in the light most favorable to the plaintiffs to carry the cases to the jury. The trial court allowed the motion in each case.

Plaintiffs appealed to this Court.

Howard P. Satisky for plaintiff-appellants.

Allsbrook, Benton, Knott, Allsbrook & Cranford, by Dwight L. Cranford, for defendant-appellee.

BROCK, Chief Judge.

[1] Plaintiffs contend by numerous exceptions that the trial court committed error in rulings on the admissibility of evidence concerning conversations between the deceased and the plaintiffs with respect to what the deceased had promised them.

G.S. 8-51, referred to as "The Dead Man's Statute," is applicable to this contention. In this action, both plaintiffs are "interested" parties; both are seeking a pecuniary interest from the estate of McGee. Both plaintiffs sought to testify to a personal transaction with the deceased, in hopes of establishing a claim against the administratrix of McGee's estate. The trial court properly excluded testimony of a personal transaction by either plaintiff with the deceased in accordance with G.S. 8-51. Testimony as to conversations between the deceased and one of the plaintiffs, brought out by the other plaintiff in testifying, was allowed. This assignment of error is overruled.

[2] Plaintiffs contend the trial court committed error in the exclusion of opinion testimony as to the reasonable value of services rendered by plaintiffs to the deceased.

Both plaintiffs in their pleadings based their complaint upon an express contract with the deceased, and now, in this Court, seek to argue an implied contract. There is no evidence in the record tending to show that the deceased accepted the services under the assumption that the plaintiffs expected to be paid for these services.

"The burden always rests upon the plaintiff, even when there is no presumption that the services were gratuitous, to show circumstances from which it might be inferred that services were rendered and received with the mutual understanding that they were to be paid for, or, as it is sometimes put, 'under circumstances calculated to put a reasonable person on notice that the services are not gratuitous'." *Johnson v. Sanders,* 260 N.C. 291, 132 S.E. 2d 582.

This assignment of error is overruled.

[3] Plaintiffs also contend that the trial court committed error in allowing defendant's motion for a directed verdict. "On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, *as a matter of law,* the evidence is insufficient to justify a verdict for the plaintiff." *Kelly v. Harvester Company,* 278 N.C. 153, 179 S.E. 2d 396.

In our opinion, the trial court correctly allowed defendant's motion. This assignment of error is overruled.

Affirmed.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. JOHNNY JHUE LANEY

No. 7420SC303

(Filed 15 May 1974)

1. **Criminal Law § 89— inadmissibility of question to show bias**

In this homicide prosecution, a question to a State's witness as to whether he had called his wife and told her that defendant had killed his wife and "I'm going to kill you" was not admissible to show bias on the part of the witness by showing that he had an intimate friendship with the deceased since such a conclusion on the part of the jury would be mere speculation.

2. **Criminal Law §§ 38, 57— testing of gun — admissibility of testimony**

In this homicide prosecution, testimony by the State's firearms expert that he studied the gun used in the crime for defects, that he did not find any defects as to the mechanical operation of the weapon and that he had no difficulty in firing the gun was not testimony as to an experiment conducted to determine if defendant's version of the killing could have occurred and was properly admitted by the court.

APPEAL by defendant from *Kivett, Judge*, 17 September 1973 Criminal Session of Superior Court held in STANLY County.

Defendant was charged in a bill of indictment, in proper form, with the murder of his wife, Doris Faye Mullis Laney, on 7 August 1973. He pleaded not guilty, contending that death resulted from accident or misadventure. The jury returned a verdict of guilty of involuntary manslaughter, and he appealed from the entry of judgment imposing a prison term of ten years with credit for time spent in jail awaiting trial.

Attorney General Robert Morgan, by Associate Attorney Archie W. Anders, for the State.

Coble, Morton, Grigg & Odom, by Ernest H. Morton, Jr., and Griffin & Humphries, by Jerry E. Griffin, for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the court's instruction that counsel not propound a certain question to one of the State's witnesses. The witness, who testified he had seen defendant enter the house trailer where the body of the victim was found, was asked, in conference and out of the presence of the jury, "Did you on the night of August 7th, 1973, call your wife, Earlene Furr and say, 'Johnny [the defendant] has killed Doris, and I'm going to kill you'?" The witness answered in the negative and then the court instructed defendant's counsel not to ask the question in the presence of the jury.

Defendant argues that the question would show bias on the part of the witness in that it would show he had an intimate friendship with the deceased. Such a conclusion on the part of the jury would be mere speculation. Evidence which has no logical tendency to prove a fact in issue in the case is inadmissible. See *Godfrey v. Power Co.*, 190 N.C. 24, 128 S.E. 485 (1925), and 1 Stansbury, North Carolina Evidence, § 77, at 234 (Brandis rev. 1973). In addition, the witness answered in the negative, therefore, we can see no prejudice from excluding the question. The assignment is overruled.

On his second assignment of error, defendant contends the court erred in overruling defendant's objections to questions put to the State's witness, Frank G. Satterfield, Jr., a firearms expert with the S.B.I., for the reason that the State failed to lay a proper foundation. We find the assignment without merit.

As a witness for himself, defendant testified: ". . . I reached under my shirt and caught it [the gun] by the handle and pulled it out and was holding it in front of her, more or less in a parallel angle to her body . . . . As I was holding the gun, the [her] left arm came up and hit the gun and it went off. That's all I know . . . . I was holding the gun out in front of her and it was about a foot to a foot and a half in front of her person. I did not point the gun at her nor did I have my finger on the trigger at any time. I just reached down and got it by the stock . . . ."

Agent Satterfield was called as a rebuttal witness by the State. After testifying with respect to his background, including 18½ years with the S.B.I., the last two years of which had

been in the firearms section, Agent Satterfield, without objection, stated:

> "I am able to identify State's Exhibit No. 2 as a .22 caliber revolver by the name of Gecado. A revolver has a barrel of approximately 3⅜ inches in length and the land and groove specifications are 8 grooves with a right twist. The pistol is a double action and single action weapon. When I say single action, I mean with the hammer cocked and double action, I mean when the hammer is not cocked. We checked to see how much weight was required to pull the trigger in both positions by firing the weapon. With the hammer cocked, it required approximately 4 to 4½ pounds of pressure to pull the weapon. However, this would vary from cylinder to cylinder, but it was generally 4¼ to 4½ pounds. This was for single action firing. By double action firing, the trigger pull was in excess of 5¼ pounds because the weights that we have are limited to a pull of 5¼ pounds."

[2] Thereafter, several questions were asked and objections thereto were sustained by the court, and a motion to strike an answer was allowed. Then, Agent Satterfield, over objection, testified that he studied the weapon for defects, that he did not find any defects "as to the mechanical operation of the weapon," and that he had no difficulty in firing the weapon. Defendant contends that this testimony was erroneously admitted and cites *State v. Phillips,* 228 N.C. 595, 46 S.E. 2d 720 (1948), and *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963).

In *State v. Phillips, supra,* page 598, we find: " 'The general rule as to the admissibility of the result of experiments is, if the evidence would tend to enlighten the jury and to enable them to more intelligently consider the issues presented and arrive at the truth, it is admissible. The experiment should be under circumstances similar to those prevailing at the time of the occurence involved in the controversy. They need not be identical, but a reasonable or substantial similarity is sufficient'—*Edwards, J.,* in *Shepherd v. State,* 51 Okla. Crim., 209 300 P., 421."

While recognizing the rule restated in *Phillips,* we do not think the rule rendered inadmissible the evidence challenged here. It would appear that Agent Satterfield's testimony related more to *testing* the death weapon for defectiveness than it did to performing an experiment as was true in *Phillips.* We note

again that a large part of the agent's testimony was not objected to, only his conclusion as to defects. We also think that the challenged testimony is distinguishable from that declared inadmissible in *Foust*. In the first place, in *Foust* the testimony relating to testing or experimenting with the weapon was objected to. Secondly, the testimony in that case more clearly tended to show an "experiment" than the testimony challenged here. Agent Satterfield in no way attempted to simulate the version of the occurrence as described by defendant, and then show that it could not have happened that way.

Defendant's third and fourth assignments of error relate to the court's charge to the jury. Considering the instructions as a whole, and contextually, we conclude that they were free from prejudicial error.

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

No error.

Judges HEDRICK and CARSON concur.

GREENVILLE CITY BOARD OF EDUCATION v. PLATO G. EVANS AND WIFE, SARA Y. EVANS

No. 743SC229

(Filed 15 May 1974)

1. **Eminent Domain § 8— condemnation of city school site — necessary parties — county commissioners**

In this condemnation action instituted by a city board of education, there is no merit in the contention that the board of county commissioners was a necessary party because the taking could not be accomplished if the commissioners did not have sufficient funds to compensate respondents where petitioner has sufficient funds in escrow to pay the amount found by the jury to be the fair market value of the land being taken.

2. **Eminent Domain § 8; Trial § 8— condemnations of contiguous tracts — consolidation for trial**

The trial court properly consolidated for trial separate actions instituted by a city board of education condemning contiguous tracts of land. G.S. 1A-1, Rule 42(a).

3. **Eminent Domain § 6; Trial § 10— ruling on objection — comment by court — absence of prejudice**

Respondents in a condemnation action were not prejudiced when the court sustained an objection to a question regarding the value of the subject property by saying "he could use a Ouija board but that wouldn't be much help."

4. **Eminent Domain § 6— probability of zoning change — contiguous tract**

Respondents in a condemnation action were not entitled to an instruction that in determining the fair market value the jury could consider the probability of a change in zoning classification where the only evidence of a potential change in zoning related to a contiguous tract.

5. **Eminent Domain § 7— condemnation of school site — disagreement on purchase price**

There is no merit in the contention that the court was without jurisdiction to enter judgment in a condemnation proceeding instituted by a school board on the ground that there was no evidence or finding that the parties could not agree on a purchase price as required by G.S. 40-11 where the pretrial order contains a stipulation that the parties unsuccessfully discussed the possibility of a settlement and the record shows that the parties have been unable to agree on a purchase price.

6. **Eminent Domain § 5— interest on judgment — date of right to possession**

The landowner is entitled to interest from the date the condemnor acquires the right to possession, not from the date the petition is filed.

APPEAL from *Cowper, Judge,* 10 September 1973 Session of PITT County Superior Court. Argued in the Court of Appeals 11 April 1974.

On 16 November 1972, the Greenville City Board of Education filed a petition seeking to acquire a 17.47-acre tract from respondents and a contiguous 12.7-acre tract belonging to Guy C. Evans, brother of respondent Plato G. Evans. In response to the petition, respondents denied that they had been unable to agree on a fair sales price, but stated they had agreed with the Board to sell the property at a price of $5,000 per acre. Respondents also moved that the Board of Commissioners of Pitt County be made a party, and the motion was denied by the Clerk of Superior Court and the denial affirmed by the Superior Court.

The court appointed a Commission to appraise the property, and the Commission determined that the sum of $91,844 should be paid respondents. The Clerk of Superior Court of Pitt County affirmed the order of the Commission. Both petitioner

and respondents excepted to the judgment awarded by the Clerk and requested a trial *de novo* in Superior Court. The case was heard by Judge Cowper sitting with a jury and a verdict of $80,040 was returned, representing less than the allegedly agreed upon price of $5,000 per acre. From the signing and entry of judgment, respondents appealed.

Gaylord and Singleton, by L. W. Gaylord, Jr., for petitioner appellee.

Sam B. Underwood, Jr., and Samuel J. Manning for Plato G. Evans and wife, Sara Y. Evans, respondent appellants.

MORRIS, Judge.

[1] We cannot sustain respondents' argument that the Board of County Commissioners should have been joined as a necessary party. The motion was made on the ground that no funds may be expended for a school site without its approval. G.S. 115-78(c) (1) provides in pertinent part:

> " . . . no contract for the purchase of the site shall be executed nor any funds expended therefor without the approval of the board of county commissioners as to the amount to be spent for the site; and in case of a disagreement between a board of education and a board of county commissioners as to the amount to be spent for the site, the procedure provided in G.S. 115-87 shall, insofar as the same may be applicable, be used to settle the disagreement."

Respondents contend that the Board is a necessary party inasmuch as the court cannot order that the land be taken when the taking cannot be accomplished as a matter of law. *Vance County v. Royster,* 271 N.C. 53, 155 S.E. 2d 790 (1967). The taking—according to respondents—would be impossible as a matter of law if it should appear that the Board did not have on hand sufficient funds to compensate respondents. From the record it appears that petitioner has on hand and in escrow sufficient funds to pay the $80,040 found by the jury to be the fair market value of the land being taken.

[2] Respondents assign error to the consolidation of the case *sub judice* and the case involving the condemnation of the contiguous tract of Guy Evans. They contend that they were prejudiced by the fact that petitioner sought to acquire 30.17 acres of "Evans Land" and that different issues were to be submitted

to the jury relative to each tract. Under G.S. 1A-1, Rule 42(a), the trial court has the discretion to consolidate "actions involving a common question of law or fact."

> "A trial court has the discretionary power, even ex mero motu, to consolidate actions for trial. He may do so even though the actions are instituted by different plaintiffs against a common defendant, or by the same plaintiff against several defendants, when the causes of action grow out of the same transaction and substantially the same defenses are interposed, provided that such consolidation results in no prejudice or harmful complications to either party." 7 Strong, N. C. Index 2d, Trial, § 8, pp. 265-266.

From the record it is apparent that consolidation was proper within the purview of the above rule, and respondents have not been prejudiced thereby.

[3] We have carefully reviewed respondents' assignments of error to various evidentiary rulings of the court and we fail to perceive that they have been prejudiced. Nor do we find prejudice in the court's sustaining an objection to a question regarding the factors used in determining the value of the subject property by saying "he could use a Ouija board but that wouldn't be much help." This isolated comment, when viewed in conjunction with the entire record, cannot be deemed so disparaging in its effect that it can reasonably be said to have prejudiced respondents.

[4] Respondents assign error to the failure of the trial court to instruct the jury that they should consider, in determining the fair market value of the land, the probability of a change in the zoning of that land. We hold that respondents were not entitled to such an instruction, for the only evidence of a potential change in zoning classification was introduced relative to the Guy Evans tract. This fact that a contiguous tract had been considered for rezoning gives rise to no inference that the tract under consideration will be rezoned. If a possible change in a zoning ordinance is purely speculative, it may not be considered in determining the fair market value of the land. *Highway Comm. v. Hamilton,* 5 N.C. App. 360, 168 S.E. 2d 419 (1969).

[5] It is respondents' position that the court was without jurisdiction to enter judgment since there was no evidence or finding of fact that the parties could not agree on a purchase price for the subject property as required by G.S. 40-11. We cannot sus-

tain this assignment, since the pretrial order contains a stipulation that the parties have unsuccessfully discussed the possibility of a settlement. Furthermore, the record clearly shows that the petitioner and respondents have been unable to agree on the purchase price.

[6] Likewise, we are unable to sustain respondents' assignment of error to the failure of the trial court to allow interest on the judgment from the date of the taking—contended by respondents to be 16 November 1972, the date of the filing of the petition. It is well established as the law in this State that the landowner is entitled to interest from the date the condemnor acquires the right to possession, not from the date the petition is filed. *Light Co. v. Briggs*, 268 N.C. 158, 150 S.E. 2d 16 (1966).

No error.

Judges CAMPBELL and VAUGHN concur.

ALICE LUCILLE CRAVEN BRITT AND HUSBAND, OSSIE GERMAN BRITT AND IDA LEOLA CRAVEN BRISTOW v. GARLAND W. ALLEN

No. 7419SC8

(Filed 15 May 1974)

1. **Contracts § 26; Trusts § 18— oral agreement to bid in property at foreclosure sale — admissibility of testimony**

In an action for breach of an alleged agreement by defendant to bid in plaintiffs' property at a foreclosure sale so that plaintiffs would not lose their homeplace, the trial court erred in refusing to permit one plaintiff to testify as to her conversation with defendant and the alleged verbal agreement entered into between plaintiffs and defendant.

2. **Frauds, Statute of § 6; Trusts § 13— oral agreements to bid in property at foreclosure sale**

Alleged oral agreement that defendant would bid in plaintiffs' property at a foreclosure sale, that defendant would satisfy the note and deed of trust on the property and deed the property to plaintiffs, and that plaintiffs would in turn convey a portion of the property to defendant was enforceable and not within the purview of the statute of frauds.

3. Contracts § 4; Trusts § 13— oral agreement to bid in property — consideration

Defendant's oral promise to bid in plaintiffs' property at a foreclosure sale, satisfy the note and deed of trust on the property and deed the property to plaintiffs was supported by consideration where plaintiffs agreed that they would not try to reinstate the loan on the property but would allow the foreclosure sale to be held and that they would convey a portion of the property to defendant.

APPEAL by plaintiffs from *Seay, Judge*, 30 April 1973 Session of RANDOLPH County Superior Court. Argued in the Court of Appeals 22 January 1974.

The plaintiffs owned a 33 acre farm in Randolph County. In 1961, the plaintiff Alice Britt borrowed from the Peoples Savings and Loan Association the sum of $3,000.00 and executed a note and deed of trust on the property to secure the note. The plaintiff became delinquent in her account, and foreclosure was instituted.

Most of the plaintiff's testimony offered beyond this point was excluded by the trial judge. If admitted, it would have shown that the plaintiff, Alice Britt, went to see the defendant, Garland Allen, shortly before the foreclosure sale was held. The purpose of this visit was to borrow $3,000.00 from Garland Allen to satisfy the note and deed of trust, thereby halting the foreclosure. Garland Allen allegedly told the plaintiff that he would not lend them any money but that he would bid the land in at the foreclosure sale. He would then satisfy the note with the Savings and Loan, and the plaintiff, in turn, would deed to him approximately 10 acres of the 33 acres. The defendant would have a survey made and would be deeded the 8 or 10 acres lying between the driveway and the house. The plaintiff, Alice Britt, would have testified further that the defendant told her not to worry about anything, that he would look after them at the sale, that he would have his attorney place the bid for him if he could not go himself, and that he would be the high bidder and complete the agreement he had made with the plaintiff. Further excluded testimony would have shown that the fair market value of the property was considerably in excess of the amount of the note or the amount for which the property was purchased at the sale.

A bid in the amount of $3,000.00, the face amount of the note, was entered at the foreclosure sale. The defendant Allen filed an upset bid in the amount of $3,200.00 within the statutory

period of time. A resale was held, and the property sold for the amount of $3,500.00. The defendant did not enter any bids except his upset bid in the amount of $3,200.00. The resale was confirmed, and the property was deeded to the purchasers.

Following the plaintiffs' evidence, the trial court directed a verdict in favor of the defendant. Apparently, the trial court considered the offered testimony, to which the defendant objected and to which objections had been sustained, in arriving at his directed verdict. The directed verdict was based on the grounds that the alleged contract to convey land was oral and within the prohibition of the statute of frauds, that the contract was not supported by consideration, and that the evidence did not conform to the allegations of the complaint. From the entry of the directed verdict, the plaintiffs appealed.

Ottway Burton for the plaintiffs-appellants.

Moser and Moser by Thad T. Moser for defendant-appellee.

CARSON, Judge.

[1] While the plaintiff was attempting to testify concerning her verbal contract with the defendant, the defendant objected to almost every question propounded by plaintiffs' attorney. Most of the objections were sustained on the grounds that the questions were leading. While some of the questions were impermissively leading, others were proper in form and should have been allowed. It would be of no benefit to relate here all of the questions asked by plaintiffs' attorney and the objections entered in response thereto. Suffice it to say that the plaintiff should have been allowed to testify as to her conversation with the defendant and the alleged verbal contract entered into between the plaintiff and the defendant.

Apparently, the trial court considered the evidentiary matters which were excluded in arriving at his decision directing a verdict in favor of the defendant. Had he not considered the excluded portions of the plaintiff's testimony, there would have been nothing upon which to base his findings of fact. The court found that the plaintiffs had failed in their case in three material respects. The first was that the evidence did not conform to the allegations of the complaint. However, the plaintiffs alleged the ownership of the land, the existence of the deed of trust, the foreclosure sale, and the related conversation between the plaintiff, Alice Britt, and the defendant, Allen. If the

testimony had been admitted at the proper places, there would have been sufficient evidence presented to sustain the plaintiffs' burden of proof. This matter would properly have been for the jury and would not have been the subject of a directed verdict.

[2] The trial court further held that the alleged contract was unenforceable as being within the purview of the statute of frauds. The court held that it was a contract for the sale of land and hence unenforceable. Our courts have tried to avoid the sometimes harsh result that a strict application of the statute of frauds would bring to unknowing and uneducated persons. It has been avoided on occasion by the application of a parol trust. This has been specifically approved by our Supreme Court on several occasions. *Bryant v. Kelly,* 279 N.C. 123, 181 S.E. 2d 438 (1971); *Roberson v. Pruden,* 242 N.C. 632, 89 S.E. 2d 250 (1955); *Embler v. Embler,* 224 N.C. 811, 32 S.E. 2d 619 (1945). If the jury had believed the plaintiffs' allegations that the defendant had purchased the land under the circumstances as indicated, a constructive trust could have been declared; and the defendant could have been ordered to convey the property to the plaintiffs to comply with the agreement.

[3] The trial court further found that there was no consideration for the alleged promise of the defendant. It is necessary for the existence of a valid contract that there be consideration extending from each side. *Investment Properties v. Norburn,* 281 N.C. 191, 188 S.E. 2d 342 (1972); *Stonestreet v. Oil Co.,* 226 N.C. 261, 37 S.E. 2d 676 (1946). Had the jury believed the plaintiffs' evidence, it could have held that a valid contract had been established. The plaintiffs had agreed not to try to reinstate the loan but to allow the foreclosure sale to be held. They had further agreed to deed 8 or 10 acres above the driveway to the defendant for his consideration in carrying out the bargain. The defendant had agreed to purchase the property at the sale and deed it to the plaintiffs. He further agreed to pay the $3,000.00 necessary to satisfy the note and deed of trust. In return for his promise, he received the promise of the plaintiffs to deed to him the property in question. Thus, there were mutual promises and forebearances sufficient to support a bilateral contract. *Helicopter Corp. v. Realty Co.,* 263 N.C. 139, 139 S.E. 2d 362 (1964); *Foundation, Inc. v. Basnight,* 4 N.C. App. 652, 167 S.E. 2d 486 (1969).

There are other assignments of error presented by the appeal, but we do not deem it necessary to decide them inasmuch as they will probably not occur at a future trial. For the foregoing reasons we award a

New trial.

Chief Judge BROCK and Judge MORRIS concur.

ADOLPH KORNEGAY, T/A A. K. MOTORS v. GENE A. OXENDINE

No. 748SC102

(Filed 15 May 1974)

1. **Courts § 21— collision in Virginia — Virginia law governs**

Since the accident giving rise to the action occurred in Virginia, the case is governed by Virginia law.

2. **Automobiles § 75— stopping on highway — contributory negligence as matter of law**

Plaintiff's evidence did not show that his employee was contributorily negligent as a matter of law in stopping his vehicle partly on and partly off the road where such evidence tended to show that he had stopped for the purpose of helping a driver who had had mechanical breakdown, the driver of the disabled vehicle had placed reflectors at the rear of the vehicle, and plaintiff's employee had on his emergency flasher lights, his headlights and numerous running lights at the time of the collision in question.

3. **Automobiles § 76— hitting stopped vehicle — contributory negligence as a matter of law**

Defendant's evidence did not show that he was contributorily negligent as a matter of law in striking plaintiff's vehicle which was parked partly on and partly off the highway where such evidence tended to show that defendant first observed plaintiff's truck when he was 100 feet away from it, there were no lights on plaintiff's truck or on the disabled vehicle beside which it was parked, there were no flares or reflectors on the highway, and, when he saw the truck, defendant immediately swerved left but was unable to avoid striking the truck; therefore, the trial court erred in granting a directed verdict for plaintiff on defendant's counterclaim for personal injury and property damage.

APPEAL by plaintiff and defendant from *Perry Martin, Judge,* 28 May 1973 Session of Superior Court held in WAYNE County.

Plaintiff is the owner of a trucking business. Before sunrise on 25 November 1970 Billy Rudolph Garner, an employee of plaintiff, was driving one of plaintiff's trucks and collided with a truck operated by defendant. The accident occurred on U. S. Highway 301 near Jarratt, Virginia. Garner was injured and plaintiff's truck was heavily damaged. Plaintiff brought this action in the Superior Court of Wayne County, alleging that the accident was caused by defendant's negligence. Defendant counterclaimed, alleging that Garner's negligence had caused the accident, and seeking to recover for personal injuries and damage to his truck.

At the conclusion of all the evidence, the trial court granted a directed verdict for defendant on plaintiff's claim and a directed verdict for plaintiff on defendant's counterclaim. The court held that both Garner and defendant had been contributorily negligent as a matter of law. Both parties appealed.

Douglas P. Connor, and Jeffress, Hodges, Morris & Rochelle, by A. H. Jeffress, for plaintiff appellant.

Dees, Dees, Smith, Powell & Jarrett, by Tommy W. Jarrett, and J. Faison Thomson for defendant appellant.

BALEY, Judge.

The sole issue in this case is whether the trial court erred in holding both Garner and defendant contributorily negligent as a matter of law.

[1] Since the accident occurred in Virginia, the case is governed by Virginia law. *Kirby v. Fulbright,* 262 N.C. 144, 136 S.E. 2d 652.

[2] In determining whether plaintiff's employee Garner was contributorily negligent as a matter of law, the evidence must be viewed in the light most favorable to plaintiff. Considered in this perspective, plaintiff's evidence shows that during the early morning hours of 25 November 1970, while it was still dark, Garner was driving a tractor-trailer truck owned by plaintiff southward on U. S. Highway 301, a four-lane highway. He observed a Chevrolet van, operated by Willie Leroy Jefferson, on the northbound side of the highway. Jefferson was parked off the right shoulder, blinking his lights at Garner and signaling for help. Garner turned into the northbound lane, noticed that Jefferson had placed flares and reflectors on the highway

behind his van, and stopped to help Jefferson. Jefferson told Garner that his van would not start and that he needed jumper cables. Garner did not have jumper cables, so he and Jefferson drove to a nearby town and borrowed some. When they returned to Jefferson's stalled van, the reflectors were still on the road, but the flares had burned out. Garner stopped his truck with the cab just in front of Jefferson's van, and the trailer parallel to the van, partly on and partly off the highway. He let Jefferson out of the truck, so that Jefferson could give him directions as he maneuvered the cab as close as possible to the front of the van. It was necessary to park the truck in this position so that the batteries of the truck and van could be connected by the jumper cables. Jefferson had just got out of the Garner truck when defendant approached from the south and drove into the rear of plaintiff's trailer. When the collision occurred, all of the lights on Garner's truck were on, including the headlights, brake lights, numerous running lights on the trailer, and four blinking emergency flashers on the cab and trailer.

Va. Code § 46.1-248(a) provides:

> "No vehicle shall be stopped in such manner as to impede or render dangerous the use of the highway by others, except in the case of an emergency as the result of an accident or mechanical breakdown, in which case the emergency flashing lights of such vehicle shall be turned on . . . and the vehicle shall be removed from the roadway to the shoulder as soon as practicable . . . . "

In this case, according to plaintiff's evidence, Garner complied with the statute. He stopped in the highway because of an emergency, and he turned on his emergency flasher lights. It was not practicable for him to move off the roadway before the accident occurred. The Virginia courts have held that under the circumstances, stopping on the highway does not necessarily constitute negligence. *Cowles v. Zahn*, 206 Va. 743, 146 S.E. 2d 200 (1966); *Bonich v. Waite*, 194 Va. 374, 73 S.E. 2d 389 (1952). Under Va. Code § 46.1-255, when a vehicle is stopped at night on the roadway, the driver must place flares on the highway to warn approaching motorists; but the failure to display flares is not negligence when the driver has not yet had time to place them on the road. *Roberts v. Mundy*, 208 Va. 236, 156 S.E. 2d 593 (1967).

[3] When viewed in the light most favorable to defendant, the evidence does not show that defendant was contributorily

negligent as a matter of law. Defendant testified that when he approached the scene of the accident, proceeding northward on Highway 301, he did not see Garner's truck until he was 100 feet away from it. There were no lights on Garner's truck or Jefferson's van, and there were no flares or reflectors on the highway. The back of Garner's truck was gray in color and blended into the highway so that it was difficult to see. When defendant did see the truck ahead of him, he immediately swerved to the left but was unable to avoid striking it.

Va. Code § 46.1-270 requires every vehicle to be equipped with headlights sufficiently powerful to illuminate 100 feet away on low beam; but defendant did not violate this statute, since he saw Garner's truck at a distance of 100 feet. "[I]t has never been held as a principle of law in Virginia, that the operator of an automobile must so operate his vehicle that he can stop within the range of his lights, or within the range of his vision." *Body, Fender & Brake Corp. v. Matter*, 172 Va. 26, 31, 200 S.E. 589, 591 (1939); *Twyman v. Adkins*, 168 Va. 456, 463, 464, 191 S.E. 615, 618 (1937). The fact that a driver runs into the rear end of an unlighted vehicle at night does not establish his negligence in failing to keep a proper lookout. *Hagan v. Hicks*, 209 Va. 499, 165 S.E. 2d 421 (1969); *Allen v. Brooks*, 203 Va. 357, 124 S.E. 2d 18 (1962); *Crist v. Fitzgerald*, 189 Va. 109, 52 S.E. 2d 145 (1949).

The evidence in this case was sharply conflicting. Each party's evidence, if believed by the jury, would have justified a verdict in his favor. It is for the jury to decide which of the evidence should be believed. In taking the case from the jury and granting directed verdicts for each side, the trial court erred, and the parties are entitled to a new trial.

New trial.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. STEVE MAHLER

No. 7419SC372

(Filed 15 May 1974)

1. **Searches and Seizures § 3— sufficiency of affidavit to support search warrant**

An affidavit was sufficient to support a finding of probable cause and the issuance of a search warrant where the affidavit described with reasonable certainty the individual involved, the place to be searched, the contraband for which the search was to be made, the basis upon which probable cause was found, information furnished by a confidential informer, the informant's reliability, and additional information known to officers from observation and surveillance of the premises which supported the report given them by the informant.

2. **Criminal Law § 84; Narcotics § 3— failure to hold voir dire — admissibility of bags of marijuana**

Since the admissibility of bags of marijuana seized in a search of defendant's home depended upon a question of law and not one of fact, the trial court was not required to hold a voir dire hearing and make findings of fact before allowing the bags into evidence.

ON *certiorari* to review trial before *Seay, Judge,* 9 April 1973 Session of Superior Court held in CABARRUS County.

Defendant was tried upon an indictment charging possession of marijuana with intent to distribute. Three law enforcement officers testified for the State that on 4 February 1973 they obtained a search warrant and went to defendant's house at 706 Boyd Street in Kannapolis. They found defendant at home, searched the house, and found several plastic bags containing a total of 36.90 grams of green vegetable material which was later analyzed and found to be marijuana. The State offered the bags of marijuana in evidence at the trial. Defendant moved to suppress this evidence and quash the search warrant, but the court denied his motion and admitted the evidence.

There was no voir dire hearing upon the admissibility of this marijuana, but there was a voir dire hearing to determine the admissibility of a confession of defendant to the officers that he had bought the marijuana in Charlotte and that he sold marijuana for a living. The court found that this confession of defendant was made freely, understandingly, and voluntarily after having been advised of his constitutional rights, and it was held to be admissible although the record does not disclose that it was actually admitted before the jury.

Defendant did not testify but offered the search warrant and affidavit in evidence. He was found guilty as charged and was sentenced to a prison term of three to five years. This Court granted his petition for certiorari.

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

Johnson & Jenkins, by Cecil R. Jenkins, Jr., for defendant appellant.

BALEY, Judge.

[1] Defendant contends that the court should have granted his motion to quash the warrant authorizing the search of his house and suppress the evidence obtained by the search. He argues that the warrant was invalid, because the magistrate who issued it was not given sufficient information to justify a finding of probable cause for the search.

The affidavit submitted to the magistrate as a basis for the search warrant reads as follows:

"STATE

v.

Steve Mahler W/M
706 Boyd Street, Kannapolis, N. C.

Lt. H. E. Tucker, Kannaplis Police Dept., Kannapolis, N. C., being duly sworn and examined under oath, says under oath that he has probable cause to believe that Steve Mahler has on his person or/and on his premises certain property, to wit: Marihuana, MDA, THC. . . . The facts which establish probable cause for the issuance of a search warrant are as follows: On 2-4-73 at 9:00 PM a confidential informer who has proven reliable in the past stated to me that Steve Mahler who lives at 706 Boyd Street had in his possession at this time a large amount of marihuana and other illegal drugs for the purpose of sale in his home at 706 Boyd Street. The informer stated that Steve Mahler has been selling drugs for some time. Officers of this department have on recent occasions have had this under surveillance and have observed known drug users enter and leave the house. The informer gave us information one

week ago leading to the arrest and confiscation of illegal drugs, from one Robert Farrell Dixon.

s/ H. E. TUCKER
Signature of Affiant"

This affidavit describes with reasonable certainty the individual involved, the place to be searched, the contraband for which the search is to be made, and the basis upon which probable cause was found. It sets out the information furnished by a confidential informant, explains why the informant was reliable, and contains additional information known to the officers from observation and surveillance of the premises which supported the report given to them by the informant. The affidavit could perhaps be strengthened by including information showing why or how the informant knows about the presence of the contraband, but it is clearly sufficient to support a finding of probable cause and the issuance of the warrant. *State v. Ellington,* 284 N.C. 198, 200 S.E. 2d 177; *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779; *United States v. Harris,* 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971).

[2] Defendant complains that the trial court did not hold a voir dire hearing and issue findings of fact concerning the admissibility of the bags of marijuana seized in the search of his home. Often the admissibility of evidence depends upon a disputed question of fact—for instance, whether the defendant consented to a search, whether an identification procedure was unduly suggestive, or whether a confession was voluntary. In such a situation, the court must hold a voir dire hearing, and if the evidence is admitted the court must issue findings of fact explaining why it is admissible. *State v. Vestal,* 278 N.C. 561, 578, 180 S.E. 2d 755, 766; *State v. McVay,* 277 N.C. 410, 177 S.E. 2d 874; *State v. Fox,* 277 N.C. 1, 24, 175 S.E. 2d 561, 575. But in this case the admissibility of the bags of marijuana was a question of law. Since the affidavit to obtain a search warrant was sufficient on its face to support a finding of probable cause, the warrant was valid and the evidence was admissible. No disputed issue of fact was involved, and it was unnecessary for the court to hold a voir dire hearing and make findings of fact.

The rights of defendant have been fully protected. The evidence of his guilt is plain. No prejudicial error has been shown in the trial.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES LEWIS HARMON

No. 746SC171

(Filed 15 May 1974)

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

The trial court did not err in allowing an in-court identification of defendant where the evidence on *voir dire* indicated that the victim looked directly into the face of defendant when he was robbed, the victim picked defendant's photograph out of a group shown him by police, the photographic identification procedure was carried out properly and without undue suggestiveness, and, regardless of any possible defects in the photographic identification, the victim's in-court identification testimony was based on the original observation of defendant at the time of the robbery.

2. **Criminal Law § 88— cross-examination — limitation proper**

The trial court acted within its discretion in limiting defendant's cross-examination of the robbery victim where the questions asked were of doubtful relevance either to the issue of guilt or innocence or for purposes of impeachment.

3. **Assault and Battery § 16; Robbery § 5— armed robbery — assault with deadly weapon — failure to submit lesser degrees of crime — no error**

In a prosecution for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in failing to instruct the jury on the lesser included offenses of common law robbery, larceny from the person, and simple assault, though the State offered no evidence specifically indicating that defendant used a deadly weapon, since the uncontradicted evidence showed that the victim was cut severely, and such a wound could not have been inflicted except by the use of a knife or other deadly weapon.

4. **Robbery § 5— armed robbery — felonious taking — instruction on state of mind**

Trial court's instruction in an armed robbery case that to find defendant guilty the jury must find that at the time of the taking defendant intended to deprive the victim of the use of the property permanently and that defendant knew he was not entitled to take the property was a sufficient description of the state of mind which is necessary to commit the crime of armed robbery, and it was not necessary that the court use the words "felonious taking" in its instruction.

State v. Harmon

APPEAL by defendant from *Rouse, Judge,* 8 October 1973 Session of Superior Court held in HERTFORD County.

Defendant was indicted for armed robbery and for assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tended to show that on the night of 3 May 1973 defendant stabbed Robert Edwin Hall in the stomach and removed a wallet containing $530 from Hall's pocket. Because of the injuries inflicted by defendant, Hall was hospitalized for ten days, and nineteen stitches were taken in his stomach.

Defendant testified that he had not robbed or stabbed Hall. The jury found defendant guilty of armed robbery and assault with a deadly weapon inflicting serious injury. From judgment imposing a prison sentence of 28 to 30 years, defendant appeals.

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

Cherry, Cherry and Flythe, by Thomas L. Cherry and Ernest L. Evans, for defendant appellant.

BALEY, Judge.

[1] The identification of defendant was the principal point at issue in the trial court. The victim, Robert Edwin Hall, testified that the defendant was the man who robbed and stabbed him. Defendant contends that this identification testimony should not have been admitted. "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 proferred 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. In this case the court complied fully with the requirements of the *McVay* case. A voir dire hearing was held, and at the conclusion of the hearing the court made findings of fact. In these findings of fact the court stated that Hall looked directly into the face of defendant when he was robbed; that after the robbery, a police officer showed Hall a group of photographs,

and Hall picked out a photograph of defendant; that this identification procedure was carried out properly and without undue suggestiveness; and that regardless of any possible defects in the photographic identification procedure, Hall's in-court identification testimony was based on his original observation of defendant at the time of the robbery. These findings of fact are amply supported by the evidence, and they fully justify the court's decision to admit the identification testimony into evidence.

[2] The trial court sustained objections to questions by defense counsel on cross-examination of Hall, but there are no answers placed in the record from which any determination of possible prejudice could be made. The questions were of doubtful relevance either to the issue of guilt or innocence or for purposes of impeachment. The court was clearly within its discretion in limiting cross-examination when it sustained these objections. 1 Stansbury, N. C. Evidence (Brandis rev.) §§ 35, 42; *Potts v. Howser,* 274 N.C. 49, 161 S.E. 2d 737; *Foxman v. Hanes,* 218 N.C. 722, 12 S.E. 2d 258.

[3] Defendant argues that since the State offered no evidence specifically indicating that defendant used a deadly weapon, the court should have instructed the jury on the lesser included offenses of common law robbery, larceny from the person and simple assault. The uncontradicted evidence shows that the victim, Hall, was cut severely, and that nineteen stitches were required to close the wound. Obviously, such a severe injury could not have been inflicted except by the use of a knife or other deadly weapon, and therefore the court acted properly in refusing to charge on the lesser included offenses.

[4] Defendant asserts that the trial court failed to instruct the jury properly on "felonious taking." "Felonious taking" is an essential element of the crime of armed robbery, and it means " '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 judge must instruct the jury on this element of the crime, but he need not use the specific words "felonious taking"; he is only required to describe in accurate terms the state of mind necessary for the crime. *Id.; State v. Spratt,* 265 N.C. 524, 144 S.E. 2d 569. In this case the court charged as follows:

"For you to find the defendant guilty of robbery with a dangerous weapon, the State must prove seven things beyond a reasonable doubt.

* * *

"Fourth, that at the time of the taking [of Hall's property], the defendant intended to deprive him of its use permanently.

"Fifth, the defendant knew he was not entitled to take the property."

This is a sufficient description of the state of mind which is necessary to commit the crime of armed robbery. *State v. Scarborough,* 20 N.C. App. 571, 202 S.E. 2d 358.

The other assignments of error concerning the summarizing of evidence and instructions in the charge have been carefully considered and determined to be without merit.

Defendant has received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ELVIN DIRIS SETZER

No. 7425SC336

(Filed 15 May 1974)

Constitutional Law § 30— speedy trial

Defendant was not denied his right to a speedy trial on a felonious assault charge by the delay between his arrest on 10 September 1972 and his trial in October 1973 where a preliminary hearing was held on 21 September 1972 and bail was set, an indictment was returned in December 1972, the case was calendared for trial in February 1973 but was continued so that an attorney could be appointed for defendant, and the case was not reached for trial at the March, April, July and August sessions of court because of prior cases.

APPEAL by defendant from *Chess, Special Judge,* 22 October 1973 Session of CATAWBA Superior Court.

The defendant was tried on a bill of indictment proper in form charging him with a felonious assault upon William L. Davis with a deadly weapon, a knife, with the felonious intent to kill and murder the said Davis, inflicting serious injuries not resulting in death. To this charge defendant entered a plea of not guilty, and a jury verdict found him guilty of assault with a deadly weapon inflicting serious injury. The defendant was sentenced to a term of five years in prison; and from this sentence, he appealed.

The evidence for the State tended to show that on the night of 10 September 1972, John Gordon Clark was the manager of a poolroom in Newton. He was acquainted with the defendant; and on that night, the defendant was in the poolroom about 10:00 p.m. and then again about midnight. On the second visit of the defendant to the poolroom, he desired to purchase some beer and Clark refused to sell him any as it was after hours for the sale of beer.

Between midnight and 1:00 a.m., Clark had the receipts of the business with him and was on his way home. Clark and the defendant lived in the same neighborhood. Clark was accompanied by Paul Swink, William Davis, and Shirley Lail. When Clark and his companions reached the front of the house where the defendant lived, the defendant came out. The defendant told Clark that he had said something that the defendant did not like, and thereupon the defendant struck Clark in the face with his fist. Clark was knocked down and rendered unconscious and knew nothing about what occurred thereafter. The defendant then began to argue with Shirley Lail. At this time, Davis approached the defendant, and the defendant took a pocketknife and stabbed Davis in the left lung and proceeded to cut him rather severely about his stomach and upper part of his right leg. Davis was knocked to the ground, and the defendant was on top of him cutting him when Davis became unconscious and recovered consciousness in the hospital. Davis had not been acquainted with the defendant prior to this time.

A Mrs. Townsend testified that she lived across the street from the defendant, and on the night in question, she heard a disturbance and went out of her home and saw Davis lying on the ground unconscious and the defendant was on top of him with a knife cutting him. She also testified that she heard a niece of the defendant say, "Don't kill him. You already cut

him. Isn't that enough?" Mrs. Townsend called the police and an ambulance.

The defendant did not testify in his own behalf, but his sister and nephew did testify in his behalf to the effect that on the evening in question, the defendant went out of his house down to the street and an altercation ensued between the defendant, Clark, and Davis. Clark was knocked down by the defendant; and Davis, in turn, knocked the defendant down. Thereafter, the defendant returned to his house and remained in the house the rest of the evening. At the time the defendant returned to his house, Davis was walking down the street and was not injured.

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

Patrick, Harper and Dixon by Stephen M. Thomas for defendant appellant.

CAMPBELL, Judge.

The evidence in the light most favorable for the State was ample to take the case to the jury. The defendant has brought forward many assignments of error, including the failure to dismiss on the ground that the defendant was deprived of his right to a speedy trial. The offense occurred 10 September 1972. The defendant was arrested the same day, and he was released from jail on 18 September 1972, upon bail bond. Probable cause was found at a preliminary hearing on 21 September 1972, and bail bond was fixed at $750.00. A bill of indictment was presented to the Grand Jury in October 1972 but was continued for lack of witnesses. A true bill of indictment was returned at the December 1972 session of court. The case was placed on the calendar for trial 7 February 1973; and at that time, the defendant did not have an attorney and was adjudged to be an indigent and counsel was appointed for him. The trial was continued.

Thereafter, the case was placed upon the trial calendar at the March, April, July and August court sessions. The case was not reached for trial, however, due to prior cases. On 24 October 1973, the defendant filed a motion to dismiss the case for failure to prosecute and provide the defendant with a speedy trial. The trial court denied the motion and found that the de-

fendant had not shown any unreasonable delay on the part of the State in bringing the case to trial. We find no error in the ruling of the trial court in this regard.

Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in the circumstances of each case. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973). In the instant case the evidence adduced at the hearing on the motion of the defendant supported the findings of fact by the judge, and those findings supported his conclusion.

We have considered the numerous other exceptions brought forward by the defendant, and we do not find sufficient merit therein to justify awarding a new trial.

The defendant was afforded a trial free of prejudicial error. It was a matter for the twelve, and they found against the defendant.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. CLARENCE WHEELER AND JERRY MARTIN

No. 7420SC247

(Filed 15 May 1974)

1. **Robbery § 5— armed robbery — sufficiency of instructions**

The trial court's instruction to the jury in an armed robbery case was sufficient where it included a reading of G.S. 14-87 in its entirety, the court set out specifically each of the elements of the offense, and the court then applied each of the elements of the offense to the evidence brought out by both parties to the trial.

2. **Constitutional Law § 34; Criminal Law § 26— armed robbery and felonious assault — two distinct offenses**

Since armed robbery and felonious assault are separate and distinct offenses, it was not error for the trial court to charge the jury on both offenses and sentence defendants for both offenses, though both arose out of the same conduct.

State v. Wheeler

APPEAL by defendants from *Martin (Robert M.), Judge*, at the 27 August 1973 Session of UNION Superior Court.

Heard in the Court of Appeals 19 April 1974.

The defendants, Clarence Wheeler and Jerry Martin, were indicted along with one James A. Bumgardner for felonious armed robbery of Mrs. Annie Lemmonds in Union County on or about 19 May 1973 and were also charged with an assault with a deadly weapon inflicting serious injury not resulting in death upon Mrs. Lemmonds. At the trial, Bumgardner testified for the State.

The State's evidence tended to show that the defendants and Bumgardner had been drinking before going to the home of Mrs. Lemmonds. When Mrs. Lemmonds answered the door, the three men shouldered past her and began running all through the house and saying they were going to rob the old woman. Bumgardner testified that at this point he left and got into the car. Mrs. Lemmonds testified that she told them to leave or she would call the police. She further testified that Bumgardner then yanked the phone out of the wall. Mrs. Lemmonds then told them that she had one $5.00 bill which she would get for them. She got her pocketbook and took out the $5.00 bill which she laid on a chair. Bumgardner then knocked Mrs. Lemmonds down and emptied the contents of the pocketbook onto the floor. There was no other money. Mrs. Lemmonds then testified that as Bumgardner started out, he struck her across the back of the neck with a knife he had gotten from her kitchen, picked up the telephone and walked out with the others. Bumgardner testified that he was out in the car and that he did not know what, if anything, Wheeler and Martin did to Mrs. Lemmonds. Bumgardner testified that Wheeler and Martin came out of the house with a telephone and knife, or knife handle, which they threw out of the car window about a quarter of a mile away. Martin allegedly then told Bumgardner that he would kill Bumgardner if he said anything about what had happened. The knife blade was found in the hallway of Mrs. Lemmonds' home and bore defendant Wheeler's fingerprints. The telephone and knife handle were found one quarter mile from Mrs. Lemmonds' home. From a verdict of guilty as charged and concurrent sentences of 20-25 years for the armed robbery and 9-10 years for the assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, both defendants appealed.

Attorney General Robert Morgan by Associate Attorney Jerry J. Rutledge for the State.

Coble Funderburk for defendant appellee Martin.

Joe P. McCollum, Jr., for defendant appellee Wheeler.

CAMPBELL, Judge.

[1] Defendants assign as error the failure of the trial court to define correctly the offense of armed robbery in that the trial court left out an essential part of the statute on armed robbery, G.S. 14-87, which reads: "[W]hereby the life of a person is endangered or threatened. . . ." The portion of the charge to which defendants except reads as follows:

> "Robbery is the felonious taking, members of the jury, or attempt to take, of money or of goods of any value from the person of another or in his presence against his will by violence or by putting him in fear. The gist of the offense is the taking or the attempt to take by force or putting him in fear.
>
> Now, armed robbery, members of the jury, is the taking of money or goods of any value from the person of another or in his presence, against his will by violence or putting him in fear by means of a deadly weapon or other dangerous weapon, implement or means."

Immediately prior to the above portion of the charge the trial court read to the jury G.S. 14-87 in its entirety. The trial court then went on to set out specifically each of the elements of the offense. Finally the trial court applied each of the elements of the offense to the evidence brought out by both parties to the trial. The part of the instruction which the defendants contend was error has been lifted out of context. It was a short statement designed to point out that "armed robbery" is not the same as the common-law offense "robbery." A reading of the full instruction given by the trial court shows that each of the essential elements of the offense was fully explained and that the law with respect to each element was applied to the evidence thereon. Viewed contextually the charge was correct. See *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1970), and *State v. Powell*, 277 N.C. 672, 178 S.E. 2d 417 (1970).

[2] The defendants also assign as error the instruction of the trial court that the jury must consider the charge of assault

with a deadly weapon with intent to kill inflicting serious injury regardless of how they answered the charge of armed robbery. Defendants also assert that it was error to sentence on both offenses. Defendants' contention is that both offenses arose out of the same conduct and that therefore separate judgments should not be allowed. However, neither the infliction of serious injury nor an intent to kill is an essential element of the charge of armed robbery. *State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971). The armed robbery and felonious assault charges upon which the defendants were convicted are separate and distinct offenses, and it was not error for the trial judge to charge the jury as he did or to sentence the defendants as he did.

We have reviewed defendants' other assignments of error and find them without merit. We find no error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. RUDOLPH BLACKBURN

No. 7425SC310

(Filed 15 May 1974)

1. **Criminal Law § 87— leading questions — allowance discretionary**

The trial court did not err in allowing the District Attorney to ask leading questions of the State's witnesses.

2. **Criminal Law § 42; Robbery § 3— attempted armed robbery — hat worn by defendant — admissibility**

The trial court in an attempted armed robbery case did not err in allowing into evidence a white Panama hat found at the crime scene, since the hat was identified by an eyewitness as the hat worn by the defendant during the attempted robbery and by the officer who found the hat fifteen feet from the scene of the crime as the hat he had found.

3. **Criminal Law § 87— leading questions — allowance proper**

The trial court did not abuse its discretion in refusing to allow defense counsel to ask leading questions of defendant.

APPEAL by defendant from *Falls, Judge*, 5 November 1973 Session of Superior Court held in CATAWBA County. Argued in the Court of Appeals 18 April 1974.

Defendant was tried upon a bill of indictment charging attempted armed robbery.

The State's evidence tended to show that on 11 April 1973 at approximately 9:50 p.m., a Negro male wearing a white hat, knit shirt and denim jacket and trousers, attempted to rob the Tas-T-O Donut Shop in Hickory, North Carolina. He pulled a pistol from his pocket and demanded money. At this point, Nancy Hester, an employee of the Donut Shop, reached for a pistol. The Negro male, identified by Nancy Hester as the defendant, pulled the trigger of his pistol, but the weapon misfired. As defendant fled the scene, Mrs. Hester fired through a window at him.

Ten minutes after receiving a description of defendant at the Tas-T-O Shop, police officers of the Hickory Police Department saw defendant along with two other individuals three blocks from the Donut Shop. Defendant was stopped, and when asked about a white Panama hat found near the scene of the robbery attempt, fled to his home. Officers pursued defendant to his home, entered defendant's home, and, after having to scuffle with and push members of the household out of the way, seized defendant and placed him under arrest.

Defendant's evidence tended to show that on the night in question he went to visit his cousin. Defendant was wearing a knit shirt with dungarees and a denim jacket, but was not wearing a hat on the night in question. Defendant testified that he ran when confronted by the officers because of fear of getting into trouble. Defendant testified that the officers entered the house without knocking and dragged him out of the house without informing him of his arrest or constitutional rights.

Witnesses for the defendant offered corroborative testimony as to the police breaking into the house, scuffling with the occupants, and dragging defendant away without informing him he was under arrest.

From a verdict of guilty and a sentence of nine to fifteen years, defendant appealed to this Court.

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

Chambers, Stein, Ferguson & Lanning, by Karl Adkins, for the defendant.

BROCK, Chief Judge.

[1] Defendant contends the trial court committed error in allowing the District Attorney to continuously lead State's witnesses.

An examination of the questions enumerated in the exceptions by defendant fails to disclose objectionable leading by the District Attorney. Although the questions were leading in nature, their control is a matter of discretion vested in the trial court, reviewable only for an abuse of discretion. *State v. Painter*, 265 N.C. 277, 144 S.E. 2d 6. No abuse of judicial discretion appears. This assignment of error is overruled.

Defendant contends the trial court committed error in admitting into evidence testimony by the State's witnesses which was incompetent, irrelevant, immaterial, remote, inflammatory, conclusive and prejudicial to the defendant.

We have reviewed both the questions and responses which defendant has enumerated as objectionable. In our opinion, the answers are responsive and relevant to the issue. This assignment of error is overruled.

[2] Defendant contends the trial court committed prejudicial and reversible error by admitting into evidence the white Panama hat found at the scene. Both Nancy Hester, the witness who was confronted by the defendant at the robbery scene, and Officer Luther Hathcock, who found that hat fifteen feet from the entrance to the Donut Shop, identified the hat as the hat worn by the defendant and as the hat found at the scene, respectively. This assignment of error is overruled.

[3] Defendant contends the trial court committed error in refusing to admit testimony from the defendant which was relevant and material to his defense.

During redirect examination, defendant testified that the police officers shot at and pursued defendant to his home; that the officers broke into the house without knocking or stating their purpose; that they grabbed defendant and choked him and dragged him to the car; that they did not arrest defendant at his home, and that they failed to advise him of his constitutional rights. Defense counsel then asked defendant:

"Q. While kicking you and beating you at the car?

"MR. GREENE: Object to that.

"COURT: Sustained."

The trial court then cautioned defense counsel on leading the witness or suggesting answers to the question.

Control of leading questions is discretionary in the trial court and its ruling will not be upset except for abuse of discretion. No abuse of discretion appears in the ruling of the Court. This assignment of error is overruled.

In our opinion, defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and BALEY concur.

NATHAN THOMAS SCOTT AND ALLEN HOLMES v. TOM SMITH

No. 744DC76

(Filed 15 May 1974)

1. **Contracts § 27— terms of agreement — jury issue**

The differing contentions of the parties as to the terms of an agreement for partial payment of an amount owed for bulldozer work on defendant's property presented a valid issue for jury determination.

2. **Appeal and Error § 49— exclusion of evidence — same testimony previously admitted**

Defendant was not prejudiced by the exclusion of testimony which was substantially the same as testimony previously given during direct examination and under cross-examination.

3. **Evidence § 45— opinion testimony based on opinions of others**

In an action to recover for bulldozer work done on defendant's land, the trial court properly excluded defendant's opinion testimony as to the value of the work based on opinions gathered from "three 'dozer people."

APPEAL by defendant from *Crumpler, District Court Judge,* 7 August 1973 Session of District Court held in DUPLIN County. Argued in the Court of Appeals 16 April 1974.

The plaintiffs agreed with the defendant that plaintiffs would clear and disc defendant's land with two bulldozers at

the rate of $15.00 per hour, not to exceed $125.00 per acre. Work commenced in December, 1970, and continued into January, 1971, at which time plaintiffs ceased clearing operations due to weather conditions which left the land too wet for bulldozer work. Defendant was to advise plaintiffs when the job site became dry enough to permit plaintiffs to return to the job site and complete the task.

Plaintiffs approached defendant seeking payment for the work already completed, estimated at $1,087.50. Defendant agreed to pay the plaintiffs $900.00 of this amount until plaintiffs could return to finish the job. Defendant later refused to pay the $900.00, and plaintiffs sued to recover upon the agreement.

The matter was tried before a jury which returned a verdict in favor of the plaintiffs in the amount of $900.00. The trial court entered judgment accordingly, and defendant appealed to this Court.

Douglas P. Connor for the plaintiff-appellees.

Donald P. Brock for the defendant-appellant.

BROCK, Chief Judge.

[1] Defendant contends that the trial court erred in refusing to allow defendant's motion for a directed verdict at the close of plaintiffs' evidence and at the close of all of the evidence in that plaintiffs failed to prove substantial compliance with their part of the agreement. Defendant's contention is based upon the premise that this agreement is a whole contract, and that plaintiffs' failure to return to the job site to complete the work agreed upon is indicative of nonperformance and lack of readiness to perform.

Plaintiffs proceeded on the theory of a new agreement between the parties which provided for plaintiffs to receive $900.00 and the balance would be held back until defendant called the plaintiffs back to complete the job. The new agreement provided that $900.00 was to be paid to the plaintiffs for work already completed; the balance is payable only when defendant called the plaintiffs back to the site to complete the job.

The differing contentions of the parties presented a valid issue for jury determination. Clearly the jury adopted plaintiffs' view of the agreement.

[2] Defendant contends the trial court committed error in not allowing testimony of the defendant which would have shown defendant was ready, able and willing to perform his part of the contract upon substantial performance by the plaintiffs. Defendant admits in his brief that the evidence " . . . corroborates and reenforces . . . earlier testimony." The testimony was substantially the same as testimony given during direct examination and under cross-examination. Defendant has failed to demonstrate how the exclusion of this testimony was prejudicial in the trial. This assignment of error is overruled.

[3] Defendant also contends the trial court committed error in refusing to allow defendant's opinion testimony as to the cost of clearing the land following the work done by plaintiffs. Defendant contends the testimony would have shown the detrimental effect of plaintiffs' work rather than an improvement of the land as plaintiffs have alleged.

Defendant's opinion was based upon opinions gathered from "three 'dozer people." Defendant's testimony was to the effect that these three people viewed his property, and all three " . . . would rather go in ground that was already standing up, than to take over where they [plaintiffs] quit and cleared." Defendant had no independent opinion of the before and after value of the land. Defendant's relation of what "three 'dozer people" said was properly excluded.

Defendant argues that the trial court committed error in its charge to the jury. We have reviewed the court's instructions to the jury in its entirety, and find the charge fairly states the contentions of the parties and adequately applies the appropriate principles of law. We find no prejudicial error in the charge.

No error.

Judges PARKER and BALEY concur.

STATE OF NORTH CAROLINA v. ENOS LEE WALLACE

No. 7426SC325

(Filed 15 May 1974)

1. **Criminal Law § 89— impeachment of defendant — commission of specified offenses**

A witness may, for the purpose of impeachment, be examined as to whether he has committed named criminal offenses and acts of degrading conduct which are not the subject of the case being tried and for which he has not been convicted.

2. **Criminal Law § 114— instructions — statement that "we are trying" defendant**

The trial court's statement to the jury that "we are trying" the defendant under a certain bill of indictment did not imply to the jury that the trial judge was a part of the solicitor's machinery for prosecution.

APPEAL by defendant from *Grist, Judge*, at the 17 December 1973 Schedule C Session of MECKLENBURG Superior Court.

Heard in the Court of Appeals 22 April 1974.

Defendant was indicted and convicted of armed robbery, a violation of G.S. 14-87. The evidence for the State tended to show that on the afternoon of 26 July 1973, two men, later identified as the defendant and one Ralph Laney, walked into the Wilgrove Superette in Charlotte, North Carolina. The two men walked to the meat counter in the rear of the store and asked Mr. Dorsey W. McElroy, proprietor of the store, if he had a certain type of bologna, which Mr. McElroy did not have. Outside the store in a car was a young girl, Lisa Case, who testified that at the time in question, she saw the defendant go into the Wilgrove Superette and then come back out. Miss Case then left. Mr. McElroy testified that the defendant and Laney did go outside but they returned a few moments later. The defendant, who this time had a shotgun in hand, stated that their car had overheated and asked if they might have some water. Mr. McElroy went to get the water but the defendant said, "This is a stickup." Mr. McElroy raised his hands. Laney picked up a butcher knife on the drainboard, came over to Mr. McElroy and took his wallet, which contained three one dollar bills. Mr. McElroy was then locked in the storage room. Sometime shortly thereafter, Mr. McElroy removed himself from the storage room by going through a rear door and called the police. Mr.

McElroy then went back into the store to see what was missing. The cash register was open and some forty dollars in currency and three to four dollars in silver had been taken as well as a pistol which had been in a drawer underneath the cash register.

The defendant, testifying in his own behalf, stated that when he arrived at the Wilgrove Superette, another car was there with the hood up. The defendant recognized one of the people in the other car as being a man named Laney. The defendant testified that he went into the store, asked for the bologna, found it was unavailable, and then left with the people he had come with, Willie Hamilton and David Hamilton. The Hamilton brothers testified that they came to the Wilgrove Superette with the defendant Enos Lee Wallace, who went inside to ask for some bologna. When Wallace returned empty-handed, they left, leaving behind the other car.

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

Myers & Collie by George C. Collie for defendant appellant.

CAMPBELL, Judge.

[1] The defendant contends that it was error to allow the Solicitor to question the defendant about committing specific criminal acts raising the inference he had been indicted or charged but not convicted. The Supreme Court of North Carolina has held on numerous occasions that the witness may, for the purpose of impeachment, be examined as to whether he has committed named criminal offenses and acts of degrading conduct which are not the subject of the case being tried and for which he had not been convicted. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973) and cases there cited. But see *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

[2] The defendant also assigns as error and a violation of G.S. 1-180 the statement of the trial judge in the opening of his charge which reads:

> "Now, members of the jury, in the case in which we are trying the defendant Enos Lee Wallace is charged in a bill of indictment as follows: . . . "

The defendant contends that the trial judge's use of the phrase "we are trying" conveyed to the jury the inference that the trial

judge was part of the solicitor's machinery for prosecution. The judge, jury, solicitor and defense counsel are all participants in a trial. It is obvious that the trial judge intended to include everyone in the courtroom in his term "we." In *State v. Hollingsworth,* 11 N.C. App. 674, 182 S.E. 2d 26 (1971), this Court stated, " . . . It must appear with ordinary certainty that the court's language, when fairly interpreted, was likely to convey an opinion to the jury and could reasonably have had an appreciable effect on the result of the trial. . . . " The defendant has failed to show that he has been prejudiced in any way by the remarks of the trial judge.

Finally, the defendant assigns as error the failure of the trial court sufficiently to explain to the jury the crime of armed robbery and to apply it to the evidence in the case. However, the trial court fully outlined each of the elements of the offense of armed robbery, recounted the evidence and charged the jury as to what facts they had to find which would supply each element of the crime. The charge was full, complete and free from prejudicial error. We find no error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. TOMMY WAYNE WILLIAMS

No. 7414SC278

(Filed 15 May 1974)

Assault and Battery § 15— discharging firearm into occupied dwelling — instructions — wilful act — knowledge of occupancy

In a prosecution for wilfully discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1, the trial court erred in instructing the jury that in order to find defendant guilty the jury must find "that the defendant acted wilfully or wantonly which means that he must have known that one or more persons were in the dwelling," since the instruction equated wilful and wanton conduct with knowledge of occupancy and thereby attempted to condense two separate elements of the crime into one.

APPEAL by defendant from *Clark, Judge,* 22 October 1973 Session of DURHAM Superior Court.

Heard in the Court of Appeals 19 April 1974.

Defendant was indicted for discharging a firearm into an occupied dwelling.

Defendant and Ronnie Coy Hester engaged in a fight about 1:00 a.m. on 9 June 1973 outside a restaurant. After the fight, Hester went home, got out his rifle, unlocked his front door, and "sat on the couch and waited" with the lights off. About 4:30 a.m., an automobile stopped in front of Hester's house. A man armed with a pistol, whom Hester identified as defendant, leaned out the car window with a pistol and fired five shots into Hester's dwelling.

The only witness for the defense, defendant's grandmother, stated that defendant arrived home shortly before 11:00 p.m. on the night of 8 June 1973; that his face was cut and swollen; that his finger "was chewed"; that defendant said he was involved in a fight; and that she bandaged his wounds. The witness also testified that she was a light sleeper; that she checked on defendant several times during the night; and that defendant did not leave the house again that night.

Upon a verdict of guilty, defendant was sentenced to a prison term of 5-7 years. Defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Roy A. Giles, Jr., for the State.

W. Paul Pulley, Jr., by Elisabeth S. Petersen, for defendant appellant.

CAMPBELL, Judge.

The statute G.S. 14-34.1 under which defendant was indicted reads as follows:

> "*Discharging firearm into occupied property.*—Any person who wilfully or wantonly discharges a firearm into or attempts to discharge a firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a felony punishable as provided in § 14-2."

This statute was enacted for the protection of occupants of the premises, vehicles, and other property described in the statute. A violation is a serious crime. A homicide committed in the perpetration of the felony can result in conviction for murder in the first degree under the felony murder rule of G.S.

14-17. *State v. Tinsley,* 283 N.C. 564, 196 S.E. 2d 746 (1973); *State v. Williams,* 284 N.C. 67, 199 S.E. 2d 409 (1973).

A person is guilty of the felony created by G.S. 14-34.1 "if he intentionally, without legal justification or excuse, discharges a firearm into *an occupied building* with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons." *State v. Williams, supra.* In the instant case the learned trial judge instructed the jury:

> "Now for you to find the defendant guilty, you must be satisfied from the evidence and beyond a reasonable doubt of the following: First, that the defendant used a firearm. I instruct you that a pistol, a .38 caliber or thereabouts, is a firearm; second, that he discharged it into a dwelling, a duplex house or apartment; third, that the dwelling was occupied at the time that (the gun was discharged; and fourth, and last, that the defendant acted willfully or wantonly which means that he must have known that one or more persons were in the dwelling or apartment), and if you do not find all of these things and find so from the evidence and beyond a reasonable doubt it would be your duty to return a verdict of not guilty."

The defendant duly excepted to the portion of the charge set out above in parentheses.

Defendant asserts that this instruction equated wilful and wanton conduct with knowledge of occupancy of the building and attempted thereby to condense two separate elements of the crime into one.

We are of the opinion that this exception is well taken; and while we are advertent to the fact that it purports to be from "Pattern Jury Instructions for Criminal Cases in North Carolina," we think it is incorrect and that the correct definition as to what constitutes the offense is the quotation set out above from *State v. Williams, supra.*

Since the case must be tried again, we will not discuss the other assignments of error.

New trial.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES PERRY, JR.

No. 749SC285

(Filed 15 May 1974)

1. **Homicide § 21— cause of death — sufficiency of evidence**

The State's evidence was sufficient to prove the cause of death in a homicide case where two witnesses testified they saw defendant shoot decedent with a shotgun and a medical witness testified that internal injuries caused by a shotgun wound appeared to be the cause of death.

2. **Homicide § 30— second degree murder — gun in decedent's pocket — failure to instruct on manslaughter**

In this second degree murder prosecution, evidence that a gun was found in decedent's pocket did not require the court to instruct on voluntary manslaughter where there was no evidence that the two eyewitnesses or defendant knew decedent had a gun on his person or that deceased made a move to go to his pocket.

APPEAL by defendant from *McLelland, Judge,* at the 5 November 1973 Criminal Session of GRANVILLE Superior Court.

Heard in the Court of Appeals 19 April 1974.

The defendant, James Perry, Jr., was indicted for first-degree murder, but the State chose to prosecute him for second-degree murder. James Moseley and William Thornton testified for the State that they and the deceased John Hobgood were at the Delphi Filling Station in Oxford, North Carolina, on the evening of 28 July 1973. Hobgood apparently owned the Delphi Filling Station and Moseley worked for him. The three men were sitting or standing around the door to the station when the defendant approached carrying a shotgun. When asked what he was doing with the gun, defendant stated, "I think I owe you something and I'm going on and pay you." The defendant then loaded the shotgun and at point blank range shot the deceased, John Hobgood. Moseley and Thornton scattered. From a verdict of guilty of second-degree murder and a sentence of 30 years, the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Roy A. Giles, Jr., for the State.

Watkins, Edmundson & Wilkinson by C. W. Wilkinson, Jr., for defendant appellant.

CAMPBELL, Judge.

[1] Defendant assigns as error the failure of the trial court to grant his motion for judgment as of nonsuit because the State failed adequately to prove cause of death or that the actions of defendant were the proximate causes of death. There were two eyewitnesses to the shooting. The Granville County Medical Examiner testified as to the wound in deceased's abdomen just before the following exchange occurred:

> "Q. Do you have an opinion as to what type of weapon caused this wound?
>
> A. It appeared to be a shotgun wound.
>
> Q. Do you have an opinion based upon your medical facts as to the cause of death of John Hobgood?
>
> A. Internal injuries caused by this shotgun wound appeared to be the cause of death."

The defendant objects to the use of the word "appeared" and contends that this shows uncertainty as to the cause of death and that therefore his motion for judgment as of nonsuit should have been granted. Defendant's argument is solely one of semantics and is without merit. In addition to the medical examiner's testimony was the testimony of two eyewitnesses to the shooting. Where the evidence is such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character, it is not necessary to have expert medical testimony to prove cause of death. *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844 (1952).

[2] Defendant also contends that the trial court erred in failing to charge on the lesser included offense of voluntary manslaughter in that a gun was found in the deceased's pocket and defendant may have thought deceased was going for the gun. There was no evidence that either of the two eyewitnesses or the defendant knew the deceased had a gun on his person or that the deceased made a move to go to his pocket. Where there is evidence only of the greater offense and no evidence which would support a verdict of the lesser offense, then the trial court is not required to instruct the jury on the lesser degrees of the crime charged. 3 Strong, N. C. Index 2d, Criminal Law, § 115, p. 21 (1967).

We find no error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. CLAUDE CARROLL

No. 744SC195

(Filed 15 May 1974)

Arrest and Bail § 6— disorderly conduct alleged — invalid arrest warrant — resistance proper

In a prosecution for resisting arrest, the trial court erred in failing to grant defendant's motion for nonsuit where the evidence tended to show that defendant owner protested when officers entered his guest house with no probable cause, no arrest warrant and no legal authority for the purpose of finding military deserters, defendant told the officers in no uncertain terms to leave the premises, the officers left and took out an arrest warrant for disorderly conduct, not in good faith but in retaliation for defendant's behavior, and there was a struggle when the officers tried to execute the invalid warrant.

APPEAL by defendant from *Tillery, Judge,* at the 13 August 1973 Session of ONSLOW Superior Court.

Heard in the Court of Appeals 16 April 1974.

This is a criminal action in which the defendant was charged in the district court with disorderly conduct and resisting arrest. He was found not guilty of disorderly conduct but was convicted of resisting arrest. He appealed to the superior court where he was again convicted of resisting arrest. The defendant, or his wife, is the owner of the Onslow Guest House in Jacksonville, North Carolina. The Onslow Guest House is a rooming and apartment house. At about 4:00 a.m. on 25 July 1973, two members of the Jacksonville Police Department, without a warrant or other legal authority, went to the Onslow Guest House to look for a Marine deserter. Officers Perkins and Thomas passed through a gate in the fence surrounding Onslow Guest House and, without knocking, entered the house and went up to the third floor. The policemen knocked on a door and questioned a Marine occupying that room. The officers returned to the first

floor and saw a man and a woman in a room together and said something to them about occupying a room for immoral purposes and to leave the door open. As the officers were leaving, they were met by Mr. and Mrs. Carroll by the porch steps. The Carrolls had been called from their home several miles away to the premises by the manager who testified the officers were roaming around upstairs checking identification cards and harassing the tenants. Mr. Carroll asked the officers why they were there, to which the officers replied that they were looking for deserters. Mr. Carroll asked if they had a warrant and the officers said "No." The defendant ordered the officers off the premises; and as they walked towards the gate, the defendant cursed them with vulgar epithets. Officers Thomas and Perkins were offended but restrained themselves. They left and went to a magistrate and obtained an arrest warrant for Mr. Carroll for creating a public disorder.

The officers testified that on their return to Onslow Guest House with Lieutenant Shiver and Officer Reed, they served the warrant on Mr. Carroll and proceeded to escort him out the gate and into the police car. They further testified that Mr. Carroll attempted to break away and struck Officer Perkins. Perkins then struck the defendant several times in an attempt to subdue the defendant and put handcuffs on him. The officers testified that several people from the porch started to come through the gate towards the officers; that the officers warned the people and then sprayed them with mace.

Mr. Carroll, Mrs. Carroll, the manager, and a tenant all testified that Mr. Carroll did not resist; that the officers slammed Mr. Carroll against the car and handcuffed him; that the officers then repeatedly hit Mr. Carroll with their fists and knocked him down; that Officer Perkins kicked the defendant and said, "Now we've got you, you son of a b ----"; that Officer Reed hit Mr. Carroll with a flashlight, and that when Mr. Carroll screamed and Mrs. Carroll and the manager came forward, they were sprayed with mace.

At the close of the State's evidence and again at the close of all the evidence, the defendant moved for judgment as of nonsuit, which motions were denied. From a verdict of guilty of resisting arrest and a sentence of 90 days in the Onslow County Jail, suspended upon the payment of a $250.00 fine plus costs, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney General Keith L. Jarvis for the State.

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

CAMPBELL, Judge.

It is common knowledge that the military frequently pays a bounty to those who turn in deserters. On the night in question, the officers involved, apparently acting as bounty hunters, with no probable cause, no warrant and no legal authority, simply entered the Onslow Guest House and began canvassing for deserters. The Onslow Guest House is private property, surrounded by a four-foot fence and open only to tenants and their guests. One of the specific duties of the manager, so he testified, was to prevent members of the public from wandering through the fence and into the Onslow Guest House. The officers were, in effect, trespassers and were told by Mr. Carroll, in no uncertain terms, to leave the premises.

The officers then took out an arrest warrant for Mr. Carroll for disorderly conduct in violation of G.S. 14-288.4(a)(2). This statute prohibits the creation of a "public disturbance." At all relevant times the defendant was on his own property, protecting it and his tenants from the harassment of trespassers. The officers were aware of this fact and knew or should have known that the Onslow Guest House was not a public place and that it was they and not Mr. Carroll who were acting illegally and outrageously. We think it clearly appears from the record that the arrest warrant was not taken in good faith but in retaliation and charged the defendant with an offense that was trumped up by the officers.

In *State v. McGowan,* 243 N.C. 431, 90 S.E. 2d 703 (1956), the North Carolina Supreme Court held that where police officers attempt an arrest under an invalid arrest warrant, the person sought to be arrested has a legal right to resist and that, in such instances, in prosecutions for resisting arrest, the defendant's motion for judgment as of nonsuit should be granted. See also *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970). The warrant in this case was most questionable under the circumstances; and the defendant, in resisting the arrest, did act within his legal right. We adopt the reasoning of *State v. McGowan, supra,* and hold that it was error not to grant the defendant's motion for judgment as of nonsuit.

Reversed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES H. SMYLES

No. 744SC99

(Filed 15 May 1974)

1. **Criminal Law § 77; Robbery § 3— armed robbery — statement by defendant to victim — admissibility**

The trial court in an armed robbery case did not err in allowing the victim to testify that he saw defendant a week after he was released on bail, and that defendant told the victim that he was going to "beat the case" and the victim would thereafter not be allowed in the town.

2. **Criminal Law § 99— examination of defendant by court — no expression of opinion**

Questioning of defendant by the trial court with respect to a probationary sentence which defendant had received as a minor was proper in form and scope for the purpose of clarifying defendant's testimony concerning probation and did not amount to an expression of opinion by the court.

3. **Criminal Law §§ 34, 117— armed robbery — instruction as to prior offenses — no error**

The trial judge in an armed robbery prosecution did not err in his charge to the jury when he instructed that defendant offered evidence tending to show that he had been convicted of statutory rape or contributing to the delinquency of a minor when defendant was 17 years old.

APPEAL by defendant from *Cohoon, Judge,* 11 June 1973 Session of Superior Court held in ONSLOW County. Argued in the Court of Appeals 16 April 1974.

Defendant was tried upon a bill of indictment charging him with armed robbery.

The State's evidence tended to show that on or about 1 May 1973, Joseph Casey (Casey), the prosecuting witness, was confronted by defendant who approached Casey with "something under his shirt." Casey was ordered to go to an automobile where a woman was sitting in the front seat. Casey was then driven to a house and was taken inside. Defendant held Casey

at gunpoint while the woman took Casey's wallet and removed $76.00 therefrom. Casey was then driven back to the bus station, put out of the car, and warned not to call the police or he would be killed. Casey memorized the tag number of the vehicle and summoned the police.

When the police arrived, Casey accompanied a detective to the scene of the robbery. Defendant was not at the house, but was located with two women at the Front Spot Bar. Defendant was not carrying a pistol at the Front Spot Bar; however, a pistol was found in a search of defendant's home.

Defendant's evidence tended to show that defendant solicited customers for prostitutes. Defendant contended that Casey had voluntarily given up $76.00 to obtain the services of a prostitute on the evening in question. Witnesses for the defendant testified that Casey voluntarily accompanied the defendant and paid $76.00 for the services of a prostitute.

Defendant was sentenced to not less than twenty-eight and not more than thirty years. Defendant appealed to this Court.

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

Cameron and Collins, by William M. Cameron, Jr., for the defendant.

BROCK, Chief Judge.

[1] Defendant contends the trial court erred in allowing, over objection, the testimony of Casey concerning a conversation which allegedly took place one week after the alleged incident. Casey testified that he saw defendant a week after defendant was released on bail, and that defendant told Casey that he was going to "beat the case," and if he did, Casey "wasn't allowed back in Jacksonville." This was a statement volunteered by defendant about the case. It was properly allowed in evidence.

[2] Defendant argues that the trial court erred when the court interrupted the District Attorney's cross-examination of defendant to examine defendant concerning a probationary sentence, which defendant received as a minor. Defendant argues that the questioning by the trial court served no purpose since defendant had freely admitted on direct examination that he was of low moral character, had received a dishonorable discharge from

the U. S. Marine Corps, and that he lived off of the earnings of prostitutes.

The record reveals that during cross-examination, defendant testified he had never been convicted of a crime, but admitted having been put on probation. The trial court inquired of defendant what offense had resulted in defendant's probation. The offense was contributing to the delinquency of a minor with regard to sexual activities.

This questioning by the trial court was for the purpose of clarifying defendant's answer concerning convictions. No expression of opinion or intimation as to personal feelings appears. The questioning was proper in form and scope for the purpose of clarifying defendant's testimony concerning probation. This assignment of error is overruled.

[3] Defendant also contends that the trial court erred in its charge to the jury when the trial court charged that defendant offered evidence tending to show that he had been convicted of statutory rape or contributing to the delinquency of a minor when defendant was seventeen years of age.

"When a defendant in a criminal case takes the stand, he may be impeached by cross-examination with respect to previous convictions of crime, but his answers are conclusive and the record of prior convictions cannot be introduced to contradict him. (Citations omitted.) In a criminal case, this rule applies to every defendant who takes the stand, regardless of his age at the time of his previous *conviction.*" *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274.

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 PARKER and BALEY concur.

JACK HAWKINS v. RHEA RITTER HAWKINS

No. 744DC270

(Filed 15 May 1974)

1. **Appeal and Error § 45— assignment of error abandoned**

Where defendant made no reference in her brief to an assignment of error stated in the record on appeal, the assignment is deemed abandoned.

2. **Appeal and Error § 42— assignment of error to signing of judgment — review of record proper**

An exception to the signing of the judgment presents the face of the record proper for review, but it cannot present the question of the sufficiency of the evidence to sustain the verdict.

APPEAL by defendant from *Crumpler, Judge,* 29 October 1973 Session of District Court held in ONSLOW County.

Plaintiff instituted this action on 9 January 1973 for absolute divorce on ground of one year separation. Defendant filed answer admitting the allegations of the complaint as to residency of the parties and that the two children of the parties had reached their majority; she denied the other allegations. By a further answer and counterclaim, she alleged the marriage of the parties on 7 June 1939, her dependency on plaintiff for support, her faithful performance of the marriage vows, misconduct on the part of plaintiff, and plaintiff's financial worth and ability to earn money. By a second further answer, she alleged, in paragraph one thereof, the execution of a "purported" deed of separation by plaintiff and defendant on 24 December 1971 and, by exhibit, made the deed of separation a part of her answer. She then set forth in five paragraphs allegations attacking the validity of the deed of separation. She asked that the divorce action be dismissed, that she be awarded alimony and counsel fees, and that the deed of separation be declared void.

By motion filed on 8 March 1973, plaintiff asked (1) that the first further answer and counterclaim be dismissed and stricken, and (2) that, except for paragraph one, that the second further answer be dismissed and stricken. Following a hearing, the court, on 4 May 1973, entered an order striking the following portions of defendant's pleadings:

> "All of the further answer and allegation of new matter as a counterclaim, consisting of paragraphs 1 through 6, (commencing on Page 1 of Answer), and

"All of the further answer and allegation of new matter, consisting of paragraphs 1 through 6, (commencing on Page 3 of Answer), other than paragraph 1 thereof."

On 18 May 1973, defendant filed "APPEAL ENTRIES" as follows: "To the Order entered in this case striking portions of defendant's answer, the defendant excepts and appeals to the North Carolina Court of Appeals."

As of 29 October 1973, no appeal to the foregoing order had been perfected. The court proceeded to try the divorce action and the jury answered issues relating to residence, marriage, and separation in favor of plaintiff. From judgment granting plaintiff an absolute divorce, defendant appealed.

Zennie L. Riggs and Edward G. Baley for plaintiff appellee.

Joseph C. Olschner for defendant appellant.

BRITT, Judge.

The record on appeal and defendant appellant's brief do not comply with the rules of this court. Nevertheless, we will attempt to answer the two questions alluded to in the brief.

The first question is stated in defendant's brief as follows: "DID THE TRIAL COURT COMMIT ERROR WHEN HE STRUCK FROM DEFENDANT'S COUNTERCLAIM 'ALL OF THE FURTHER ANSWER AND ALLEGATION OF NEW MATTER AS A COUNTERCLAIM CONSISTING OF PARAGRAPH 1 THROUGH 6'? (Exception 1, R p 20)"

No Exception 1 appears on page 20 of the record. On pages 23 and 24 of the record, defendant purports to group her assignments of error. By assignment no. 1, she appears to contend that the court, by its order of 4 May 1973, erred in striking her first further answer and counterclaim for alimony. By assignment no. 2, she appears to contend that the court erred in striking all but paragraph one of her second further defense in which she set forth the deed of separation but asked that it be declared null and void. By assignment no. 3, she contends that the court erred in signing and entering the divorce judgment dated 30 October 1973.

[1] In her brief, defendant makes no reference to the second assignment of error stated in the record on appeal, therefore, it is deemed abandoned. *McDonald v. Heating Co.*, 268 N.C. 496, 151 S.E. 2d 27 (1966). That being true, defendant's second fur-

ther answer sets forth a deed of separation completely valid on its face, and all of her allegations attacking the deed of separation are stricken. The result is that the deed of separation negates the first further defense and counterclaim; therefore, we hold that defendant fails to show prejudicial error in the striking of her first further defense and counterclaim.

The second question stated in defendant's brief is as follows: "DID THE TRIAL COURT COMMIT ERROR BY SIGNING AND ENTERING THE JUDGMENT DATED OCTOBER 30, 1973?" Defendant's only argument on this question is that "there is no testimony in the record that would justify the court in entering the judgment granting an absolute divorce."

[2] An appeal itself is an exception to the judgment and to any matter appearing on the face of the record proper. *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882 (1961). A sole exception to the judgment, or to the signing of the judgment, likewise presents the face of the record proper for review. *Vance v. Hampton,* 256 N.C. 557, 124 S.E. 2d 527 (1962). An exception to the judgment cannot present the question of the sufficiency of the evidence to sustain the verdict. *Lea v. Bridgeman,* 228 N.C. 565, 46 S.E. 2d 555 (1948). A review of the face of the record proper reveals no error. The record on appeal does not set forth the testimony presented at trial but it is the responsibility of an appellant to make up and serve the record on appeal. 1 Strong's N. C. Index 2d, Appeal and Error, § 36, p. 173 (1967).

For the reasons stated, we conclude that defendant has failed to show prejudicial error.

No error.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. VERNELL PRATT

No. 7419SC363

(Filed 15 May 1974)

Criminal Law § 145.1— revocation of probation — hearsay evidence

The trial court erred in revoking defendant's probation for changing her place of residence without the written consent of her probation

officer where the competent evidence before the court showed only that on eight or ten occasions defendant was not found at the place that was supposed to be her residence, and the evidence which tended to show that she had established her residence elsewhere was hearsay.

APPEAL by defendant from *Seay, Judge,* 22 October 1973 Session of Superior Court held in MONTGOMERY County.

Defendant appeals from an order revoking her probation and activating a prison sentence. The record reveals:

At the 8 October 1969 Session of Superior Court held in Montgomery County, defendant pleaded guilty to the violation of a prohibition law. The court entered judgment imposing an 18 months prison sentence, suspended on condition defendant be placed on probation for five years. The terms of probation included a provision that defendant "Remain within a specified area and shall not change place of residence without written consent of the probation officer."

On 22 October 1973, Probation Officer Sandra Pugh reported to the court, in writing, that defendant had willfully and without lawful excuse violated the terms of her probationary judgment in the following respect:

> "That on or about September 1, 1972, subject left her residence at Route 1, Box 1-F, Candor, N. C. and changed her place of residence to an unknown address without securing the written consent of the probation officer in violation of the condition of probation that she shall 'Remain within a specified area and shall not change place of residence without the written consent of the probation officer.' "

Following proper notice, the court conducted a hearing after which it entered an order finding as a fact that defendant had willfully violated the conditions of her probation by changing her address without securing the written consent of the probation officer and, in its discretion, revoked defendant's probation and activated the prison sentence. Defendant appealed.

Attorney General Robert Morgan, by Associate Attorney Kenneth B. Oettinger, for the State.

Smith & Thigpen, by Dock G. Smith, Jr., and Frank C. Thigpen, for defendant appellant.

BRITT, Judge.

Defendant contends that the finding of fact upon which the court revoked her probation was not supported by sufficient evidence. We agree with the contention.

Many cases involving the revocation of suspended sentences and probation judgments have found their way to the appellate courts of this State. A review of a representative number of those cases leads us to conclude that an accurate statement of the law on the question of revocation of probation is as follows: A proceeding to revoke probation is not a criminal prosecution but is a proceeding solely for the determination by the court whether there has been a violation of a valid condition of probation so as to warrant putting into effect a sentence theretofore entered; and while notice in writing to defendant, and an opportunity for him to be heard, are necessary, the court is not bound by strict rules of evidence, and all that is required is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the defendant had, without lawful excuse, willfully violated a valid condition of probation. *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476 (1967); *State v. Morton,* 252 N.C. 482, 114 S.E. 2d 115 (1960); *State v. McMilliam,* 243 N.C. 775, 92 S.E. 2d 205 (1956); *State v. Sawyer,* 10 N.C. App. 723, 179 S.E. 2d 898 (1971).

In the case at bar, there was no *competent* evidence that defendant had changed her address in violation of a provision of her probation. The probation officer testified that she saw defendant at Route 1, Box 1-F, Candor, N. C., through June of 1972; that she went to that address several times subsequent to that date but failed to find defendant; that some two or three months prior to the hearing, she was advised that defendant was in Moore County "running a club where they were selling liquor"; and, that "I don't know whether she now resides at the same address." On cross-examination, the probation officer stated that while she had information that defendant was running a place in Moore County, "I do not believe I had any information on where she was staying." (While the evidence did not show how far said residence is from Moore County, we take judicial notice of the fact that the Town of Candor is only a few miles from the Moore County line.) H. Elam testified that he went to the residence at the address aforesaid five or six times looking for defendant but never found her there; that the

second or third time he went there a lady came to the door and stated that defendant no longer lived there.

At the hearing, defendant and several witnesses presented by her testified that defendant had not changed her residence but had resided continuously at Route 1, Box 1-F, Candor, N. C.

Although there was direct evidence that on eight or ten occasions defendant was not found at the place that was supposed to be her residence, the evidence which tended to show that she had established her residence elsewhere was hearsay and insufficient to support the order of revocation. Our holding is supported fully by *State v. McMilliam, supra.*

For the reasons stated, the order appealed from is

Reversed.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. CHARLES GRIER JENKINS

No. 7427SC196

(Filed 15 May 1974)

1. **Automobiles § 129— drunken driving — opinion testimony — recapitulation**

Where an officer gave opinion testimony that defendant's faculties were impaired due to the use of an alcoholic beverage, the trial court did not err in instructing the jury that "in the opinion of the officer, the defendant was under the influence of some intoxicating liquor," since the officer's testimony was tantamount to an opinion that defendant was under the influence of an intoxicating beverage.

2. **Automobiles § 129— drunken driving — breathalyzer test — finding by a jury — instructions**

In a drunken driving case, the trial court was not required to instruct the jury that they must find that the breathalyzer test given defendant was administered in accordance with State Board of Health regulations in order to find defendant guilty.

APPEAL from *Snepp, Judge,* 24 September 1973 Session of GASTON County Superior Court.

Defendant was charged with driving while under the influence of an intoxicant. He was convicted in the District Court

and on trial *de novo* in Superior Court. At the Superior Court trial, the arresting officer testified that he observed the defendant weaving from side to side as he drove on the public highway. Defendant was arrested, read his rights and taken to the police station where he was given a breathalyzer test before he had anything else to drink. In response to the solicitor's question whether the arresting officer had an opinion whether defendant was "under the influence of intoxicating liquor at the time he operated the motor vehicle on the state highway," the officer responded "It's my opinion that his mental and physical factors were impaired due to the use of some alcoholic beverage."

The breathalyzer operator who administered the test testified that he had a permit from the North Carolina Board of Health to administer the test and that the test he administered to defendant was conducted pursuant to the rules and regulations of the Board of Health. Defendant's blood alcohol level was .17 percent.

In his instruction to the jury, the trial court instructed:

> "If you should find from the evidence and beyond a reasonable doubt that the chemical test indicated one-tenth of one percent or more by weight of alcohol in the defendant's blood, you may infer from this evidence that the defendant was under the influence of intoxicating liquor."

Defendant was found guilty by the jury, and from the signing and entry of judgment, he appealed.

Attorney General Morgan, by Deputy Attorney General White, Assistant Attorney General Byrd, and Associate Attorney Heidgerd, for the State.

Childers and Fowler, by Henry L. Fowler, Jr. and Max L. Childers, for defendant appellant.

MORRIS, Judge.

[1] Defendant assigns error to the trial court's instructing the jury that "in the opinion of the officer, the defendant was under the influence of some intoxicating liquor." It is his contention that the court erred in recapitulating incompetent evidence to the jury. However, the competency of this statement is not before us inasmuch as no motion was made to strike the statement and no exception to its competency has been brought

forward. Thus, we consider only whether the trial court properly stated the evidence before the jury. It is true that the officer did not testify that in his opinion the defendant was under the influence of an intoxicant; rather, he testified that defendant's faculties were impaired due to the use of an alcoholic beverage. A person is under the influence within the meaning of G.S. 20-138 when he has drunk a sufficient amount of intoxicating beverage or taken a sufficient amount of narcotic drug to cause him to lose normal control of his bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties. *State v. Ellis,* 261 N.C. 606, 135 S.E. 2d 584 (1964); *State v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688 (1946). The response of the officer was tantamount to an opinion that defendant was under the influence of an intoxicating beverage. The evidence offered by both the State and the defendant is recapitulated with reasonable accuracy. This is sufficient. Additionally, it has long been the general rule that objections to the charge of the court in reviewing the evidence must be made before the jury retires, so that the court may have the opportunity to correct any mistakes. Otherwise, the objection is deemed waived and will not be considered on appeal. *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973).

[2] Defendant next assigns error to the failure of the trial court to instruct the jury that they must find beyond a reasonable doubt that the breathalyzer test was administered according to State Board of Health regulations before they found defendant guilty. Officer Brooks testified that he administered the test in accordance with the prescribed rules, and the court instructed the jury to this effect. There is no requirement that the jury be instructed that they must find that the test was administered in accordance with Board of Health regulations.

We note in passing that the breathalyzer test itself does not—as the court instructed—give rise to the inference that defendant was under the influence. Rather, the evidence of the results of the test create that inference. However, the charge, when read contextually, sufficiently applied the law to the facts, and we perceive no prejudicial error in defendant's trial.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. THOMAS LEWIS ALSTON AND LARRY BATTLE

No. 748SC208

(Filed 15 May 1974)

Jury § 3— trial by thirteen jurors — prejudicial error

Defendants are entitled to a new trial where a thirteenth juror was selected and seated as an alternate, and participated in the deliberation of the case. G.S. 9-18.

APPEAL from *Webb, Judge,* 10 September 1973 Session of WAYNE County Superior Court. Argued in the Court of Appeals 16 April 1974.

Defendants were tried jointly in identical bills of indictment with the offenses of assault with a deadly weapon with intent to kill inflicting serious bodily injury and armed robbery. Defendants pled not guilty to all charges, and twelve jurors were duly sworn and empanelled to try the case. A thirteenth juror was selected and seated as an alternate. Following the instructions given by the court, all thirteen jurors retired, deliberated and returned a verdict of guilty on all charges as to both defendants. All jurors, including the alternate, were polled and stated their acquiescence in the verdict. From the entry and signing of judgment defendants appealed.

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

W. Dortch Langston, Jr., for Thomas Lewis Alston, defendant appellant.

Cecil P. Merritt for Larry Battle, defendant appellant.

MORRIS, Judge.

Although defendants present several assignments of error, we limit our discussion to one of those assignments which, standing alone, entitles defendants to a new trial. G.S. 9-18 provides that alternate jurors shall be discharged upon the final submission of the case to the jury. The alternate juror in this case was not discharged at that point, although all twelve regularly empanelled jurors retired to the jury room. Examination of the appellate decisions reveals that this precise factual situation has rarely arisen. However, the Supreme Court in *White-*

hurst v. Davis, 3 N.C. 113 (1800), awarded a new trial where a caveat was tried by thirteen jurors.

> "It may be said, if thirteen concur in a verdict, twelve must necessarily have given their assent. But any innovation amounting in the least degree to a departure from the ancient mode may cause a departure in other instances, and in the end endanger or prevent this excellent institution from its usual course." *Id.*

A decision that a deliberation by thirteen jurors is error is compelled both by the statute and by the appellate decisions of the State. Defendants are entitled to a

New trial.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. RUBY STRICKLAND

No. 7416SC293

(Filed 15 May 1974)

1. **Homicide § 21— second degree murder — cause of death — sufficiency of evidence**

State's evidence in a second degree murder case was sufficient to permit the jury to find that the cause of death was a gunshot wound inflicted by defendant.

2. **Homicide § 26— second degree murder — cause of death — instructions sufficient**

Trial court's reference in its jury instructions to the opinion testimony of doctors as to the cause of death fairly and accurately reflected the testimony of the medical experts and did not amount to a violation of G.S. 1-180.

3. **Criminal Law § 122— jury unable to agree — instructions as to further deliberations**

Where the jurors deliberated only a short time before reporting to the court that they were unable to agree, the trial court did not err in asking the jury to continue their deliberations which they did for the remainder of the afternoon, and, upon opening court on the following morning, again asking the jury to deliberate further, since, in so doing, the court instructed that no juror was to do anything against his conscience.

State v. Strickland

APPEAL by defendant from *Winner, Judge,* 12 November 1973 Session of Superior Court held in ROBESON County.

Defendant was indicted for the first-degree murder of one Joseph Strickland. The State elected to try her for second-degree murder, to which defendant pled not guilty. The State's evidence showed that defendant shot Joseph Strickland, who was her brother-in-law, and that Strickland died seven days later in the hospital, while apparently making a successful recovery from the shooting. The pathologist who performed a post-mortem examination of the deceased testified that in his opinion the cause of death was pulmonary emboli or blood clots in the lungs. The physician who treated the deceased testified that if he had emboli, these would be secondary to the gunshot wound.

Defendant offered no evidence. The jury found her guilty of involuntary manslaughter, and from judgment imposing a prison sentence, she appealed.

Attorney General Robert Morgan by Associate Attorney General Charles J. Murray for the State.

Page, Floyd & Britt by W. Earl Britt for defendant appellant.

PARKER, Judge.

[1] Defendant's motion for nonsuit was properly overruled. The State's evidence was sufficient to permit the jury to find that the cause of death was the gunshot wound inflicted by defendant.

[2] We also find no error in the portion of the court's charge, to which defendant excepted, in which the court referred to the opinion testimony of the doctors as to the cause of death. The court's charge fairly and accurately reflected the testimony of the medical experts, and no violation of G.S. 1-180 was made to appear.

[3] Finally, we find no error in the portion of the court's instructions to the jury, to which appellant also assigns error, in which the court urged the jury to try to reach a unanimous verdict. The jurors, after deliberating only a short time, reported to the court that they were unable to agree, whereupon the court simply asked them to continue their deliberations, which they did for the remainder of the afternoon. Upon opening of court on

the following morning, the court again asked them to deliberate further. In so doing the court was careful to point out that it did not want any juror to do anything against his conscience, and in our opinion the instruction given neither intimated an opinion in violation of G.S. 1-180 nor tended to coerce the jury to reach a verdict notwithstanding the conscientious convictions of any member.

In defendant's trial and in the judgment appealed from, we find

No error.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. KELLY LEE WOOD

No. 743SC103

(Filed 15 May 1974)

1. **Burglary and Unlawful Breakings § 6; Larceny § 8— instructions — intent to commit robbery — no prejudice**

Defendant in a prosecution for felonious breaking and entering and larceny was not prejudiced by the trial judge's slip of the tongue in referring to intent to commit robbery rather than intent to commit larceny since the court correctly instructed the jury in the mandate portion of the charge.

2. **Burglary and Unlawful Breakings § 6; Larceny § 8— larceny from premises entered — sufficiency of instructions**

Under the trial court's instruction in a felonious breaking and entering and larceny case there can be no question but that the jury clearly understood that if it was to find defendant guilty of felonious larceny it was required to find beyond a reasonable doubt that defendant had carried a television set out of a house after first entering therein.

APPEAL by defendant from *Cowper, Judge,* 13 August 1973 Session of Superior Court held in PITT County.

Defendant was indicted for (1) felonious breaking and entering and (2) felonious larceny after such breaking and entering. The victim of the crimes testified that her home was broken into during her absence on the afternoon of 21 June 1973 and her portable television set taken therefrom by some

person unknown to her. An accomplice testified that he accompanied the defendant and acted as a lookout while defendant entered the dwelling and removed the television set, and that they later sold the set for $20.00 and divided the proceeds. Defendant offered no evidence. The jury found him guilty of both charges. Judgment was entered on each count sentencing defendant to prison for five years, the two sentences to run concurrently. Defendant appealed.

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

Blount, Crisp & Grantmyre by William E. Grantmyre for defendant appellant.

PARKER, Judge.

[1] Appellant assigns error to two portions of the court's instructions to the jury. In the first instance complained of, the court, after correctly instructing the jury that "the defendant has been accused of felonious breaking or entering into another's building without consent and with intent to commit the crime of larceny therein," proceeded to list the elements of the crime and in so doing inadvertently stated one of them to be, "fourth, that at the time of the breaking or the entry, the defendant intended to commit the crime of robbery therein." Immediately after making this incorrect reference to robbery rather than to larceny, the judge correctly instructed the jury in the mandate portion of the charge that for the jury to return a verdict of guilty on the first count, that they must find beyond a reasonable doubt that defendant broke or entered the house, without the owner's consent, "intending at the time to steal or commit the crime of larceny therein." In view of the evidence in this case and the court's correct instruction in the mandate portion of the charge, it is inconceivable that the jury could have been misled or that the defendant could have been prejudiced by the judge's slip of the tongue in referring to intent to commit robbery rather than to intent to commit larceny.

[2] In the second portion of the charge complained of, the appellant contends that the judge did not clearly instruct the jury that to find defendant guilty of felonious larceny it must find that the taking and carrying away of the television set was from the building entered. Reading the charge as a whole and taking the challenged portion in proper context, the trial court

charged sufficiently on this point. Under the uncontradicted evidence there could have been no question but that if defendant took the television set, he could only have done so by entering the house and taking it therefrom. Under the court's instruction there can be no question but that the jury clearly understood that if it was to find defendant guilty of felonious larceny in this case, it was required to find beyond a reasonable doubt that defendant had carried the television out of the house after first entering therein.

No error.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. DAVID RAY KING AND MARK McDOUGALD

No. 7412SC346

(Filed 15 May 1974)

1. **Criminal Law § 161— assignment of error abandoned**

An assignment of error not supported by argument and authority is deemed abandoned.

2. **Criminal Law § 117— accomplice testimony — instructions not required**

In the absence of a special request, the failure of the court to charge the jury to scrutinize the testimony of an accomplice will not be held for error.

APPEAL by defendants from *Canaday, Judge,* 10 December 1973 Criminal Session of Superior Court held in CUMBERLAND County.

Defendants appeal from judgments sentencing them to prison upon their convictions for felonious breaking and entering and felonious larceny. They assign as errors (1) the denial of their motions for nonsuit and (2) the failure of the trial judge to charge the jury to scrutinize the testimony of the State's witness, Ralph Long, an accomplice.

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

Mitchel E. Gadsden for defendant appellants.

PARKER, Judge.

[1] Appellants have set forth no argument and have cited no authority in support of their first assignment of error, which is accordingly deemed abandoned. In any event, there was ample evidence to warrant submitting the cases to the jury.

[2] As to appellants' second assignment of error, the rule is that in the absence of a special request, the failure of the court to charge the jury to scrutinize the testimony of an accomplice will not be held for error, the matter being a subordinate and not a substantive feature of the case. *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398. Here, there was no request for such an instruction.

No error.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. DELTON HARRIS

No. 7426SC388

(Filed 15 May 1974)

1. **Criminal Law § 166— abandonment of exception — failure to support by reason or argument**

Exception to the court's conclusion that in-court identifications were of independent origin is deemed abandoned for failure to be supported by reason or argument where appellant merely restated the question involved and stated that "the evidence presented does not sustain such a ruling." Court of Appeals Rule 28.

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

The State's evidence was sufficient for the jury on the issue of defendant's guilt of armed robbery of a grocery store owner.

3. **Criminal Law § 128— remarks by solicitor — failure to declare mistrial**

The trial court did not abuse its discretion in failing to declare a mistrial because of remarks made by the solicitor in his jury argument where no motion for mistrial was made at the time of the remarks and the court gave instructions to the jury on the matter.

4. **Criminal Law § 132— motion to set aside verdict — discretion of court**

A motion to set aside a verdict is addressed to the discretion of the trial judge and the denial of such a motion is not reviewable on appeal in the absence of gross abuse.

State v. Harris

APPEAL by defendant from *Grist, Judge,* 15 October 1973 Schedule "C" Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a bill of indictment, in proper form, with the robbery of Dewitt L. Tutterow with a firearm, to wit, a sawed-off shotgun. Defendant pleaded not guilty, the jury returned a verdict of guilty as charged, and the court entered judgment sentencing defendant to prison for a term of not less than 15 nor more that 18 years, with credit for time spent in custody pending trial. Defendant appealed, assigning error.

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

J. Reid Potter for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the conclusion of the court that the in-court identification by the State's witnesses was of independent origin and not the result of out-of-court confrontations. In his argument, defendant first restates the question involved and then says: "The appellant argues and contends that the evidence presented does not sustain such a ruling, especially with regard to Dewitt Tutterow and his wife, Dorothy Elaine Tutterow." Such a statement presents no argument, but is merely a restatement of his assignment. Rule 28, Rules of Practice in the Court of Appeals of North Carolina, provides: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." In view of this rule, we treat this exception as abandoned.

[2] Defendant next assigns as error the denial of his motion for judgment as of nonsuit interposed at the close of all the evidence. Viewing the evidence in the light most favorable to the State, as is required upon this motion, the evidence tends to show: On 12 June 1973, defendant, along with another man, went into Tutterow's Grocery at 1200 North Davidson Street in Charlotte. Defendant was carrying a shotgun. Upon entering, one of the two stated, "This is a holdup." Defendant required Dewitt Tutterow, the owner of the grocery, at gunpoint, to empty his pockets. The other man rifled the cash register. The two took between $400 and $450. We hold that the evidence

was sufficient for submission to the jury and the assignment of error is overruled.

[3] Defendant's third assignment of error concerns remarks in the State's closing argument to the jury. A review of this exception shows that what transpired was nearly identical to the situation in *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968). There, the court, at page 114, said defendant "should have excepted and moved for a mistrial before the case went to the jury . . . . " In *Peele,* the court went on to state the rule that the arguments of the solicitor and counsel are left largely to the discretion of the trial court. No abuse is shown here. The court gave instructions on the matter, and no motion for mistrial was made at the time of the remarks. This assignment is overruled.

[4] Defendant's final assignment is to the denial of his motion for a new trial interposed after a verdict was returned. Such a motion is also addressed to the discretion of the trial judge and will not be reviewed on appeal in the absence of gross abuse. *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909 (1943), and *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972). Defendant has failed to show such abuse and this assignment is likewise overruled.

No error.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. BILLY RAY BROWN

No. 7420SC213

(Filed 15 May 1974)

Assault and Battery § 16— assault with a deadly weapon with intent to kill inflicting serious injury

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, defendant was not entitled to an instruction on the lesser included offense of assault with a deadly weapon, since the uncontradicted evidence offered by the State showed a shooting of the prosecuting witness, immediate hospitalization, and treatment for the wounds.

APPEAL by defendant from *Copeland, Judge,* 20 August 1973 Session of Superior Court held in UNION County. Argued in the Court of Appeals 18 April 1974.

Defendant was tried upon a bill of indictment charging him with assault with intent to kill, inflicting serious injury.

The State's evidence tended to show that on 2 June 1973, at an establishment called Sleepy Allen's in Monroe, North Carolina, defendant was standing outside Sleepy Allen's with a gun in his hand. Defendant aimed the gun at the building where the prosecuting witness was standing. John Funderburk, who had been drinking with defendant on the evening in question, grabbed defendant's arm but, as he did so, the pistol discharged. Ralph Meadows, the prosecuting witness, was standing in the building approximately twelve feet from the defendant when the gun discharged. Meadows was wounded in the groin and the right leg. Meadows was hospitalized and received treatment several times after his release.

The defendant offered no evidence. From a verdict of guilty, and judgment entered thereon, defendant appealed to this Court.

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

Joe P. McCollum, Jr., for the defendant.

BROCK, Chief Judge.

Defendant contends the trial court committed error in charging the jury on assault inflicting serious injury, but not charging on assault with a deadly weapon. Defendant was charged in the bill of indictment with assault with a deadly weapon with intent to kill, inflicting serious injury.

There can be no doubt that if an assault occurred, it was an assault with a deadly weapon which inflicted serious injury. Uncontradicted evidence offered by the State shows a shooting of the prosecuting witness in the groin and right leg, bleeding of the witness, immediate hospitalization, and treatment for the wounds. Therefore, defendant was not entitled to an instruction on the lesser offense of assault with a deadly weapon. This assignment of error is overruled.

No error.

Judges PARKER and BALEY concur.

SHIRLEY SMITH HINSON v. NORMAN EUGENE SPARROW

No. 748SC163

(Filed 15 May 1974)

Automobiles § 61— negligence while backing

Plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence in the form of improper lookout or excessive speed when he backed into plaintiff's car while attempting to leave a parking space.

APPEAL by plaintiff from *James, Judge,* at the 10 September 1973 Session of LENOIR Superior Court.

Heard in the Court of Appeals 18 April 1974.

This is a civil action for the recovery of damages for personal injuries, medical expenses and loss of wages suffered by the plaintiff as the result of an automobile collision. On 2 April 1971 the plaintiff was sitting on the passenger side of the front seat of her automobile which was lawfully parked on Queen Street in Kinston, North Carolina. Plaintiff was waiting for her husband who was transacting some business in a nearby store. The defendant's car was parked directly in front of the plaintiff's car. The defendant, in attempting to leave his parking place, backed into plaintiff's car.

As a result of the collision, the bumper on plaintiff's car was dented and the front end was knocked out of alignment. The plaintiff stated that after the accident she suffered severe pains in her back and legs which required extensive medical care. Dr. Davenport and Dr. Langley testified as to their treatment of plaintiff after the accident and as to her preexisting back condition, which may have been aggravated by the accident.

The defendant testified that in backing up to get out of his parking place, he moved only two to three feet, that in doing so he never used the accelerator; that he looked back before moving and then idled back until he made contact lightly with plaintiff's car; that the only damage apparent to plaintiff's car was a scratch on the bumper, and that the plaintiff got out of the car unharmed and talked with him and even got down on her hands and knees to inspect the bumper.

At the close of all the evidence, defendant moved for a directed verdict under G.S. 1A-1, Rule 50, on the grounds that

the evidence taken in the light most favorable to the plaintiff failed to establish actionable negligence. The trial court granted defendant's motion, and plaintiff appealed.

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

Jeffress, Hodges, Morris & Rochelle, P.A. by Thomas H. Morris for defendant appellee.

CAMPBELL, Judge.

The issue of the credibility of plaintiff's damages was not or should not have been before the trial judge on a motion for directed verdict. The jury and not the judge passes on credibility. The question is whether the plaintiff has offered enough evidence to permit a legitimate inference of negligence on the part of the defendant. We hold that the evidence as to defendant's backing up and the damage to plaintiff and her car presented a legitimate inference of negligence in the form of improper lookout or excessive speed, or both. See *Conway v. Timbers, Inc.*, 7 N.C. App. 10, 171 S.E. 2d 62 (1969), *cert. denied*, 276 N.C. 183 (1970); *Murray v. Wyatt*, 245 N.C. 123, 95 S.E. 2d 541 (1956). See also annotations on the backing of automobiles at 67 A.L.R. 647, 63 A.L.R. 2d 5, 63 A.L.R. 2d 108, and 63 A.L.R. 2d 184.

Reversed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JACKIE ELLIOTT

No. 7420SC253

(Filed 15 May 1974)

Burglary and Unlawful Breakings § 6— breaking and entering with intent to commit larceny — failure to define larceny

The trial court in a prosecution for breaking and entering with intent to commit larceny erred in failing to define the crime of larceny in its jury instructions.

APPEAL by defendant from *Copeland, Special Judge*, at the 20 August 1973 Criminal Session of UNION Superior Court.

Heard in the Court of Appeals 16 April 1974.

The defendant was indicted and convicted of the crime of felonious breaking and entering with the intent to commit larceny. The State's evidence tended to show that on the night of 1 July 1973, Mr. Fred McCallum, manager of the Monroe Hardware Company in Monroe, North Carolina, locked all the doors and windows and gave no one permission to enter the store after hours. Officer Charles McManus of the Monroe Police Department testified that an alarm system had gone off in police headquarters indicating that someone was on the premises of Monroe Hardware Company and that he and three other officers went to the scene to investigate. The officers found that a window in the rear door had been broken and the door opened. Beside the door, the officers found a pair of shoes and a hat which the defendant later identified as his. Prior to entering the building, the officers observed the defendant walking around inside the building for about five minutes. During the time the officers were watching, the defendant did not attempt to take any merchandise or conceal any on his person. Officer Benton testified that the rear door had a lock which required a special key to unlock it either from the outside or inside. Three witnesses for the defendant testified that on the night in question he was quite drunk. From a verdict of guilty as charged and a judgment imposing a sentence of five to seven years in prison, the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General John R. B. Matthis for the State.

Charles D. Humphries for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error the failure of the trial court to define, in its charge, the crime of larceny. The charge to the jury was in all other respects excellent, and the trial court did give a detailed charge on the issue of intent. However, nowhere did he define the term "larceny" which is a vital element of the crime of breaking and entering with the intent to commit larceny. This was error, and we award a new trial. See *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572 (1967); *State v. Hickman,* filed in the Court of Appeals on 1 May 1974.

New trial.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOE LEWIS MOORE

No. 7418SC396

(Filed 15 May 1974)

APPEAL by defendant from *Kivett, Judge,* at the 8 October 1973 Criminal Session of GUILFORD Superior Court.

Heard in the Court of Appeals 23 April 1974.

The defendant was indicted for armed robbery and convicted of common-law robbery. The State's evidence tended to show that the prosecuting witness, George Lester Anderson, on the afternoon of 5 December 1972, was walking to the bus stop on the corner of McCulloch Street and Asheboro Street in Greensboro, North Carolina. Mr. Anderson was jumped by two men, Rudolph "Sonny" Gentry and the defendant, Joe Lewis Moore, who knocked Mr. Anderson to the ground and began patting his pockets. Mr. Anderson kicked his assailants and got to his feet. At this time a third assailant, Tommy Lee Miller, came out of the nearby hedge and struck Mr. Anderson in the head with a knife. Miller held the knife to Mr. Anderson's throat while the defendant grabbed Anderson's feet and pulled them from under him. Defendant then ripped open Mr. Anderson's pants pocket and took his billfold, which contained $415.00. The defendant also took Mr. Anderson's watch. Miller, Gentry and the defendant then fled. From a verdict of guilty of common-law robbery and a sentence of 10 years, the defendant appealed.

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

Public Defender Wallace C. Harrelson for defendant appellant.

CAMPBELL, Judge.

This appeal presents only the face of the record for our review. We have reviewed the record and find no prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JONES LUTHER CHANDLER

No. 7425SC365

(Filed 15 May 1974)

APPEAL by defendant from *Braswell, Judge,* 8 October 1973 Session of Superior Court held in CALDWELL County.

Defendant was convicted of murder in the second degree and two offenses of assault with a firearm with intent to kill. Judgments imposing a prison sentence of thirty years and two sentences of five years were entered. The sentences will be served concurrently.

Attorney General Robert Morgan by James F. Bullock, Deputy Attorney General and R. W. Dew, Jr., Assistant Attorney General, for the State.

Paul L. Beck for defendant appellant.

VAUGHN, Judge.

The only assignment of error is that the court should have granted defendant's motion for nonsuit. Appellant does not bring forward in his brief argument or authority to support the exception. Nevertheless, we have reviewed the testimony and find that evidence of defendant's guilt was clear and compelling. We have examined the record proper and find no error.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. HOWARD E. BORLAND

No. 743SC162

(Filed 5 June 1974)

Automobiles §§ 117, 119; Criminal Law § 7— speeding and reckless driving — compulsion — pursuit by unmarked car

In a prosecution for reckless driving and for speeding 110 mph in a 60 mph zone, the trial court erred in instructing the jury that no motorist has the right to speed or otherwise break the law even if he may feel that some other motorist is trying to do him harm and in failing to instruct the jury that if defendant did not know and had been given no recognizable information that the pursuing car was a law enforcement car, he had the right to attempt to evade his pursurer when he had reasonable grounds to fear for his safety where defendant's evidence tended to show that he was violating no law when the chase began, that he accelerated when the driver of the car behind him began blowing his horn and flashing his headlights, and that he "took off" when three shots were fired from the pursuing car, and the uncontradicted evidence showed that the pursuing car, driven by a deputy sheriff, had no siren, blue light or insignia of any kind indicating it was a law enforcement car, since the evidence was sufficient to support a finding that defendant acted under a compulsion that was present, imminent and impending and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if defendant did not elude his pursuer.

APPEAL by defendant from *Exum, Judge,* 17 September 1973 Session, Superior Court, CARTERET County. Argued in the Court of Appeals 10 April 1974.

Defendant was convicted in District Court on the following charges: Operation of a motor vehicle on a public highway without due caution and circumspection and at a speed and in a manner so as to endanger persons and property, and operation of a motor vehicle at a speed of 110 miles per hour in a 60 mile-per-hour zone. On appeal to Superior Court, he was again convicted of both charges and appeals from judgments entered on the verdicts. Facts necessary for decision are set out in the opinion.

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

Wheatley and Mason, P.A., by L. Patton Mason, for defendant appellant.

MORRIS, Judge.

The only evidence for the State in this case was that of the deputy sheriff who arrested defendant. It tended to show that the deputy, in uniform, but driving his own car which he had just purchased, came up behind the car driven by defendant, paced him for about ½ mile and clocked defendant's speed at in excess of 110 miles per hour; that this was on a four-lane highway with defendant driving in the left lane; that the deputy got in the right lane and pulled up beside defendant; that there were no markings or lights on his car because it was brand new; that he turned his four-way flasher on and turned on his interior light; that he had his I.D. card and badge; that he blew his horn, and the passenger in the right front seat turned around and looked at the deputy; that he held his "badge up like that to the window"; that the passenger turned and said something to the driver who accelerated his car; that several times thereafter, the deputy pulled along beside the defendant's car, blew his horn and motioned for defendant to move over; that about the fourth time he did this, he pulled his revolver and fired three shots "in the air right beside the car"; that defendant ignored that and continued speeding; that when they got to Havelock, defendant's car was smoking; that defendant slowed down to about 45 miles per hour and stopped at the stop light at Parker Ford intersection; that the deputy got out of his car, went up to defendant's car and was reaching for the door when defendant turned around and looked straight at the deputy "and he took off"; that he followed defendant through some streets of Havelock; that defendant failed to stop for another red light but got on the Lake Road going back into Carteret County; that while they were still in Craven County, defendant stopped, started to get out of the car; that the deputy who had stopped back of defendant, told him "if he knew what was good for him he wouldn't bring nothing out from under the seat"; that defendant jumped back into his car and "took off again"; that after they got back into Carteret County, defendant failed to make a curve and his car went into the woods; that by the time the deputy got to the car both occupants had run "into the swamp"; that the posted speed limit on Highway No. 70 at the time of the chase was 60 miles per hour. On cross-examination, the deputy testified that he had been a deputy sheriff for one month; that his car was a white 1972 Chevrolet and had no insignia on it indicating it was a sheriff's car; that it had no blue light nor siren on it, but was like any other Chevrolet an

individual would purchase from a dealer; that he was not alone but had with him a "long-haired fellow" who had been picked up on the beach for public drunkenness, had been jailed, and the deputy was carrying him home; that the passenger did not have on any sort of uniform; that he knew the boy in the other car could see the badge.

Defendant's evidence tended to show that he and his passenger were Marines stationed at Cherry Point; that on the night in question they had been to the beach, had stopped off and had a beer but left the place because they didn't know whether there would be trouble there and they had to go to work the next morning; that he was in his right lane of travel and came up on a white Chevrolet driving under the posted speed limit, so he passed and got back in the right lane; that soon the white car passed him and he saw "this long-haired guy sitting in the seat"; that the Chevrolet again got below the posted speed limit, so defendant passed it again; that they were the only two cars on the road; that he was driving about 60 miles per hour when the white Chevrolet pulled right up on defendant's bumper, began beeping his horn and flashing his high beam lights; that defendant had to adjust his rear view mirror because the lights were in his eyes; that the white car pulled partially alongside and the long-haired fellow was looking at defendant and the driver of the white car was still "beeping" his horn; that defendant accelerated a little and when he did so, he heard three shots; that his passenger ducked down on the floor; that he didn't believe he was going 110 miles per hour but whatever his speed was when he heard the shots, he "took off"; that he just identified two people in the car; that when the shots went off, he didn't know what to think; that the summer before a corporal was shot and killed in the highway and his body left in a junk yard; that when they got to Havelock, there was still no traffic; that he pulled up to the red light and stopped; that he saw somebody running around the car shining a flashlight "about that far from my face outside the window and I just took off and went right through the red light"; that he did not know whether this was the person with the gun so he went through some streets in Havelock and came out on the Nine Mile Road, the car still following; that he pulled over again and stopped and watched the driver of the following car get out and approach his car at which time defendant "took off" again and when he got a good distance ahead of the following car, he "just drove the car over to the wooded area there and parked the car in the ditch, got

out and ran into the woods and that was it"; that at no time did he know the driver of the following car was a deputy sheriff; that he had never heard of such a chase in a privately owned unmarked vehicle without sirens and blue lights; that he was scared; that his friend did not say anything about seeing the driver of the following car showing an I.D. card or badge; that "the first time he said anything to me, as soon as the guy started honking the horn, I asked him, I said, 'Well what's going on?' and he said, 'I don't know' and he looked out the window and said, 'I think he wants you to stop.' So, I said, 'Well that's the car with the hippie in it.', and we just kept on driving. I said, 'Well, hell, I'm not going to stop out here in the middle of nowhere.' So, he said, 'No, I wouldn't stop either.'" Defendant further testified on cross-examination that he did not stop at one of the well-lighted taverns in Havelock because he did not think that would prevent his getting shot if the man wanted to shoot him; that he saw no gun during the chase and that whoever shot the gun was close enough to the car to have shot him or his car if he had wanted to; that he was afraid; that he had not been at Cherry Point very long and did not know all the roads which was the reason he failed to go into the base instead of heading back toward Carteret County; that he had never been to Morehead City or Atlantic Beach before and was surprised to learn that he was back in Carteret County; that the deputy never put his hand on defendant's car door and defendant never saw the deputy's uniform; that he later reported his car stolen because he did not know who had it.

The passenger in defendant's car substantially corroborated defendant's testimony. He also testified that he never saw a badge or I.D. card and if it was held up it must have been after he got on the floor; that he did not get up from the floor at Havelock because he was afraid to stick his head up; that the defendant was not going over 5 miles per hour over the speed limit when the deputy began blinking his lights and blowing his horn; that he never saw anything which would have indicated to him that the man driving the white car had anything to do with law enforcement; that when they heard the shots they got scared, "lost their cool," and that he told the defendant "Let's get outta here" and that that's what they did.

The defendant submits two questions on appeal, both of which we think are well taken.

He urges that the court erred in charging the jury, in effect, that there was no defense to the charges of speeding and careless and reckless driving, and that the court also erred in submitting what he called a special advisory issue as follows: "Did the defendant, Howard Lee Borland, know that an officer of the law was attempting to apprehend him and thereafter wilfully attempt to evade apprehension?" The court specifically told the jury, "In my view of the law, it has nothing to do with the guilt or innocence of the defendant on the particular crimes charged, but the court wants to know your answer to this issue for other purposes." The court went on to charge the jury, as to this issue, with respect to burdens of proof, contentions of the parties, and specifically instructed them that no motorist has the right to speed or otherwise break the law even if he may feel that some other motorist is trying to do him harm. The charge had the effect of requiring the jury to find the defendant guilty of speeding and reckless driving. Defendant admitted his speed during the chase but contended, and his evidence tended to show, that he had no idea he was being chased by a law enforcement officer and that he was violating no law when the chase began. The evidence is undisputed that the deputy's car was not equipped with any siren, blue light, or any insignia of any kind indicating it was a law enforcement car. Nowhere in the charge did the court refer to or explain or read to the jury the provisions of G.S. 20-183(a) which are as follows:

> "It shall be the duty of the law enforcement officers of the State and of each county, city, or other municipality to see that the provisions of this article are enforced within their respective jurisdictions, and any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this article. Such officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the State for the purpose of determining whether the same is being operated in violation of any of the provisions of this article. Provided, that when any county, city, or other municipal law enforcement officer operating a motor vehicle overtakes another vehicle on the highways of the State, outside of the corporate limits of cities and towns, for the purpose of stopping the same or apprehending the driver thereof, for violation of any of the provisions of this article, he shall, before stopping such other vehicle, sound a siren or activate a special light, bell, horn, or exhaust whistle

approved for law enforcement vehicles under the provisions of G.S. 20-125(b)."

We find no cases from this jurisdiction which are helpful in this situation. Defendant candidly admits that he was able to find no authority except by analogy to civil cases. The State did not cite us any authority for its position on these questions.

In 21 Am. Jur. 2d, Criminal Law, § 100, we find the general rule stated thusly:

"Though coercion does not excuse taking the life of an innocent person, it does excuse most, if not all, other offenses. In order to constitute a defense, the coercion or duress must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. Apprehension of loss of property, or of slight or remote personal injury, is no excuse. Furthermore, the danger must be continuous throughout the time when the act is being committed and must be one from which the defendant cannot withdraw in safety. The doctrine of coercion or duress cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. And threat or fear of future injury is not sufficient."

This rule was applied in *Browning v. State,* 31 Ala. App. 137, 13 So. 2d 54 (1943). There the defendant was prosecuted for reckless driving. The officers had no warrant and defendant was not, according to the evidence committing a crime at the time of the attempted arrest from which he fled at high speed. He requested that the court charge the jury that no citizen has a duty to submit to an unlawful arrest and that an attempt to make an unlawful arrest on the part of any officer could be avoided by flight. This and the requests of similar import were refused. He was convicted and appealed assigning as error, among others, the failure of the court to charge on his right to flee under the circumstances. In reversing the trial court, the Alabama Court said:

"The defendant interposes in justification of his driving at an excessive rate of speed after he was fired upon as aforesaid that he was fleeing an unlawful attack made and being made upon him and that he had a right to do so to save himself from serious injury. Viz, that the act com-

plained of in the indictment was without free will upon his part but was the result of compulsion and duress because of the State's witnesses who sought to ambush him and unlawfully fire upon him. The authorities seem to approve such a defense if satisfactorily proven.

In *Arp v. State,* 97 Ala. 5, 12 So. 301, 302, 19 L.R.A. 357, 38 Am. St. Rep. 137, it was held: (1) *'The person committing the crime must be a free agent, and not subject to actual force at the time the act is done;* Thus if A by force takes the arm of B, in which is a weapon, and therewith kill C, A is guilty of murder, but not B.' (2) Further from the Arp case, is the proposition: *'No matter what may be the shape compulsion takes, if it affects the person, and be yielded to bona fide, it is a legitimate defense.'* (3) *'That always an act done from compulsion or necessity is not a crime. To this proposition the law knows no exception. Whatever it is necessary for a man to do to save his life is, in general, to be considered as compelled.'* (Italics supplied.)

Upon the question of self-preservation, even a dumb animal is thus imbued. A pertinent quotation is found in Bartlett's Familiar Quotations, p. 764, as follows: 'They say that the first inclination which an animal has *is to protect itself.'*

In 13 R.C.L. § 8, p. 708, it is said: 'It has been declared by statute that "a person forced by threats or actual violence to do an act is not liable to punishment for same." '

In 15 American Jurisprudence, § 318, p. 16:

'It seems that the law will excuse a person when acting under coercion or compulsion, for committing most, if not all, crimes, except taking the life of an innocent person. * * * The fear which the law recognizes as an excuse for the perpetration of an offense must proceed [as was claimed here] from an immediate and actual danger, threatening the very life of the perpetrator.' (Brackets supplied.)

C.J. Vol. 16, § 59, p. 91: 'An act which would otherwise constitute a crime may also be excused on the ground that it was done [as defendant contends here] under compulsion or duress. The compulsion which will excuse a criminal act, however, must be present, imminent, and impending, and of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done.'

See also 22 C.J.S., Criminal Law, § 44. (Brackets supplied)." Id. at 140.

In *Brown v. State,* 227 Miss. 823, 87 So. 2d 84 (1956), the Court reached the same result where the defendant was driving his truck at some 15 to 20 miles per hour, and as he drove up to within 200 feet of a deputy sheriff and the mayor of the town, they flagged him down. Defendant kept going and the deputy and mayor shot at the truck twice each. Defendant accelerated his speed. The deputy sheriff got into his car and began to chase defendant who got up to 75 to 80 miles per hour and the deputy was not able to catch him.

In neither of these cases was there any evidence that defendant did not know his pursuers were law enforcement officers. In this case there was such evidence on behalf of the defendant and, in our opinion, the evidence would support a finding that the compulsion under which defendant acted was present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if defendant did not elude his pursuer.

We think, under the circumstances of this case and the uncontradicted evidence, the defendant was entitled to have the jury instructed that if they believed that the defendant did not know the pursuing car was a law enforcement car, and had been given no recognizable information that it was, he had a right to attempt to evade the pursuers when he had reasonable grounds to fear for his safety. While it might be that an instruction as to G.S. 20-183(a) would have rendered the submission of the advisory issue harmless, this was not done.

For prejudicial errors in the charge, the defendant is entitled to a new trial.

New trial.

Judges CAMPBELL and VAUGHN concur.

ACTION DEVELOPMENT CORPORATION v. HENRY D. WOODALL AND WIFE, EVALYN M. WOODALL

No. 731SC784

(Filed 5 June 1974)

1. **Vendor and Purchaser § 5— specific performance according to terms of contract**

A plaintiff cannot expect specific performance of a contract in a method different from that specified by the contract itself.

2. **Vendor and Purchaser § 2— tender — actual offer to pay required**

An announcement, without more, of an intention to make a tender is not sufficient, nor is an assertion of readiness or willingness to pay; rather, in making a tender there must be an actual offer by the tenderer to pay.

3. **Vendor and Purchaser §§ 2, 5— specific performance — failure to make tender — performance sought different from contract**

Plaintiff which failed to tender payment and demand delivery of a deed according to the terms of the contract was in no position to demand specific performance; furthermore, the performance plaintiff demanded was not in accordance with the terms of the contract, and the trial court therefore erred in failing to grant defendant's motion for summary judgment.

Judge VAUGHN dissenting.

ON *certiorari* by petition of defendants to review the order of *Cohoon, Judge,* 10 August 1973 Session, Superior Court, CURRITUCK County.

This action was brought seeking specific performance of a contract for the sale of land. The contract was attached to the complaint and had been recorded in the office of the Register of Deeds of Currituck County. Plaintiff alleged it had complied with the contract and asked that the court order specific performance by the defendants. The contract of sale contained the following pertinent provisions: (1) That the sellers agree to sell and buyer agrees to buy certain land particularly described therein, (2) "The buyer and seller agree that the sale price shall be $500,000 payable upon the following terms: $5,000 upon the signing of this contract, $75,000 payable on or before the first day of March 1973; the balance remaining shall be paid at the rate of $25,000 a year on the first of March of each year, plus interest at the rate of 7% computed semiannually. It is agreed that the rate of interest upon the aforesaid $75,000 shall also be 7%. Upon the payment of the total of $80,000 as

herein provided, the sellers agree to execute and deliver to the buyer a good and sufficient general warranty deed free and clear from all encumbrances with the exception of current taxes, easements and restrictions of record, if any. The buyer agrees to execute and deliver to the seller a mortgage or deed of trust for the unpaid balance payable in accordance with the terms stated above. . . . (3) The buyer agrees that he intends to develop the land which he is buying from the seller as a family campground for the accommodations of travel trailers and recreational vehicles, boatels, cottages, marina, motels, and such facilities as may be determined desirable or necessary for the proper and efficient operation of said business. *The buyer and seller agree that from time to time as the buyer develops the aforesaid property the sellers will release from the aforesaid mortgage or deed of trust such amount of land that may be required by the buyer, provided however that the buyer pay to the seller a sum equal to $1,500 per acre for each tract of land released which amounts will be applied upon the buyer's obligation to the seller.*" (Emphasis supplied.)

The contract further provided that the buyer would furnish the sellers plans and specifications for improvements, would not do any construction which would unreasonably destroy the beauty or "ecology" of the area, and would abide by the rules and regulations of all governmental agencies. Sellers agreed that all equipment on the premises used in the operation of the campground would become the property of buyer.

"It is agreed by and between the buyer and seller that upon the signing of this agreement and upon the payment of the $5,000 aforesaid the buyer may enter upon the premises, make such survey, plans, and construction as he desires so long as the buyer furnishes the seller a copy of his development plans, reasonably satisfactory to the seller. The buyer shall have all the income derived from the property thereby."

Plaintiff alleged that in accordance with the terms of the contract, it took possession of the property and made substantial improvements, that it tendered the down payment to defendants, requested a conveyance of the property and "releases from the operation of the purchase money deed of trust as provided by the contract of sale."

Defendants answered the complaint admitting execution of the contract and that the copy attached to the complaint was

a copy of the contract as executed and denied the other allegations. As a further answer, they averred that plaintiff had failed to pay the $75,000 due 1 March 1973, despite defendants' request that it do so. Defendants further averred that on 28 March 1973, they tendered plaintiff a deed, but that plaintiff refused to pay the $75,000 which was due on 1 March 1973, and the defendants notified plaintiff, in writing, of their intention to rescind the contract because of plaintiff's breach. Defendants averred that they had fully complied with the contract, and specific performance would be inequitable because plaintiff had refused to pay the $75,000 due on 1 March 1973, in accordance with the terms of the contract and that, because of plaintiff's breach, it was not entitled to damages.

Defendants served interrogatories and requests for admission which were answered by plaintiff. Defendants moved for motion on the pleadings and for summary judgment. Both motions were denied. Both parties filed affidavits. The judgment filed recited that it appeared to the court "at said hearing from the pleadings, affidavits and arguments from both parties that defendants' motion should be denied." Whether the court considered the answers to interrogatories and requests for admission, we cannot say. Defendant petitioned this Court for a writ of certiorari to review order of the court denying the motion for summary judgment. We granted the petition. The matter was submitted without oral argument.

Twiford, Abbott and Seawell, by O. C. Abbott and John C. Trimpi, for plaintiff appellee.

White, Hall, Mullen and Brumsey, by Gerald F. White and William Brumsey III, for defendant appellants.

MORRIS, Judge.

Section V of plaintiff's complaint alleges the following:

> "In accord with the provisions of the said contract of sale, plaintiff tendered to defendants the down payment and requested a conveyance of the property and releases from the operation of the purchase money deed of trust as provided by the contract of sale; that the defendants failed and refused to convey and release any property for the down payment."

It is apparent that plaintiff asks for specific performance by release of portions of the land before or at the time of the pay-

ment of the $75,000. The contract is certainly not ambiguous. It clearly states that $5,000 is to be paid upon the execution of the contract; that $75,000 plus interest at the rate of 7% is to be paid *on or before 1 March 1973,* that the balance of the purchase price is payable $25,000 annually with interest at the rate of 7% secured by a deed of trust; that upon the payment of the $80,000, sellers will give a deed and buyer will give a deed of trust to secure the balance of the purchase price.

In a subsequent section, the contract provides that from time to time as buyer develops the property, sellers will release from the operation of the deed of trust one acre of land for each $1,500 paid and that that payment will be applied to the obligation secured by the deed of trust.

It is obvious to us that no release of land could be made until the deed of trust became operative. The deed of trust could not have become operative until buyer tendered the $75,000 plus interest and received a conveyance of the land. After that had been accomplished, seller, in accordance with the contract, was obligated to release from the operation of the deed of trust one acre of land for each $1,500 paid by buyer, which payments would be applied to the buyer's obligation to sellers.

[1] It is inconceivable that plaintiff can expect specific performance of a contract in a different method than the contract itself specifies. This principle is specifically spelled out in *McLean v. Keith,* 236 N.C. 59, 71, 72 S.E. 2d 44 (1952), where Justice Johnson, speaking for a unanimous Court, said:

> "The remedy of specific performance is an equitable remedy of ancient origin. Its sole function is to compel a party to do precisely what he ought to have done without being coerced by the court. 49 Am. Jur., Specific Performance, Sec. 2, p. 6.
>
> Equity can only compel the performance of a contract in the precise terms agreed on. It cannot make a new or different contract for the parties simply because the one made by the parties is ineffectual. 49 Am. Jur., Specific Performance, Sec. 22, pp. 35 and 36. 'The remedy of specific performance is never applicable where there is no obligation to perform,' 58 C.J., p. 847, and specific performance does not lie until there has been a breach of contract. 58 C.J., p. 851."

[2] Had plaintiff tendered $75,000 to defendants on 1 March 1973, and defendants had refused to convey the property and take a deed of trust securing the balance of the purchase price, defendants would have breached the contract, nothing else appearing, and plaintiff would be entitled to specific performance. However, the plaintiff's affidavits in opposition to the motion state only: "That on March 1, 1973, Action Development Corporation was ready, willing and able to pay the consideration as proposed in the contract upon the delivery of a general warranty deed free of encumbrances." Even if the court considered the answers to interrogatories, and there is no indication in the record that it did, the answer to the question of whether plaintiff paid the $75,000 due 1 March 1973 as called for in the contract was that the plaintiff "had the $75,000 plus 7% interest" to pay defendants and notified the attorney who prepared the contract by letter before 1 March 1973, that plaintiff was ready to settle the transaction. None of this constitutes tender. "In making a tender there must be an actual offer by the tenderer to pay. An announcement without more of an intention of making a tender is not sufficient; nor is an assertion of readiness or willingness to pay sufficient." 86 C.J.S., *Tender*, § 28.

[3] In *Aiken v. Andrews*, 233 N.C. 303, 305, 63 S.E. 2d 645 (1951), Stacy, C.J., speaking of necessity of tender in a situation involving a contract of sale said:

> "Speaking of its purpose and effect in *Bateman v. Hopkins*, 157 N.C. 470, 73 S.E. 133, *Walker, J.*, with his usual thoroughness, analyzed the authorities and drew from them the following epitome: 'Where the stipulations are mutual and dependent—that is, where the deed is to be delivered upon the payment of the price—an actual tender and demand by one party is necessary to put the other in default, and to cut off *his* right to treat the contract as still subsisting.' "

Here obviously actual tender and demand was necessary before defendants could be in default and plaintiff in a position to demand specific performance, assuming the performance he demands is in accordance with the terms of the contract. Here, however, the performance plaintiff demands is not in accordance with the terms of the contract. Had plaintiff tendered the $75,000 plus interest, it would have been entitled only to receive a warranty deed and have defendant accept its deed of trust for the balance of the purchase price. Then, and only *after* the pay-

ment of the $75,000 plus interest, could plaintiff be entitled to release of property from the operation of the deed of trust upon the payment of additional sums of money in multiples of $1,500.

In our view of the case, the court should have granted defendants' motion for summary judgment.

Reversed.

Judge HEDRICK concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

I agree with the majority's view of the meaning of the contract as it relates to the release of land from the operation of the deed of trust upon the payment of additional sums by plaintiff.

I do not agree that the judge erred when he declined to grant summary judgment in favor of defendant and thereby dismiss plaintiff's action to enforce the contract "according to the terms thereof," damages or other relief. We are not dealing with an option to purchase but with a contract of purchase and sale where, ordinarily, time is not of the essence. Moreover, plaintiff, according to the affidavits, went into possession under the contract of sale shortly after its execution on 25 September 1972 and has expended over $160,000.00 in development of the property. Plaintiff's failure to pay the additional $75,000.00 on 1 March 1973, whether prompted by a dispute over the terms of the contract, the existence of unsatisfied liens against the property or other reasons, did not, as a matter of law, constitute an abandonment of the contract and did not entitle defendants, on 28 March 1973, to "cancel" the contract without reasonable and formal notice to plaintiff that if plaintiff did not fulfill its obligations, defendants would not consider themselves bound.

STATE OF NORTH CAROLINA v. DOUGLAS WILLIAM MURRAY

No. 7410SC245

(Filed 5 June 1974)

1. **Criminal Law §§ 112, 118— instructions — reasonable doubt — circumstantial evidence — contentions — failure to request additional instructions**

The trial court did not err in failing to define reasonable doubt or in failing to give more detailed instructions on circumstantial evidence or a fuller statement of defendant's contentions where defendant made no request for such instructions.

2. **Criminal Law § 114— instructions on contentions — length — equal stress**

Although the court spent more time summarizing the State's evidence than the evidence for defendant, the court did not overemphasize the State's case since the State presented considerably more evidence.

3. **Criminal Law § 66— *in-court identification* — pretrial photographic identification**

In-court identification of defendant was properly admitted where the trial court found upon supporting *voir dire* evidence that the witness's pretrial photographic identification of defendant was not the result of unduly suggestive police procedures.

4. **Criminal Law § 73; Evidence § 35— spontaneous utterances — opportunity to discuss incident**

Statement made by the owner of a grill to an officer that defendant had stolen money from the cash register while she was in the back of the grill for three or four minutes was not a spontaneous utterance admissible as substantive evidence where the statement was made some time after she discovered the money was missing from the cash register and before making the statement the owner had a chance to discuss the incident with a deliveryman, a customer and the policeman whom she telephoned.

5. **Criminal Law § 88— cross-examination — exclusion of repetitious testimony**

Defendant was not prejudiced by the exclusion of questions asked an officer on cross-examination as to a description of defendant given by the victim where another officer had testified about this description and the questions merely duplicated the other officer's previous testimony.

6. **Criminal Law § 86— prior convictions — cross-examination of defendant**

The solicitor properly asked defendant on cross-examination about specific prior convictions and whether he had been convicted of anything else.

7. **Larceny § 8— felonious larceny — failure to submit simple larceny**

The trial court in a prosecution for felonious larceny did not err in failing to instruct the jury on the lesser included offense of simple

larceny where all the substantive evidence tended to show a larceny resulting from a breaking and entering.

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

The State's evidence was sufficient for the jury in a prosecution for breaking and entering a restaurant and larceny of money therefrom where it tended to show that money was stolen from the cash register, that defendant was the only customer who had been in the restaurant on the morning when the theft occurred, that the owner closed the restaurant, latched the back screen door and locked the front door, that a witness thereafter observed defendant enter the restaurant through the back screen door, and that the back screen door latch had been broken.

APPEAL by defendants from *Winner, Judge,* 5 November 1973 Session of Superior Court held in WAKE County.

Defendant was tried for felonious breaking or entering and felonious larceny.

The State's witness, Mrs. Mary Charles, testified that she is the owner of a restaurant in Raleigh known as the Roast Grill. On the morning of 21 May 1973 defendant was the only customer in the restaurant. Mrs. Charles decided to close the restaurant for the morning, and she and defendant went out the front door. When she left, she latched the screen door at the back of the restaurant and locked the front door. Ten or twenty minutes later, a man came to the restaurant to deliver bread. Mrs. Charles reopened the restaurant and went to the cash register to pay him. She found that all the bills had been taken from the cash register, so that only the change was left. She reported the theft to the police.

Robert Miller, a Raleigh policeman, testified that he went to the Roast Grill on the morning of 21 May 1973 in response to a call from Mrs. Charles. Mrs. Charles told him that someone had stolen the money from her cash register. Miller observed the screen door at the back of the restaurant and saw that the latch was broken. The latch operated by means of a hook which was screwed into the door, and when Miller saw the door, the hook and screw had been pulled out.

Mrs. Nitisa Partsakoulokis testified that she lives in the building where the Roast Grill is located. On 21 May 1973 she saw defendant at the back door of the restaurant. He gave the screen door "one good, hard jolt" and then opened it and walked in.

John Beasley, a Raleigh policeman, testified that he showed Mrs. Partsakoulokis a group of photographs, including one of defendant, and that she picked out defendant as the man who broke into the Roast Grill.

Defendant objected to Mrs. Partsakoulokis' testimony identifying defendant as the man who broke into the grill, and also to Officer Beasley's identification testimony. Before this testimony was received, the court held a voir dire hearing, and at the conclusion of the hearing the court found as a fact that the identification procedures used by the police were proper and were free from undue suggestiveness.

Defendant testified that on 21 May 1973 he went to the Roast Grill and ordered a beer, and when Mrs. Charles closed the restaurant he left and went to his brother's house. He did not break into the Roast Grill or steal any money from the cash register.

The jury found defendant guilty as charged, and he was sentenced to a prison term of 8 to 10 years. He appealed to this Court.

Attorney General Morgan, by Assistant Attorney General Eugene A. Smith, for the State.

Bailey, Dixon, Wooten, McDonald & Fountain, by Wright T. Dixon, Jr., for defendant appellant.

BALEY, Judge.

[1] Defendant has brought forward a number of assignments of error relating to the court's charge. He contends that the court did not instruct the jury adequately on circumstantial evidence and did not define reasonable doubt. In addition, he argues, the court did not set forth his contentions in sufficient detail. However, defendant did not request an instruction defining reasonable doubt, and he did not ask for a more detailed charge on circumstantial evidence or a fuller statement of his contentions. " '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 of his contentions, 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. In the absence of a request from the defendant, the court is not required to define reasonable doubt, *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577; *State v. Browder,* 252 N.C. 35, 112 S.E. 2d 728; *State v. Ammons,* 204 N.C. 753, 169 S.E. 631, or to discuss the significance of circumstantial evidence. *State v. Flynn,* 230 N.C. 293, 52 S.E. 2d 791; *State v. Warren,* 228 N.C. 22, 44 S.E. 2d 207; *State v. Shoup,* 226 N.C. 69, 36 S.E. 2d 697. Likewise, a defendant who desires a more detailed statement of his contentions must request it from the court. *State v. Rankin,* 284 N.C. 219, 200 S.E. 2d 182; *State v. Hunt, supra; State v. Shumaker,* 251 N.C. 678, 111 S.E. 2d 878.

[2] Defendant contends that in summarizing the evidence, the court overemphasized the State's case and spent too little time on his own evidence. This contention is without merit; the court fairly and accurately set forth the most important testimony offered by each side. It is true that the court spent more time summarizing the State's evidence than the evidence for defendant, but this was to be expected since the State presented considerably more evidence. *State v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668; *State v. Crutchfield,* 5 N.C. App. 586, 169 S.E. 2d 43.

[3] Defendant strongly asserts that the court erred in admitting the testimony of Mrs. Partsakoulokis in which she identified defendant as the man who entered the Roast Grill through the back screen door. However, the trial judge held a very thorough voir dire hearing on the admissibility of this evidence, and he issued findings of fact stating that the identification testimony had not been obtained by means of unduly suggestive police procedures. These findings of fact are amply supported by the evidence. "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 admissibilitiy. When the facts so found are supported by competent evidence, they are conclusive on appellate courts." *State v. Tuggle,* 284 N.C. 515, 520, 201 S.E. 2d 884, 887; *State v. McVay,* 277 N.C. 410, 417, 177 S.E. 2d 874, 878.

[4] Officer Robert Miller testified that when he arrived at the Roast Grill on the morning of 21 May 1973, Mrs. Charles told him that defendant had stolen the money from the cash

register while she was in the back of the restaurant for three or four minutes. The court instructed the jury not to consider this testimony as substantive evidence, but only for corroborative purposes. Since no other witness gave similar evidence, this was in effect an instruction to ignore the testimony. Defendant contends that this instruction was erroneous, and that Miller's testimony was admissible as substantive evidence. It is well established that "[w]hen a startling or unusual incident occurs, the exclamations of a participant or bystander concerning the incident, made spontaneously and without time for reflection or fabrication, are admissible." 1 Stansbury, N. C. Evidence (Brandis rev.), § 164, at 554; *accord, State v. Cox,* 271 N.C. N.C. 579, 157 S.E. 2d 142; *Hargett v. Ins. Co.,* 258 N.C. 10, 128 S.E. 2d 26; *State v. McKinney,* 13 N.C. App. 214, 184 S.E. 2d 897. Such exclamations must be entirely spontaneous, however; they must be made contemporaneously with the startling event, or within a very short time thereafter. *Gray v. Insurance Co.,* 254 N.C. 286, 118 S.E. 2d 909; *Johnson v. Meyer's Co.,* 246 N.C. 310, 98 S.E. 2d 315; *Coley v. Phillips,* 224 N.C. 618, 31 S.E. 2d 757. In the present case Mrs. Charles' statements to Officer Miller were made some time after she found the money missing from her cash register. Between the time when she discovered the theft and the time when Officer Miller arrived, she had a chance to discuss the incident with the man who delivered the bread, with a customer outside the restaurant, and with the policeman whom she telephoned. During this interval, she had sufficient time for thought and reflection. Therefore, her statements to Officer Miller cannot be considered spontaneous, and the court acted properly in refusing to admit them as substantive evidence.

[5] When Officer Miller went to the Roast Grill on May 21, Mrs. Charles gave him a description of defendant, and Miller testified about this description at the trial. While cross-examining Officer Beasley, counsel for defendant questioned him about this description. No prejudicial error is shown in excluding these questions, because they merely duplicated Miller's testimony. " 'The limits of legitimate cross-examination are largely within the discretion of the trial judge,' " and he may exclude questions which are purely repetitious. *State v. Chance,* 279 N.C. 643, 652, 185 S.E. 2d 227, 233, *vacated and remanded on other grounds,* 408 U.S. 940; *see State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20; 1 Stansbury, *supra,* § 35, at 108.

[6] When defendant testified, the Solicitor cross-examined him concerning his criminal record. He first asked defendant about a number of specific convictions, and then asked: "Is there anything else you've been convicted of?" These questions were proper, and the court did not err in allowing them. A criminal defendant, like any other witness, may be cross-examined about prior criminal convictions. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874; *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174.

[7] Defendant contends that the court erred in failing to instruct the jury on simple larceny, a lesser included offense of felonious larceny. If Mrs. Charles' original statement that defendant stole her money while she was at the back of the restaurant had been admissible as substantive evidence, this contention would be correct. But since the court properly limited this testimony to corroborative purposes, there is no substantive evidence in the record showing that defendant was guilty of simple larceny. The court was therefore correct in refusing to charge on this offense. *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545; *State v. Lyles,* 19 N.C. App. 632, 199 S.E. 2d 699, *cert. denied and appeal dismissed,* 284 N.C. 426, 200 S.E. 2d 662.

[8] Finally, defendant argues that his motion for nonsuit should have been granted. This argument cannot be accepted, for there is substantial evidence tending to show defendant's guilt. Mrs. Charles found that all the bills had been taken from her cash register. Defendant was the only customer who had been in the restaurant on the morning when the theft occurred. Mrs. Partsakoulokis observed defendant entering the restaurant through the back screen door, which Mrs. Charles had latched; and Officer Miller noticed that the screen door latch had been broken. Clearly the jury's verdict is supported by the evidence.

Defendant has been well represented by counsel and has received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

Arnold v. Distributors and Wilson v. Distributors

ARTHUR LARRY ARNOLD v. MERCHANTS DISTRIBUTORS, INC. AND RONNIE WAYNE LEWIS

— AND —

TIMOTHY EUGENE WILSON v. MERCHANTS DISTRIBUTORS, INC. AND RONNIE WAYNE LEWIS

No. 7422SC187

(Filed 5 June 1974)

1. **Pleadings § 32— denial of motion to amend answer — discretion of court**

The trial court did not abuse its discretion in the denial of defendants' motion to be allowed to amend their answers to plead contributory negligence on the part of plaintiffs as passengers in a truck driven by another.

2. **Automobiles § 53— driving on wrong side of highway**

Plaintiffs' evidence was sufficient for the jury where it tended to show that defendants' truck was traveling on the wrong side of the highway when it collided with plaintiffs' oncoming truck.

3. **Automobiles § 90— vehicles meeting on highway — failure to apply law to evidence**

In an action arising out of a collision between two trucks in which the evidence was conflicting as to which truck was on the wrong side of the highway at the time of the collision, the trial court erred in failing to apply the law as to vehicles meeting on the highway to defendants' evidence that their truck was traveling in the proper lane at the time of the accident and that plaintiffs' truck was across the center line of the highway.

ON *Certiorari* to review the trial before *Collier, Judge,* 6 August 1973 Session of Superior Court held in IREDELL County.

These are civil actions wherein plaintiffs, Arthur Larry Arnold (Arnold) and Timothy Eugene Wilson (Wilson), seek to recover damages for personal injuries allegedly resulting from a collision between the truck in which plaintiffs were riding as passengers and a truck owned by defendant, Merchants Distributors, Inc., (MDI) and driven by defendant Ronnie Wayne Lewis (Lewis). In addition to the two defendants named above, the plaintiffs each also included as a party defendant (both as an individual and as the administrator of his son's estate) John Hutchinson, father of the deceased driver of the vehicle in which plaintiffs were riding.

The complaint in the Arnold case was filed in October 1969; while the complaint in the Wilson case was filed two months

thereafter. In January of 1970, the defendants, MDI and Lewis filed answers to these two complaints and also a crossclaim for personal injuries and property damages against John N. Hutchinson, individually and as administrator of the estate of his son, alleging negligence on the part of Hutchinson and his deceased son. Previously, on 9 September 1969, the defendants Lewis and MDI had instituted an action in Catawba County involving the same parties and claims as named in the aforementioned crossclaim; however, at the 4 January 1972 Session of Superior Court held in Catawba County, a jury answered the issue of the Hutchinsons' negligence in the negative; and it was adjudicated that defendants MDI and Ronnie Wayne Lewis have and recover nothing of John N. Hutchinson, individually, and as administrator of the estate of Mark S. Hutchinson. Subsequently, on 9 February 1972, the defendant Hutchinson filed a motion in Iredell County requesting to be allowed to amend his answer to the crossclaim of defendants Lewis and MDI to plead the judgment in Catawba County as *res judicata* to the defendants' crossclaim in the Iredell County action. On 19 March 1973 an order was entered dismissing the crossclaim of the defendants MDI and Lewis against Hutchinson, both individually and as administrator of the estate of Mark S. Hutchinson.

These two cases were consolidated for trial and were first heard at the 30 April 1973 Session of Superior Court held in Iredell County. At the time the case was called, the plaintiffs submitted to a voluntary dismissal with prejudice of their claim against defendant Hutchinson individually; and at the conclusion of plaintiffs' evidence, defendant Hutchinson as administrator of the estate of Mark Hutchinson moved for and was granted a directed verdict pursuant to G.S. 1A-1, Rule 50(a), Rules of Civil Procedure. The first trial as to the defendants Lewis and MDI resulted in a mistrial. Thereafter, on 6 August 1973 the trial giving rise to the present appeal was commenced; and the plaintiffs offered evidence tending to show the following:

On 2 June 1969 plaintiffs Wilson and Arnold were passengers in a 1965 Dodge truck, which was being driven by Mark Hutchinson. The truck was equipped with a two-man sleeper and was used by plaintiffs and Mark Hutchinson, all of whom were members of a professional-style drag racing team, to transfer their racing car from one locality to another. On this particular trip the three men departed from Suffolk,

Virginia, at 8:00 o'clock Sunday evening following an auto race. Plaintiff Arnold drove the truck for three or four hours until they stopped to get something to eat. At midnight, Hutchinson, who had been asleep in the back of the truck, assumed the role of driver and continued in this capacity until shortly after five o'clock the next morning at which time their truck became involved in a collision with a truck belonging to defendant MDI and driven by defendant Lewis. At the time of the collision, the truck operated by Hutchinson was headed in a westerly direction on highway US 64, while the MDI truck was progressing in an easterly direction. US 64 was described as being a twenty-two foot wide highway over which two-lane traffic traveled and having a posted speed limit of 55 miles per hour for cars and 45 miles per hour for trucks. Geographically, the site of the accident was east of Statesville in Iredell County where Highway 64 contains a number of valleys and hills; and the collision occurred just after the MDI truck had reached the crest of one of these hills and shortly before the truck in which plaintiffs were riding arrived at the top of this same hill.

Officer J. M. Burns of the State Highway Patrol investigated the accident and testified that upon his arrival at the scene of the collision, he observed defendant MDI's truck on the south side of Highway 64 headed in an easterly direction; and the 1965 Dodge truck in which plaintiffs were riding was on the north side headed in a westerly direction. Both trucks were heavily damaged with the bulk of the damages being located on the left side or driver's side of the vehicles. Officer Burns further testified that:

> "There were approximately 37 feet of skid marks on the highway and shoulder with just a small portion of the skid marks on the shoulder where the right wheel of the MDI truck ran off the pavement on the south side. There were no skid marks on the shoulder running parallel with U. S. Highway 64. The 37 feet of skid marks on the paved portion of the highway ran from the left rear wheels of the trailer. * * * The 37 feet of skid marks started approximately a foot or 14 inches on the south side of the center line and ran parallel with the center line a short distance and then verred [sic] off toward the south shoulder."

Officer Burns also indicated that he had talked with defendant Ronnie Lewis shortly after the accident and that Lewis

had stated to him that immediately prior to the accident he was driving between 45 and 50 miles per hour.

The only eyewitness to the accident aside from the occupants of the two trucks was Paul Fink, who at the time of the collision was traveling approximately one-third of a mile behind the truck in which plaintiffs were riding. He testified that he had a constant, unimpeded view of the truck and that the last time he saw the truck, it was in the right hand lane. Similar testimony was offered by plaintiff Wilson who testified as follows:

> "As to what happened directly leading up to the collision, like I said I was dozing and then all of a sudden Mark yelled 'look out.' I looked up and I could see the side of the road. It was the right side of the road because I could see the shoulder. We were almost on top of the shoulder, and I could see the headlights to the other truck coming towards us. No, the MDI truck was not in its proper lane. It would have had to be on our side . . . ."

Plaintiffs also offered as evidence the oral testimony and written depositions of several doctors who had treated plaintiffs for injuries allegedly received in the accident. This evidence tended to establish that both plaintiffs received in the accident severe, painful, and permanent personal injuries, and that each plaintiff incurred substantial hospital and medical bills for his injuries, and that each plaintiff lost considerable time and money from his employment.

Issues as to defendants' negligence were submitted to and answered by the jury in favor of the plaintiffs. The jury answered the issue as to Arnold's damage in the amount of $135,000.00 and the issue as to Wilson's damage in the amount of $27,500.00. From judgments entered on the verdicts, the defendants appealed.

Seymour S. Rosenberg and Sowers, Avery & Crosswhite by William E. Crosswhite for plaintiff appellees.

James C. Smathers and Edwin G. Farthing for defendant appellants.

HEDRICK, Judge.

[1] By their first assignment of error, based on an exception to an order dated 30 April 1973, defendants contend the court

erred in denying their motion to be allowed to amend their answers to plead contributory negligence on the part of plaintiffs as passengers in the truck being driven by Hutchinson. It will be noted that the order denying the motion was entered subsequent to the entry of the judgment of the case in Catawba County, where the question of Hutchinson's negligence had been determined in his favor as the driver of the truck in which plaintiffs were riding. Likewise, it will be noted that the order denying the motion was entered prior to the first trial which resulted in a mistrial and was not renewed before the trial giving rise to the present appeal. A motion to amend the pleadings is addressed to the sound discretion of the trial court and is not reviewable upon appeal in the absence of a showing of abuse of discretion. *Flores v. Caldwell*, 14 N.C. App. 144, 187 S.E. 2d 377 (1972); *Gifts, Inc. v. Duncan*, 9 N.C. App. 653, 177 S.E. 2d 428 (1970). Clearly, there has been no showing in this case of an abuse of discretion. This assignment of error is without merit.

[2] We next discuss defendants' contention that the trial court erred in not granting defendants' motion for a directed verdict. A review of the evidence presented leads us to conclude that the evidence introduced by plaintiffs was sufficient to withstand the motion for directed verdict and to require submission of the cases to the jury.

[3] Defendants, by their assignment of error number 27, contend that the trial court erred in its charge to the jury. More specifically, the defendants argue that, although the trial court correctly stated the applicable law with regard to vehicles meeting on the highway, the trial court erred when it failed to apply this law to certain evidence introduced by the defendants. A careful examination of the charge discloses that the court did correctly declare and explain the law with respect to vehicles meeting on the highway, and did correctly and accurately apply this to plaintiffs' evidence tending to show that defendant Lewis was driving on the wrong side of the highway. However, the defendants contended, and their evidence tended to show, that the driver of the vehicle in which plaintiffs were riding, not the defendants, was driving on the wrong side of the road at the time of the collision. Defendants now maintain that the trial court's failure to apply the relevant law as to vehicles meeting on the highway to this evidence constitutes prejudicial error for which the defendants are entitled to a new trial.

In their answers and further defenses to plaintiffs' complaints, the defendants, among other things, alleged that Mark S. Hutchinson, the deceased driver of the truck in which plaintiffs were riding, was driving on the wrong side of the highway at the time of the accident. At trial the defendants offered the testimony of two witnesses, defendant Lewis (driver of defendant MDI's truck) and Patrolman Burns (the investigating officer) in support of this allegation. Their testimony tended to establish that defendant Lewis was driving in the proper lane at the time of the accident, and that the truck driven by Hutchinson in which the plaintiffs were riding, was across the center line of the highway at the time of the collision. While defendants submit that the trial court erred in its charge in not applying the law to the defendants' evidence, the plaintiffs insist that the defendants cannot now be heard to complain that the trial court erred, since the defendants did not make a special request that such instruction be given.

> "It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence." 7 Strong, N. C. Index 2d, Trial, § 33, pp. 324-5.

We are of the opinion that the defendants were entitled to have the applicable law applied to the evidence which they introduced without having to make a request for a special instruction. For error in not doing so, the defendants must be afforded a new trial. It was crucial to defendants' case to have the trial court apply the law relating to vehicles meeting on the highway to the relevant evidence defendants introduced, as this evidence tended to sustain defendants' contention that they were not actionably negligent. *Faison v. Trucking Co.*, 266 N.C. 383, 146 S.E. 2d 450 (1965). Therefore, the defendants are entitled to a new trial.

Defendants have brought forward other assignments of error which we do not discuss inasmuch as they are not likely to recur upon retrial.

New trial.

Judges CAMPBELL and BALEY concur.

A. GLENDON JOHNSON v. WILLIAM HARVEY HOOKS, JR.

No. 7410DC252

(Filed 5 June 1974)

1. **Pleadings § 9; Rules of Civil Procedure § 6— extension of time to answer — excusable neglect — plaintiff's failure to file amended complaint**

The trial court did not abuse its discretion in granting defendant an extension of time to file answer based on excusable neglect where the court found that plaintiff had been given 60 days to amend his complaint, that plaintiff did not amend his complaint and that defendant and his attorney did not file an answer because they did not receive an amended complaint. G.S. 1A-1, Rule 6(b)(2).

2. **Evidence § 31— party to note — oral testimony — best evidence rule**

In an action to recover an amount plaintiff paid to a bank under the mistaken belief that he was paying a note of defendant's son rather than defendant's note, the trial court erred in refusing to permit plaintiff to question several witnesses, including defendant, as to whether defendant was a party to the note satisfied by plaintiff, since the best evidence rule does not prevent proof by oral testimony of a fact which has an existence independent of the terms of a writing.

3. **Unjust Enrichment — payment of another's note — misapprehension of facts — recovery of payment**

If plaintiff paid an amount to a bank under the mistaken belief that he was paying a note of defendant's son rather than defendant's note, plaintiff may bring an action against defendant to recover the money paid on the theory that by such payment the recipient has been unjustly enriched at plaintiff's expense.

ON *Certiorari* to review the Order of Preston, Judge, 16 October 1972 Session of District Court held in WAKE County.

This is a civil action wherein the plaintiff, A. Glendon Johnson, seeks to recover $1,621.19 from defendant, William Harvey Hooks, Jr. The sum plaintiff is attempting to recoup represents a payment made by him to Wachovia Bank and Trust Company in Goldsboro, N. C., while plaintiff was allegedly operating under the mistaken impression that this payment was to be credited to an obligation owed Wachovia by defendant's son, William Harvey Hooks III.

This matter, by the consent of the parties, was heard by the trial judge without a jury and the trial judge made findings of fact, which, except where quoted, are summarized as follows:

On 25 February 1965 William H. Hooks III (defendant's son) purchased a Ford Mustang automobile from Fremont

Motor Sales in Fremont, N. C.; and the purchase of this car was financed through Wachovia Bank and Trust Company of Goldsboro, which had a first lien on the title in the amount of $1,621.19.

The plaintiff and defendant's son became good friends, "having met in the Psychiatric Ward, Duke Hospital, Durham, North Carolina," and through their conversations plaintiff became apprised of defendant's son's indebtedness to Wachovia Bank. After both men had been discharged fom the hospital, they performed favors for one another on several different occasions; and on 3 March 1966, "plaintiff's bank, pursuant to plaintiff's request, paid to Wachovia Bank and Trust Company in Goldsboro, North Carolina, $1,621.19 . . . . [A]t the time this payment was made, the defendant [sic] believed that the payment which he ordered made to Wachovia was to be credited to an obligation owed Wachovia by William Harvey Hooks III . . . . [Furthermore] at the time the plaintiff made the above mentioned payment to Wachovia he had never conferred about said indebtedness in any manner whatsoever with William Harvey Hooks, Jr., and that William Harvey Hooks, Jr., had never requested nor authorized the plaintiff to pay any amount whatsoever to Wachovia."

Upon receipt of the money from plaintiff's bank, the funds were applied to the account on the 1965 Ford Mustang and "Wachovia Bank mailed whatever relevant papers it had to William Harvey Hooks, Jr., P. O. Box 574, Fremont, North Carolina, which was then, and still is, the Post Office Box of William Harvey Hooks, Jr."

Based on the foregoing findings of fact, the court made the following pertinent conclusions of law:

> "2. That plaintiff has failed to produce sufficient evidence which, when taken in its most favorable light, would show that the defendant, William Harvey Hooks, Jr., was ever a party to any note or financing agreement whatsoever concerning the purchase of a 1965 Mustang automobile above referred to.
>
> 3. That even if the plaintiff had affirmatively established any liability on the part of William Harvey Hooks, Jr., then the plaintiff's own evidence shows that the plaintiff, in paying the above mentioned obligation, was an 'officious intermeddler' and that defendant received no con-

sideration or benefit from plaintiff's unwarranted acts, and therefore, is entitled to no relief, either in law or in equity."

From a judgment that plaintiff recover nothing of defendant, the plaintiff failed to file a timely appeal; however, the plaintiff sought and was granted a writ of certiorari on 11 September 1973.

A. Glendon Johnson for plaintiff appellant.

Strickland and Rouse by David M. Rouse for defendant appellee.

HEDRICK, Judge.

A discussion of plaintiff's first assignment of error can be made more meaningful by a brief review of the procedural history of this case. This action was commenced on 19 February 1969 against defendants William Harvey Hooks, Jr., and Wachovia Bank & Trust Co. of Goldsboro (Wachovia). Both defendants demurred to the complaint and the trial court in an Order filed on 14 May 1969 determined (1) that the demurrer of Wachovia was proper and should be allowed, (2) that the demurrer of Hooks should be overruled. Thereafter, the plaintiff appealed from that portion of the judgment of the district court sustaining Wachovia's demurrer; and this court, in an opinion reported in 6 N.C. App. 432, 169 S.E. 2d 893 (1969), affirmed the judgment of the district court. In the 14 May 1969 Order, the trial court also allowed the plaintiff's motion to amend his complaint and gave plaintiff sixty (60) days in which to make such amendment(s). On 6 November 1970 plaintiff made a motion for judgment on the pleadings contending that the defendant Hooks had failed to file an answer in this action and that the time for so doing had long since expired. On 10 November 1971 the defendant filed a motion seeking an extension of time to file his answer, and in this motion the defendant explained his reason for failing to answer as follows:

> "[T]he plaintiff was given sixty days to amend his complaint [but] . . . the plaintiff did not amend his complaint and has not filed or served an amended complaint and has not filed or served an amended complaint upon William Harvey Hooks, Jr., or his attorney . . . . [I]t was the understanding of the defendant, William Harvey Hooks, Jr., and his attorney, that the amendment would apply to

> him and that he would have a reasonable time to file answer after the plaintiff amended his complaint . . . . The defendant . . . delayed filing an answer until such time as he had received the amended complaint and having never received the amended complaint, did not file [an] answer."

In an order filed 16 November 1971, the trial judge entered an Order extending the time for defendant to file an answer and in so doing stated:

> "[T]he plaintiff was given sixty days to amend his complaint; [however], the plaintiff did not amend his complaint and, therefore, did not serve an amended complaint upon the defendant, William Harvey Hooks, Jr., or his attorney . . . . [T]he defendant, William Harvey Hooks and his attorney did not file an answer because they did not receive an amended complaint [and] . . . the Court finds as a fact that it was due to this misunderstanding that an answer was not filed."

[1] The plaintiff excepted to the granting of this extension of time to file and this exception provides the foundation for his first assignment of error.

G.S. 1A-1, Rule 12(a)(1) of the Rules of Civil Procedure requires an answer to be filed within thirty (30) days and defendant, having failed to comply with this rule, must resort to G.S. 1A-1, Rule 6(b), of the Rules of Civil Procedure, for an enlargement of the period in which to file his answer. Rule 6(b) gives the court discretionary authority to enlarge the time period for filing pleadings, motions, interrogatories, etc., and this discretion can be exercised (1) upon request prior to the expiration of the time to file, *or* (2) *where the failure to act within the time prescribed was the result of excusable neglect.* (Emphasis added.) *Hubbard v. Lumley,* 17 N.C. App. 649, 195 S.E. 2d 330 (1973); *Cheshire v. Aircraft Corp.,* 17 N.C. App. 74, 193 S.E. 2d 362 (1972). In the instant case, the trial judge, in his discretion, determined that the defendant should be allowed to file his answer. Although the order allowing such extension was not couched in the specific language of Rule 6(b), we hold that the finding of the trial court was tantamount to a finding of excusable neglect, and there having been no showing of abuse of discretion, the exercise of the trial court's discretionary power in allowing defendant to file his answer is not

reviewable upon this appeal. *State Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22 (1967). Thus, this assignment of error is without merit.

[2] In order for the plaintiff to prevail in this action, it is necessary that he prove, among other things, that the defendant was a party to the note held by Wachovia and satisfied by plaintiff; and plaintiff, by three separate assignments of error, asserts that he was denied the opportunity to offer into evidence testimony relevant to the proof of this vital fact. Plaintiff attempted to ask questions concerning the note to (1) the sales manager of the automobile dealership where defendant's son purchased the car; (2) the assistant cashier of the bank which financed the purchase; and (3) the defendant himself; but, in each instance the questions asked were objected to by defendant's counsel and such objections were sustained by the trial court. Clearly, the most expedient course for plaintiff to have followed would have been to introduce the note in question; however, the uncontroverted findings reveal that Wachovia mailed the relevant papers involved in the loan transaction to the defendant upon payment of the note by plaintiff. Therefore, the plaintiff, in order to prove the critical element of defendant's involvement in the transaction, chose to offer secondary evidence of this fact and such secondary evidence was offered in the form of questions propounded by plaintiff to several witnesses, including the defendant. That this was an acceptable method of proving the significant fact in question is manifested by the following comment which appears in 2 Stansbury, N. C. Evidence, § 191, p. 103, N. 24 (Brandis Rev. 1973).

> "[I]f a fact has an existence independent of the term of any writing, the best evidence rule does not prevent proof of such fact by the oral testimony of a witness having knowledge of it or by any other acceptable method of proof not involving use of the writing."

Although the testimony which appears in the record of this case is somewhat awkward and confusing as a result of the absence of a court stenographer, we are persuaded that the record does disclose that the plaintiff was prejudiced by being denied—without any justifiable reason—the opportunity to present pertinent testimony. For such error the plaintiff must be afforded a new trial.

As a consequence of reaching the result that plaintiff must be given an opportunity to introduce evidence relative to the

determination of whether defendant was a party to the note, we must next discuss the import of the trial court's conclusion that even if the plaintiff had offered evidence of defendant being a party to the note that the plaintiff could not have prevailed, as he was nothing more than an "officious intermeddler" or "volunteer." By a liberal construction of the complaint, plaintiff alleges that he made the payment to Wachovia while operating under the mistaken belief that he was paying the debt of defendant's son. Indeed, the trial court found as a fact that "at the time this payment was made, the defendant believed that the payment which he ordered made to Wachovia was to be credited to an obligation owed Wachovia by William Harvey Hooks, III . . . . " Moreover, as we have previously noted, *supra,* the plaintiff was subsequently frustrated in his attempt to prove this allegation.

[3] It is an accepted principle that payments are not considered voluntary so as to bar their recovery when they are made under misapprehension of the true facts. 70 C.J.S., Payments, § 157, p. 367. Such is the law in this jurisdiction. *Boney, Insurance Com'r. v. Insurance Co.,* 213 N.C. 563, 197 S.E. 122 (1938); *Publishing Co. v. Barber,* 165 N.C. 478, 81 S.E. 694 (1914). See also, *Guaranty Co. v. Reagan,* 256 N.C. 1, 122 S.E. 2d 774 (1961). One who makes a payment of money under a mistake is permitted to bring an action to recover the money paid on the theory that by such payment the recipient has been unjustly enriched at the expense of the party making the payment. *Guaranty Co. v. Reagan, supra; Morgan v. Spruill,* 214 N.C. 255, 199 S.E. 17 (1938). Thus, in light of the foregoing principles, we determine that the trial court erroneously concluded that the plaintiff could not recover even if he proved defendant was a party to the loan transaction.

For the reasons herein stated the plaintiff must be awarded a

New trial.

Judges CAMPBELL and BALEY concur.

NATIONAL HOME LIFE ASSURANCE COMPANY, PETITIONER v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA, RESPONDENT

No. 7410SC385

(Filed 5 June 1974)

Appeal and Error § 6— appeal from interlocutory order

Purported appeal from an interlocutory order not affecting a substantial right of respondent appellant is dismissed as premature. G.S. 7A-27(d).

APPEAL by respondent from *Bailey, Judge,* 21 December 1973 Session of Superior Court held in WAKE County.

On 27 November 1973 the petitioner, National Home Life Assurance Company (National), filed a petition in the Superior Court in Wake County against the respondent, who is the Commissioner of Insurance for the State of North Carolina (Commissioner). In this petition, National in substance alleged:

National is a corporation incorporated under the laws of Missouri and licensed to write insurance in the State of North Carolina, but is not actually doing business in North Carolina. National was licensed by the North Carolina Insurance Department continuously for several years prior to 1971, and prior to 30 September 1971 National was marketing both accident and health insurance and life insurance in North Carolina as well as in nearly all other states in the Union. On 19 November 1971, Edwin S. Lanier, then Commissioner of Insurance of North Carolina, wrote a letter to the Chairman of the Board of Directors of National, wherein he indicated feeling that National was unable to handle certain marketing expenditures without the financial backing of its companion company, National Liberty Life Insurance Company, and its owner, National Liberty Corporation, and that he deemed it necessary that "National Home Life voluntarily agree to cease and desist from writing any further business in North Carolina until further notice to the contrary in writing from this Department." National has at all times since this communication from Commissioner Lanier ceased and desisted from writing accident and health insurance business in North Carolina. Commissioner Lanier went out of office on 5 January 1973 without removing the aforesaid cease and desist request. National knows of no violations of any of the provisions of the insurance laws of North Carolina and

Commissioner Ingram has not charged formally or informally any violations of the insurance laws of North Carolina committed by National. Respondent Commissioner and his predecessor have issued licenses to National to transact the business of insurance in the State of North Carolina for the period 1 July 1972 through 30 June 1973 and for the period 1 July 1973 through 30 June 1974, with the request that National "is to still cease and desist from writing any further business in North Carolina until written notice to the contrary from this Department." National has repeatedly endeavored to find out what charges, if any, are being made against it by respondent Commissioner but has been unable to do so. There has been unreasonable delay on the part of respondent Commissioner in reaching a final administrative decision as to whether National has in fact violated any provisions of the North Carolina Insurance laws despite many requests made at many meetings and conferences with respondent. Without a final administrative decision by the Commissioner, National is being deprived of its right of appeal and being kept under a restriction of its license without a hearing required by law.

On these allegations in the petition, National prayed the court to issue an order to respondent Commissioner to show cause (1) why respondent should not charge the petitioner with violations of a specific provision of the North Carolina Insurance laws or withdraw the cease and desist request, and if such a charge is made, why respondent should not conduct a hearing on said charge; (2) why the Commissioner should not be enjoined and restrained from placing an illegal restriction upon petitioner's right to do business in North Carolina pending outcome of the hearing; and (3) why the Commissioner should not be restrained and enjoined from delaying having a final administrative hearing more than 20 days from the date of the order to show cause.

On the filing of the foregoing petition on 27 November 1973, Judge Hamilton H. Hobgood entered an order, dated and filed 27 November 1973, directing that respondent Commissioner appear and show cause why (a) the petitioner is not entitled to a prompt hearing in respect to any pending charges against it for violations of the North Carolina Insurance laws; (b) why respondent should not be enjoined and restrained from placing restriction upon the right of the petitioner to do business in North Carolina pending such hearing or appeal, if any; and (c)

why the Commissioner should not be enjoined from delaying having a final administrative hearing and rendering a final administrative decision thereon more than 30 days from the date of the order to show cause.

By consent of the parties the hearing on the show cause order was continued until 21 December 1973 to be heard before Judge James H. Pou Bailey.

On 21 December 1973 respondent Commissioner filed with the court a motion to dismiss this action for failure of the pleading to state a claim upon which relief may be granted, asserting as grounds for the motion that the action is against the Commissioner of Insurance in his official capacity and the State has not waived its immunity to such a suit, and further asserting that petitioner had not exhausted administrative remedies. In this motion, respondent Commissioner also stated opposition to injunctive relief "on grounds of acquiescence, estoppel, and waiver."

The matter came on for hearing before Judge Bailey pursuant to the show cause order on 21 December 1973, at which time the verified petition of the petitioner was treated as an affidavit, and the court heard testimony of a witness presented by respondent Commissioner and received evidence in the form of exhibits introduced by respondent. Among these exhibits were certain letters written by respondent Commissioner or his predecessor in office to officials of National, as follows:

LETTER DATED 19 NOVEMBER 1971

[After referring to certain losses due to marketing expenditures incurred by National as shown on National's 30 September 1971 Interim Financial Statement, this letter contains the following:]

"[S]ince National Home Life is presently unable to handle such marketing expenditures without the financial backing of its companion Company, namely, National Liberty Life Insurance Company, and its owner, National Liberty Corporation, both of the State of Pennsylvania, but not licensed in the State of North Carolina, *I therefore deem it necessary that:*

"1. National Home Life voluntarily agree to cease and desist from writing any further business in North Carolina

until further notice to the contrary in writing from this Department;

"2. Increase its current $300,000.00 deposit in securities in this State to not less than $500,000.00 for the sole protection of the North Carolina policyholders of National Home Life; *or*

"3. In lieu of the above, and in order that National Home Life may continue to maintain its license in North Carolina, that it reinsure all of its existing business, as well as all future writings, in North Carolina, with an acceptable carrier licensed in this State."

[Respondent's witness King, Deputy Commissioner in charge of Company Operations Division of the Department of Insurance, testified before Judge Bailey that National placed the required deposit in the Insurance Department.]

LETTER DATED 23 JUNE 1972

"The Renewal License of National Home Life Assurance Company of St. Louis, Missouri for the license period July 1, 1972 through June 30, 1973, is hereby issued under the same circumstances and conditions as set forth in this Department's letter to you of November 19, 1971 and January 1, 1972, *copies of which are attached.*"

[There is no copy of the letter referred to above as dated "January 1, 1972" in the record on this appeal.]

LETTER DATED 11 JULY 1973

"As I indicated to you, license number 1056 was leased [sic] to your Company under the same terms and conditions as were set forth in this Department's letters to you of November 19, 1971 and January 27, 1972 (copies enclosed), that is, National Home Life is to still cease and desist from writing any further business in North Carolina until written notice on [sic] the contrary from this Department."

[There is no copy of the letter referred to above dated "January 27, 1972" in the record on this appeal.]

At the conclusion of the hearing, Judge Bailey entered an order as follows:

"After having examined the verified petition of the petitioner which, for the purpose of this hearing, was

treated as an affidavit; after hearing the witness of the respondent, Mr. George E. King, Deputy Commissioner and Chief Examiner, Company Operations Division, N. C. Insurance Department; and further after hearing argument of counsel and the Court being under the impression that the requests from the Insurance Department to the petitioner in the years 1971, 1972, and 1973, to cease and desist from writing insurance were merely informal requests without the force and effect of law and that subsequent inaction on the part of the petitioner in refraining from writing of insurance in North Carolina, was voluntary; and the court further being under the impression that aforesaid requests are not enforceable legally;

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

"(1) That all of the requests from the respondent to the petitioner to cease and desist in the years 1971, 1972 and 1973, were merely informal requests without the force and effect of law.

"This the 21st day of December 1973.

"s/ JAMES H. POU BAILEY
"Senior Resident Judge"

To the signing and entry of this order, respondent appealed.

Blanchard, Tucker, Denson & Cline by Charles F. Blanchard and James E. Cline for petitioner appellee.

Attorney General Robert Morgan by Assistant Attorney General Charles A. Lloyd for respondent appellant.

PARKER, Judge.

The order appealed from is interlocutory, does not affect a substantial right of the respondent appellant, and does not otherwise fall within any of the subsections of G.S. 7A-27(d). The appeal is premature and accordingly will be dismissed. 1 Strong, N. C. Index 2d, Appeal and Error, § 6.

The order appealed from contains no findings of fact, no ruling upon the questions sought to be raised by respondent appellant's motion to dismiss, and no direction to respondent to do or to refrain from doing anything. At most, it simply announced

the trial court's conclusion of law, unrelated to any factual finding, "[t]hat all of the requests from the respondent to the petitioner to cease and desist in the years 1971, 1972 and 1973, were merely informal requests without the force and effect of law." If this be considered a declaratory judgment, it still did not affect any substantial right of respondent Commissioner, who was in no way prevented from fully exercising his statutory responsibilities and powers to make examinations, conduct hearings, and, upon proper findings to suspend, revoke or refuse to renew National's license to do business in this State. We further note that G.S. 58-66 provides that the license required of insurance companies continues for the next ensuing twelve months after July first of each year, and the order appealed from, whatever its effect, deals with a matter which for all practical purposes is now moot.

Appeal dismissed.

Judges VAUGHN and CARSON concur.

BELDON N. LITTLE v. JAMES D. ROSE AND RICHARD (DICK) O'NEAL

No. 742SC69

(Filed 5 June 1974)

1. **Limitation of Actions § 18— three year period of limitation — time action commenced — sufficiency of evidence**

In an action commenced on 16 February 1970 to recover for damages to a mobile truck crane allegedly caused by defendants, facts pleaded by plaintiff, among them that the crane was purchased on 26 January 1967 and that the damage was sustained between March 1967 and September 1967, were sufficient to establish that the commencement of the action took place within the three year period as required by G.S. 1-52(1).

2. **Partnership § 6— two defendants — failure to submit issue of partnership — no error**

The trial court did not err in refusing to submit to the jury issues as to whether defendants were engaged in a partnership at the time the cause of action accrued where plaintiff presented evidence that both defendants dealt with him, both participated in the closing and sale of the crane, and both shared the responsibility for the crane while it was in their possession awaiting plaintiff's return to pick it up, since that evidence was sufficient to make a claim for damages against the defendants individually.

3. Damages §§ 4, 13— loss of use of business vehicle — measure of damages

Ordinarily, the measure of damages for loss of use of a business vehicle is not the profits which the owner would have earned from its use during the time he was deprived of it, but it is the cost of renting a similar vehicle during a reasonable period for repairs; therefore, in an action to recover damages for loss of use of a crane allegedly damaged while in defendants' possession, the trial court did not err in allowing into evidence testimony by plaintiff as to costs incurred by him on two occasions in renting other cranes to meet his contractual obligations.

Judge BALEY dissenting.

APPEAL by defendant from *Fountain, Judge,* 6 August 1973 Session of Superior Court held in BEAUFORT County. Argued in the Court of Appeals 10 April 1974.

This action was instituted by the plaintiff on 16 February 1970, seeking to recover for physical damages to a mobile truck crane sold to plaintiff by the defendants on 26 January 1967, and damages for loss of use of the crane.

Defendant O'Neal denied the allegations of the complaint, particularly the allegation of the existence of a partnership between defendant O'Neal and defendant Rose.

Judgment by default and inquiry was entered by the Clerk of the Superior Court of Beaufort County on 7 February 1973 against defendant Rose.

The jury returned a verdict in favor of the plaintiff in the amount of $7,900.00. Defendant O'Neal appealed from the judgment as to him.

LeRoy Scott for plaintiff-appellee.

Wilkinson, Vosburgh & Thompson, by James R. Vosburgh, for defendant-appellant.

BROCK, Chief Judge.

Defendant contends the trial court committed error in failing to rule as a matter of law that the Statute of Limitations was a bar to recovery in that more than three years had passed since the accrual of the cause of action as alleged in the complaint.

Plaintiff alleged in his complaint that on 26 January 1967 plaintiff purchased a mobile truck crane from the defendants;

that as a condition of the purchase, plaintiff and defendants agreed the crane could be left in defendants' possession for a period not to exceed one year; that the crane would be in good mechanical condition when plaintiff returned to pick up the crane; that between March 1967 and September 1967, defendants used the crane and damaged it; and that in September 1967, when plaintiff called for the crane, plaintiff discovered $2,000.00 in physical damage done to the crane in the interim of possession by defendants.

Defendant filed a motion for judgment on the pleadings, stating that the cause of action accrued on 26 January 1967, and the action was not commenced until 16 February 1970, more than three years later. The trial court denied the motion.

> "A party who moves for judgment on the pleadings thereby admits, for the purpose of the determination of such motion: (1) the truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations controverted by the pleading of his adversary. (Citations omitted.) . . . .
>
> "In determining the motion the court looks only to the pleadings. It hears no evidence, makes no findings of fact and does not take into account other statements of fact in briefs of the parties, or in testimony or allegations by them in a different proceeding. It is limited to the facts properly pleaded in the pleadings before it, inferences reasonably to be drawn from such facts and matters of which the court may take judicial notice. (Citations omitted)." *Wilson v. Development Company,* 276 N.C. 198, 171 S.E. 2d 873.

[1] Plaintiff has pleaded facts sufficient to establish that the commencement of this action took place within the three year period as required by G.S. 1-52(1). Defendant's motion was properly denied. This assignment of error is overruled.

[2] Defendant contends the trial court committed error in refusing to submit issues to the jury tendered by defendant which put in issue the question of whether or not the defendant O'Neal and defendant Rose were engaged in a partnership at the time the alleged cause of action accrued.

The evidence tends to show that plaintiff dealt with both defendants whether they were engaged in a partnership or not.

Plaintiff contacted O'Neal, went to Rose's place of business where the crane was located, tested the crane under Rose's acquiescence, and received assurances from both defendants that the crane was in good condition. Payment was made to O'Neal who turned to Rose, and requested Rose to give plaintiff a receipt.

Although plaintiff alleged a partnership in the complaint, it was not necessary that the issue be submitted to the jury. Summons was served upon each defendant individually. Plaintiff's evidence tended to show joint actions on the part of both defendants and a sharing of the responsibility for damage to the crane.

It was not crucial to plaintiff's action to establish a partnership. Plaintiff need only adduce evidence sufficient to show that both defendants dealt with him, that both participated in the closing and sale of the crane, and that both shared the responsibility for the crane while it was in the hands of defendants until plaintiff could return to pick it up. Such evidence is sufficient to make a claim for damages against the defendants individually. This assignment of error is overruled.

Defendant argues the trial court committed error in allowing plaintiff's evidence as to loss of use when plaintiff failed to lay a proper foundation for the introduction of such evidence. Defendant also argues that plaintiff has failed to meet the burden of proof in establishing evidence sufficient to permit recovery.

Plaintiff's evidence tended to show that upon discovery of the damage to the crane, he immediately telephoned defendant Rose, and received assurances from Rose that the crane would be repaired. Defendant O'Neal also assured plaintiff that the crane would be repaired.

Plaintiff was forced to rent a truck crane in order to meet a contractual obligation on 1 October 1967 in Rocky Mount, North Carolina. Plaintiff had estimated and anticipated a net profit of $1,400.00 on the Rocky Mount contract by using the crane purchased from defendants. The truck crane rental was between $1,400.00 and $1,500.00.

Due to the unavailability of his crane in July, 1968, plaintiff was compelled to rent a crane for $4,500.00 in order to meet an oral contract. Plaintiff's testimony indicated he received no

profit, but did not allege that he suffered a loss other than the rental cost of the substitute crane.

Defendant's contention is bottomed upon the grounds that plaintiff failed to take affirmative action in order to mitigate any damages incurred by him by loss of use of the crane. This contention is without merit. On two separate occasions under two separate contracts in two consecutive years, plaintiff was compelled to rent substitute cranes in order to meet contract deadlines when it became evident to plaintiff that his personal crane would not be available and suitable for use.

[3] "Ordinarily the measure of damages for loss of use of a business vehicle is not the profits which the owner would have earned from its use during the time he was deprived of it; it is the cost of renting a similar vehicle during a reasonable period for repairs. (Citations omitted) . . . . If a plaintiff could have rented a substitute vehicle, the cost of hiring it during the time reasonably necessary to acquire a new one or to repair the old one is the measure of his damage even though no other vehicle was rented. The burden is on the plaintiff to establish the cost of such hire. (Citation omitted)." *Roberts v. Freight Carriers,* 273 N.C. 600, 160 S.E. 2d 712.

Under the first contract, plaintiff's cost of hiring a substitute crane was between $1,400.00 and $1,500.00. Under the second contract, plaintiff's substitution cost was $4,500.00. Plaintiff has pleaded and demonstrated a measure of $5,900.00 in loss of use damages, evidenced by expenditures to minimize damages in the amount of $5,900.00 to $6,000.00. Plaintiff's pleadings are not based upon a loss of profits, but rather upon loss of use damages which may be measured by the cost of renting a similar replacement vehicle. This assignment of error is overruled.

Defendant also contends the trial court committed error in failing to allow defendant's post trial motions to set aside the verdict for errors of law and as being contrary to the greater weight of the evidence, and in failing to grant a remittitur in damages on the grounds that the amount of damages as awarded was based upon grounds too remote and too speculative for any award. These motions were addressed to the sound discretion of the trial judge. No abuse of discretion has been shown. This assignment of error is overruled.

No error.

Judge PARKER concurs.

Judge BALEY dissents.

Judge BALEY dissenting.

I am concerned about the issue of damages and the application of the three-year statute of limitations to plaintiff's cause of action.

As a part of the contract of sale defendants agreed to retain possession of the crane on their premises until plaintiff was ready to use it. In March 1967 plaintiff discovered that the crane was damaged and left it with defendants for repair. It was still in the possession of defendants and had not been repaired at the time of the trial in August of 1973 over six years later.

Plaintiff was permitted to recover $2,000.00 for the damage to the crane. He was also permitted to recover for loss of use, such loss being demonstrated by rental of another crane in October 1967 for $1,400.00, and in July 1968 for $4,500.00, and presumably this loss of use had continued to the time of trial. It is my view that plaintiff had a duty to mitigate his damages, *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590; *Troitino v. Goodman*, 225 N.C. 406, 35 S.E. 2d 277; *Chesson v. Container Co.*, 215 N.C. 112, 1 S.E. 2d 357, and that such mitigation involved more than arranging to rent a substitute crane at heavy expense over an indeterminate period. He had an obligation to see that the crane was promptly repaired, and, if defendants were not making such repairs, it should have been removed from their premises and repaired by someone else. *See Valencia v. Shell Oil Co.*, 23 Cal. 2d 840, 844, 147 P. 2d 558, 560 (1944); *Rogers v. Nelson*, 97 N.H. 72, 75, 80 A. 2d 391, 393 (1951); *Holmes v. Raffo*, 60 Wash. 2d 421, 430, 374 P. 2d 536, 541 (1962) (en banc); Dobbs, Remedies, § 5.11, at 385. The failure to make such duty clear to the jury is error.

In addition, there is no clear evidence of the time the damage to the crane occurred. Plaintiff purchased it on 26 January 1967 and saw it in good condition about a week or ten days later. This would have been between February 2 and February 5. About one month later, March 2 or March 5, he saw the crane in damaged condition. This action was instituted on 16

February 1970. Defendant pleaded the three-year statute of limitations. Plaintiff has the burden of proving his action was brought within the statutory period. *Parsons v. Gunter,* 266 N.C. 731, 147 S.E. 2d 162; *Bennett v. Trust Co.,* 265 N.C. 148, 143 S.E. 2d 312; *Commercial Union Co. v. Electric Corp.,* 15 N.C. App. 406, 190 S.E. 2d 364. His evidence shows only that the breach occurred sometime between February 2 and March 5. Whether it occurred before or after February 16 is purely a matter of speculation.

It is my conviction that defendants are entitled to a new trial.

STATE OF NORTH CAROLINA v. RONNIE FEIMSTER

No. 7422SC394

(Filed 5 June 1974)

1. **Criminal Law § 92— consolidating homicide charges against two defendants**

The trial court did not abuse its discretion in consolidating for trial homicide cases against two defendants where both defendants were indicted for an offense of the same class arising out of the same killing.

2. **Criminal Law § 128— motion for mistrial — newspaper article concerning another charge**

The trial court in a homicide case did not err in the denial of defendant's motion for mistrial based on a newspaper article printed during the trial stating that a warrant had been issued charging defendant with assaulting a police officer where the record does not show that any of the jurors read the article or were adversely influenced by it, notwithstanding the court denied the motion without examining the jurors regarding any possible prejudicial effect of the article on them.

3. **Criminal Law § 42— chain possession of exhibits**

In a prosecution for the murder of a taxicab driver, the State's showing of the chain of possession of spent cartridges found in the cab, bullets removed from deceased and an envelope containing the bullets and the pistol from which they were fired was sufficient to permit the admission of such exhibits, notwithstanding one officer who had had possession of the exhibits was deceased at the time of the trial.

4. **Criminal Law § 42; Homicide § 20— bullets "similar" to those removed from deceased — admissibility**

The fact that a medical witness was able to state only that bullets presented at trial were "similar" to those he removed from the deceased did not render the bullets inadmissible in evidence.

5. **Criminal Law § 89— statements by witnesses to SBI agent — admission for corroboration**

The trial court properly allowed an SBI agent to read statements given by two State's witnesses for the purpose of corroborating their testimony where inconsistencies between the statements and the testimony of the two witnesses were either not substantial enough to warrant excluding the evidence or were properly excluded by the court when defendant moved to strike.

6. **Criminal Law § 95— conversation with codefendant — admission against defendant**

The trial court did not err in failing to restrict testimony of a witness's conversation with a codefendant regarding a pistol to the codefendant where the conversation was relevant to the homicide with which defendant was charged.

7. **Criminal Law § 45— experimental evidence — distance cab driven — amount of fare**

In a prosecution for the murder of a taxicab driver, the trial court did not err in permitting an SBI agent to testify that he drove decedent's cab from a point where defendant allegedly entered a cab to the place where the cab containing decedent's body was found and that the fare meter registered the same amount as that shown on the meter when the cab was found.

8. **Criminal Law § 80— dispatch ticket — nonadmitted documents attached — absence of prejudice**

In a prosecution for the murder of a taxicab driver, defendant was not prejudiced by the fact that when a dispatch ticket was admitted into evidence other documents not introduced into evidence were attached to it where the other documents were removed as soon as this was called to the attention of the court.

APPEAL by defendant from *Collier, Judge,* 15 October 1973 Session of Superior Court held in IREDELL County.

Defendant was tried for murder in the second degree. Evidence for the State tended to show the following.

About 6:00 p.m. on 9 May 1972, defendant and others were together at a residence where Barbara Bruner lived. Illegal drugs were being used. There was a discussion about robbing either Bruner's father, who operated a taxi cab stand, or Creedmore's cab. One of the group, after a short absence, returned and advised against robbing Bruner's father. Shortly after 7:00 p.m., defendant and another left. Defendant returned to the Bruner residence about 1:10 a.m. on 10 May 1972. Defendant said, ". . . he didn't think it was worth it, we didn't get that much money. . . ."

Patricia Redman lived at 522 Tradd Street in Statesville. Redman testified that defendant came to her house shortly before 11:00 p.m. on 9 May. She granted defendant's request that he be allowed to use her telephone. Defendant turned to the yellow pages and then dialed a number. He asked to speak with someone named Pete. He asked Redman for her house number. She told him 523. Defendant "said 525." Before leaving, defendant told Redman not to tell anyone he had used her telephone. Redman saw a Creedmore cab with number 2 on the side stop near 525 Tradd Street across the street from her house. She saw defendant and another person get in the cab and be driven away. When defendant left her house, he was wearing a pair of "shades" but she did not remember what color they were. Creedmore Company records disclosed a call for a cab to go to 523 Tradd Street at 10:41 p.m.

About 11:45 p.m., Pete Sprinkle, a cab driver, was found dead in Creedmore cab number 2. He had been shot in the chest four times. The cab was discovered at the intersection of two rural roads in Iredell County about 1½ miles from where defendant resided with his parents. The cab lights were on and the motor was running. The trip meter showed $3.50 in fare. During his investigation of the murder an officer drove the cab from 523 Tradd Street to where Pete Sprinkle was found in the cab. The meter registered a fare of $3.50 when the officer reached the scene of the crime.

Four spent .25 caliber cartridges and a purple eyeglass lens were found at the scene. Examination of slugs removed from Pete Sprinkle's body and the spent cartridges disclosed that they had been fired from a pistol owned by Vernon Tomlin. Wilford Walls was also charged with the murder of Pete Sprinkle. Walls came to Tomlin's home on the evening of 9 May and asked to borrow his gun. Tomlin kept the gun in his bedroom. He did not "hand" the gun to Walls but went to another room. Later Walls came out and left. Tomlin next saw the gun about 1:00 p.m. the following day. On 11 May 1974, Walls told Tomlin to keep the gun because people were saying that he [Walls] had killed the cab driver. Tomlin did keep the pistol for a few days and then turned it over to the police.

Defendant denied any participation in the crime. He denied being at the home of Barbara Bruner or ever having ridden in a Creedmore cab. He admitted using Patricia Redman's telephone but said he used it to call a friend to take him

home. He said he walked away from Redman's house and later the friend he had called, Michael Feimster, took defendant and Wilford Walls to the home of defendant's parents where they spent the remainder of the night.

Defendant was convicted of murder in the second degree and a prison sentence of from 28 to 30 years was imposed.

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

Collier, Harris, Homesley, Jones & Gaines by Wallace W. Dixon for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that the court erred in consolidating his case with that of Wilford Walls who was also indicted for the homicide of Claude (Pete) Brown Sprinkle. Both defendants were indicted for an offense of the same class arising out of the same killing. Whether to consolidate the cases for trial rested within the court's sound discretion. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; G.S. 15-152. The exercise of that discretion will not be disturbed absent a showing of abuse. *State v. Yoes* and *Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386. No such showing has been made in the present case. The cases were properly consolidated. *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670.

[2] Defendant next asserts that the court erred in denying his motion for a mistrial which was based on the fact that a local newspaper printed an article saying that a warrant had been issued for defendant for assaulting a police officer with a deadly weapon. The story allegedly appeared at approximately the same time the court recessed overnight after the jury had been selected but before the presentation of evidence. The court denied defendant's motion without examining the jurors regarding any possible prejudicial effect of the article on them. While our Supreme Court has suggested that it might be better practice to examine each juror on the effect of a potentially prejudicial article, *see State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652, the court's failure to do so in this case is not prejudicial error since the record does not demonstrate that any of the jurors read the article or that they were adversely influenced by it. *See State v. McVay* and *State v. Simmons, supra.* Whether to grant defendant's motion for a mistrial

involved a discretionary decision which we decline to reverse where abuse has not been shown. *See* 3 Strong, N. C. Index 2d, Criminal Law, § 128, p. 49.

[3, 4] Defendant also contends the court erroneously admitted into evidence four spent cartridges found in the taxi cab, three bullets "similar" to those removed from the deceased, an envelope containing the bullets removed from the deceased and the pistol from which the bullets and cartridges were allegedly fired. Defendant's argument that no connection was shown between the gun and bullets and defendant is without merit. Defendant also argues that the envelope, bullets and casings were inadmissible because there was a break in the chain of possession of the evidence precipitated by the death of Sgt. Tate, one of the officers who investigated the crime. With respect to the cartridges, the evidence suggested the following chain of possession. On the night of 9 May, Captain Michael Courain of the Iredell Sheriff's Department found the casings and put them in an evidence bag under the control of Sgt. L. V. Tate, now deceased. On the morning of 10 May, SBI Agent Richard Lester received four cartridges from Sgt. Tate. Lester placed identifying marks on the cartridges. The casings were then given to Cleon Mauer for ballistics analysis. At trial, Lester positively identified the casings on the basis of the presence of his identifying marks. Mauer identified them from the fact they were still in sealed envelopes marked with his fingerprints. Courain said the cartridges were similar to those he found in the cab. Regarding the bullets removed from the deceased, Dr. Schnell testified he sealed them in an envelope which he signed, dated and labeled with the name of the deceased. He turned the envelope over to Sgt. Tate. Agent Lester received the envelope, apparently still sealed, and put identifying information on the envelope. He put each bullet in a separate box, labeled each box, sealed them and turned them over to Mauer. Mauer put identification marks on the bullets and sealed them in an envelope which was still sealed when offered at trial. We conclude that the chain of possession with respect to the bullets, casings and envelope was sufficiently definite to support the identification of these items. That Dr. Schnell was only able to state that the bullets presented at trial were "similar" to those he removed from the deceased did not render the bullets inadmissible. *See State v. Bass, supra; State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4; *State v. Culbertson,* 6 N.C. App. 327, 170 S.E. 2d 125.

[5, 6] Defendant next maintains that the trial court erred "in allowing the State to go forward in its attempt to impeach its own witness, Vernon Tomlin, and erred by allowing the witness Lester to read the statements of Tomlin and the witness Patricia Redman." The defendant further contends that the trial court "erred in not restricting the offered testimony of Tomlin to the original codefendant Wilford Walls." Sgt. Lester was permitted to testify to the contents of statements given to him by Tomlin and Redman. The purpose of this testimony was not impeachment but rather corroboration. That prior consistent statements not otherwise admissible may be admitted for corroborative purposes is well settled in this jurisdiction. Any inconsistencies between the statements given to Lester and the testimony of Tomlin and Vernon at trial were either not substantial enough to warrant excluding the evidence, *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572; *State v. Thompson*, 8 N.C. App. 313, 174 S.E. 2d 130, or were properly excluded by the court when the defendant moved to strike. Tomlin's conversation with Walls regarding his pistol was relevant to the commission of the homicide with which defendant was charged, and it was unnecessary to restrict the testimony of Tomlin to the codefendant Wilford Walls.

[7] Defendant objects to the fact that Lester was allowed to describe the results of an experiment involving the cab in which the deceased was found. Lester and another officer drove the cab from 523 S. Tradd Street to the rural intersection where it had been found. Lester stated that the fare meter was set at zero at the Tradd Street address and registered $3.50 upon arrival at the intersection. Lester detailed the route followed. Before allowing this testimony, the court conducted a *voir dire* examination during which Lester stated in effect that he thought the route followed was the shortest direct route, that there was another way to go, that the "differences in the two mileages was not very much," and that he "just assumed we traveled the route [the deceased] took." This assumption appears to be the basis of defendant's objection to the admission of the experimental evidence. The general rule regarding the admissibility of experimental evidence has been stated as follows:

> "Experimental evidence is competent when the experiment is carried out under circumstances substantially similar to those existing at the time of the occurrence in question and tends to shed light on it. It is not required

that the conditions be precisely similar, the want of exact similarity going to the weight of the evidence with the jury."

State v. Brown, 280 N.C. 588, 187 S.E. 2d 85. We conclude that the trial judge did not abuse his discretion in determining that Lester's testimony was competent under the above test. *See State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633; *State v. Brown, supra.* In *State v. Plyler,* 153 N.C. 630, 69 S.E. 269, the court held it proper to permit a witness to testify that he had gone from one place to another in a certain length of time.

[8] Defendant assigns error to the fact that when a dispatch ticket was admitted into evidence and exhibited to the jury other documents not introduced in evidence were attached to it. As soon as this was called to the attention of the court the other documents were removed. There is nothing in the record to indicate what the "other documents" were. Defendant has failed to show prejudice, and his contention that the judge should have declared a mistrial is without merit.

We have considered defendant's remaining assignments of error, including his objections to the charge and find no prejudicial error.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. CURTIS TURNER

No. 7414SC419

(Filed 5 June 1974)

1. **Criminal Law § 169— failure to show what witness's answer would have been — exclusion not prejudicial**

Defendant failed to show prejudice in the exclusion of a witness's answer on cross-examination where the record does not show what the witness would have said had he been allowed to answer.

2. **Criminal Law § 34— prior offense — question as to sentence proper**

The district attorney's question put to defendant with respect to the type of sentence defendant had received in another county in connection with a separate crime was proper.

3. **Criminal Law § 97— appearance of witness after beginning of jury deliberations — exclusion of testimony proper**

The trial court did not err in refusing to permit defendant to introduce testimony of a witness who did not arrive in the courtroom until the jury had already begun its deliberations where defendant made his request and the court conducted a voir dire to determine the importance of the witness's testimony before denying the request.

4. **Criminal Law § 111; Assault and Battery § 15— improper punctuation of instructions — no prejudicial error**

Though the insertion of periods in the trial court's instructions would have made the instructions clearer, such errors in the transcript of the proceedings did not prejudice defendant.

5. **Assault and Battery § 16— assault with deadly weapon with intent to kill inflicting serious injury — failure to submit lesser included offenses — no error**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where the evidence tended to show that the victim was shot in his chest with a .38 caliber pistol, the victim was treated in the hospital for eleven days and the hospital bill was over $3500, all the evidence showed serious injury; therefore, it was not error for the trial court to fail to submit to the jury any lesser included offense which did not contain serious injury as an element. G.S. 14-32.

APPEAL by defendant from *Clark, Judge,* 22 October 1973 Session of Superior Court held in DURHAM County.

Defendant was charged with an assault with a deadly weapon with intent to kill inflicting serious injury by shooting James Wesley Crews in his chest with a .38 cal. pistol. The offense was alleged to have occurred on 4 August 1973. A jury found defendant guilty "as charged," and the court entered judgment imposing prison sentence of not less than 7 nor more than 10 years. Defendant appealed.

Attorney General Robert Morgan, by Kenneth B. Oettinger, Associate Attorney, for the State.

Loflin, Anderson & Loflin, by Thomas B. Anderson, Jr., for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error, defendant contends the court erred in sustaining the district attorney's objection to a question propounded by defendant's counsel to a State's witness on cross-examination. The record does not disclose what the answer to the question would have been had the witness been

allowed to answer, therefore, defendant has failed to show prejudice. *State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239 (1973). The assignment is overruled.

Defendant does not bring forward in his brief any argument with respect to his assignment of error No. 2, therefore, it is deemed abandoned.

[2] By his assignment of error No. 3, defendant contends the court erred in overruling his objection to the district attorney's question to defendant on cross-examination with respect to the "type of sentence" defendant received in Jones County in another case. Defendant had testified on direct examination that at the time of the offense for which he was being tried, he was "on parole for second-degree murder in the death of his wife"; that he pleaded guilty to that charge. On cross-examination, the district attorney asked defendant as to the type of sentence he received in Jones County (in connection with the murder of his wife). The court overruled defendant's objection to the question and defendant answered twenty years. Without further objection, defendant was asked how much time remained on that sentence and he answered 9 years and 15 days; and to the question "That is what you would receive if your parole was revoked," he answered, "Yes, sir."

We do not think the question objected to was improper in this case. As to the two questions which followed, no objections were made as to them, therefore, defendant is in no position to complain. The assignment of error is overruled.

[3] Defendant assigns as error No. 4 the failure of the court to permit him to introduce the testimony of a witness who did not arrive in the courtroom until after all other evidence had been presented, arguments to the jury had been made, the court's instructions to the jury had been given, and the jury had begun its deliberations. We find no merit in this assignment. Defendant's request to be allowed to introduce further testimony was addressed to the sound discretion of the trial judge, and his ruling is not reviewable on appeal unless abuse of discretion is shown. *State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206 (1971); *State v. Jackson,* 265 N.C. 558, 144 S.E. 2d 584 (1965). The record discloses that when defendant's request was made, the court conducted a *voir dire* to determine the importance of the witness' testimony. Following the *voir dire,* the trial judge stated: "Well, the court elects, in its discretion, not to call the

jury out to hear this witness. I think that this witness' testimony would be conflicting with the testimony offered by the defendant and maybe his witness, possibly Hazel Roper, and may do him more harm than good." We perceive no abuse of discretion and the assignment of error is overruled.

By his assignments of error Nos. 5 and 6, based on his exceptions Nos. 5 and 6, defendant contends the court erred in charging the jury (1) that defendant had the specific intent to kill the prosecuting witness, and (2) that defendant inflicted serious bodily injury upon the prosecuting witness. The portions of the charge pertinent to these exceptions appear in the record as follows:

> "Now for you to find the defendant guilty of the offense charged in the Indictment, it is incumbent upon the State to satisfy you from the evidence and beyond a reasonable doubt of the following: That the defendant acted intentionally and without justification or excuse, such as in self-defense, and that the defendant used a deadly weapon. (I instruct you that a .38 caliber revolver is, as a matter of law, a deadly weapon; that the defendant had the specific intent to kill James Crews.)
>
> EXCEPTION NO. 5.
>
> (Now, intent, Members of the jury, is a state of mind which is seldom, if ever, capable of direct or positive proof and must be inferred, if inferred at all, from all of the surrounding circumstances that the defendant inflicted serious bodily injury upon James Crews.)
>
> EXCEPTION NO. 6."

[4] Considered in context, the *words* set forth within the parentheses are proper; only the punctuation, or lack of punctuation, causes us difficulty. Certainly, the bench and bar cannot expect perfection in the transcription of trial court proceedings, particularly jury instructions. With respect to the portion of the charge challenged by exception No. 5, while a period rather than a semicolon following the word "weapon" would have indicated better a complete break in instructions, we think there is sufficient indication that there was a break between the instruction regarding a deadly weapon and the instruction with regard to specific intent to kill.

With respect to the portions of the charge challenged by exception No. 6, our task in visualizing just how the judge gave the instructions becomes more difficult. Were there a period—or even a semicolon—after the word "circumstances," there would be no problem. Nevertheless, when we consider the fact that the judge in stating the elements of the offense alleged, began each element with the word "that," and that the words "from all of the surrounding circumstances" clearly relate to the element of intent, we are convinced that in transcribing the charge, a period or semicolon following the word "circumstances" was inadvertently left out. The assignments of error are overruled.

By his assignment of error No. 7, defendant contends the trial court erred in failing to instruct the jury that they could return a verdict on the evidence in this case of the lesser included offenses of assault with a firearm with intent to kill and the misdemeanor of assault with a deadly weapon. The court instructed the jury that they could return a verdict of guilty as charged, guilty of assault with a deadly weapon inflicting serious injury, or not guilty. This assignment is without merit.

G.S. 14-32, the statute under which defendant was indicted, has undergone various changes in recent years. At the time of the alleged offense, 4 August 1973, the statute provided as follows:

> "Sec. 14-32. FELONIOUS ASSAULT WITH A FIREARM OR OTHER DEADLY WEAPON WITH INTENT TO KILL OR INFLICTING SERIOUS INJURY; PUNISHMENTS.
>
> —(a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than ten (10) years, or both such fine and imprisonment.
>
> (b) Any person who assaults another person with a deadly weapon and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than five (5) years, or both such fine and imprisonment.
>
> (c) Any person who assaults another person with a firearm with intent to kill is guilty of a felony punishable by a fine, imprisonment for not more than five (5) years, or both such fine and imprisonment."

We think the question raised here was answered adversely to defendant in *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972). In that case, the defendant was charged with felonious assault on two people on 10 March 1971. The evidence disclosed that the assaults were made with a knife with a 6-inch blade and that extensive wounds were inflicted on both victims, requiring lengthy hospitalization. On 10 March 1971, G.S. 14-32 provided as follows:

> "14-32. Assault with a firearm or other dead'y weapon with intent to kill or inflicting serious injury; punishments.—(a) Any person who assaults another person with a firearm or other deadly weapon of any kind with intent to kill and inflicts serious injury is guilty of a felony punishable under G.S. 14-2.
>
> (b) Any person who assaults another person with a firearm or other deadly weapon per se and inflicts serious injury is guilty of a felony punishable by a fine or imprisonment for not more than five years, or both such fine and imprisonment.
>
> (c) Any person who assaults another person with a firearm with intent to kill is guilty of a felony punishable by a fine or imprisonment for not more than five years, or both such fine and imprisonment."

In each case in *Thacker,* the court limited the jury to one of four verdicts: (1) guilty as charged, (2) guilty of assault inflicting serious injury, (3) guilty of assault with a deadly weapon, or (4) not guilty. In one of the cases (Waddell), the jury found defendant guilty as charged. In the other case (Pierce), the jury found defendant guilty of an assault inflicting serious injury. We quote from the opinion, pages 456-457:

> "It suffices to say that the crime condemned by G.S. 14-32(b) is a lesser degree of the offense defined in G.S. 14-32(a), and a defendant is entitled to have the different permissible verdicts *arising on the evidence* presented to the jury under proper instructions . . . . However, this principle applies when, and only when, there is evidence of the lesser degrees. *State v. Smith,* 201 N.C. 494, 160 S.E. 577 (1931). 'The *presence of such evidence* is the determinative factor.' *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954) . . . .

"In limiting the jury to the four verdicts enumerated above, the trial judge committed two errors: (1) He failed to submit defendant's guilt or innocence of assault on Miss Waddell with a deadly weapon *per se* inflicting serious injury, a felony punishable by a fine or imprisonment for not more than five years under G.S. 14-32(b); and (2) he submitted defendant's guilt or innocence of an assault inflicting serious injury and an assault with a deadly weapon, misdemeanors condemned by G.S. 14-33 the punishment for which is limited to two years. All the evidence tends to show that defendant wielded a knife with a six-inch blade inflicting serious injury on both Miss Waddell and Mr. Pierce. A knife with a six-inch blade is a deadly weapon *per se,* and there is no evidence showing only the commission of the misdemeanors which were submitted to the jury, and nothing more, because a deadly weapon was used in both assaults and serious injury was inflicted on both victims. Therefore, these offenses are governed by G.S. 14-32(a) if committed with intent to kill, or by G.S. 14-32(b) absent such an intent.

"These errors may be corrected in the Waddell case at the next trial. They are now history in the Pierce case because defendant cannot be retried for either the ten-year felony with which he was charged or the five-year felony punishable under G.S. 14-32(b) * * *."

[5] In the case at bar, all of the evidence tended to show that the victim was shot in his chest with a .38 calibre pistol; that the victim was treated for his injuries in Duke Hospital for eleven days; and that the hospital bill was $3,540. As was true in *Thacker,* all the evidence showed serious injury; therefore, the trial court did not err in refusing to submit any lesser included offense that did not contain serious injury as an element. This holding finds support in *State v. Jennings,* 16 N.C. App. 205, 192 S.E. 2d 46 (1972), cert. den. 282 N.C. 428. In *Jennings,* decided after *Thacker* and citing *Thacker,* this court held that in a prosecution for felonious assault upon an officer with a deadly weapon with intent to kill, where all the evidence presented showed a shooting with a deadly weapon with an intent to kill, and none of the evidence showed a lack of such intent, the trial court did not err in failing to submit to the jury the lesser offense of assault with a deadly weapon (without intent to kill), inflicting serious injury.

We have considered the other assignments of error brought forward and argued in defendant's brief, but finding them to be without merit, they too are overruled.

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

THOMAS W. BURBAGE, PLAINTIFF v. ATLANTIC MOBILEHOME SUPPLIERS CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF v. REESE PRODUCTS, INC., THIRD-PARTY DEFENDANT

No. 7429DC153

(Filed 5 June 1974)

1. **Uniform Commercial Code § 15— implied warranty of merchantability — burden of plaintiff claiming breach**

   In asserting a claim under G.S. 25-2-314 for breach of an implied warranty of merchantability a plaintiff must prove the giving of the warranty, the breach of that warranty, and damages resulting to him as a proximate result of the breach.

2. **Uniform Commercial Code § 20— trailer hitch — implied warranty of merchantability — insufficient evidence of breach**

   In an action for breach of an implied warranty of merchantability based upon an alleged defect in a trailer hitch manufactured by third-party defendant and installed by third-party plaintiff, the trial court erred in denying third-party plaintiff's motion for a directed verdict since plaintiff's evidence was sufficient to raise only a conjecture as to whether an improperly loaded or balanced trailer caused a trunnion on the hitch to break, whether the trunnion itself was defective, or whether the accident was caused by another force.

APPEAL from *Gash, District Court Judge,* 10 September 1973 Session of TRANSYLVANIA County District Court. Argued in the Court of Appeals 20 March 1974.

The plaintiff, Thomas W. Burbage (Burbage), brought suit against Atlantic Mobilehome Suppliers Corporation (Atlantic) and Reese Products, Inc. (Reese), alleging that a trailer hitch manufactured by Reese and sold by Atlantic broke while the plaintiff was towing his trailer. The trailer hitch was purchased and installed in North Carolina, and the accident took place in Tennessee. In a special appearance, Reese moved to dismiss on the grounds that it had not been properly served.

This motion was allowed on 3 March 1972. On 21 March 1972, Atlantic moved that it be allowed to file a third party indemnification complaint against Reese. On 24 March 1972, the motion of Atlantic was allowed and Reese was properly served. Whereupon, Reese moved that the third party action against it be dismissed on the grounds that the court lacked jurisdiction and on the further grounds that the statute of limitations had run. Without deciding the question of jurisdiction, the court on 9 March 1973, allowed Reese's motion to dismiss on the grounds that the three year statute of limitations had run before the third party action was filed against Reese. No appeal was noted from this ruling.

The action was tried at the 10 September 1973 Session of Transylvania County District Court. Reese did not participate. A verdict was rendered in favor of Burbage against Atlantic. Atlantic gave notice of appeal and attempted also to appeal the dismissal of the action as against Reese on 9 March 1973.

The plaintiff's evidence tended to show that on 24 October 1966, he went to the sales room of Atlantic for the purpose of purchasing a trailer hitch with which to pull his 3,500 pound trailer. After describing his car and his trailer to the sales person on duty, he purchased a Reese Travel-Lite trailer hitch. He then took the hitch to the Spring Welding Company in Greensboro and had it welded to his car. The day after the hitch was installed, the plaintiff hooked up his trailer and started on a a trip. After driving almost to Knoxville, Tennessee, the plaintiff heard a loud bang, and the car was shaken violently. The trailer turned over, doing considerable damage to the trailer and the rear of the car. The road conditions were favorable at the time of the accident, and the plaintiff had no warning until the loud noise was heard. The plaintiff discovered that a trunnion on the hitch had broken. The plaintiff further testified that there was a black mark on the trunnion near the place where the break occurred.

The plaintiff admitted that he had not read the instructions on the use of the trailer hitch. He testified that he did know that the proper tongue weight of a trailer was between 10 and 15 percent of the gross weight. He did not know the weight of his trailer, but he did know that the tongue weight was light enough that he was able to pick the tongue up and place it on the hitch. No evidence was presented concerning the manner in which the hitch was welded to the car. The plaintiff

offered no evidence other than his testimony and the broken trunnion, which was introduced into evidence.

At the conclusion of the plaintiff's evidence, the defendant Atlantic moved for a directed verdict. This motion was denied. Atlantic presented no evidence, and the matter was submitted to the jury. From a verdict in favor of the plaintiff, the defendant Atlantic gave notice of appeal.

Ramsey, Hill, Smart and Ramsey by Allen Van Turner for plaintiff-appellee.

Morris, Golding, Blue and Phillips by James F. Blue III for defendant-appellant.

Roberts and Cogburn by Landon Roberts for third party defendant-appellee.

CARSON, Judge.

[1] The plaintiff bases his claim upon the breach of an implied warranty by defendant Atlantic. In 1965, when North Carolina enacted the Uniform Commercial Code, the long accepted concept of implied warranty in sales transactions was codified. G.S. 25-2-314 provides an implied warranty of merchantability with respect to goods sold by merchants. In order to effectively assert a claim under the statute, the plaintiff must prove the giving of the warranty, the breach of that warranty, and damages resulting to him as a proximate result of the breach. *Douglas v. Mallison,* 265 N.C. 362, 144 S.E. 2d 138 (1965); Uniform Commercial Code, White and Summers, Sec. 9-1, p. 272 (1972). We do not feel that the plaintiff has satisfied this burden.

In the case of *Hanrahan v. Walgreen Co.,* 243 N.C. 268, 90 S.E. 2d 392 (1955), the plaintiff brought an action for breach of warranty against the retailer of a hair rinse which she alleged caused damage to her scalp. No analysis of the hair rinse was made. The only showing was the use of the rinse and a severe scalp infection which followed. In affirming the nonsuit granted to the defendant at the close of the plaintiff's evidence, the court held that the mere use of the product and the damage were insufficient to submit the matter to the jury. Without an analysis of what was in the hair rinse and what effect it had on the plaintiff, the cause of the damages was purely speculative, and the suit was properly dismissed.

[2] In the instant case the plaintiff admitted that he did not read the instructions furnished with the trailer hitch. He further admitted that he knew the tongue weight should be between 350 and 525 pounds, but he stated that he picked up the tongue and placed it on the ball. Whether the breaking of the trunnion was caused by a defect in the part, or by the improper load distribution or connection, is pure speculation and should not have been submitted to the jury. The only evidence presented was the testimony of the plaintiff and the trunnion itself. No evidence was presented as to why the trailer hitch broke. No expert or opinion testimony was given concerning the suitability of the trailer hitch. The plaintiff contends that a layman would know from experience that steel is of uniform consistency and color, that it sometimes contains processed impurities, that impurities render steel less resilient and more brittle, that manufacturers of steel products use steel which provides a minimum margin of strength to meet product stresses, and that steel products which contain impurities may not be sufficiently strong to meet such stresses. However, these matters are not common knowledge and cannot be inferred without competent evidence. It is only conjecture as to whether the improperly loaded or balanced trailer caused the trunnion to break, whether the trunnion was defective, or whether the accident was caused by another force. This matter should not have been submitted to the jury, and the defendant's motion for a directed verdict should have been allowed.

Because the motion for a directed verdict should have been granted to the defendant, it is not necessary to decide the third party defendant's questions concerning lack of jurisdiction and running of the statute of limitations. The judgment is reversed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. VESTER EDWARD SASSER

No. 744SC184

(Filed 5 June 1974)

1. **Assault and Battery § 13— assault with intent to kill — testimony of victim — competency**

In a prosecution for assault with intent to kill, the trial court did not err in allowing the prosecutrix to testify that she heard

gunshots and "saw a flash of a gun . . . or what appeared to be a gun" from the car which was pursuing her.

2. **Criminal Law § 169— failure to include witness's answer in record — exclusion of answer not prejudicial**

Defendant failed to show prejudice in the refusal of the trial court to permit him to elicit a statement from the prosecuting witness as to the consistency of statements made at the preliminary hearing and at trial, since defendant failed to have the answer of the witness placed in the record; furthermore, defendant's question was argumentative and therefore improper.

3. **Assault and Battery §§ 16, 17— not guilty of assault with deadly weapon — guilty of assault with firearm — verdicts not inconsistent**

Where defendant was charged with assault with intent to kill with an automobile, but the jury found him guilty of the lesser included offense of assault on a female, and where defendant was also charged with assault with intent to kill with a firearm, but the jury found him guilty of the lesser included offense of assault with a firearm, the verdict of not guilty of assault with a deadly weapon (the automobile) was not inconsistent with the verdict of guilty of assault with a firearm.

APPEAL by defendant from *Tillery, Judge,* 20 July 1973 Session of Superior Court held in SAMPSON County. Argued in the Court of Appeals 16 April 1974.

Defendant was charged, along with his brother, in a bill of indictment with assault with intent to kill, with a firearm and with an automobile.

The State's evidence tended to show that on 5 April 1973 at 1:00 a.m. in the morning, Officer Bobby Greene of the Clinton Police Department observed two cars moving at a high rate of speed along Railroad Street in Clinton, North Carolina. Officer Greene pursued the vehicles at a speed in excess of eighty miles per hour along city streets, observing the cars making a series of reckless turns at high speeds. Thirty seconds after losing sight of the two cars, while proceeding on Oakland Terrace, Officer Greene discovered the vehicle of Mrs. Edith Ann Hartis, the prosecutrix, wrecked against a light pole beside Mrs. Hartis' driveway.

Mrs. Hartis testified that she had been dating the defendant for several months, meeting in clandestine places. On the date in question, Mrs. Hartis had declined defendant's request to meet him after work because of a prior engagement. Later that evening as Mrs. Hartis was returning home after her date, defendant and his brother, riding in defendant's car, began

pursuing the Hartis vehicle. While speeding along city streets, the prosecutrix heard gunshots simultaneously with the flash emitted from a gun coming from the passenger side of defendant's pursuing vehicle, the side in which the prosecutrix had observed defendant. The prosecutrix crashed her car into a light pole in her front yard and fled into her house, escaping shots fired at her front door. Officer Greene arrived at the scene after defendant's vehicle had gone, at which time Mrs. Hartis informed Greene of the events which had transpired.

The defendant's evidence tended to show that the prosecutrix constantly called defendant's home and drove by his house; and that the prosecutrix once pointed a pistol at defendant.

Defendant was found guilty of assault with a firearm and assault on a female, and appealed to this Court.

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

Jeff D. Johnson III for the defendant.

BROCK, Chief Judge.

[1] Defendant contends the trial court committed error in allowing the prosecuting witness to testify, over objection, that she "heard gunshots . . . saw a flash of a gun . . . or what appeared to be a gun . . . from the car behind . . . " .

An examination of the record reveals a specific objection lodged by defendant as to the identity of the party who allegedly fired a weapon from the pursuing vehicle. This objection was sustained. Defendant then objected to that portion of the prosecuting witness' testimony relating to the flash of a gun or what appeared to be a gun. This objection was overruled.

Defendant's contention that this testimony is inadmissible as nonexpert opinion testimony not within the shorthand statement of fact exception is without merit. The prosecuting witness merely testified as to observations made by her of the events. She described what she saw and heard. This assignment of error is overruled.

[2] Defendant contends that the trial court committed prejudicial error in not permitting defendant to elicit a statement from the prosecuting witness as to the consistency of statements made at the preliminary hearing and at trial. The prosecuting

witness had testified at the preliminary hearing that she had heard gunshots on three separate streets during the chase, but at the trial testified she had heard gunshots on only two of the three streets named previously. That portion of testimony which defendant alleges was erroneously excluded is as follows:

"Q. The point of the matter is, your testimony in this regard has not been consistent today with what it was at the preliminary hearing?

"MR. DALE P. JOHNSON: OBJECTION.

"THE COURT: SUSTAINED."

Defendant failed to have the answer placed in the record in order to show what her answer would have been. The sustaining of an objection to a question directed to a witness will not be deemed prejudicial when the record fails to disclose what the answer would have been had the objection not been sustained. *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239. In addition, it is noted that the question was argumentative and therefore improper. This assignment of error is overruled.

Defendant argues the trial court committed error in denying defendant's motion in arrest of judgment, to set aside the verdict, as against the greater weight of the evidence, to order a mistrial, and motion for a new trial.

[3] Defendant was found not guilty as to assault with a deadly weapon, and not guilty as to assault with a firearm with intent to kill. Defendant was found guilty as to assault with a firearm and assault on a female. Defendant now argues that the verdict of not guilty of assault with a deadly weapon is inconsistent with a verdict of guilty of assault with a firearm.

In reviewing the verdicts, we find the verdicts of not guilty of assault with a deadly weapon but guilty of assault on a female were based upon the charge of assault with the automobile. Apparently the jury in reviewing the evidence found there was insufficient evidence to support the assault with a deadly weapon employing an automobile, but did find the evidence sufficient to convict on the lesser offense of assault on a female by use of an automobile.

The verdict of not guilty of assault with a firearm with intent to kill was addressed to the assault by firing the pistol. It is apparent from the record that the jury found defendant guilty of the lesser included offense of assault with a firearm.

"A verdict, apparently ambiguous, 'may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court.' (Citations omitted.) 'The verdict should be taken in connection with the charge of his Honor and the evidence in the case.' (Citations omitted)." *State v. Tilley,* 272 N.C. 408, 158 S.E. 2d 573.

The trial court's charge to the jury does not appear in the record. Inasmuch as there has been no assignment of error as to the charge, it is presumed that the charge was proper and clearly presented the elements of an assault with an automobile and an assault with a pistol.

This assignment of error is overruled.

We note that the judgment recites that defendant was convicted of "assault with a Firearm With Intent to Kill," which is incorrect because the verdict returned in open court clearly found defendant guilty of the lesser included offense of "assault with a firearm." However, this incorrect recitation in the judgment was clearly inadvertent because the judgment further recites that the offense is of the grade of misdemeanor, and the sentence imposed was within the limits prescribed for a misdemeanor. At the time of the offense involved in this case an assault with the use of a deadly weapon was a misdemeanor, punishable by a fine, imprisonment for not more than two years, or both. G.S. 14-33(c)(2).

We do not deem it necessary to discuss the propriety of the verdict of guilty of "assault on a female" because the two verdicts were consolidated for judgment and one sentence of two years was imposed. This sentence is clearly supported by the verdict of guilty of "assault with a firearm."

In our opinion, the defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and BALEY concur.

ILENE NORRIS, ADMINISTRATRIX OF THE ESTATE OF MAUDE N. McGHEE v. ROWAN MEMORIAL HOSPITAL, INC.

No. 7419SC194

(Filed 5 June 1974)

Hospitals § 3— injury to patient in hospital — negligence of hospital — sufficiency of evidence

In an action to recover damages for personal injury sustained by plaintiff's intestate when she fell and fractured her hip while a patient in defendant hospital, the trial court erred in granting defendant's motion for a directed verdict where the evidence was sufficient to warrant a jury finding, first, that defendant's employees were negligent in failing to raise the bed rails on plaintiff's intestate's bed and in failing to instruct her to use the bedside call button to obtain assistance in going to the bathroom, and, second, that such negligence was a proximate cause of her injury.

APPEAL by plaintiff from *Exum, Judge,* 15 October 1973 Session of Superior Court held in ROWAN County.

Civil action to recover damages for personal injuries received by Mrs. Maude McGhee on 31 March 1971 when she fell and fractured her hip while a patient in defendant hospital. In her complaint Mrs. McGhee alleged that the hospital employees were negligent in failing to raise the side rails on her bed in violation of the hospital safety rules and in failing to give her proper attention, and that such negligence was the proximate cause of her injuries. Prior to the trial Mrs. McGhee died of causes unrelated to her fall, and her administratrix was substituted as party plaintiff.

Plaintiff's evidence disclosed the following: At about 2:30 o'clock on the afternoon of 30 March 1971, Mrs. Maude McGhee, a lady then 75 years of age, was admitted under direction of her physician as a patient to defendant hospital for the purpose of having a "workup" or diagnosis of an undetermined anemia. At the time, she was just getting over viral pneumonia. She walked into the hospital, accompanied by her daughter, and was assigned to a semi-private room with another patient. On her doctor's orders at about 4:30 p.m. she was administered castor oil and between 9:30 and 10:30 p.m. was given a sleeping pill. Her daughter remained with her until about 11:00 p.m., at which time Mrs. McGhee was becoming drowsy and her daughter left. The hospital bed in which Mrs. McGhee was placed was a hospital "hi-low" bed, which could be raised or lowered as

care of the patient might require and which was equipped with bed rails which could be raised or lowered. When Mrs. McGhee's daughter left, the bed was in the low position, "probably 24 or 25 inches off the floor, about the height of an ordinary bed," and the bed rails were in the lowered position. During the night, Mrs. McGhee got out of bed for the purpose of going to the bathroom, and in so doing, fell, fracturing her hip. In her deposition, taken 17 January 1972 and which was read to the jury, she testified:

> "During the first night at the hospital I got up. I just slid off the side of the bed. I was thinking . . . I was asleep, and I was thinking I was at home. I just, you know, slid off the side of the bed and stood up. When I stood up everything went round and round, and I just passed out. I remember hollering when I fell. I hollered after, or about the time I fell, and about that time the nurses got to me, and that's the last thing I remember. . . .
>
> "No one had told me not to get out of the bed. They didn't tell me to ring the buzzer if I wanted to go to the bathroom. They didn't tell me that a bedpan would be brought to me if I wanted it. I don't remember taking any steps before I fell, I just remember that I was just drunk, that I was just going round and round. If I made a step I don't know it."

On cross-examination, Mrs. McGhee testified:

> "Before I went to the hospital I was able to walk. I walked into the hospital and could have needed help to get into bed. Of course, the nurses and my daughter were up there with me too. I had been accustomed to getting out of bed and going to the bathroom and things like that at home.
>
> "No one at the hospital told me that I must not go to the bathroom by myself. I didn't have any instructions that I should remain in bed that night. The doctor did not order me to stay in bed that night, but after you take about a pint of castor oil, you don't feel like . . . you can't stay in bed. When I got out of bed I became dizzy. I was able to get out of bed, I put my feet off on the floor, you know, just like you, just like anybody would slide out, and stood up. After I stood up I became dizzy. I did not walk."

Plaintiff introduced in evidence as an exhibit a copy of a bulletin dated 4 October 1965 issued by defendant hospital for distribution to "all nursing units," which bulletin, insofar as pertinent to the question presented by this appeal, was as follows.

"I. This bulletin is a guide to provide safe care and protection for Rowan Memorial Hospital patients; to prevent injury to aged, sedated, and disoriented patients; to conserve skilled time of nursing personnel; and to make full use of hospital equipment.

"II. The professional nurse will determine the condition of the patient for use of bed rails, and circumstances for use of HiLow bed in the 'Hi' position.

"A. Bed rails are to be in the up position day and night for patients who:

"1. Are irrational, comatose, or advanced age, or otherwise disorientated.

"2. Are sedated or having received an analgesic.

* * * * *

"B. Bed rails are to be in the up position from 9:00 p.m. to 7:00 a.m. for patients who:

"1. Are over 60 years of age.

"2. Are described in 'A' above.

* * * * *

"III. Patients over 60 years of age will be instructed to use bedside call light for assistance to bathroom between 9:00 p.m. and 7:00 a.m."

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict pursuant to Rule 50. The court allowed the motion, the judgment reciting that in the opinion of the court the plaintiff's evidence, construed in the light most favorable to the plaintiff, failed to make a case of actionable negligence on the part of the defendant "in that the evidence of the plaintiff fails to show any negligent act or omission which was a proximate cause of injury to the plaintiff's intestate."

From the judgment allowing defendant's motion for a directed verdict, plaintiff appealed.

Burke & Donaldson by Arthur J. Donaldson for plaintiff appellant.

Kluttz & Hamlin by Lewis P. Hamlin, Jr. and Richard R. Reamer for defendant appellee.

PARKER, Judge.

In our opinion, plaintiff's evidence, when considered in the light most favorable to the plaintiff, presented a case for the jury. Ever since the decision in *Rabon v. Hospital,* 269 N.C. 1, 152 S.E. 2d 485, in which the defendant in the present case was also the party defendant, there can be no question but that a hospital owes the duty to exercise due care for the safey of its patients and may be held liable for damages proximately caused by breach of that duty. Where, as here, the alleged breach of duty did not involve the rendering or failure to render professional nursing or medical services requiring special skills, expert testimony on behalf of the plaintiff as to the standard of due care prevailing among hospitals in like situations is not necessary to develop a case of negligence for the jury. Under the factual situation here presented the jury was fully capable without aid of expert opinion to apply the standard of the rearsonably prudent man.

In our opinion, the evidence here was sufficient to warrant a jury finding, first, that defendant's employees were negligent in failing to raise the bed rails on Mrs. McGhee's bed and in failing to instruct her to use the bedside call button to obtain assistance in going to the bathroom, and, second, that such negligence was a proximate cause of her injury. True, one purpose served by raising the bedside rails would have been to prevent the patient from rolling or falling from the bed, and there is no evidence that Mrs. McGhee fell from the bed. That, however, was not the only purpose which would have been served by raising the rails, and defendant's duty of due care did not end with merely assuring that its patients would not fall out of their beds. The presence of the rails in the raised position would have also served to arouse a patient in Mrs. McGhee's situation, who was made drowsy by a sedative, and alert her that she should ring for assistance if she needed to go to the bathroom. Without the small obstruction provided by the raised rails, it was all too easy for the patient, still half asleep from a sleeping pill administered by the hospital, to get out of the bed, attempt

to stand without assistance, and then, dizzy from the sedative, tumble to the floor. The jury could find from the evidence here that this was exactly what happened to Mrs. McGhee. On her doctor's instructions the hospital employees had given her castor oil and a sleeping pill, a combination of dosage, which, so the jury could find, should have put a reasonably prudent person on notice that at some time during the night and while she was still under the effects of the pill she woulud need to go to the bathroom. Her attempt to do so unassisted led directly to her injury. On the evidence here the jury could legitimately find that her injury was a reasonably foreseeable consequence of the failure of defendant's employee to observe the very precautions set forth in defendant's own safety bulletin, which were clearly designed to protect against the exact hazard which Mrs. McGhee encountered.

In our opinion this case was for the jury, and the order directing a verdict for defendant is

Reversed.

Judges VAUGHN and CARSON concur.

IN RE: THE ESTATE OF KIRBY W. LOFTIN, DECEASED (72E146) AND SYBIL LEWIS LOFTIN, PETITIONER (73SP35) v. KIRBY C. LOFTIN, EXECUTOR OF THE ESTATE OF KIRBY W. LOFTIN, RESPONDENT

No. 748SC132

(Filed 5 June 1974)

1. **Husband and Wife § 4— wife's attack on acknowledgment and privy examination**

A married woman may attack a certificate of acknowledgment and a privy examination upon grounds of mental incapacity, infancy or fraud; however, the certificate of the Clerk is conclusive except for fraud.

2. **Husband and Wife § 2— antenuptial agreement — fraud — insufficiency of complaint**

Petitioner's complaint was insufficient to state a claim for relief to set aside an antenuptial agreement on the ground it was procured by fraud where her allegations amounted to a mere conclusion that the agreement was procured by fraud and petitioner failed to allege the specific facts she intended to rely upon in establishing fraud. G.S. 1A-1, Rule 9(b).

3. Wills § 61— acceptance of benefits — estoppel to dissent

The wife was estopped to dissent from her deceased husband's will where she accepted a $5,000 bequest and a life estate in the home place pursuant to the terms of the will.

Judge VAUGHN dissents.

APPEAL from *James, Judge,* 10 September 1973 Session of LENOIR County Superior Court. Argued in the Court of Appeals 16 April 1974.

Kirby W. Loftin died on 26 July 1972 leaving an estate valued in the neighborhood of $500,000. Loftin's will left $5,000 and a life estate in the family home to his widow, Sybil Lewis Loftin. On 26 January 1973, Sybil Lewis Loftin (petitioner) filed a dissent to the will. The executor (respondent) answered the dissent, alleging that the dissent was barred both by an antenuptial contract and by the payment of $5,000 to petitioner pursuant to the terms of the will. Petitioner's reply alleged the invalidity of the antenuptial contract.

On 8 March 1973, petitioner filed an application for year's allowance from the estate. Again respondent pled the contract and the $5,000 payment in bar, and petitioner's reply alleged that the antenuptial contract was obtained through coercion and misrepresentation.

Following discovery, respondent moved for summary judgment as to the dissent and as to the application for year's allowance. The motions were consolidated for hearing on the motions and for trial.

From the affidavits, it was established that petitioner and Kirby W. Loftin signed an antenuptial contract prior to their marriage in 1958. The contract was lost when Kirby W. Loftin's office was burglarized in 1968, and the parties executed a duplicate antenuptial contract, stating that it embodied substantially the same terms of the 1958 agreement. The 1968 agreement provided in pertinent part:

> "*Second:* That the party of the second part hereby releases, renounces, and quitclaims, all dower and all other rights in the real property, and all right to participate in the distribution of the personal property, and all claims for a year's allowance in the property of the said party of the first part, should she survive him, both as to property now owned by

him and property hereafter acquired, together with the right to administer on his estate."

Petitioner denied that she was privately examined, although the Clerk of Superior Court's signature appears on his certificate as to the privy examination of the petitioner. In addition, the Clerk testified that he remembered the transaction because it was the only occasion on which a duplicate antenuptial contract had been presented to him. Petitioner admits having signed the original contract in 1958 and the duplicate in 1968, although she alleges that she did not understand either. It was stipulated that all signatures on the duplicate antenuptial contract are genuine.

The court held that there was no genuine issue of material fact and entered summary judgment as to the dissent and as to the application for year's allowance. From the entry and signing of judgment, petitioner appealed.

Donald P. Brock for petitioner appellant.

Jeffress, Hodges, Morris and Rochelle, P.A., by A. H. Jeffress, for respondent appellee.

MORRIS, Judge.

G.S. 52-10 provides that married persons may, subject to the provisions of G.S. 52-6 release any of the rights they may by marriage acquire in the property of each other. G.S. 52-6 provides that no separation agreement or contract between married persons affecting the real estate of the wife shall be valid unless acknowledged before a certifying officer who shall privately examine the wife. The Supreme Court held in *Turner v. Turner,* 242 N.C. 533, 89 S.E. 2d 245 (1955), that an antenuptial contract executed between parties mutually releasing the prospective interest of each in the property of the other, is valid when acknowledged before the Clerk of Superior Court who incorporates in his certificate a finding that the agreement is not unreasonable or injurious to the wife. An antenuptial contract is also effective as a bar to the right of the wife to recover a year's support. *Perkins v. Brinkley,* 133 N.C. 86, 45 S.E. 465 (1903). The effect of these decisions and the above statutes is to require a "privy exam" for the validity of an antenuptial contract, and, by implication, to make applicable to antenuptial contracts the appellate decisions regarding separation agreements and contracts affecting real estate of the wife.

[1] A married woman may attack a certificate of acknowledgment and a privy exam upon grounds of mental incapacity, infancy or fraud. *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562 (1968). The certificate of the Clerk is conclusive except for fraud. *Tripp v. Tripp,* 266 N.C. 378, 146 S.E. 2d 507 (1965).

A separation agreement acknowledged pursuant to G.S. 52-6 can be set aside if induced by fraud. The petitioning party must, however, allege *"facts* which, if found to be true, permit the legitimate inference that the defendant induced the plaintiff by fraudulent misrepresentations to enter into the contract which but for the misrepresentations she would not have done. If the pleading alleges conclusions rather than facts, it is insufficient to raise an issue of actual fraud." *Van Every v. Van Every,* 265 N.C. 506, 512, 144 S.E. 2d 603 (1965). As we have stated, the requirements for a successful attack on an acknowledged separation agreement are apposite to antenuptial contracts.

Petitioner in the case *sub judice* alleges that:

> "Misrepresentations were made to the widow at the time said contract was purportedly executed, both as to the assets of the deceased and as to the contents and meaning of said contract. That the execution of said contract was obtained through coercion and was in fact injurious and unfair to the undersigned widow."

While this allegation purports to attack the Clerk's certificate on the basis of fraud in the procurement of the contract, it is questionable whether it sufficiently alleges the fraud.

G.S. 1A-1, Rule 9(b) provides in pertinent part:

> "In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

This rule codifies a rule applied without a specific code directive under former practice. N.C.R. Civ. P. 9, Comment. Prior to the new rules, evidence of fraud, however complete, could not be submitted to the jury without allegations which, if true, would constitute fraud. *Mangum v. Surles,* 281 N.C. 91, 187 S.E. 2d 697 (1972). In order to comply with Rule 9(b), the pleadings must state the facts to be relied upon to establish fraud, duress or mistake. *Id.*

Under the former practice, it was held that the following elements must be alleged in order to constitute a sufficient allegation of fraud: The intent to deceive [*Calloway v. Wyatt,* 246 N.C. 129, 97 S.E. 2d 881 (1957)]; the specific false representations that were made [*Fulton v. Talbert,* 255 N.C. 183, 120 S.E. 2d 410 (1961)]; that the defrauded party relied upon the misrepresentations to his detriment [*Products Corporation v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587 (1960)].

[2] Petitioner's allegations amount to a mere conclusion that the antenuptial contract was fradulently procured. Such allegations were not sufficient before the adoption of the current rules, and they are not sufficient under Rule 9(b), which is a codification of the former case law. Since petitioner has failed to allege the specific facts she intends to rely upon in establishing fraud, her pleadings have not raised a genuine issue of material fact in this regard.

[3] Even if petitioner were not barred by the valid antenuptial contract, she would be estopped to dissent inasmuch as she accepted a $5,000 bequest and a life estate in the home from the estate. A person designated as a beneficiary cannot take under the instrument and at the same time assert a title or claim in conflict with the same writing. *Rouse v. Rouse,* 238 N.C. 568, 78 S.E. 2d 451 (1953). Having accepted benefits—$5,000 and a life estate in the "home place"—petitioner may not repudiate the will and take her intestate share.

The judgment of the trial court is correct in holding that the pleadings and interrogatories presented no genuine issue of material fact and that respondent was entitled to judgment as a matter of law.

No error.

Judge CAMPBELL concurs.

Judge VAUGHN dissents.

JOSEPH B. SETZER AND WIFE, JOAN Q. SETZER v. RONNIE ANNAS

No. 7425SC170

(Filed 5 June 1974)

Appeal and Error § 6— premature appeal from preliminary injunction

Appeal from a preliminary injunction is dismissed as premature since no substantial right of defendant appellant was affected by the injunction which required defendant to do nothing more than refrain from obstructing plaintiffs' easement to cross defendant's property in going to and from their property.

Judge CARSON dissenting.

APPEAL by defendant from *Falls, Judge,* 17 September 1973 Session of Superior Court held in CALDWELL County.

This is a civil action wherein plaintiffs, Joseph B. Setzer and wife, Joan Q. Setzer, seek to enjoin defendant, Ronnie Annas, from obstructing the right-of-way and easement of the plaintiffs; from threatening and assaulting the plaintiffs; and from further bulldozing upon the property of the plaintiffs.

The present action was instituted on 5 September 1973 with the filing of a complaint which contained the following relevant allegations:

"4. The plaintiffs, on April 28, 1972, acquired the easement and right-of-way from State Road No. 1510 across the properties of James C. Barlow and wife, Sandra B. Barlow; Lona Beaver, widow; and Ronnie Annas to the property of the plaintiffs . . . .

5. The defendant, in violation of the right-of-way and easement above referred to, has wilfully and maliciously erected two gates across the right-of-way thus severely hindering the plaintiffs in their use of the same. On September 3, 1973, the defendant, while ordering the plaintiffs to close said gates, maliciously threatened and assaulted them by pointing a gun in their direction.

6. On September 3, 1973, the defendant wilfully and maliciously bulldozed across the boundary lines between his property and property of the plaintiffs and threatens to continue such bulldozing until he has leveled a strip of land belonging to the plaintiffs approximately sixty feet in width."

On 5 September 1973, the plaintiffs were granted a temporary restraining order enjoining the defendant from engaging

in the activities complained of; and on 17 September 1973, a hearing was held to determine if the temporary restraining order should be continued until a final judgment could be entered in this action. Both plaintiffs and defendant offered evidence at this hearing.

The evidence introduced by the plaintiffs acknowledged that there were wire gates on the defendant's property prior to the granting of the easement to the plaintiffs; however, the plaintiff, Mrs. Setzer, testified that these wire gates were altered by defendant after the granting of the easement so as to make it more difficult to cross the plaintiff's land.

On the other hand, defendant's evidence tends to show that the "wire fences" of which plaintiffs complain were present prior to the date of the granting of the easement and right-of-way, and that the defendant has done nothing more than maintain and improve these fences.

At the conclusion of the presentation of the evidence, the trial judge entered an order continuing the enforcement of the injunction pending a final hearing; and the defendant appealed from the granting of this temporary injunction.

Dickson Whisnant and Fate J. Beal for plaintiff appellees.

Wilson, Palmer and Simmons, by George C. Simmons III for defendant appellant.

HEDRICK, Judge.

Defendant's four assignments of error are directed to both the granting and the composition of the preliminary injunction which was entered against the defendant by the trial court. The plaintiffs have filed a motion to dismiss this appeal, contending that such an appeal from a preliminary injunction is premature and fragmentary.

An appeal may be taken to this court "from every judicial order or determination of a judge of a superior court . . . *which affects a substantial right* [emphasis added] claimed in any action or proceeding, or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial." G.S. 1-277. Justice Ervin, writing for the Court in *Raleigh v. Edwards*, 234 N.C. 528, 67 S.E. 2d 669 (1951) succinctly stated the underlying policy of G.S. 1-277 to be as follows:

"Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute defining the right of appeal prescribes, in substance, that an appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. G.S. 1-277; *Veazey v. City of Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Emry v. Parker,* 111 N.C. 261, 16 S.E. 236."

Thus, the defendant's right to appeal rests solely on our determination of whether he will suffer impairment of a substantial right if this appeal is not entertained. The word "substantial" is defined in Black's Law Dictionary, 4th Ed. (1968) as "of real worth and importance; of considerable value, valuable" and several decisions of our Supreme Court construing G.S. 1-277 exemplify the fact that the presence of the word "substantial" was not intended as mere surplusage, but rather was to function as a roadblock to trivial appeals. *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311 (1956); *Veazey v. Durham, supra; Privette v. Privette,* 230 N.C. 52, 51 S.E. 2d 925 (1949).

In the instant case the defendant insists that he will suffer infringement of a substantial right in that he will not be able to enjoy the full and complete use of his property. This contention is without merit. By the terms of the preliminary injunction entered by the trial court the defendant must do nothing more than refrain from obstructing the plaintiffs' lawful right (by the easement granted to plaintiffs by defendant *et al)* to ingress and egress across the property, and under such circumstances impairment of any right of defendant must be deemed *de minimis.* Therefore, for failure on the defendant's part to demontrate that a substantial right was affected by the action of the trial judge, the appeal must be dismissed.

Appeal dismissed.

Judge BRITT concurs.

Judge CARSON dissents.

Judge CARSON dissenting:

Following the issuance of the temporary restraining order, a full hearing was held in this matter on 17 September 1973. The defendant, both plaintiffs and various neighbors testified. The undisputed testimony showed that the property in question consisted of approximately 25 acres purchased by the defendant in 1967. The defendant had continuously used his land as a pasture since that time. It was the only land he had which had water suitable for cattle. The fences had been around the land continuously since 1967, and the defendant had improved the fences in certain areas to keep the cattle from getting out. Following the issuance of the restraining order on 5 September 1973, the defendant was forced to move his cattle and a horse from the land in question to another area. He has been deprived of his use of the pasture land continuously since 5 September 1973. No mention was made of assaults or bulldozing.

The case of *Raleigh v. Edwards, supra,* relied upon by the majority, is not analogous to the instant situation. There, an additional party was allowed to intervene in a condemnation proceeding, and an attempted appeal was taken from the order allowing the intervention. A closer factual situation is found in the case of *Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545 (1968). In that matter the Board of Elders of the Moravian church had obtained an interlocutory injunction restraining the defendant, the Bible Moravian Church, from using the word "Moravian" in its name. The defendant appealed, and the plaintiff moved to dismiss on the grounds that the appeal was premature. This motion was denied. The use of the word "Moravian" was held to be a substantial right, and the temporary denial of this right was the proper subject of an appeal. The definition of a substantial right is difficult, and each case must be decided on its particular factual situation. I believe that the defendant in this matter suffered a loss of a substantial right by the denial of the use of his property for this long period of time, and I think that the appeal should be considered on its merits.

If this matter were to be considered on its merits, I would feel that errors were committed in the granting of the injunction. However, since this is not before us because of the dismissal of the appeal, it would serve no purpose to point out these errors.

M. B. NELSON, PLAINTIFF v. RUTHER F. COMER AND WIFE, LENA ETHEL COMER, DEFENDANTS

— AND —

CHARLES L. WILLOUGHBY AND WIFE, JANET WILLOUGHBY, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. J. PATRICK ADAMS AND ROY M. BOOTH, KONRAD K. FISH, J. PATRICK ADAMS, H. MARSHALL SIMPSON AND A. WAYNE HARRISON, A PARTNERSHIP d/b/a BOOTH, FISH, ADAMS, SIMPSON & HARRISON THIRD PARTY DEFENDANTS

No. 7418SC370

(Filed 5 June 1974)

1. **Public Officers § 1— notaries public**

A notary public is a public officer.

2. **Public Officers § 9— personal liability**

A public official engaged in the performance of governmental duties involving the exercise of judgment and discretion may not be held personally liable for mere negligence in respect thereto; for such official to be held liable, it must be alleged and proved that his act or failure to act was corrupt or malicious or that he acted outside of and beyond the scope of his duties.

3. **Public Officers § 9— notary public — taking acknowledgment of deed — no personal liability for negligence**

The taking of an acknowledgment of the execution of a deed by a notary public is a judicial or quasi-judicial act by a public official for which he may not be held personally liable absent a showing that his act was corrupt, malicious, or outside the scope of his duties; therefore, a notary public would not be personally liable for negligently failing to establish the identity of the person who purported to be the grantor named in a deed and who acknowledged execution of the deed before the notary public.

APPEAL by third party plaintiffs from *Kivett, Judge,* 3 December 1973 Session of Superior Court held in GUILFORD County.

This is an action seeking to have a deed declared null and void. Allegations of the complaint, filed 20 December 1972, are summarized in pertinent part as follows: By deed dated 16 April 1970, and duly recorded, plaintiff acquired title to certain real estate in Guilford County. On 23 May 1972, a paper-writing purporting to be a deed from plaintiff to defendant Ruther B. Comer, conveying said real estate, was filed for registration in Guilford County Registry and recorded; plaintiff did not execute said instrument. On 10 November 1972, a deed from defendants Comer to defendants Willoughby purporting to convey said real estate was recorded in Guilford County Reg-

istry. Plaintiff asks that the purported deed from him to Comer be declared null and void.

Defendants Willoughby filed answer denying the invalidity of the purported deed from plaintiff to Comer. They also asserted a cross claim against defendants Comer, asking that in the event plaintiff should prevail on his claim, that defendants Comer, by reason of the warranty in their deed, indemnify defendants Willoughby.

Defendants Willoughby also, as third party plaintiffs, caused J. Patrick Adams and Roy M. Booth, Konrad K. Fish, J. Patrick Adams, H. Marshall Simpson, and A. Wayne Harrison, a partnership d/b/a Booth, Fish, Adams, Simpson & Harrison, to be made third party defendants to the action. In their third party complaint, the Willoughbys alleged: The third party defendants are partners. Defendant Adams is, and was at all times pertinent to this action, a duly appointed notary public. Based on "the certificate and notarization" of Adams on the purported deed to Comer, defendants Willoughby paid good and valid consideration to defendants Comer for conveyance of the subject property. Defendant Adams negligently notarized the deed to Comer, and negligently failed to establish the identity of the person purporting to be M. B. Nelson. The purported deed to Comer was prepared by the partnership composed of the third party defendants; should the court determine that the deed to Comer is void, then third party plaintiffs Willoughby are entitled to indemnification from the third party defendants.

Third party defendants filed answer denying material allegations of the third party complaint. They also moved for judgment on the pleadings or summary judgment pursuant to G.S. 1A-1, Rules 12(c) and 56.

Answers by third party defendants to the interrogatories of third party plaintiffs, and affidavit of defendant Adams, tended to show: On 23 May 1972, defendant Ruther F. Comer was well known to Adams. Some time prior to that date, Comer employed Adams to prepare a deed from M. B. Nelson to Comer and supplied Adams with the original deed dated 16 April 1970. Adams prepared the deed and on 23 May 1972, Comer went to Adams' office accompanied by a man whom he introduced as M. B. Nelson. The man stated that he was M. B. Nelson, that he was still a widower, and asked that Adams notarize the deed. Adams did so.

Following a hearing, the trial court granted the third party defendants' motion for summary judgment and dismissed the action as to them. The third party plaintiffs appealed.

Smith, Moore, Smith, Schell & Hunter, by Larry B. Sitton and J. Donald Cowan, Jr., for third party plaintiff appellants.

Henson, Donahue & Elrod, by Perry C. Henson and Sammy R. Kirby, for third party defendant appellees.

BRITT, Judge.

Under G.S. 1A-1, Rule 56(c), "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Appellants contend that there is a genuine issue of fact as to negligence. Appellees contend that the pleadings and filed documents disclose a defense, *i.e.*, governmental immunity, which precludes the court from reaching the question of negligence.

[3] Appellants argue that in this State the "taking of an acknowledgment" of the execution of a deed by a notary public is a ministerial act, and that a notary is liable for negligence in the performance of that act. Appellees argue that the act is a judicial, or quasi-judicial, act by a public official for which he may not be held liable absent a showing that his act was corrupt, malicious, or outside the scope of his duties. We are constrained to agree with appellees.

[1, 2] In North Carolina, a notary public is a public officer. *Harris v. Watson,* 201 N.C. 661, 161 S.E. 215, 79 A.L.R. 441 (1931); *State v. Knight,* 169 N.C. 333, 85 S.E. 418 (1915). A public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto; for such official to be held liable, it must be alleged and proved that his act, or failure to act, was corrupt or malicious or that he acted outside of and beyond the scope of his duties. *Smith v. Hefner,* 235 N.C. 1, 68 S.E. 2d 783 (1951), and cases cited therein.

Appellants contend that statements in *State v. Knight, supra,* and other North Carolina cases to the effect that the

taking of an acknowledgment by a notary public is a judicial act, are dicta. We are inclined to agree, but feel that we must treat those statements as indicative of the court's concept of the office of notary public. In *Knight,* page 342, we find: "One of the duties which a notary public may perform is taking the probate of deeds, and this is a judicial act." And on the same page, the court quoted with approval from a Mississippi case as follows: " 'The officer who takes an acknowledgment (of the execution of a deed) acts in a judicial character in determining whether the person representing himself to be, or represented by some one else to be, the grantor named in the conveyance actually is the grantor. He determines further whether the person thus adjudged to be the grantor does actually and truly acknowledge before him that he executed the instrument.' "

A judicial act is defined as "[a]n act which involves exercise of discretion or judgment." Black's Law Dictionary, Fourth Edition, page 984. Chapter 47 of our General Statutes provides for the probate and registration of legal documents, and G.S. 47-1 provides that "[t]he execution of all deeds of conveyance, . . . may be proved or acknowledged before any one of the following officials of this State: The justices, judges, magistrates, clerks, assistant clerks, and deputy clerks of the General Court of Justice, and notaries public." We observe that notaries public are included in the statute along with other officials who are clearly judicial officials. It is noteworthy that various sections of Chapter 47 refer to the acknowledgment or *proof* of the execution of instruments. G.S. 47-12, et seq., provide for proof of an attested instrument by a subscribing witness or by handwriting. A notary public is authorized to make a determination as to those proofs, thereby performing a judicial act. Historically, the probate of a real estate deed in this State has been regarded as a judicial act as is indicated by the fact that during most of the nineteenth century the execution of a deed was proven in the *nisi prius* courts.

Appellants argue that the weight of authority in other jurisdictions is to the effect that notaries public may be held liable for negligence and they cite us four cases: *Meyers v. Meyers,* 5 Wn. App. 829, 491 P. 2d 253 (1971) ; *Brittain v. Monsur,* 195 S.W. 911 (Tex. 1917) ; *Figuers v. Fly,* 137 Tenn. 358, 193 S.W. 117 (1916), and *Transamerica Title Ins. Co. v. Green,* 11 Cal. App. 3d 693, 89 Cal. Rptr. 915 (1970). In each of these cases it appears that the notary was held liable when he did not fol-

low the statutory procedure for ascertaining the identity of the grantor in the deed. This State has no such statutory procedure.

On the question of "ministerial act," in *Langley v. Taylor*, 245 N.C. 59, 62, 95 S.E. 2d 115, 117 (1956), Chief Justice Winborne, writing for the court, defined the term as follows: "A ministerial act is 'one which a person performs in a prescribed manner in obedience to the mandate of legal authority, without regard to or exercise of his own judgment upon the propriety of the act being done.' Black's Law Dictionary, 3rd Ed. Indeed 'a ministerial duty, the performance of which may in proper cases be required of a public officer by judicial proceedings, is one in respect to which nothing is left to discretion; it is a simple, definite duty arising under circumstances admitted or proved to exist and imposed by law.' Black's Law Dictionary."

[3] For the reasons stated, we conclude that the rule set forth in *Smith v. Hefner, supra,* applies with respect to the acts of defendant Adams as a notary public. The liability of all of the third party defendants being dependent upon the liability of defendant Adams, the trial court properly entered summary judgment in their favor.

Affirmed.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. RICKY BLACK

No. 7420SC201

(Filed 5 June 1974)

Robbery § 5— armed robbery — failure to submit common law robbery

The trial court in a prosecution for armed robbery or attempted armed robbery did not err in failing to submit the lesser included offense of common law robbery where the State's evidence tended to show that defendant and another entered a shop and examined a knife with the blade open, that defendant told the owner, "If you don't give us this knife, we're going to get you," and that the owner was then assaulted by both persons who pummeled her head, inflicted a laceration of the ear and fled the premises with the knife, and defendant's evidence tended to show that no robbery was committed

or attempted, that the person who accompanied defendant assaulted the shop owner and that defendant did not participate in that offense.

Judge BALEY dissenting.

APPEAL by defendant from *McConnell, Judge,* 22 October 1973 Session of Superior Court held in UNION County.

Defendant was tried upon a bill of indictment charging robbery with a dangerous weapon, a knife, whereby the life of Mrs. Lonnie S. Carr was endangered or threatened.

The State's evidence tends to show that on 13 September 1973 defendant and two other individuals entered Carr's Novelty Shop in Monroe, North Carolina. Mrs. Lonnie S. Carr, the prosecuting witness who operates the business, brought some knives to defendant who had requested to see them out of their respective shelves. The three individuals remained in the store a few minutes until Mrs. Carr coaxed them out in order that she might close the store and go to lunch. When Mrs. Carr reopened the store after lunch, defendant and one other youth came back and stated they wanted to buy the knife seen earlier in the day. Mrs. Carr then testified:

"I turned right around and handed Black [defendant] the knife. I told him that it was the same price as it was, $2.58, counting the taxes. He took the knife and held it up like this. (Witness indicating). The blade of the knife was open. It was still open, I didn't close it back up after they went out. After raising the knife, Black said, 'If you don't give us this knife, we're going to get you.' That's the last thing I knew. I blacked out. . . .

* * *

"It was a very short time till I regained consciousness. No one was present at that time but me. I was down on the floor on my knees, and they had been beating my head. I could hear, but couldn't see them. The boys that got the knife were beating my head. . . .

"My ear was cut. I had to go to the hospital and have about three stitches taken in it. I had on a blue print dress when I got up, I looked at it and there was blood all over it."

When the two youths left, they took the knife with them. On cross-examination, Mrs. Carr testified:

"Ricky [defendant] was holding the knife after I gave it to him. He was holding it about like this. (Witness indicating). It was about eye level. Both of his palms were together. His thumbs and fingers were extended and the knife was between his palms. Ricky Black at no time pointed the knife at me. He said he would get me. He said, 'We'll get you if you don't give us this knife.' He knocked me out. He grabbed me from behind the showcase and I didn't know anything. I do not know who struck me. . . .

"The first time I was struck, I didn't see who struck me. I was standing directly in front of Ricky Black. They grabbed me. He was not to one side or the other. I did not see Ricky Black's arm move at all. He never said he would kill me. He only said, 'If you don't give us the knife, we're going to get you.' "

Michael Duncan appeared as a witness for the State and testified that he accompanied defendant to Carr's Novelty Shop on the day in question. Duncan stated that when Mrs. Carr handed the knife to defendant

"He [defendant] told her he wanted some money, and she was talking and so she didn't hear him. He then again said he wanted some money, and then she jumped back and started to run. She ran toward the back of her store. That was all. When she went backward, Ricky [defendant] just stood there and looked at her, and then went out the back door. The two of us were in there about three minutes at that time. . . . Ricky said he left the knife there. I don't know what he did with the knife."

The defendant's evidence tends to show that he and Michael Duncan went to Carr's Novelty Shop on 13 September 1973 to buy a knife. Mrs. Carr handed defendant a knife which he opened himself and held it to his face, looking at it. Defendant testified

"She started hollering and screaming and ran to the right side of the counter where Michael [Duncan] was. Michael started beating the lady and she fell. . . . Michael started beating the lady in the head and I just stood there. I just stood there and the knife that I had—I dropped it in the store on the floor. I ran over there and pushed Michael off the lady and he said, 'Are you going to get the money?' I said, 'No, let's get out of here.' So we ran."

The trial judge instructed the jury that it might return any one of three verdicts: (1) guilty of robbery with a dangerous weapon, (2) attempted robbery with a dangerous weapon, or (3) not guilty. The jury returned a verdict of guilty of attempted robbery with a dangerous weapon. Judgment of imprisonment was entered thereon.

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

William H. Helms for the defendant.

BROCK, Chief Judge.

The prosecuting witness in this case is an eighty-one year old woman who, on the date in question, was conducting business alone in her establishment when defendant, a five feet-nine inch seventeen year old male, accompanied by a fifteen year old male, entered the shop and examined the knife with the blade opened. There is evidence to the effect that Mrs. Carr was then assailed by both males who pummeled her head, inflicted a laceration of the ear, and then fled the premises with the knife.

The State's evidence tends to show that defendant took, or attempted to take, Mrs. Carr's knife by the use or threatened use of the knife whereby the life of Mrs. Carr was endangered or threatened, and that the taking, or attempt to take, was with intent to permanently deprive Mrs. Carr of her knife and to convert the knife to defendant's own use. This evidence tends to show a violation of G.S. 14-87. Defendant does not argue to the contrary. He argues only that the trial court committed prejudicial error by failing to submit to the jury the lesser offense of common law robbery.

It is true that in a prosecution for robbery with a dangerous weapon, the accused may be acquitted of the crime charged and convicted of a lesser offense included in the offense charged, such as common law robbery, if there is evidence from which the commission of such lesser offense can be found. But the trial court is not required to submit to the jury the question of a lesser offense, included in that charged, where there is no evidence to support such a verdict. *State v. Owens,* 277 N.C. 697, 178 S.E. 2d 442. The mere contention that the jury might accept the State's evidence in part and might reject it in part

is not sufficient to require submission to the jury of a lesser offense. *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809.

The State's evidence tended to show robbery or attempted robbery with the use or threatened use of the knife, a dangerous weapon.

The defendant's evidence tends to show that no robbery was committed or attempted. It tends to show commission of the offense of an assault on Mrs. Carr by one Michael Duncan, who had accompanied defendant. However, defendant's evidence tends to show defendant did not participate in the commission of that offense.

If the State's evidence is believed, defendant committed the offense of robbery with a dangerous weapon, or attempted robbery with a dangerous weapon. If defendant's evidence is believed, he committed no offense. There was no evidence to support a verdict of guilty of common law robbery. The mere contention that the jury might accept the State's evidence that defendant robbed, or attempted to rob, Mrs. Carr, but might reject the State's evidence that defendant used or threatened to use the knife does not require the submission of the offense of common law robbery to the jury. *State v. Bailey, supra.* Under the State's evidence, if a robbery were committed or attempted, it was committed or attempted with the use or threatened use of the knife. The jury was properly instructed that they must be satisfied beyond a reasonable doubt of the existence of each element of the crime, which included the use or threatened use of the knife, or it would be the jury's duty to acquit defendant.

The trial court was correct in refusing to submit to the jury the question of defendant's guilt of common law robbery.

No error.

Judge PARKER concurs.

Judge BALEY dissenting:

In my view there is evidence to support a verdict for the lesser offense of common law robbery.

STATE OF NORTH CAROLINA v. GARY MARTIN

No. 7420SC250

(Filed 5 June 1974)

1. **Indictment and Warrant § 13— denial of bill of particulars**

In a prosecution for possession of LSD, the trial court did not abuse its discretion in the denial of defendant's motion for a bill of particulars where defendant was furnished specific information about the offense in a pretrial conference with an SBI agent and defense counsel was present at the preceding trial where the witnesses stated that their testimony against defendant would be substantially the same as their testimony in that case.

2. **Jury §§ 2, 7— jury panel in audience during preceding trial — motion for special venire — challenges for cause**

The trial court in a prosecution for possession of LSD did not abuse its discretion in the denial of defendant's motion for a special venire and his challenges for cause based on the fact that the jury panel was in the audience during the preceding trial when the State's witnesses testified that their testimony in both cases would be substantially identical and when the jury in the preceding case returned a guilty verdict.

3. **Criminal Law § 91— motion for continuance — location of additional witnesses**

The trial court in a prosecution for possession of LSD did not abuse its discretion in the denial of defendant's motion for continuance so that defendant could attempt to locate two unnamed persons who an SBI agent testified were with defendant when the agent purchased LSD from defendant.

APPEAL from *McConnell, Judge*, 1 October 1973 Session of RICHMOND County Superior Court. Argued in the Court of Appeals 19 April 1974.

Defendant was charged in a bill of indictment with the possession of LSD. His case was docketed for trial at the 1 October 1973 Session of Richmond County Superior Court along with the cases of three other defendants indicted as a result of the same SBI investigation that produced the indictment of defendant Martin.

Three of the four defendants tried for the possession of LSD were represented either by counsel for defendant Martin or his law partner. The trial of Kevin Baxley immediately preceded that of Gary Martin, and Baxley was represented by Martin's counsel and his partner. The jury panel for Martin's case was in the audience during the Baxley trial, and they were

able to hear the State's witnesses testify that their testimony in both cases would be substantially identical.

The selection of the jury for the Martin case began while the Baxley jury was deliberating. During the voir dire, the Baxley jury entered the courtroom and returned a guilty verdict in the presence of the entire venire. Defendant's motion for a continuance at this point was denied. All but one of the jurors ultimately selected for the Martin trial had been present in the courtroom during the jury trial. Counsel for defendant challenged three of the veniremen because of their presence during the Baxley trial, and when his challenges were denied, he was forced to exhaust his peremptory challenges. Counsel for defendant thereupon moved for a new venire, and the motion was denied.

Defendant moved for a bill of particulars, and the motion was denied. Defendant's attorney was, however, allowed to discuss the case at a pretrial conference with SBI Agent Van Parker, who gave him information which will be set out hereinafter.

State's evidence tended to show that SBI Agent Duehring purchased three "blotters" of LSD from Martin. Agent Van Parker testified that he had given Agent Duehring the money to purchase the LSD, and that Agent Duehring had related to him essentially the same narration of the purchase that he gave on the witness stand. Agent Parker received the blotters from Duehring, and mailed them to the SBI laboratory where SBI Chemist Tom McSwain identified the controlled substance as LSD.

Defendant offered evidence tending to show that he was with his family and several friends at the time of the alleged incident. At the close of all the evidence, defendant moved for a continuance until the next day in order that he could attempt to locate the two unnamed persons who Agent Duehring testified were with defendant at the time of the purchase. The motion was denied, motion for nonsuit was denied, and the jury returned a verdict of guilty. From the signing and entry of judgment, defendant appealed.

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

Joseph G. Davis, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant assigns error to the denial of his motions for a bill of particulars, a new venire and two motions for continuances. These motions are addressed to the sound discretion of the trial court, and they are not subject to review on appeal absent an abuse of discretion. Under the facts of the case before us, we hold that the trial court did not abuse its discretion in denying the motions.

G.S. 15-143 provides that:

> "In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters."

That a motion for a bill of particulars is addressed to the trial court's discretion has been well established in the decisions of the Supreme Court. *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318 (1965); *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901 (1960). The granting or denial of such a motion is not subject to review on appeal except for palpable and gross abuse of discretion. *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802 (1967). It has been held that where all the information surrounding the commission of the crime is contained in the bill of indictment or can be obtained by examination of the State's witnesses, there is no abuse of discretion in the denial of the motion. *State v. Cameron, supra.*

The function of a bill of particulars is to inform the defendant of the nature of the evidence the State proposes to offer. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). The indictment contained the following information: (1) the name of the defendant, (2) the date of the alleged offense, (3) the type of contolled substance possessed, and (4) the county in which the alleged offense occurred. Following the denial of the motion for a bill of particulars, defendant was given the following information at a pretrial conference in chambers: (1) the time of the alleged offense, (2) the specific location of the alleged offense, (3) the quantity of the controlled substance, and (4) the names of the prospective witnesses for the State. In addition, the record shows that counsel and his law partner were present at the preceding trial where the witnesses stated that

their testimony against defendant Martin would be substantially the same as their testimony against defendant Baxley. The information thus provided defendant is as adequate as the information furnished defendant in *State v. Cameron, supra,* and we hold that defendant has shown no abuse of discretion in the denial of his motion for a bill of particulars.

[2] Defendant assigns error to the trial court's allowing the jury to try this case in spite of its exposure to the case of *State v. Kevin Baxley.* This assignment of error is grounded, *inter alia,* on exceptions to denials of challenges for cause, and the denial of a motion for a new venire. Neither can be sustained. The rulings on the competency of jurors is discretionary in the court and will not be reviewed unless accompanied by an imputed error of law. *Highway Comm. v. Fry,* 6 N.C. App. 370, 170 S.E. 2d 91 (1969). In that case, the trial court denied the Commission's motion to dismiss jurors who had served in the immediately preceding condemnation trial. In affirming the trial court's denial, this Court noted that the trial court carefully questioned two jurors who had served in the previous case. Both stated that their service in the previous case would not prevent their giving the present parties a fair trial. The fact that a juror has served in a case which has similarity to the case he is now asked to serve does not automatically disqualify him as to the latter trial. Whether a special venire should be called in such a case is a matter resting in the sound discretion of the court. *Id.*

In *State v. Haltom,* 19 N.C. App. 646, 199 S.E. 2d 708 (1973), defendant moved prior to selection of a jury for a continuance because the jury panel had been in the courtroom in the immediately preceding case where counsel for defendant had represented a different defendant charged with the same offense as was Haltom. The jury panel was thus able to hear counsel in his arguments outside the presence of the jury as well as observe the trial in its entirety. In affirming, we held that the trial court did not abuse its discretion in denying the motion for continuance under the circumstances.

Defendant in the case *sub judice* has shown no abuse of the court's discretion. The court's rulings on the competency of the jurors is affirmed.

[3] Defendant's final assignment of error is to the denial of a motion for a continuance on the ground that the State's under-

cover agent testified that two persons were with defendant at the time of the alleged offense. He contends that since he relies upon alibi as a defense, he is precluded from knowing the names of accomplices, aiders or abettors. Without discussing the logic of this position, we hold that, like the above motions, this motion was addressed to the court's discretion, *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973). Since no abuse of discretion has been shown, it is likewise affirmed. In *State v. Hughes*, 5 N.C. App. 639, 169 S.E. 2d 1 (1969), defendant moved for a continuance until the next day because of the absence of a witness. In affirming the denial of the motion, we stated:

> "The granting of a continuance is a matter entirely within the discretion of the trial judge and not reviewable unless there is a clear abuse of discretion. *Dupree v. Insurance Co.*, 92 N.C. 418; *State v. Banks*, 204 N.C. 233, 167 S.E. 851; and *State v. Murphy*, 4 N.C. App. 457, 167 S.E. 2d 8. We think this rule is in accord with sound policy. In this day of crowded court calendars, Judges, with the aid of attorneys, should and must take steps to insure the smooth flow of cases." *Id.*, at 642.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. LEVI WHITTED

No. 7414SC348

(Filed 5 June 1974)

1. Searches and Seizures § 3— affidavit — sufficiency for finding of probable cause

An affidavit which stated that the affiant had probable cause to believe that defendant and another person had heroin on the premises of defendant and on the person of his companion, gave the address and a description of defendant's home, stated that the facts given were supplied by an informant who had given information in the past leading to arrests and convictions, and indicated that on the date of the issue of the warrant, the informant saw defendant's companion in defendant's home while he was in possession of heroin, was sufficient to constitute the basis for a finding of probable cause by the magistrate.

2. Narcotics § 4— constructive possession of heroin — sufficiency of evidence

Evidence was sufficient to be submitted to the jury on the issue of defendant's constructive possession of heroin where such evidence tended to show that defendant owned the house in which heroin was found, he was in and out of the house frequently, his car was often there, and on at least two occasions very shortly after the occurrence in question defendant stated to officers that it was his home.

3. Narcotics § 4— manufacturing heroin — insufficiency of evidence

The trial court erred in submitting to the jury the charge of manufacturing heroin where the evidence tended to show that items used in the cutting of heroin were found in a search of defendant's residence but there was no evidence that any of them belonged to defendant, and where the evidence tended to show that defendant was not at home when the search was made and there was no evidence as to when he had last been there.

APPEAL by defendant from *Clark, Judge,* 8 October 1973 Session, Superior Court, DURHAM County. Argued in the Court of Appeals 22 April 1974.

Defendant was charged with felonious possession of heroin, felonious possession of heroin with intent to distribute, and manufacturing heroin. He was convicted on all three counts and appeals from judgment entered on each verdict.

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

Taylor and Upperman, by Herman L. Taylor, for defendant appellant.

MORRIS, Judge.

The record contains six groups of assignments of error based on 39 exceptions. Defendant brings forward and argues only two. Although he does not refer to any exception or assignment of error in his brief, since there are only two questions raised, we choose not to invoke the provisions of Rule 28, Rules of Practice in the Court of Appeals of North Carolina, and dismiss the appeal. Rather, we shall discuss the two questions on their merits.

Defendant first urges that the evidence in this case should have been suppressed on defendant's motion because of the legal insufficiency of the search warrant and the inadequacy of the affidavit upon which the search was authorized.

In *United States v. Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965), Mr. Justice Goldberg wrote the opinion for the majority of the Court (Chief Justice Warren and Justice Douglas dissenting). In discussing the requirements of probable cause with respect to search warrants, he said:

> "While a warrant may issue only upon a finding of 'probable cause,' this Court has long held that 'the term "probable cause" . . . means less than evidence which would justify condemnation,' *Locke v. United States,* 7 Cranch 339, 348, 3 L.ed. 364, 367, and that a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial. *Draper v. United States,* 358 U.S. 307, 311, 3 L.ed. 2d 327, 331, 79 S.Ct. 329. As the Court stated in *Brinegar v. United States,* 338 U.S. 160, 173, 93 L.ed. 1879, 1889, 69 S.Ct. 1302, 'There is a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.' Thus hearsay may be the basis for issuance of the warrant 'so long as there (is) a substantial basis for crediting the hearsay.' *Jones v. United States, supra,* 362 U.S. at 272, 4 L.ed. 2d at 708, 78 A.L.R. 2d 233. And, in Aguilar we recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved 'whose identity need not be disclosed . . . was "credible" or his information "reliable." ' *Aguilar v. Texas, supra* 378 U.S. at 114, 12 L.ed. 2d at 729."

With respect to the application of the principles, Mr. Justice Goldberg said:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings 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." *Id.*, 13 L.Ed. 2d at 688-689.

[1] In the case before us, the affiant stated under oath before the issuing magistrate that he had probable cause to believe that Levi Whitted and Larry Lee had on the *premises of Levi Whitted,* the person of Larry Lee and his vehicle, heroin. The affidavit gave the address of the Whitted premises, described the home and Larry Lee and his automobile, giving also its license number. The affiant stated that the facts given were given by an informant who had in the past given information which had led to the arrest and conviction of people in the Superior Court, Durham County, giving the dates of conviction. Further the affiant stated that the informant had told him that on the date of issue of the warrant he was in the home of Levi Whitted in the presence of Larry Lee and saw within the premises a quantity of heroin in the possession of Larry Lee. Further the informant had been on the Vice Squad office on several occasions and had correctly identified heroin and knew heroin when he saw it.

Applying the principles of *Ventresca,* we think the affidavit in this case complies with the requirements of the Constitution of the United States, the decisions of the Supreme Court of the United States, the decisions of the Supreme Court of North Carolina, the decisions of this Court, and the statutory law of North Carolina. It was sufficient to constitute the basis for the magistrate's finding of probable cause, and there was no error committed in allowing the evidence in.

Defendant next contends that motion for nonsuit should have been allowed.

[2] As was said in *State v. Harvey,* 281 N.C. 1, 12, 187 S.E. 2d 706 (1972),

> "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."

The evidence in the case before us for decision was plenary, if believed, that defendant owned the house, was in and out frequently, that his car was there often, that he was seen driving his car from that direction almost daily, that on at least two occasions very shortly after this occurrence he had stated to the officers that it was his home, that he claimed the money as belonging to him. This is certainly sufficient to send the case to the jury on the possession charge. Defendant appears to concede this in his brief, but argues that it is not sufficient to send the case to the jury on the case of possession with intent to distribute.

[3] With respect to the charge of possession with intent to distribute and manufacturing, we are compelled to reach a different conclusion. There is no evidence that defendant was at the house at the time of the search, nor was there any evidence that he had been in the house at any specific time just prior thereto. The evidence is clear that he said, after the search, that he lived there; but we find no evidence in the record that he had *been* there at any specific time or times prior to the search. We think this charge of manufacturing is controlled by *State v. Baxter*, 21 N.C. App. 81, 83, 203 S.E. 2d 93 (1974), where Judge Campbell said:

> "The only evidence of manufacturing, therefore, is the fact that the marijuana was 'packaged.' G.S. 90-87(15). However, there was no showing when the marijuana was packaged, by whom, or for what purpose. The defendant was not at home at the time and it was not established that he had been home in over a week. The sport coat containing marijuana was not established as being the defendant's nor was any of the marijuana or other items found established to have been defendant's, other than on the theory of constructive possession. We hold that the State failed to prove a sufficient nexus between the defendant, the marijuana, and other items to establish that (1) marijuana was being manufactured and (2) that it was being done by the defendant."

Here we have obvious items used in the cutting of heroin, a small amount of packaged heroin, a large number of glassine bags, but no evidence that any of it belonged to defendant. The coats from which money was taken were never identified although he did claim the money. Defendant was not at home when the search was made and there was no evidence as to when he had last been there. Even if there were a presumption with respect to possession of heroin for distribution, and there is not, it would not aid the State in a case of manufacturing in order to prove intent to distribute. G.S. 90-87(15) defines manufacturing in such a way that it can only mean manufacture with the intent to distribute as opposed to manufacturing for one's own use. *State v. Baxter, supra.* For the reasons stated, we are of the opinion that the court erred in submitting the charge of manufacturing to the jury.

As to the charge of possession—affirmed.

As to the charges of possession with intent to distribute and manufacturing—reversed and judgments arrested.

Judges CAMPBELL and VAUGHN concur.

DOROTHY B. WALSER v. CHARLIE PHYNE COLEY

No. 7422SC331

(Filed 5 June 1974)

Automobiles § 94— intoxicated driver — contributory negligence of passenger — instructions

In a passenger's action against the driver to recover for injuries sustained in a one-car accident wherein the court instructed the jury that a passenger who enters a car with knowledge that the driver is under the influence of intoxicants and voluntarily rides with him is guilty of contributory negligence, the court erred in failing to instruct the jury that the plaintiff contended and offered evidence that she did not know defendant was under the influence of any intoxicants to the extent that his mental or physical faculties were appreciably impaired, and that defendant, when observed by plaintiff, was acting, walking, talking, dancing and conducting himself in a normal manner.

APPEAL by plaintiff from *Collier, Judge,* 1 October 1973, Civil Session, DAVIDSON Superior Court.

Heard in the Court of Appeals 14 May 1974.

This action was instituted to recover damages for personal injuries sustained in a one-car automobile wreck in the early morning hours of Sunday, 26 July 1970. Plaintiff was riding as the only passenger in the front seat of a Chevrolet automobile owned and driven by the defendant. On a rural paved road in Iredell County just west of the City of Statesville and in open country on a curve, the automobile went off the road and turned over, seriously injuring the plaintiff. Plaintiff alleged that the automobile was being driven at a speed which was greater than was reasonable and prudent under the conditions then existing and in excess of the posted speed limit; that the defendant driver failed to exercise due care and operated the automobile without keeping a proper and careful lookout and without keeping the automobile under reasonable and proper control; and that he drove in a careless and reckless manner.

The defendant denied any negligence on his part and affirmatively alleged that the plaintiff was guilty of contributory negligence in that she had been in the presence of the defendant for an appreciable period of time prior to the journey in question and that she knew, or by the exercise of due care should have known, that the defendant had consumed a quantity of alcoholic beverage and that his mental and physical faculties were appreciably impaired thereby; that despite this knowledge, the plaintiff voluntarily rode in the automobile and that this contributory negligence and assumption of risk on the part of the plaintiff barred her right of recovery.

Plaintiff offered evidence tending to show that on the afternoon and evening of Saturday, 25 July 1970, she was with a friend, a Mrs. Lazenby, and her daughter at the home of Mrs. Lazenby in Salisbury. Mrs. Lazenby formerly lived in Statesville. Plaintiff accompanied Mrs. Lazenby and her daughter in Mrs. Lazenby's automobile to Statesville where they went to the Bamboo Lounge. The Bamboo Lounge was a place where beer was sold and music and dancing available. Before leaving Salisbury, plaintiff had had one drink of whiskey but did not have anything of an alcoholic nature thereafter. At the Bamboo Lounge, plaintiff was introduced by Mrs. Lazenby to the defendant. During the course of the evening, plaintiff danced with the defendant and from time to time observed him drinking beer; but he at no time showed any effects therefrom. They left the Bamboo Lounge and went to the home of friends of Mrs. Lazenby. At this home there was more music and dancing.

Plaintiff danced there with the defendant and testified that the defendant talked all right, walked all right and danced all right and showed no effects of drinking alcohol. Plaintiff had ridden to this home in Mrs. Lazenby's car. When the party broke up, Mrs. Lazenby remarked that she needed some gas for her automobile in order to drive back to Salisbury. The defendant stated that he had the keys to the place where he worked and that he drove a gas tanker, and at this place of business gas would be available for the automobile. Plaintiff had gotten back in the Lazenby automobile, and Mrs. Lazenby had gotten in the automobile with the defendant. A couple of other boys got in the Lazenby automobile; and before leaving Mrs. Lazenby and the plaintiff switched places, with Mrs. Lazenby getting back in the automobile with her daughter, and the plaintiff getting in the automobile with the defendant. They drove to the place where the defendant worked, and he went in the office and turned on the lights to the gas pump. The defendant came out and put gas in his automobile and also in Mrs. Lazenby's automobile. Mrs. Lazenby was going to take the two boys that were in her automobile to some place where they had left their automobile. Defendant was going to drive the plaintiff over to the same place where the plaintiff would get back in Mrs. Lazenby's automobile. It began to drizzle a little rain. The defendant went back inside and turned off the lights and locked the doors, and they left to follow the Lazenby automobile. Plaintiff testified that the defendant at this time was walking all right, and she did not notice anything irregular about the way he spoke; and she had not noticed anything wrong with his driving over to his place of business where the gas was gotten. After they left from getting the gas, the defendant's automobile skidded a couple of times, and the plaintiff told him, "Maybe you'd better slow down a little bit." He said, "I'm a truck driver," and "I can handle this car pretty good." It skidded another time and plaintiff asked him to slow down because she knew Mrs. Lazenby would wait on her until she got there. Plaintiff testified that she asked the defendant to slow down three times, and then he lost control and the car turned over.

The jury answered the negligence issue "Yes" in favor of the plaintiff and then answered the contributory negligence issue "Yes" in favor of the defendant.

From judgment entered upon the jury verdict to the effect that the plaintiff have and recover nothing of the defendant, the plaintiff appealed.

Barnes and Grimes by Jerry G. Grimes for plaintiff appellant.

Walser, Brinkley, Walser and McGirt by Walter F. Brinkley for defendant appellee.

CAMPBELL, Judge.

Plaintiff excepted and assigns as error certain portions of the charge given by the judge to the jury.

The judge instructed the jury that the defendant claimed that if he was negligent, the plaintiff was also negligent in riding with him and assuming the risk of riding with him when he was driving "as she alleges he was driving and under the condition of intoxication which she alleges, or under the influence of intoxicating beverage which he alleges was his condition on this occasion; that therefore, she should not be entitled to recover if she suffered any injuries." This was a misstatement of the allegations of the plaintiff because she did not make any allegations in her complaint that the defendant was driving while in an intoxicated condition.

Later in the charge when instructing the jury on the second issue of contributory negligence, the judge instructed the jury that a passenger is not absolved from all care for her personal safety but is under the duty of exercising ordinary or reasonable care to avoid injury "particularly when the guest or passenger knows the driver is operating the automobile in a careless or reckless manner or under the influence of some intoxicating beverage, then the duty devolves on her for taking means for her own protection by word or act, it may be her duty to restrain or warn the driver from acts of negligence or from violation of the law."

Again, at the conclusion of the charge and after counsel for the defendant had approached the bench and conversed with the judge, the judge instructed the jury:

> "Members of the Jury, it has been pointed out that I may have made an error and misread something to you relative to riding with a person under the influence—as to the second issue I charge you that it is negligence per se for one to operate an automobile while under the influence of some intoxicating beverage. I instruct you further that if one enters a car with the knowledge that the driver is

under the influence of intoxicating beverage and voluntarily rides with him, that person is guilty of contributory negligence per se."

At no point in the charge to the jury did the judge instruct the jury that the plaintiff had at all times contended and offered evidence to the effect that she did not know that the defendant was under the influence of any intoxicants to the extent that his mental or physical faculties were appreciably impaired; that at all times the defendant, when observed by the plaintiff, was acting, walking, talking, dancing and conducting himself in a normal manner. We think the plaintiff was entitled to have the judge, in instructing the jury, apply the law to the various factual situations brought out in the evidence. The judge failed to do this with the result that the tenor of the charge was slanted in favor of the defendant on the second issue of contributory negligence. This was prejudicial to the plaintiff and necessitates a new trial.

New trial.

Chief Judge BROCK and Judge BRITT concur.

WILLIAM WAYNE WILLIAMS v. CANAL INSURANCE COMPANY AND VOGLER ADJUSTERS

No. 7423DC399

(Filed 5 June 1974)

Insurance § 76— auto fire policy — change of insured vehicle — notice to broker — insufficient notice to insurer

Where defendant insurer had issued a fire policy on a Ford Torino owned by plaintiff, plaintiff's notification by telephone to the insurance broker who procured the policy that he wanted the policy changed to afford protection for a Ford Galaxie which he had purchased in lieu of the Ford Torino was not sufficient to bind defendant insurer, since the broker was the agent of plaintiff and not of defendant insurer; therefore, defendant insurer was not liable for fire damage to the Ford Galaxie.

APPEAL by plaintiff from *Osborne, District Judge,* 19 November 1973 Session of ALLEGHANY County, General Court of Justice, District Court Division.

Heard in the Court of Appeals 15 May 1974.

Plaintiff instituted this action to recover $2,500.00 on an insurance policy for the burning of a 1970 Ford Galaxie automobile.

At the close of the plaintiff's evidence, the defendant moved for a directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure. This motion was allowed and the action dismissed with prejudice. The plaintiff appealed.

Worth B. Folger for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by James H. Kelly, Jr., for defendant appellee.

CAMPBELL, Judge.

At the outset it is noted that the judgment was entered 26 November 1973. The case on appeal was not filed in this Court until 11 March 1974, which was more than 90 days after the entry of the judgment; and no order was procured granting an extension of time within which to file the case on appeal. The case is, therefore, subject to dismissal for failure to file in apt time. We, nevertheless, elect to consider the appeal on its merits.

A directed verdict against the plaintiff having been entered, we will consider the evidence on behalf of the plaintiff in the light most favorable to the plaintiff. When so taken, the evidence for the plaintiff would establish the following factual situation.

On 13 February 1972, the plaintiff went to Ben Reeves and requested him to procure an insurance policy covering fire loss on a 1971 Plymouth automobile. Thereafter, a 1970 Ford Torino automobile was substituted in lieu of the Plymouth. On 6 May 1972, the plaintiff traded the Torino automobile for a 1970 Ford Galaxie. At the time of the trade, the plaintiff told Wayne Wright of the motor company, where the trade was made, that Ben Reeves was the plaintiff's insurance agent. Thereupon, Wayne Wright telephoned and gave the serial numbers over the telephone to have the insurance transferred. Wayne Wright did not say to whom he was talking but simply said he was calling the insurance office.

On 25 September 1972, the automobile was in possession of a boy to have the car tuned up when a fire started under the dashboard in some mysterious manner and the car burned up. The plaintiff went to Mr. Reeves and reported the loss; and some two weeks later an adjuster, representing the defendant,

came to the plaintiff and stated that the car was not covered under the policy.

Wayne Wright testified on behalf of the plaintiff that on 6 May 1972, the plaintiff traded a 1970 Ford Torino for a 1970 Ford Galaxie and that he called Ben Reeves to change the insurance and gave him the serial number of the Ford Galaxie that the plaintiff was buying and requested Reeves to change the collision insurance and Reeves said he would. Wright further testified that the value of the Ford Galaxie was $2,500.00. Wright further testified that he showed on the invoice that J. B. Reed Insurance Agency had been telephoned to change the liability insurance. He stated that the liability carrier's name was put on the bill of sale in case the purchaser should be stopped by the Highway Patrol; that the Highway Patrol does not care whether there is collision insurance on an automobile or not, so no entry was ever made about the collision insurance carrier. He further testified that he had told the plaintiff that he would take care of getting the insurance changed and that he did.

Ben G. Reeves testified on behalf of the plaintiff that he operated the Ben G. Reeves Insurance Agency and that he was an agent for Nationwide Insurance Company, but that in addition, he wrote insurance for other companies as a broker. Reeves further testified that he wrote insurance for the plaintiff on a 1971 Plymouth automobile and that he secured this insurance through Carolina Insurance Service of Winston-Salem. The policy was dated 13 February 1972, and was effective for twelve months. On 3 May 1972, Reeves was notified by the plaintiff that he had traded the 1971 Plymouth for a 1970 Ford Torino. Reeves notified Carolina Insurance Service of this change and received an endorsement from the defendant showing the change in coverage from the Plymouth to the Torino. On 25 September 1972, the plaintiff notified Reeves that a 1970 Ford Galaxie had burned. Reeves testified that he had no record of Mr. Wright calling him to change the coverage from a 1970 Ford Torino to a 1970 Ford Galaxie; that he had no knowledge of any such notification; that he had no record in his files of having any coverage for the plaintiff on a 1970 Ford Galaxie; that he never received an endorsement from the defendant or their agent, Carolina Insurance Service, showing a change in the coverage from the Torino to the Galaxie; that there is no difference in the collision premium rate on a 1970 model standard motor Torino and on a standard motor Galaxie.

The burden of proof rested upon the plaintiff to establish not only the issuance of the policy by the defendant, but that this policy afforded plaintiff coverage on the 1970 Ford Galaxie. Assuming that the plaintiff, through his automobile salesman, Wright, notified Ben G. Reeves of the exchange of the Ford Torino for the Ford Galaxie with a request that the insurance policy be changed to afford protection for the Ford Galaxie in lieu of the Ford Torino, was such notification sufficient to bind the defendant? We do not think so. North Carolina General Statute § 58-39.4 reads:

> "*Definitions.*—(a) An insurance agency is hereby defined to be any person, partnership, or corporation designated in writing by any insurance company lawfully licensed to do business in this State, to act as its agent, with authority to solicit, negotiate, and effect contracts of insurance on behalf of the insurance company through duly licensed agents of such company, and to collect the premiums thereon, or to do any of such acts.
>
> (b) An insurance broker is hereby defined to be an individual who being a licensed agent, procures insurance through a duly authorized agent of an insurer for which the broker is not authorized to act as agent."
>
> "§ 58-40.3. *Broker's authority and commissions.*—(a) A broker, as such, is not an agent or other representative of an insurer, and does not have power, by his own act, to bind an insurer for which he is not agent upon any risk or with reference to any insurance contract.
>
> (b) An insurer or agent shall have the right to pay to a broker licensed under this chapter, and such broker shall have the right to receive from the insurer or agent, the customary commissions upon insurance placed in the insurer by the broker."

Insofar as the defendant was concerned, Ben G. Reeves was not its agent and had no authority to bind it.

Insofar as the policy of insurance in the instant case is concerned, Reeves was acting only as a broker and as such was actually the agent of the plaintiff and not of the defendant.

In 44 C.J.S., Insurance, § 140, p. 799, we find:

> "An insurance broker, like other brokers, is primarily the agent of the person who first employs him, and, in the

absence of a statute to the contrary, he is the agent of insured as to all matters within the scope of his employment, and acts or knowledge of such broker or agent will be binding on, or imputed to, insured and not to the company. In the absence of a statute to the contrary, such broker or agent is the agent of insured, even though he solicits the insurance, or the policy is delivered to him, and he collects the premium as agent of the company, and even though he receives his compensation from the company or its agent. The fact that one is an insurance agent for other companies does not prevent him from being an insurance broker and agent for insured."

The plaintiff in the instant case failed to carry the burden of proof imposed upon him to establish coverage on the 1970 Ford Galaxie which was destroyed by fire. The judgment of the trial court was correct.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JOHN WAYNE SHELTON

No. 7417SC389

(Filed 5 June 1974)

1. **Criminal Law § 148— newly discovered evidence — denial of new trial — appeal**

Appeal does not lie from a refusal to grant a new trial for newly discovered evidence.

2. **Criminal Law § 131; Rules of Civil Procedure § 59— motion for new trial based on affidavit — time of filing**

The trial court properly refused to consider defendant's second affidavit in support of his motion for a new trial, since the affidavit was filed after the trial court had already ruled on defendant's motion. G.S. 15-174; G.S. 1A-1, Rule 59(c).

3. **Criminal Law § 131— newly discovered evidence — denial of new trial proper**

The trial court properly denied defendant's motion for a new trial based on newly discovered evidence where the court was not convinced that the evidence, which consisted of a statement by a codefendant, was "probably true" and where the additional evidence would

tend merely to contradict or impeach the testimony of a witness at defendant's trial.

PURPORTED appeal by defendant from *Rousseau, Judge,* 7 January 1974 Criminal Session, SURRY Superior Court.

Heard in the Court of Appeals 23 April 1974.

The defendant's conviction of safecracking was affirmed by this Court in 17 N.C. App. 694, 195 S.E. 2d 369 (1973). The defendant's petition for certiorari to the Supreme Court of North Carolina was denied on 3 May 1973, and his petition for certiorari to the United States Supreme Court was denied on 29 October 1973. On 4 January 1974, defendant filed a motion for new trial on the ground of newly discovered evidence in the Superior Court of Surry County. The previous session of Superior Court in Surry County began on 29 October 1973. With his motion defendant filed the affidavit of one Ernest Da'e Smith, who was a codefendant in the trial. Smith's affidavit stated that he, Samuel Paul Martin, and Eddie Ray Spivey had committed the safecracking and not John Wayne Shelton. Eddie Ray Spivey had testifed for the State at the trial that he, John Wayne Shelton and Ernest Dale Smith had committed the safecracking. Defendant's motion for new trial was denied on the grounds that the testimony of Ernest Dale Smith would merely contradict that of Eddie Ray Spivey. Defendant gave notice of appeal. Thereafter, defendant requested an extension of time to serve his case on appeal and also requested the trial court to consider a second affidavit as grounds for granting his motion for new trial for newly discovered evidence. The second affidavit was that of one Samuel Paul Martin who stated that he, Ernest Dale Smith, and Eddie Ray Spivey, but not the defendant, had committed the safecracking. Samuel Paul Martin was at the time incarcerated in Central Prison for an unrelated offense. The trial court found that the second affidavit was filed after his ruling on the motion and thus was not filed in time to be considered. The trial court went on to hold that if it should be determined that the trial court should have considered the second affidavit, then the trial court would again deny the motion for new trial on the ground that the testimony of Samuel Paul Martin would merely contradict that of Eddie Ray Spivey. Defendant appealed.

Attorney General Robert Morgan by Associate Attorney Archie W. Anders for the State.

Smith, Carrington, Patterson, Follin & Curtis by David James for defendant appellant.

CAMPBELL, Judge.

[1] Defendant contends that the trial court erred in denying his motion for new trial on the basis of newly discovered evidence. Appeal does not lie from a refusal to grant a new trial for newly discovered evidence. *State v. Gordon,* 15 N.C. App. 241, 189 S.E. 2d 550 (1972). We have, however, treated defendant's appeal as a petition for certiorari, which is allowed.

G.S. 15-174 reads as follows:

> "The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases."

G.S. 1A-1, Rule 59(a), in pertinent part reads:

> "A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> * * * *
>
> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligency, have discovered and produced at the trial;"

[2] A motion for new trial on the grounds of newly discovered evidence is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion. *State v. Blalock,* 13 N.C. App. 711, 187 S.E. 2d 404 (1972); 7 Strong, N. C. Index 2d, Trial, § 49, p. 366. The trial court's refusal to consider the second affidavit was correct. The second affidavit was filed after the trial court had already ruled on defendant's motion. Rule 59(c) of the Rules of Civil Procedure provides:

> "(c) *Time for serving affidavits.*—When a motion for new trial is based upon affidavits they shall be served with the motion. . . . "

The case of *State v. Casey,* 201 N.C. 620, 161 S.E. 81 (1931), sets out the prerequisites for cases involving motions for new trials on the grounds of newly discovered evidence as follows:

> "1. That the witness or witnesses will give the newly discovered evidence. (Citations omitted.)

2. That such newly discovered evidence is probably true. (Citations omitted.)

3. That it is competent, material and relevant. (Citations omitted.)

4. That due diligence was used and proper means were employed to procure the testimony at the trial. (Citations omitted.)

5. That the newly discovered evidence is not merely cumulative. (Citations omitted.)

6. That it does not tend only to contradict a former witness or to impeach or discredit him. (Citations omitted.)

7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. (Citations omitted.)"

[3] The issue here is whether the affidavit of Ernest Dale Smith, codefendant with John Wayne Shelton, tends only to contradict, impeach, or discredit Eddie Ray Spivey. Many jurisdictions refuse to hold that a trial judge abuses his discretion in denying a motion for new trial for newly discovered evidence on the basis of the recantation of a witness. Such testimony is exceedingly unreliable, and it is the duty of the trial court to deny the motion for new trial where it is not satisfied that such testimony is true, especially where the recantation involves a confession of perjury or where there is a repudiation of the recantation. See annotations at 33 A.L.R. 550, 74 A.L.R. 757, 158 A.L.R. 1062, and 51 A.L.R. 3d 907. See, also, *State v. Ellers,* 234 N.C. 42, 65 S.E. 2d 503 (1951); *State v. Roddy,* 253 N.C. 574, 117 S.E. 2d 401 (1960); *State v. Blalock, supra; State v. Chambers,* 14 N.C. App. 249, 188 S.E. 2d 54 (1972); and *State v. Bynum,* 20 N.C. App. 177, 201 S.E. 2d 93 (1973). If recantations of witnesses are suspect, so are post-trial statements by convicted codefendants. It would appear that the trial court was not, as *State v. Casey, supra,* requires, convinced that the new evidence was "probably true."

It would also appear that the affidavit of Ernest Dale Smith would tend merely to contradict or impeach the testimony of Eddie Ray Spivey. The jury has already passed on the credibility of Eddie Ray Spivey, which was strenuously attacked at

the trial. We can find no abuse of discretion. The order denying defendant's motion is affirmed.

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. ANDREW JONES, JR.

No. 7410SC505

(Filed 5 June 1974)

1. **Criminal Law § 98— denial of motion to sequester witnesses**

The trial court did not err in the denial of defendant's motion to sequester the State's witnesses where the motion was made after the State had begun to present its case and defendant failed to explain why he wanted the witnesses sequestered.

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

The trial court did not express an opinion in questioning witnesses where the court was merely trying to clarify the witnesses' testimony. G.S. 1-180.

3. **Criminal Law § 88— cross-examination — assuming fact not in evidence — absence of prejudice**

In an armed robbery case, the solicitor's question during cross-examination of a witness as to whether the witness had ever used any of the drugs defendant brought by, while assuming a fact not shown by the evidence, was not prejudicial to defendant.

4. **Criminal Law § 114— summarizing evidence — expression of opinion — failure to use "allegedly admitted"**

The trial judge did not express an opinion that the evidence was sufficient to show that defendant admitted the robbery in question when he charged the jury that a deputy sheriff testified that he wasn't present "when defendant admitted the robbery," although the deputy testified that he did not hear defendant admit the robbery, where the sheriff had testified that defendant admitted to him that he had participated in the robbery; furthermore, defendant was not prejudiced by the court's failure to say "allegedly admitted" rather than "admitted."

5. **Criminal Law § 113— failure to define "confession"**

The trial court was not required to define the term "confession" for the jury absent a request for such an instruction.

6. **Criminal Law § 117— accomplice testimony — failure to charge on scrutiny**

The trial court did not err in failing to charge that the testimony of accomplices required special scrutiny absent a request therefor.

7. **Criminal Law § 138— more severe sentence than given accomplices who pled guilty**

Defendant was not punished for exercising his right to plead not guilty when he received a more severe sentence than sentences received by two accomplices who pled guilty and testified against defendant.

APPEAL by defendant from *Copeland, Judge,* 21 January 1974 Session of Superior Court held in WAKE County.

Defendant Andrew Jones, Jr., was indicted for armed robbery.

The State's evidence tended to show the following. On 5 October 1973, defendant discussed with friends the possibility of "going stealing" in order to get some "quick money" for rent and car payments. On the evening of 8 October 1973, Ranson W. Byrd was robbed at gunpoint by three men, defendant Jones, Leon Cheek and Bobby Oliver. The robbers left the scene of the robbery in a black Chevrolet Monte Carlo. Some time after 10:00 p.m., Jones, Cheek and Oliver went to Cheek's residence. Cheek's wife testified that after the trio went into a back bedroom, she heard money rattling and that "[t]here was also some burning of papers." The witness also said that the group discussed "who was going to take who home and whether or not they should change clothes at this time. Andrew did change clothes." Another witness corroborated part of the above evidence and also testified that when Cheek was asked how "much money did ya'll get?" he responded, "about $275.00. There weren't no money in it." The same witness stated he had seen a gun similar to that used in the robbery in defendant's possession on 5 October 1973. The State called a police officer who testified that defendant admitted participating in the robbery after his arrest. There was also testimony from both Cheek and Oliver implicating themselves, each other and defendant in the crime.

Testifying in his own behalf, defendant denied robbing Byrd's Grocery and claimed he was elsewhere when the robbery allegedly occurred. Several witnesses tended to corroborate defendant's claim of alibi.

Upon a verdict of guilty, defendant was sentenced to an active prison term of 10 to 12 years to commence at the expiration of a sentence previously imposed in another case.

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

Vaughan S. Winborne for defendant appellant.

VAUGHN, Judge.

Defendant contends the court erred in denying his timely motions for nonsuit and to set aside the verdict as contrary to the weight of the evidence. The evidence was clearly sufficient to take the case to the jury and supports the verdict.

[1] Defendant argues that the court erred in denying his motion to sequester the witnesses for the State. Defendant concedes that the denial is not reviewable except on the issue of abuse of discretion. We note that defendant made the motion after the State had begun to present its case and that defendant failed to explain why he wanted the witnesses sequestered. *Compare State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557. The record does not show abuse of discretion, and this assignment of error is overruled.

[2, 3] Defendant further contends that several times during the trial the court, in questioning witnesses, improperly expressed an opinion in violation of G.S. 1-180. The record indicates that the court was merely trying to clarify witness' testimony, *see State v. Freeman,* 280 N.C. 622, 187 S.E. 2d 59, and in so doing did not violate G.S. 1-180. In one instance the court was obviously endeavoring to determine whether a defense witness stated that she had seen defendant wear a particular shirt or whether she stated that she had seen him wear a similar shirt. In response to the court's question, the witness simply repeated the statement she had just made, namely, that she had seen defendant wear the shirt before. In this there was no error. In the other instance, the court was seemingly attempting to ascertain what a witness meant by the statement, ". . . to meet to deal or whatever." The court asked, "What?" The witness replied, "To deal drugs." In a related challenge, defendant asserts that the court erred in allowing the district attorney to ask the following question: "Have you ever used any of the drugs he [defendant] brought by?" The answer was "No." Although the question assumed a fact not shown by the evidence and thus was improperly framed, the witness was under cross-examination, and we hold that defendant has shown neither abuse of discretion nor prejudicial error.

[4-6] Defendant maintains that the trial court's instructions to the jury contained numerous errors. Having carefully reviewed the charge as a contextual whole, we conclude that it was free of prejudicial error. Defendant maintains that in summarizing the evidence, the court made the following misstatement:

> "Then, the defendant called Deputy Sheriff Brown, who gave evidence tending to show . . . he was present when the defendant signed the waiver of his rights and he was in and out of the room, but *wasn't in there when the defendant admitted the robbery.*"

That part of Brown's testimony which the court was summarizing included the following:

> "He, Andrew Jones, advised Deputy Womble and I if we would charge him with a misdemeanor, he would tell us all about it. I never heard him admit participating in Byrd's Grocery Store robbery."

Sheriff Womble in effect testified at trial that defendant admitted participating in the robbery. The court recapitulated this evidence in an earlier portion of its instructions. Defendant asserts that the court in summarizing Brown's testimony expressed an opinion, i.e., that in the court's view the evidence was sufficient to show defendant admitted the robbery, although defendant denied making such an admission. We disagree. There was evidence that defendant had made the admission to Sheriff Womble. The court was merely summarizing what evidence tended to show. If his remarks erroneously indicated that Brown's testimony tended to show that defendant, contrary to his assertions, actually admitted participating in the robbery although Brown did not actually hear such an admission, defendant should have advised the court of its misconception regarding the evidence before the case was sent to the jury. *State v. Butcher,* 13 N.C. App. 97, 185 S.E. 2d 11, and cases cited therein. Moreover, even if it is assumed that better practice requires the court to say "allegedly admitted" rather than "admitted," failure to use the former expression is not reversible error. "[T]here is no reason to think the incorrect word misled the jury or was understood by them as taking away their power to say whether matters in evidence," including those relating to defendant's confession, "were facts or not. . . ." *State v. Jones,* 67 N.C. 285. Defendant also contends the court was obli-

gated to define the term "confession" for the jury. We hold that the court was not required to do so. No request was made for a definition of the term, which is a word of common usage and meaning. *See State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447. Defendant maintains the court erred in not instructing that the testimony of accomplices required special scrutiny, although defendant did not request such an instruction. This contention is without merit. *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654. Defendant's other exception to the charge has been considered and is overruled.

[7] Defendant also argues that his sentence was discriminatory because his coparticipants in the crime, who pled guilty and testified against defendant, received lighter sentences than the one imposed on defendant and that he thus, in effect, was punished for exercising his right to plead not guilty. There is nothing in the record to support the contention and the same is overruled. We find no prejudicial error in defendant's trial.

No error.

Judges PARKER and CARSON concur.

JAMES S. HARDISON v. JESSE LEE WILLIAMS

No. 748SC131

(Filed 5 June 1974)

1. **Automobiles § 55— defendant on highway without lights — summary judgment improper**

In an action to recover damages for injuries sustained by plaintiff when his truck collided with defendant's truck the trial court erred in granting summary judgment for defendant, since plaintiff's evidence which tended to show that defendant was driving without his lights on raised issues of fact as to whether defendant was in fact driving without lights, whether that was a proximate cause of the accident, and whether plaintiff was contributorily negligent.

2. **Automobiles § 55; Rules of Civil Procedure § 15— variance in allegation and proof — consideration of proof on summary judgment motion**

In ruling on defendant's motion for summary judgment the trial court should have given consideration to plaintiff's evidence contained in his deposition that defendant was driving without lights, though plaintiff's only allegation of negligence in his complaint was that defendant stopped his truck with the rear end extended into the trav-

eled portion of the highway, since defendant would not have been prejudiced in maintaining his action or defense upon the merits by consideration of the evidence. G.S. 1A-1, Rule 15(b).

APPEAL by plaintiff from *James, Judge*, 1 October 1973 Session of Superior Court held in GREENE County.

This is an action to recover damages for personal injuries sustained by plaintiff when his Chevrolet truck collided with a Ford pickup truck operated by defendant. At the time of the accident, defendant was employed at the Hennis Freight Terminal, which is located on the east side of U. S. Highway 301, a dual-lane highway. Defendant worked the night shift, and about 1:00 a.m. he left work and started to drive home in his pickup truck. Intending to turn into the southbound lane of Highway 301, he crossed the northbound lane and stopped to wait for southbound traffic. At this time plaintiff was traveling northward on Highway 301. He drove into the back of defendant's truck, and as a result of the collision he was severely injured.

In his complaint plaintiff alleged that defendant had been negligent in stopping his pickup truck so that the back of it extended for three to five feet into the northbound lane of Highway 301. Defendant denied any negligence and al'eged that plaintiff had been contributorily negligent. Each partv took the other's deposition pursuant to Rule 26 of the North Carolina Rules of Civil Procedure. Defendant filed a motion for summary judgment and submitted his own deposition in support of his motion. Plaintiff submitted his deposition in opposition to the motion. The court granted summary judgment for defendant, and plaintiff appealed.

Lewis, Lewis & Lewis, by John B. Lewis, Jr., for plaintiff appellant.

Narron, Holdford, Babb & Harrison, by William H. Holdford, for defendant appellee.

BALEY, Judge.

[1] Under Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment may be granted only if "there is no genuine issue as to any material fact." Plaintiff testified in his deposition that at the time of the accident, defendant had no lights on the back end of his truck. G.S. 20-129(a) provides that "[e]very vehicle upon a highway within this State [at

night] shall be equipped with lighted head lamps and rear lamps . . . ." The violation of this statute is negligence per se. *Reeves v. Campbell,* 264 N.C. 224, 141 S.E. 2d 296; *Williamson v. Varner,* 252 N.C. 446, 114 S.E. 2d 92; *Brown v. Products Co.,* 5 N.C. App. 418, 168 S.E. 2d 452. Clearly, therefore, plaintiff's evidence tends to show that defendant was driving negligently. Whether defendant was in fact driving without his lights on, whether this was a proximate cause of the accident, and whether plaintiff was contributorily negligent, all are genuine issues of material fact to be resolved at trial. It was error for the court to grant defendant's motion for summary judgment.

[2] Defendant takes the position that the testimony of plaintiff that there were no lights on defendant's truck should not be considered since the only allegation of negligence in the complaint was defendant's stopping his truck with the rear end extended into the traveled portion of the highway. He asserts that there is a fatal variance between the allegations in the complaint and the proof of negligence.

Under the old system of civil procedure, prior to the adoption of the North Carolina Rules of Civil Procedure, the concept of "variance" played a very significant role. "[I]t was well recognized that a plaintiff's recovery had to be based on allegations in his complaint, and that when there was a material variance between allegations and proof, nonsuit was proper." *Roberts v. Memorial Park,* 281 N.C. 48, 55, 187 S.E. 2d 721, 725. "Proof without allegation [was] as ineffective as allegation without proof." *McLaurin v. Cronly,* 90 N.C. 50, 52; *see* Note, *Pleadings—Material and Immaterial Variance,* 41 N.C.L. Rev. 647.

Under the new Rules of Civil Procedure, the significance of the doctrine of variance has been drastically reduced. Rule 15(b) 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. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Under Rule 15(b) when the plaintiff offers evidence at trial which varies from his complaint and introduces a new issue, the defendant may object. If the defendant does not object, he is (except in certain unusual situations) viewed as having consented to admission of the evidence, and the pleadings are deemed amended to include the new issue. If the defendant does object, he has the burden of proving that he would be prejudiced by admission of the varying evidence. Unless he can satisfy the court that he would be prejudiced, the objection must be overruled, the evidence admitted, and the pleadings amended to incorporate the new issue. *Roberts v. Memorial Park, supra; Mangum v. Surles,* 281 N.C. 91, 187 S.E. 2d 697; 1 McIntosh, N. C. Practice & Procedure (Phillips supp.), § 970.80; 3 Moore's Federal Practice ¶¶ 15.13[2], 15.14; Sizemore, *General Scope and Philosophy of the New Rules,* 5 Wake Forest Intra. L. Rev. 1, 22; Note, *Trial of Issues by Implied Consent under Rule 15(b),* 51 N.C.L. Rev. 1003, 1007-09.

In the present case defendant cannot claim that in submitting this evidence plaintiff acted unfairly and took him by surprise. He will have ample time before trial to study plaintiff's deposition and prepare his defense against the charge that he was driving without lights. It is clear that defendant would not have been "prejudice[d] . . . in maintaining his action or defense upon the merits" by consideration of this evidence on a motion for summary judgment. To grant summary judgment for variance between allegation and proof would subvert Rule 15(b) and run contrary to the policy of the new rules which are designed to eliminate procedural technicalities and encourage trial on the merits.

In ruling on defendant's motion for summary judgment, the court should have given consideration to plaintiff's evidence

that defendant was driving without lights. When this evidence is considered, defendant is not entitled to summary judgment.

Reversed.

Chief Judge BROCK and Judge PARKER concur.

MILDRED LEE BRIGGS v. WILLIAM DONALD BRIGGS

No. 7426DC256

(Filed 5 June 1974)

1. **Divorce and Alimony § 18— dependent spouse — sufficiency of findings**

In an action for alimony *pendente lite*, the trial court's findings were sufficient to show that plaintiff wife is the dependent spouse and that defendant husband is the supporting spouse.

2. **Divorce and Alimony § 18— alimony pendente lite — indignities and abandonment**

The evidence was sufficient to support an award of alimony *pendente lite* to plaintiff wife upon grounds of abandonment and indignities where plaintiff's evidence tended to show that defendant husband spent a great deal of time with a female neighbor both at work and in leisure activities, that defendant warned plaintiff not to speak to the neighbor concerning the unhealthy effect she was having on the marriage of the parties, and that defendant abandoned the residence and is presently residing in an apartment.

3. **Divorce and Alimony § 18— alimony pendente lite and child support — failure to find reasonable expenses of husband**

The trial court erred in ordering defendant, who received a net income of $1,533 per month, to make alimony *pendente lite* and child support payments in excess of $1,000 per month where the court made no finding as to the reasonable and necessary expenses of defendant.

APPEAL by defendant from *Stukes, District Court Judge*, 3 December 1973 Session of District Court held in MECKLENBURG County. Argued in the Court of Appeals 14 March 1974.

Action in the cause was initiated by the wife against her husband, seeking alimony and counsel fees *pendente lite*, and custody and support of two minor children. The complaint alleges acts of misconduct by defendant in meetings and activities with Elizabeth Bemis, the wife of a neighbor, causing plaintiff to suffer intolerable indignities and a loss of attention and affection associated with the marital state.

At the close of plaintiff's evidence, defendant moved to dismiss as to portions of the complaint for failure of proof and to dismiss the entire claim for failure to make a sufficient showing; both motions were denied. At the close of all the evidence, defendant moved to dismiss the entire claim for failure to make a sufficient showing. This motion was denied.

An order was entered awarding plaintiff $400 per month for alimony *pendente lite*, $200 per month for support and maintenance, exclusive possession of a 1971 Ford automobile, monthly mortgage payments in the amount of $301, $100 per month to reduce credit balances on Sears and Master Charge accounts, piano lessons for one of the children, medical and hospital expenses for plaintiff and the children and $500 counsel fees. Defendant appealed from the order.

Mraz, Aycock, Casstevens & Davis, by Nelson M. Casstevens, Jr., for the plaintiff.

Richard H. Robertson for the defendant.

BROCK, Chief Judge.

[1] Defendant contends the trial court erred in failing to make sufficient findings of fact to support an order for alimony *pendente lite*. G.S. 50-16.8(f) provides, among other things, that when an application for alimony *pendente lite* is made, the trial judge shall find the facts from the evidence presented. The trial judge is not required to make findings as to each allegation and evidentiary fact presented. However, the trial judge is required to make such findings which, upon appellate review, will support his award of alimony *pendente lite*.

The trial judge in this case found from competent evidence that a marital relationship existed between the parties; that the plaintiff is substantially dependent upon the defendant for her maintenance and support; and that the defendant is capable of making support payments. These findings are sufficient to show that plaintiff is the dependent spouse, and that defendant is the supporting spouse.

Defendant contends that the trial court erred in denying defendant's motion to dismiss at the close of plaintiff's evidence and renewed at the conclusion of all the evidence. "Such a motion, apparently made under Rule 41(b), in an action or cause tried by the court without a jury challenges the sufficiency

of the plaintiff's evidence to establish her right to relief. (Citation omitted.) In determining the sufficiency of the evidence in this cause, when the trial judge denied defendant's motion for dismissal, he was subject to the same principles applicable under our former procedure with respect to the sufficiency of the evidence to withstand the motion for nonsuit." *Presson v. Presson,* 12 N.C. App. 109, 182 S.E. 2d 614.

[2] In this case, plaintiff has bottomed her cause upon the grounds of abandonment and indignities suffered. To withstand the motion to dismiss, plaintiff must make a *prima facie* showing of the existence of her grounds for relief. The showing can be made orally, upon affidavit, verified pleading, or other proof.

In this case, there was evidence to the effect that the defendant spent a great deal of time with Elizabeth Bemis both at work and in leisure activities; that defendant denied plaintiff the right of consortium by failing to show plaintiff the love, affection and attention to which she was accustomed; that defendant warned plaintiff not to speak to Elizabeth Bemis concerning the unhealthy effect she was allegedly having on the marriage of plaintiff and defendant; and that defendant abandoned the residence and is presently residing in an apartment in Charlotte, North Carolina. In our opinion, this evidence constitutes a *prima facie* showing of indignities and abandonment. This assignment of error is overruled.

[3] Defendant contends the trial court abused its discretion in ordering defendant to make payments in accordance with the findings of fact regarding the reasonable needs and expenses of the plaintiff and the two minor children.

The trial court made findings of fact that defendant received a total of $1,533.00 per month net income from his employment and stock dividends. The trial court ordered the defendant to make monthly payments for the needs and expenses of the plaintiff and the two minor children in excess of $1,000.00.

Defendant presented evidence of his monthly expenses. However, no finding was made by the trial court as to the reasonable and necessary expenses of defendant. Such an omission appears to ignore the fact that defendant must also exist during this *pendente lite* period. Because of the omission, we are unable to determine by appellate review the basic facts upon which the trial court predicated its award.

For the reasons stated, those portions of the order requiring payments to be made by defendant are vacated and the cause is remanded for awards based upon a balancing of the needs of plaintiff and the children with ability of defendant to pay.

Remanded.

Judges MORRIS and CARSON concur.

AZALEA MATTOX AND HUSBAND, TOM MATTOX v. STATE OF NORTH CAROLINA AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY

No. 7426SC40

(Filed 5 June 1974)

State § 4— State's breach of condition subsequent — action for rental value — sovereign immunity

Where it was determined in a prior action that plaintiffs, the grantors of land to the State, were entitled to repossession of the property for breach of a condition subsequent that the State perpetually and continuously operate a Highway Patrol Radio Station and Highway Patrol Headquarters there, G.S. 41-10.1 did not give plaintiffs the right to sue the State for the fair rental value of the property from the time the plaintiffs first requested return of the property until the time possession was given to the plaintiffs.

APPEAL from *Grist, Judge,* 30 July 1973 Session of MECKLENBURG County Superior Court. Argued in the Court of Appeals 14 March 1974.

On 12 March 1949, the plaintiffs conveyed to the defendant a parcel of land in Mecklenburg County on the condition that the State erect a Highway Patrol Radio Station and Highway Patrol Headquarters there, and on the further condition that they perpetually and continuously keep and operate said station. In 1968, the defendant terminated its operation of the radio station. In November 1968, the plaintiff, Tom Mattox, demanded that the property be surrendered to him. The State refused. On 19 November 1969, the plaintiff instituted an action in the Mecklenburg County Superior Court against the State and the Department of Motor Vehicles seeking repossession of the property. Summary judgment was granted in favor of the State, and the plaintiffs gave notice of appeal.

On 9 February 1972, the Supreme Court held that summary judgment should have been granted in favor of the plaintiffs. On 28 February 1972, the Mecklenburg County Superior Court entered judgment in favor of the plaintiffs, and the plaintiffs were given the right to immediate possession of the property.

After summary judgment was entered in their favor, the plaintiffs, on 25 April 1972, filed this action. The plaintiffs here seek judgment against the State in the amount of $37,440.00, claiming this to be the fair rental value of the property from November 1968, when the plaintiff first requested the return of the property, until 1 March 1972, when possession was given to the plaintiffs. The defendant moved to dismiss the action on the grounds that the court lacked jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief could be granted. The trial court denied the defendant's motion to dismiss for lack of jurisdiction over the subject matter. It then granted the motion to dismiss upon the grounds that the complaint failed to state facts upon which relief may be granted insofar as the complaint purported to assert a claim for rents for any period prior to 28 February 1972. The court ruled that the complaint stated a valid claim for the period of time from 28 February 1972, until 1 March 1972, when the defendants vacated the premises. Each party excepted to the court's ruling and gave notice of appeal.

Attorney General Robert Morgan by Assistant Attorney General Roy A. Giles, Jr., for the State.

Robertson and Brumley by Richard H. Robertson and A. Neal Brumley for the plaintiffs.

CARSON, Judge.

It is well founded that a sovereign State may be sued by a private individual only when the State has given permission to do so. *Ferrell v. Highway Commission,* 252 N.C. 830, 115 S.E. 2d 34 (1960); *Smith v. Hefner,* 235 N.C. 1, 68 S.E. 2d 783 (1952); *Shipyard, Inc. v. Highway Comm.,* 6 N.C. App. 649, 171 S.E. 2d 222 (1969). The plaintiffs acquired the right to sue the State in their first action pursuant to G.S. 41-10.1. They allege that this statute allows them to sue the State here for the fair rental value of the property. G.S. 41-10.1 provides:

> Trying title to land where State claims interest. Whenever the State of North Carolina or any agency or department

thereof asserts a claim of title to land which has not been taken by condemnation and any individual, firm or corporation likewise asserts a claim of title to the said land, such individual, firm or corporation may bring an action in the Superior Court of the county in which the land lies against the State or such agency or department thereof for the purpose of determining such adverse claims. Provided, however, that this section shall not apply to lands which have been condemned or taken for use as roads or for public buildings.

It is clear in the instant situation that the title has already been he'd to be properly vested in the plaintiffs, and the plaintiffs now have possession of the property. *Mattox v. State,* 280 N.C. 471, 186 S.E. 2d 378 (1972). The title not being in issue, the question before us is whether the plaintiffs may bring an action for damages under the statutory provisions of 41-10.1. The right to sue the State is a conditional right, and the statutory provisions must be strictly followed. *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703 (1955); *Construction Co. v. Dept. of Administration,* 3 N.C. App. 551, 165 S.E. 2d 338 (1969). With the title to the property no longer in question, we hold that plaintiffs may not sue the State for any further damages.

The motion of the defendants to dismiss the action should have been granted. This cause is remanded with direction to dismiss this action with prejudice.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. MARGIE BUTLER

No. 7419SC405

(Filed 5 June 1974)

1. **Assault and Battery § 13— self-defense pleaded — evidence of prior threats — inadmissibility**

The principle of G.S. 14-33.1 that prior threats are admissible in assault cases where the defendant claims self-defense did not apply in this case since there was no evidence that threats allegedly made to defendant were made by defendant's victim.

2. **Assault and Battery § 15— failure to charge on communicated threats — no error**

The trial court did not err in failing to charge on communicated threats as they relate to apparent necessity and on the force defendant might lawfully have used to repel the alleged assault by the prosecuting witness, since there was no competent evidence of any communicated threats made by the prosecuting witness.

3. **Criminal Law § 112— charge on reasonable doubt**

The trial court did not err in failing to charge that a reasonable doubt may be based on a lack of evidence since it is required that such instruction be given only in conjunction with the instruction that "a reasonable doubt is a doubt based upon reason and common sense and growing out of the evidence in the case."

4. **Assault and Battery § 15; Criminal Law § 119— failure to define the term aggressor in instructions — no error**

The trial court did not err in failing to define the term "aggressor" when he charged the jury that self-defense was only an excuse if the defendant was not the aggressor or if she voluntarily entered the fight but thereafter attempted to abandon the fight and gave notice to her opponent of her intention to abandon the fight, since "aggressor" is a word of common usage, and in the absence of a request for special instructions such words need not be defined.

APPEAL by defendant from *Seay, Judge,* at the 22 October 1973 Session of MONTGOMERY Superior Court.

Heard in the Court of Appeals 14 May 1974.

The defendant was charged in a bill of indictment with assault with a deadly weapon with the intent to kill, inflicting serious injury not resulting in death. The State's evidence tended to show that on 5 April 1973 one Carol Whitaker entered Broadway's Grill in Troy, North Carolina, to look for her nephew. On the way in, Mrs. Whitaker was warned that Margie Butler, who apparently had been seen with Mrs. Whitaker's husband in the past, was downstairs. When Mrs. Whitaker got downstairs, the defendant pulled something out of her chest and ran into Mrs. Whitaker. Mrs. Whitaker grabbed the defendant's wrist and noticed she had a knife and that blood was gushing from her [Mrs. Whitaker's] shoulder. The parties then struggled over the knife and fell to the floor with the defendant at one point saying, "Take it, bitch, if you can." and "I'll kill you." Two men in the grill then stopped the fight by pulling the parties apart.

The defendant's evidence tended to show that when Mrs. Whitaker came down the steps, she started across the room

towards the defendant with her hand in her sweater. The defendant figured Mrs. Whitaker had something, so the defendant pulled her own knife. Mrs. Whitaker grabbed the defendant, they struggled and the defendant was thrown to the floor. It was then that the defendant began using the knife. From a verdict of guilty of assault with a deadly weapon inflicting serious injury and a sentence of three years in the custody of the Commissioner of Corrections as a committed youthful offender, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Robert P. Gruber and Associate Attorney Norman Sloan for the State.

S. H. McCall, Jr., by Carl W. Atkinson for defendant appellant.

CAMPBELL, Judge.

[1] The defendant contends that it was error for the trial court to sustain an objection to her testimony as to threats she had received. G.S. 14-33.1 provides:

> *"Evidence of former threats upon plea of self-defense.* —In any case of assault, assault and battery, or affray in which the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of bodily harm, and also as bearing upon the amount of force which reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant."

The testimony in question was as follows:

> "I had received conversation about the fact or accusations that I had been dating him. I have received threats. On that very day all that happened I had heard, right when I was getting off the school bus, that she was going to shoot me.
>
> MR. ROBERTS: The State objects, your Honor.
>
> THE COURT: Sustained."

The testimony of the defendant was hearsay. There was no showing that the alleged threats came from Mrs. Whitaker. The principle of G.S. 14-33.1 that prior threats are admissible in assault cases where the defendant claims self-defense does not apply until the evidence of threats is properly presented. *State v. Clontz,* 6 N.C. App. 587, 170 S.E. 2d 624 (1969). We would point out that the trial court did not strike the objected to testimony or instruct the jury to disregard it, and thus defendant had the benefit of it anyway.

[2] The defendant next assigns as error certain portions of the charge. No exceptions appear in the record and the defendant has not specifically identified those portions of the charge which she finds objectionable. This would be grounds for overruling defendant's assignments of error. 1 Strong, N. C. Index 2d, Appeal and Error, Sec. 31 (1967). However, we have decided to consider the merits. Defendant contends that it was error for the trial court to fail to charge on communicated threats as they relate to apparent necessity and what force defendant might lawfully have used to repel the alleged assault by Mrs. Whitaker. However, there was no competent evidence of any communicated threats made by the prosecuting witness and no charge on this point was warranted.

[3] Defendant further contends that the trial court erred in its definition of "reasonable doubt" in that the court did not charge that a reasonable doubt may be based on a lack of evidence. No error was committed in the instant case for the judge did not charge "that a reasonable doubt is a doubt based upon reason and common sense and growing out of the evidence in the case." It is when those words are used that it is error not to go further and add "or the lack of evidence or from its deficiency." *State v. Braxton,* 230 N.C. 312, 314, 52 S.E. 2d 895, 897 (1949). The trial court fully charged on reasonable doubt in this case as follows:

> " . . . A reasonable doubt is not a vain, imaginary or fanciful doubt, but a sane, rational doubt. The proof beyond a reasonable doubt means that you must be fully satisfied, entirely convinced or satisfied to a moral certainty of the defendant's guilt." *State v. Bryant,* 231 N.C. 106, 55 S.E. 2d 922 (1949).

[4] Finally, the defendant assigns as error the failure of the trial court to define the term "aggressor" when he charged the

jury that self-defense was only an excuse if the defendant was not the aggressor or if she voluntarily entered the fight but thereafter attempted to abandon the fight and gave notice to her opponent of her intention to abandon the fight. The trial court's charge on self-defense was correct. The use of the undefined term "aggressor" was not error as it is a word of common usage and in the absence of a request for special instructions such words need not be defined. *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1970).

We have considered defendant's other assignments of error and find them without merit. Defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge BRITT concur.

ANDREW T. JENKINS AND ROBERT D. JENKINS v. WILBUR ORVILLE COOMBS AND WIFE, BETTY JANE COOMBS, E. W. MARTIN, TRUSTEE, AND MARGARET L. JENKINS

No. 746SC395

(Filed 5 June 1974)

Vendor and Purchaser § 1— "option" to repurchase land — agreement void

A paperwriting executed by the brother of plaintiffs as part of the transaction by which he acquired the property in question from one plaintiff was void and therefore did not entitle plaintiffs to the first chance to buy the property upon the brother's decision to sell it.

APPEAL by plaintiffs from *Rouse, Judge,* 29 October 1973 Session of Superior Court held in NORTHAMPTON County.

Plaintiffs instituted this action to compel the conveyance to them of a 94 acre tract of land located in Northampton County and referred to by them as the Jenkins homeplace; also to recover damages. In their complaint, they purportedly allege three causes of action, briefly summarized as follows:

In 1952, plaintiff Andrew T. Jenkins was the owner of the subject property and conveyed it by deed to his brother, J. H.

Jenkins. As a part of the transaction, J. H. Jenkins executed a paperwriting in the following words and form:

"Zebulon, N. C.
October 29, 1952

If I, or my heirs or assigns, decide to sell the Jenkins Home Place in Northampton County, I will give Andrew T. Jenkins, Robert D. Jenkins, and Clyde W. Jenkins, first chance to buy the above said property.

Signed: J. H. Jenkins"

Thereafter, J. H. Jenkins died and his widow, the feme defendant, with full knowledge of plaintiffs' rights and without giving them a chance to buy the property, conveyed the same to defendants Coombs by deed dated 17 December 1971. Defendants Coombs, in turn, executed a deed of trust on the lands to defendant Martin, trustee. After taking possession of the property, defendants Coombs committed waste thereon. Plaintiffs asked (1) that the deed to defendants Coombs be set aside; (2) that the feme defendant be required to convey the property to plaintiffs "upon the payment of its fair value price"; (3) that plaintiffs recover of the feme defendant actual damages in the sum of $10,000 and punitive damages in the sum of $25,000; (4) that plaintiffs recover $5,000 from defendants Coombs; (5) that defendants Coombs be restrained from committing further waste on the property; and (6) for costs, etc.

Defendants filed answer denying plaintiffs' claims and, among other defenses, pled priority of registration under G.S. 47-18, the statutes of limitations, and adverse possession. Plaintiffs filed reply and defendants filed motions for summary judgment pursuant to G.S. 1A-1, Rule 56. Following a hearing, the court granted defendants' motions for summary judgment and dismissed the action. Plaintiffs appealed.

Vaughan S. Winborne for plaintiff appellants.

Allsbrook, Benton, Knott, Allsbrook & Cranford, by J. E. Knott, Jr., for defendant appellee Margaret L. Jenkins.

Revelle, Burleson and Lee, by L. Frank Burleson, Jr., for defendant appellee E. W. Martin, Trustee.

Carter W. Jones, by C. Roland Krueger, for defendant appellees Coombs.

BRITT, Judge.

We hold that the court did not err in entering summary judgment in favor of all defendants.

Summary judgment is appropriate 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. G.S. 1A-1, Rule 56(c). Admissions in the pleadings and affidavits presented at the hearing in the instant case established the following:

(1) The deed from Andrew T. Jenkins and wife to J. H. Jenkins conveying the subject property is dated 14 October 1952 and was filed for registration on 5 November 1952.

(2) The paperwriting alleged by plaintiffs to be an option to purchase is dated 29 October 1952, and was filed for registration in Northampton County Registry on *6 March 1961*.

(3) On 25 January 1954, a deed from J. H. Jenkins to the feme defendant, conveying the subject property, was executed and recorded.

(4) The deed from the feme defendant to defendants Coombs, and the deed of trust from defendants Coombs to defendant Martin, trustee, conveying the subject property, are dated 17 December 1971 and were filed for registration on 20 December 1971.

Defendants contend first that the alleged "option" is void. We agree with this contention. While our research fails to disclose a precedent in this jurisdiction directly in point, we have found cases in which a similar provision was set forth in the deed. Certainly, plaintiffs' position is no stronger by reason of the fact that the paperwriting they rely on is separate from the deed.

In *Hardy v. Galloway*, 111 N.C. 519, 15 S.E. 890, 32 Am. St. Rep. 828 (1892), a provision in a deed whereby the grantors retained, for themselves and their heirs and assigns, the right to repurchase the land, "when sold," was held not only to be void for uncertainty and fixing no price for the repurchase, and no time for the performance of the provision, but also as an unlawful restraint upon alienation, the court stating at 524, 15 S.E. at 890: "The restriction is certainly inconsistent with the ownership of

the fee as well, it would seem, as against public policy, (sic) The right to repurchase is of indefinite extent as to time (it being reserved to the grantors, their heirs or assigns), and may be exercised whenever the property is sold, although no amount is fixed upon as purchase money. In other words, we have an estate in fee without the power to dispose of or encumber it, unless first offering it for no definite price to the grantors, their heirs or assigns. The condition is repugnant to the grant, and therefore void."

See also *Brooks v. Griffin,* 177 N.C. 7, 97 S.E. 730 (1919), in which case Chief Justice Clark reviewed the decisions relating to provisions of instruments held void as illegal restraint upon alienation and cited *Hardy* with approval. See also note in 162 A.L.R. 581, at 594, quoting from *Hardy;* also *Story v. Walcott,* 240 N.C. 622, 83 S.E. 2d 498 (1954).

We are aware of the opinion of our Supreme Court in *Oil Co. v. Baars,* 224 N.C. 612, 31 S.E. 2d 854 (1944), but find it easy to distinguish that case from the case at bar. We think the principles declared in *Hardy* control here.

In view of our holding that the paperwriting relied on by plaintiffs is void, we do not reach the question relating to priority of recordation, statutes of limitations, adverse possession, and the other defenses asserted by defendants.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. NELSON RAY RICHARDS AND JOHN MAXWELL HAROLD

No. 749SC212

(Filed 5 June 1974)

1. Conspiracy § 7; Robbery § 5— conspiracy to commit armed robbery — sufficiency of instructions

In a prosecution for conspiracy to commit armed robbery and armed robbery, the trial court's instruction correctly stated that one defendant could conspire with one or more of the persons mentioned,

and it did not suggest that defendant could conspire with himself or that he could be guilty of conspiracy even if he had made no agreement with anyone.

2. **Criminal Law § 113— alibi instruction — sufficiency**

The trial court's instruction on alibi which specifically stated that the State must prove defendants' presence and participation in the crime beyond a reasonable doubt and that, if the State had failed to do so, the jury should acquit defendants was proper.

3. **Criminal Law § 98— hearings on motions — presence of defendants' counsel**

All assignments of error directed to the consideration of pretrial and other motions when defendants were not present are overruled, since defendants were represented by able counsel who participated in the hearings on the motions, and at no time did counsel suggest the absence of defendants or note exceptions to their absence.

4. **Criminal Law §§ 95, 169— statements of nontestifying codefendant — any error in admission harmless**

Even if the trial court erred in allowing into evidence testimony by a State's witness as to telephone statements made by a nontestifying codefendant which referred to defendants, such error was harmless beyond a reasonable doubt.

ON *certiorari* to review trial before *McKinnon, Judge,* at the April-May 1973 Session of Superior Court held in FRANKLIN County.

Defendants were indicted for conspiracy to commit armed robbery and armed robbery. C. V. Cooley was indicted for accessory before and after the fact of armed robbery and conspiracy to commit armed robbery.

The State's evidence tended to show that on 4 November 1970, two men entered the Louisburg home of Walter H. Horton, Jr. and forced Horton to open his safe. One of the men held a gun on Horton, while the other ransacked the house. The men, one of whom Horton identified as defendant John Maxwell Harold, took about $30,000.00 worth of bonds, silver coins, cash and travelers checks.

On 13 December 1970, Durham County police officers stopped an automobile owned and operated by defendant Nelson Ray Richards. Acting pursuant to a search warrant issued in a matter unrelated to that presently before the court, the officers searched the automobile. They found two debentures which were identified as belonging to Horton.

In early 1972, Georgia law enforcement officials and SBI agent Roger Allen talked with Harvey Ward in Atlanta. Ward told the officers that Cooley and Richards had planned the robbery and that he and Harold had been recruited to help Richards carry it out. Some of Horton's property was recovered from a safety deposit box Ward rented in Atlanta. Ward was a witness for the State and gave evidence tending to show that all defendants were guilty as charged.

Although defendant Harold did not testify in his own behalf, his wife testified that in November 1970, Harold was living in Charlotte and was there on the date of the Louisburg robbery.

Defendant Richards, who said he lived in Jonesboro, Georgia in November 1970, claimed that he had won the debentures found in his automobile in a poker game in Durham on 6 December 1970. His evidence also tended to show he was staying in an Atlanta motel when the Horton robbery occurred.

Cooley was acquitted. Richards was found guilty of conspiracy to commit armed robbery and sentenced to an active prison term of 10 years. Harold was found guilty of armed robbery and conspiracy to commit armed robbery. He was sentenced to 24-30 years for the first offense and 10 years on the second. The terms are to run consecutively. We allowed certiorari to allow both defendants appellate review.

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

Blanchard, Tucker, Denson & Cline by Irvin B. Tucker, Jr., and Tharrington, Smith & Hargrove by Roger W. Smith, attorneys for defendant appellants.

VAUGHN, Judge.

Defendant Richards contends that the court's instructions to the jury were erroneous in that they would permit defendant Richards' conviction for conspiracy "if he conspired with himself or if the defendant Ward conspired with Harold or Cooley with no connection with the defendant Richards at all." This contention involves the following portion of the court's charge:

> "On the charge of conspiracy to commit an armed robbery against the defendant Nelson Ray Richards, I instruct you if you are satisfied from the evidence beyond a reason-

able doubt that there was an unlawful meeting of the minds between Nelson Ray Richards and C. V. Cooley, John Maxwell Harold and Harvey Allen Ward, or any one or more of those persons, to commit the crime of armed robbery upon Mr. Horton, if you find those to be the facts beyond a reasonable doubt, the defendant Nelson Ray Richards would be guilty of a conspiracy to commit armed robbery, as charged, and it would be your duty to so find.

If you fail to so find, or have a reasonable doubt as to his guilt of that, it would be your duty to find him not guilty."

In an earlier instruction the court stated:

"So, if several people have a meeting of the minds, it does not necessarily have to be in writing or in any express language, but if there is a meeting of the minds communicated between the parties that one is to direct or point out to others a place or a person to be robbed, and that others are to commit the robbery and that one or more of the parties are to engage in the disposing of the property taken, or in its division, then that would be a conspiracy on the part of each party entering into such an agreement whose mind met with one or more of the others as to the carrying out of those unlawful purposes."

[1] The charge must be viewed as a whole. When so considered, the instructions do not suggest that defendant Richards could conspire with himself or that he could be guilty of conspiracy even if he had made no agreement with anyone. The contested section of the charge correctly states that defendant Richards could conspire with one or more of the others mentioned. Since there is no "and" between Cooley and Harold, defendant Richards is equated to one unit necessary for conspiracy while Cooley, Harold and Allen, together, alone or in any other combination, constitute the other necessary unit. Defendant Harold makes a similar argument. We find no error in this portion of the charge.

[2] Both defendants complain that the court did not properly instruct on "alibi." The case was heard before the opinion in *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513. The judge was therefore required, without request, to instruct the jury as to the legal effect of defendants' evidence that they were not present at the scene of the crime. The relevant instructions were as follows:

"As to both the defendant Richards, members of the jury, and the defendant Harold, they having offered evidence tending to show that they were somewhere else on the date of the offense charged, that is what is known as evidence in the nature of alibi. Alibi means to be elsewhere and it is evidence in denial of the one of the things that the State must prove, that is, the presence and participation of this party in the alleged criminal offense.

Evidence of alibi is to be considered by you just as any other evidence in denial of the State's contention and the State must prove beyond a reasonable doubt the defendants' presence and participation in the alleged crime.

If the State fails to prove beyond a reasonable doubt the presence and participation of Richards, then he would not be guilty. Likewise, if it failed to prove beyond a reasonable doubt the presence and participation of Harold, he would not be guilty of the charge."

The judge thus specifically told the jury that the State must prove defendants' presence and participation in the crime beyond a reasonable doubt and that if the State had failed to do so they should acquit defendants. In an earlier part of the charge the jury had been properly instructed as to the presumption of innocence and the burden the State must bear to prove guilt beyond a reasonable doubt. Surely the instruction that the State must prove defendants' presence makes it clear that defendants need not prove their absence. We find no prejudicial error in the instructions.

[3] Several motions made by the State and defendants were heard when defendants were not present. These included motions for a special venire, consolidation of the cases, sequestration of witnesses and change in venue. Defendants were represented by able counsel who participated in the hearings on these motions and at no time did counsel suggest the absence of defendants or note exceptions to their absence. All assignments of error directed to the consideration of pretrial and other motions when defendants were not present are overruled.

[4] Other assignments of error concern testimony by Ward as to statements defendant C. V. Cooley made during telephone conversations between Ward and Cooley after the robbery and prior to trial. The court instructed the jury to consider the evidence only in connection with the guilt or innocence of

defendant Cooley. Cooley did not testify. Assuming, without declaring, that it was error to admit Ward's version of the conversation between him and one of the other alleged conspirators, we will set out Ward's testimony as to the conversation to illustrate that the error, if any, was harmless beyond a reasonable doubt.

"A. Well, the phone rang, I picked it up, the man said, 'this is C. V., the man from up in Louisburg,' and I said, 'yeah, how did you get this phone number', I said, 'how did you know my name?' He said, 'well, Nelson left his address book laying here and I found it in that.' And he said he wanted to know what was going on, said—he asked 'how much money was in there?', and I said about fifteen hundred dollars and some bonds. He said, 'well'—I didn't tell him about the other six thousand dollars. He said, 'well, the paper up here said it was thirty or forty thousand dollars.' I said, 'well, Nelson has got these bonds, there was fifteen, twenty or twenty-five thousand dollars'. He said, 'well, I want to make sure that I get my part of the money.' He said, 'I think Nelson might try and screw out of them', told me that he would be back in touch with me and he left me a phone number in case I heard from Nelson.

EACH DEFENDANT MOVES TO STRIKE ANSWER.

MOTION DENIED.

RICHARDS' EXCEPTION NO. 11

HAROLD'S EXCEPTION NO. 9

He did leave me a phone number. I did not have any further conversation with that person at that time. I did have a conversation with this same person again at a later time. He called me and identified himself the same way. 'This is C. V., the guy from Louisburg', in return to a call that I made up here.

I called the number he had given me. A lady answered. I said 'is C. V. there?' She said, 'no', and I said 'is this the C. V. with the orange Pontiac' and she said 'yes'. I said 'do you know when he will be back', and she said, 'no'. I said 'fine'. The next day I called the same number and I called person to person for C. V. Cooley. The lady that answered the phone said he wasn't there. The operator left the num-

ber for him to call me back. She left my number. After I left my number with the lady for him to call me back, the man called back, said 'this is C. V., the man from Louisburg.' He called back the next day.

Q. What, if anything did this person tell you?

EACH DEFENDANT OBJECTS. OVERRULED.

A. He said that Nelson was flying into Atlanta with a girl, and he gave me the time of the flight and he said he thought he screwed us out of the money for the bonds. He said, 'you need to get out to the airport to find out what is going on.'

RICHARDS' EXCEPTION NO. 12

HAROLD'S EXCEPTION NO. 10

I went to the airport and Nelson Richards came in on the airplane.

Q. All right, what other conversation did you have with this man at that time?

EACH DEFENDANT OBJECTS.

COURT: OVERRULED as to the defendant Cooley. Objection SUSTAINED as to the defendants Harold and Richards, and the jury has previously been instructed not to consider that.

A. I called him back after seeing Nelson at the airport and told him I had seen Nelson out there and Nelson claimed that he had lost the bonds.

RICHARDS' EXCEPTION NO. 13

HAROLD'S EXCEPTION NO. 11

Q. How did you call?

A. I called the number —

DEFENDANT COOLEY OBJECTS.

OVERRULED BY THE COURT.

A. I called the number that the man had given me who had identified himself as 'C.V., the man from Louisburg.'

DEFENDANTS HAROLD AND RICHARDS MOVE TO STRIKE ANSWER.

DEFENDANT COOLEY OBJECTS, MOVES TO STRIKE ANSWER.

COURT: Again, members of the jury, any statements by the person on the telephone as testified by this witness are to be considered only against the defendant Cooley and not against the defendants Harold and Richards.

RICHARDS' EXCEPTION NO. 14

HAROLD'S EXCEPTION NO. 12

Q. Tell us what happened in that conversation.

A. I just told him that I had gotten in a hassel with Nelson at the airport and had slapped him and he had called the police and had me taken away, and I said that it looked like he wasn't going to give us the money for the bonds.

EACH DEFENDANT MOVES TO STRIKE ANSWER.

COURT: Motion allowed as to Harold and Richards, DENIED as to Cooley.

RICHARDS; EXCEPTION NO. 15

HAROLD'S EXCEPTION NO. 13

Q. What, if anything, did the other person say?

EACH DEFENDANT OBJECTS.

COURT: Objection OVERRULED as to Cooley, SUSTAINED as to Harold and Richards.

A. He said that he would get the money. He said that Nelson wasn't going to screw us out of it, that he would be back in touch with us, that he wasn't going to let Nelson beat us out of the money.

RICHARDS' EXCEPTION NO. 16

HAROLD'S EXCEPTION NO. 14

Q. Did you ever have any further telephone conversations with this person at any time?

A. About nine months ago.

Q. When was that?

EACH DEFENDANT OBJECTS.

COURT: Sustained as to the defendants Richards and Harold and OVERRULED as to the defendant, Cooley, and again, members of the jury, any conversation this witness may testify that he had with the person who identified himself as 'C.V.' on the phone may be considered only against the defendant Cooley and not against the defendants Richards and Harold.

RICHARDS' EXCEPTION NO. 17

HAROLD'S EXCEPTION NO. 15

Q. Where were you when you had a conversation with the person again?

A. At my house.

Q. All right, now, tell us how that came about.

EACH DEFENDANT OBJECTS.

COURT: SUSTAINED as to Harold and Richards and OVERRULED as to Cooley. Go ahead.

A. The man called, said this was 'C.V.' and he said 'did you know that we have all four been indicted?' I said, 'how do you know that?' and he said, 'some friend of Collins had told him, a friend of Mike Collins, and he had found out that we had all been under indictment and we were all going to be tried.'

RICHARDS' EXCEPTION NO. 18

HAROLD'S EXCEPTION NO. 16

Q. Was there any further conversation?

EACH DEFENDANT OBJECTS.

OVERRULED BY THE COURT as to Cooley.

SUSTAINED BY THE COURT as to Richards and Harold.

A. Then he asked me where John Harold was, and I said John was in Charlotte, and then he said he would find out more about it, and he would be back in touch with me. He just said 'keep your mouth shut.'

RICHARDS' EXCEPTION NO. 19

HAROLD'S EXCEPTION NO. 17

He didn't say anything else that I can recall at this time, other than we just discussed, you know, what he had heard and he just talked about not saying anything. He said, you know, 'if you are in any kind of bad way, just let me know' or something like that, but 'don't open your mouth at all.'

I had another conversation with this same person. It was several days after that, five, six, seven days, I am not exactly sure. This was after that first phone call. I was at the same number at my house. He called me.

Q. What, if anything, was said on that occasion?

EACH DEFENDANT OBJECTS.

COURT: OBJECTION SUSTAINED as to Richards and Harold.

OVERRULED as to Cooley.

A. He said that he had found out that Collins was going to testify against us and he said we might have to have him killed.

RICHARDS' EXCEPTION NO. 20

HAROLD'S EXCEPTION NO. 18

Q. Did you have any further conversation with him?

A. Yeah, he said that, 'did I think that John Harold would say anything?' I said, 'I didn't think he would,' and he said, 'well, if he does, you are going to have to take care of him because I can't do anything outside of North Carolina.'

EACH DEFENDANT OBJECTS.

COURT: SUSTAINED as to Harold and Richards, DENIED as to Cooley.

RICHARDS' EXCEPTION NO. 21

HAROLD'S EXCEPTION NO. 19

DEFENDANT COOLEY OBJECTS.

OVERRULED BY THE COURT.

DEFENDANTS HAROLD AND RICHARDS OBJECT.

SUSTAINED as to defendants Harold and Richards.

A. He said, 'we are all going to go to jail, and if anybody did any talking, that we would all be in the Raleigh State Prison, the North Carolina State Prison.' He said that his brother or somebody was a guard there and he said that we wouldn't last in there if we said anything against him."

All that Ward testified he did or told Cooley was, of course, competent. Ward was on the stand and subject to cross-examination and jury consideration of his veracity. Apparently the jury gave little credence to this and other testimony by Ward as to Cooley's involvement for Cooley was acquitted. Nothing that Cooley is alleged to have said with reference to defendant Harold is of significant value. In fact, the only references to Harold were Cooley's inquiries as to Harold's whereabouts and whether Ward thought that Harold would say anything.

Cooley's statements as to Richards were of little more consequence. Ward's statement that Nelson [Richards] had the bonds was competent. Cooley's alleged concern that Nelson might not share the bonds was no evidence that he had them. Cooley's later statement that Nelson was flying to Atlanta with the bonds added little to Ward's statements that he met Nelson at the airport, and that Nelson claimed he had lost the bonds and had caused Ward to be arrested after Ward slapped Nelson at the airport. There is no reasonable probability that the statements the witness Ward attributed to defendant Cooley contributed to the conviction of defendants Harold and Richards.

We have considered the other assignments of error and find them to be without such merit as to require a new trial.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. RALPH LEON HARRIS

No. 7430SC338

(Filed 5 June 1974)

1. **Narcotics § 4— sale of marijuana — payment by person not named in indictment**

There was no fatal variance between indictment and proof where the indictment charged the sale of marijuana to one person and the evidence showed that a second person wrote a check for the marijuana, that the person named in the indictment took possession of the marijuana, and that requests for the purchase of marijuana were made by both persons on behalf of the person named in the indictment.

2. **Criminal Law § 7— failure to instruct on entrapment**

In a prosecution for sale of marijuana, the trial court was not required to charge on entrapment where the evidence showed that the buyer acted on his own initiative in requesting and purchasing the marijuana, that only after nine-tenths of the purchased marijuana had been consumed did the buyer contact an SBI agent and turn the marijuana over to him, and that the SBI agent then reimbursed the buyer for his expenses, and there was no evidence tending to show that the SBI agent recruited the buyer for the purpose of inducing defendant to commit a crime.

3. **Criminal Law § 114— request for instructions — characterization as "contentions" — expression of opinion**

The trial court did not express an opinion on the evidence in characterizing additional instructions requested by defendant as "contentions" rather than "evidence" or "evidence tending to show."

APPEAL by defendant from *Copeland, Judge,* 10 December 1973 Session of Superior Court held in JACKSON County. Argued in the Court of Appeals 8 May 1974.

Defendant was charged in a bill of indictment with "unlawfully, wilfully and feloniously selling and distributing" more than five grams of cannabis (marijuana).

The State's evidence tended to show that on 1 February 1973, Darrell E. Meredith, Jr., and Gary Wayne Michaux went to the defendant's apartment in Dillsboro, North Carolina, where Meredith purchased a "dime bag" of marijuana for $10.00. Michaux wrote a check for the marijuana, but Meredith took possession of the substance.

Meredith testified that he had known defendant for approximately 12 to 18 months during which time they had taken karate classes together and gone to parties together. At one of

these parties, the defendant urged Meredith and Michaux not to condemn marijuana until they had tried it. Thereafter, Meredith and Michaux requested defendant to sell them marijuana on several occasions. After several denials, defendant did inform Meredith he would sell him a quantity of marijuana for $10.00. Defendant sold the marijuana on 1 February 1973 to Meredith, who along with Michaux and defendant, smoked a portion of the purchase at defendant's apartment.

James T. Maxey, a Special Agent for the SBI, testified that he had been acquainted with Meredith for about a year and a half. On 6 February 1973, Meredith gave Maxey an envelope containing about one gram of marijuana, and related to Maxey the events of 1 February 1973. Maxey reimbursed Meredith for his expenses.

The defendant's evidence tended to show that Meredith and Michaux repeatedly approached him requesting a sale of marijuana. Defendant testified that he did not tell Meredith and Michaux that he could get them marijuana at any time, but instead refused their requests. Defendant finally bought some small quantity of marijuana to alleviate persistent annoyances by the two men. Michaux wrote a check for the marijuana, but informed defendant the purchase was for Meredith. Defendant stated this was the only sale of marijuana he had ever made.

Witnesses for the defendant testified that they were acquainted with the defendant and knew his reputation in the community to be good.

From a verdict of guilty and judgment rendered accordingly, defendant appealed to this Court.

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

Holt & Haire, by Creighton W. Sossomon, for defendant.

BROCK, Chief Judge.

[1] Defendant contends the trial court committed error in denying defendant's motion for a directed verdict at the close of State's evidence and at the close of all the evidence. Defendant contends there was a fatal variance between the crime charged in the indictment, the sale of marijuana to Darrell Meredith, and the proof offered of a sale to Gary Michaux.

"In considering a trial court's denial of a motion for judgment of nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true and inconsistencies or contradictions therein are disregarded. (Citations omitted.) Evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered upon such motion. (Citations omitted.)" *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866.

The evidence presented by both parties indicates defendant made a sale of marijuana for $10.00. The State's evidence shows that requests for the purchase of marijuana were made by Meredith or Michaux on behalf of Meredith. Even though the check was written by Michaux, the evidence is clear that the purchase was being made by Meredith. In considering the evidence in the light most favorable to the State, the evidence introduced was sufficient for submission of the case to the jury. This assignment of error is overruled.

[2] Defendant contends the trial court committed error in refusing to instruct the jury on the defense of entrapment. Defendant contends the evidence presented was sufficient to require the trial court on its own motion or motion of the defendant to instruct the jury on the elements and consequences of the defense of entrapment.

"Where the offense charged is a crime regardless of the consent of any one, it seems that an essential element of entrapment is that the acts charged as crimes were incited directly or indirectly by officers or agents of the government or state; that it is not entrapment that one has been induced by some other than a person acting for the government or state to commit a crime." *State v. Jackson,* 243 N.C. 216, 90 S.E. 2d 507.

The evidence presented shows, at best, requests by Meredith that defendant sell him a quantity of marijuana. The requests by Meredith were in response to a suggestion by defendant that marijuana should not be condemned until it had been tried. Furthermore, there is no evidence suggesting that Meredith acted as an agent for law enforcement officers. Meredith acted upon his own initiative in meeting the defendant, in requesting the marijuana, and in purchasing the marijuana from defendant. Only after approximately nine-tenths of the purchased marijuana had been consumed did Meredith get in touch with SBI Agent Maxey and turn over the marijuana to Maxey. Although the record shows reimbursement of Meredith by Agent

Maxey, there is no evidence presented which would tend to show that Maxey recruited Meredith for the purpose of inducing defendant to commit a crime.

This assignment of error is overruled.

[3] Defendant contends the trial court committed error in its instructions to the jury as to character evidence and the elements of the crime charged, and expressed an opinion to the jury by identifying defendant as the party who requested additional instructions characterizing these as "contentions" rather than "evidence."

We have reviewed the entire charge to the jury and find no prejudicial error or erroneous instructions regarding the evidence presented by either side. We do not feel that defendant's argument of the effect upon the jury of the use of the word "contentions" as opposed to "evidence" or "evidence tending to show" bears any validity other than one of semantical differences. The trial court's use of the term "contentions" in the circumstances shown here is not sufficient to intimate to the jury any personal evaluation of the evidence presented. This assignment of error is overruled.

In our opinion, defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and BALEY concur.

NEW SOUTH INSURANCE COMPANY v. CARMEN L. VELEZ

No. 7421DC306

(Filed 5 June 1974)

1. **Insurance § 75— rights of insured against coinsured — subrogation of collision insurer**

   A collision insurer is subrogated to any rights its insured might have against a coinsured where the coinsured has settled with the tort-feasor, applied the funds to his own use and released the tort-feasor.

2. **Insurance § 75— recovery by car owner against tort-feasor — equitable lien of mortgagor — subrogation of collision insurer**

   Where plaintiff insurer issued a collision policy to defendant and to her coinsured, a mortgagee holding a security interest in defend-

ant's car, defendant was paid an amount by a tort-feasor's insurer for damage to the car, defendant failed to have the car repaired and defaulted on her payments to the mortgagee, the car was repossessed by the mortgagee, and plaintiff insurer was required to pay the mortgagee a sum to cover damage to the car, the mortgagee has an equitable lien in the amount obtained by defendant from the tort-feasor for damage to the car and plaintiff insurer is subrogated to the rights the mortgagee has against defendant.

Judge VAUGHN dissenting.

APPEAL by plaintiff from *Clifford, District Judge,* at the 5 November 1973 Session of FORSYTH County, General Court of Justice, District Court Division.

Heard in the Court of Appeals 7 May 1974.

This is a civil action to recover money paid to defendant by an insurer of a third party tort-feasor who was at fault in an automobile accident with defendant. The plaintiff issued a collision insurance policy to defendant and her coinsured, Wachovia Bank and Trust Company, N.A., which held a security interest in defendant's car. Defendant was paid by the tort-feasor's insurer, Shelby Mutual Insurance Company, the sum of $671.76 for damage to the car, and defendant then released the tort-feasor. Defendant never had the car repaired and defaulted on her payments to Wachovia, which subsequently repossessed the car. Plaintiff was required to pay to the insured, Wachovia, under the collision policy the sum of $566.13 to cover the damage to the car and then brought this action to recover that amount from defendant which had been paid to her by the Shelby Mutual Insurance Company. This action was based on the grounds of subrogation to the rights of Wachovia. At the close of plaintiff's evidence, defendant's motion for a directed verdict was granted. Plaintiff appealed.

Womble, Carlyle, Sandridge & Rice by William F. Womble, Jr., for plaintiff appellant.

White and Crumpler by Michael J. Lewis and Melvin F. Wright, Jr., for defendant appellee.

CAMPBELL, Judge.

[1] Under North Carolina case law an insurer who pays damages to the insured is subrogated to whatever rights the insured may have against the tort-feasor. 4 Strong, North Carolina Index 2d, Insurance, § 75, p. 553 (1968). Furthermore, an in-

surer's right to subrogation under a collision insurance policy includes a claim against any judgment secured by the insured against the tort-feasor for the amount paid by the insurer in satisfaction of the collision claim. Couch On Insurance 2d, § 61:237 (Supp. 1973). Finally, paragraph 11 of the insurance policy, issued by plaintiff to defendant and Wachovia, entitled "Subrogation," reads:

> "In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

We hold that the insurer is also subrogated to any rights its insured might have against a coinsured, where the coinsured has settled with the tort-feasor, applied the funds to his own use, and released the tort-feasor, in effect destroying any rights the first insured might have against the tort-feasor. This is particularly true where the insurer then has to pay a claim presented by the first insured.

[2] The issue then becomes, what are the rights as between the coinsureds? What are the rights of the security interest holder in the proceeds obtained from the tort-feasor by the mortgagor in settlement for damages to the collateral? The security agreement expressly included, as part of the total price, a provision for collision insurance. It is clear that the parties to the security agreement intended that the security interest of the mortgagee (Wachovia) would continue in any insurance proceeds obtained by the mortgagor as recompense for damage to the collateral. It is also clear that the mortgagee would have an equitable lien upon the proceeds of any insurance obtained for the better security of the mortgagee to the extent of his interest in the property destroyed. Couch On Insurance 2d, § 29:82, p. 366 (1960). It follows then that the mortgagee would also have an equitable lien in any judgment or settlement obtained by the mortgagor against a tort-feasor for damage to the collateral. We hold that the insurer, New South Insurance Company, is subrogated to any rights Wachovia may have had against its coinsured, Carmen L. Velez. *Cf. Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750 (1934); *Robinson v. Breuninger,* 152 Kan. 644, 107 P. 2d 688 (1940); Couch On Insur-

ance 2d, § 29:89, p. 372 (1960). We, therefore, hold that it was error for the trial court to grant defendant's motion for directed verdict, and we reverse and remand for further proceedings in accordance with this decision.

Reversed and remanded.

Judge MORRIS concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

Defendant executed a note and purchase money security agreement which has apparently been assigned to Wachovia. Wachovia, the secured party, has a security interest in the Fiat as collateral for the debt. Plaintiff insured the collateral. On 4 October 1971, the collateral was damaged. Defendant immediately notified plaintiff of the loss and advised that she would make no claim against plaintiff, but would pursue her claim against the tort-feasor. Defendant, at her own expense, recovered damages for the loss from the tort-feasor and released it from liability. Nearly ten months later, on 1 August 1972, the collateral was voluntarily delivered to Wachovia for disposition or retention according to law. At the time defendant surrendered the collateral she acknowledged "default under the terms of said security agreement." This is the only evidence in the record before us to support the majority's statement that defendant "defaulted on her payments to Wachovia." Although only the first page of the security agreement is in the record, it is clear that a debtor may be in default in a number of ways other than a failure to pay an installment when due, for example, damage to the collateral so as to impair its value as security. In any event, there is nothing in this record to show that defendant was indebted to Wachovia after surrender of the collateral, albeit damaged, on 1 August 1972. Indeed, Wachovia may have been indebted to defendant for surplus money received from sale of the collateral, refund of the finance charges and unearned insurance premiums. Under these facts, plaintiff has shown no right to recover from defendant for the voluntary payment it made to Wachovia on 1 September 1972, with knowledge that its right of subrogation against the tort-feasor had been extinguished. I vote to affirm the judgment.

CHARLIE GLENN REDMON v. UNITED STATES FIDELITY AND GUARANTY COMPANY, FRANCIS LILLIAN BARE HOLCOMB, JOHNNY MARSHALL HOLCOMB, AND O. L. ELLIOTT

No. 7423SC243

(Filed 5 June 1974)

1. **Insurance § 95— cancellation of assigned risk policy by insurer — jury question**

In an action to determine whether an assigned risk automobile liability policy had been cancelled by defendant insurer for nonpayment of premium prior to an accident, the trial court properly denied defendant's motions for summary judgment, directed verdict and judgment n.o.v., notwithstanding defendant offered evidence that it had complied with statutory requirements for cancellation of the policy, since the insured testified she received no notice of cancellation and the weight and credibility of the evidence were for the jury. G.S. 20-309(e); G.S. 20-310(a).

2. **Insurance § 106; Witnesses § 8— action against insurer by injured third party — bias of driver against insurer**

In an action to determine whether an assigned risk insurer is liable for a judgment obtained by plaintiff against the owner and driver of a vehicle involved in an accident wherein the issue was whether the policy had been effectively cancelled by the insurer prior to the accident, the trial court erred in the exclusion of testimony by the driver that he would like to see plaintiff recover from defendant insurer since such testimony was competent to show bias or interest in the outcome of the case.

3. **Insurance § 95— cancellation of assigned risk policy by insurer — admissibility of FS-4 form**

In an action to determine whether an assigned risk automobile liability policy had been cancelled by defendant insurer prior to an accident, the trial court committed prejudicial error in refusing to allow defendant to introduce the FS-4 form received by the Department of Motor Vehicles which notified the Department of the cancellation since that document bore on whether the statutory procedures for cancellation had been followed and on the credibility of the insured's testimony that she had not received a cancellation notice allegedly mailed along with the FS-4 form.

APPEAL by defendants from *Rousseau, Judge,* 17 September 1973 Session of Superior Court held in WILKES County.

On 5 April 1971, plaintiff was injured in a single vehicle accident involving a truck owned by defendant Francis Bare Holcomb and operated by her husband, defendant Johnny Marshall Holcomb. Plaintiff was a passenger in the truck. Plaintiff instituted an action against defendants Holcomb to recover

damages for personal injuries sustained in the accident and secured a $16,000.00 judgment. In August 1972, plaintiff initiated the present action seeking a declaratory judgment adjudicating that United States Fidelity & Guaranty Insurance Company (Guaranty) is liable for payment on that judgment.

Plaintiff asserted that the defendants Holcomb were insured under an assigned risk automobile liability policy issued by Guaranty and procured by defendant O. L. Elliott, an insurance agent in West Jefferson, North Carolina. Prior to trial plaintiff's claim against Elliott was dismissed.

Plaintiff's evidence indicated the following. In June 1970, defendant Francis Bare Holcomb purchased liability insurance on a 1953 Ford automobile. In October 1970, Holcomb had the insurance on the 1953 Ford cancelled and transferred the coverage to the 1948 pickup truck involved in the accident. The insurance premium for the automobile was paid in full, and there was no additional premium when coverage was transferred to the truck. In December 1970, Holcomb requested that another vehicle be added to the policy. Holcomb claimed that, after making this request, she was never notified that the addition of another vehicle to the policy would precipitate a premium increase. Holcomb also denied receiving any notification that her insurance was being cancelled for nonpayment of premium.

Defendants' evidence tended to show the following. When Holcomb requested that her insurance coverage be extended to include the additional vehicle, Guaranty sent copies of an endorsement to the insured and to agent Elliott which indicated that the extension in coverage required an additional premium of $13.00. Guaranty sent written notice to the insured, defendant Holcomb, that the additional premium was payable on or before February 12, 1971. The notice also contained the following warning: "If payment is not received by that date, the policy and any certificate issued will be cancelled." When the required payment was not made, Guaranty mailed a notice of cancellation to Holcomb. A copy of the notice and a certificate of mailing were introduced into evidence as was a copy of an envelope routinely used by Guaranty to mail cancellation notices bearing the notation, "Important Insurance Notice." Joseph T. Allford, Jr., an underwriter for Guaranty, testified that he did not personally mail the notice of cancellation or receive the certificate of mailing from the Post Office but explained,

> "I know that letter was transmitted to the Post Office as our Mail Clerk takes all direct notices, such as this, down to the Post Office and he carried the certificate with him and he gives the letter and the certificate to the Postal Clerk. . . . The Post Office Department receives the letter stamps the certificate of mailing as proof that it was mailed. . . ."

Regarding the envelope in which the cancellation notice was mailed to insured, Allford stated, "No, sir as I said I cannot swear that everything was mailed in an envelope containing the words 'Important—Notice Insurance.' " Allford also stated that Guaranty owed defendant Francis Holcomb $21.00 as a result of the insurance cancellation, that the $13.00 owing to Guaranty and a 10% seller's commission were deducted from the $21.00, and that a draft for $7.20 was issued to Capital Premium Plan which had financed Holcomb's initial insurance premium.

At the close of all the evidence, plaintiff's claim against defendants Holcomb was dismissed. The jury determined that Guaranty had issued an insurance policy covering the truck involved in the accident to Francis Bare Holcomb, that another truck was later added to the policy, that Holcomb failed to pay the additional premium required for the extension of coverage and that Guaranty did not cancel the policy as provided by law. From the judgment that the insurance policy in question was in full force and effect when the accident occurred, Guaranty appealed.

Franklin Smith for plaintiff appellee.

Edwin G. Farthing for defendant appellant.

VAUGHN, Judge.

[1] Defendant United States Fidelity and Guaranty Company contends the court erred in refusing to grant its motions for summary judgment, directed verdict and judgment notwithstanding the verdict. We disagree. Defendant bore the burden of proof on the issue of the insurance policy's cancellation. *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E. 2d 149. In order to be effective, a purported cancellation must comply with the provisions of G.S. 20-309(e) and G.S. 20-310(a). *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812; *Crisp v. Insur-*

ance Co., supra. G.S. 20-309(e) requires an insurer to notify the Department of Motor Vehicles of a policy cancellation 15 days prior to the effective date of the cancellation. Upon receiving such notice of cancellation, the Department of Motor Vehicles must notify the owner of the cancellation. Before the 1971 amendment, which is not applicable here, G.S. 20-310(a) provided, among other things, that an insurer could not cancel an insurance policy until fifteen (15) days after mailing a notice of termination by certificate of mailing to the named insured at the latest address filed with the insurer. G.S. 20-310(a) also required the face of the envelope in which the notice was mailed be marked "Important Insurance Notice." Defendant offered evidence of compliance with G.S. 30-309(e) and G.S. 20-310(a). The weight and credibility of such evidence was, however, for the jury.

[2] Defendant maintains that the court committed prejudicial error in not permitting defendant, John Holcomb to answer the following question, " . . . you would like to see Mr. Redmon recover from this insurance company, wouldn't you?" The record discloses the witness' answer would have been "Yes." A witness may be cross-examined to show bias or interest in the outcome of a case, and it is error to prevent cross-examination of a witness as to facts from which bias would clearly be inferred. Holcomb's relationship to Guaranty and his attitude toward that defendant could permit an inference of bias and interest in the outcome of the proceedings.

[3] Defendant also objects to the court's exclusion of an FS-4 form received by the Department of Motor Vehicles from defendant. The FS-4 form is used by an insurer to notify, as is required by G.S. 20-309(e), the Department of Motor Vehicles of a liability insurance policy cancellation. Defendant was allowed to introduce Guaranty's file copy of the FS-4 defendant claimed was mailed simultaneously with a notice of cancellation to the insured. G.S. 20-309(e) must be complied with before a cancellation of an insurance policy is legally sufficient. Although the fact that the Department mailed an FS-5 form, which was introduced into evidence, to the insured suggests defendant had notified the Department, defendant should have, nevertheless, been allowed to introduce the FS-4 received by the Department. Not only did that document bear on whether the statutory procedures for a valid cancellation had been followed, but it also bore on defendant's credibility in view of the fact Francis Hol-

comb denied receiving a cancellation notice allegedly mailed along with the FS-4.

For the reasons stated, we direct that there be a new trial.

New trial.

Judges PARKER and CARSON concur.

STEVE W. KISER v. H. F. SNYDER, C. EDWIN ALLMAN, W. O. BARRETT, R. DOUGLAS BOYER, DALLAS CHAPPELL, VANN H. JOHNSON, MRS. H. C. LAUERMAN, CLYDE F. McSWAIN, GRADY SWISHER, MARVIN MULHERN, DR. DONALD M. HAYES AND THOMAS D. ROBINSON, TRUSTEES OF FORSYTH TECHNICAL INSTITUTE

No. 7421SC203

(Filed 5 June 1974)

1. **Colleges and Universities; Schools § 11— vocational training class — use of machinery — duty of teacher to warn of hazards**

A teacher in a vocational training class has a duty to warn students of known hazards in the operation of machinery used in the class.

2. **Colleges and Universities; Schools § 11— injury in welding class — negligence of teacher — contributory negligence of student**

In an action by a community college student to recover for injuries sustained while operating a metal shearing machine during a welding class, plaintiff's evidence disclosed that the class instructor sufficiently instructed the students on how to operate the machine and was not otherwise negligent toward plaintiff and that plaintiff was contributorily negligent in failing to use an auxiliary piece of metal or wood when cutting a short metal sheet and in failing to recheck the position of his fingers in relation to the guardrail after looking down to find the foot pedal; therefore, the trial court should have allowed defendants' motions for directed verdict.

APPEAL by defendants from *Wood, Judge,* 1 October 1973 Session of Superior Court held in FORSYTH County.

Plaintiff seeks to recover damages for personal injuries he sustained while operating a metal shearing machine located at and supplied by Forsyth Technical Institute, a community college organized under Chapter 115A of the General Statutes. At the time of the accident, plaintiff was a student at Forsyth

Technical Institute. The cutting machine was used in conjunction with a welding class taught by an institute employee. Defendants, whose derivitive negligence plaintiff contends precipitated his injury, are the trustees for Forsyth Technical Institute, and this action against them is authorized by G.S. 115A-35(b).

At an earlier stage of this case, defendants' motion for summary judgment was granted. This court reversed in *Kiser v. Snyder,* 17 N.C. App. 445, 194 S.E. 2d 638.

Plaintiff's evidence tended to show the following. Early in the first semester and again early in the second term, plaintiff's class, while plaintiff was present, was given general operating instructions for using the metal shearer. Part of the instructions dealt with "some safety about the machine" and included a warning to the students not to put their fingers or hand under or beyond the guardrail which separates the machine's feeder bed from its cutting area, because doing so could result in injury. The instructor demonstrated how the machine worked and was to be used. During one of the demonstrations, the instructor illustrated the proper technique for cutting short pieces of metal: a stick or second piece of metal was used to push the metal to be cut from the feeder area under the guardrail toward the cutting surface. The students were told "to use another stick or piece of metal so [they] wouldn't get [their] fingers beyond that guard."

Plaintiff, then 19 years old and a high school graduate, used the metal cutter at least twice without incident during the first semester. On one occasion, plaintiff was told by a fellow student to be careful as his fingers were too close to the guardrail. Early in the second term, plaintiff was injured while attempting to cut a short piece of metal. The tips of two of plaintiff's fingers were mashed by a hold down plunger behind the guardrail which clamps the metal to be cut in place when a foot pedal is depressed. The plungers are not activated when the shearing machine is turned on but rather do not extend unless and until the machine operator depresses the foot pedal. Plaintiff explained that he always looked under the horizontal feeder surface to see if his foot was properly situated on the pedal and that when he did so, he was unable to see the position of his hand and the metal he was cutting in relation to the feeder bed, guardrail, and shearing area. Before the accident, plaintiff did not recheck to see if his fingers were in front of the guardrail, although there was nothing which prevented him from

doing so. Plaintiff was never expressly instructed to recheck the position of his hand after locating the foot pedal.

Defendants' evidence indicated that the instructor had given more extensive explanations and warnings than those recalled by plaintiff.

The jury answered the issue in favor of plaintiff, and judgment awarding damages was entered.

White and Crumpler by James G. White, Michael J. Lewis and G. Edgar Parker for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for defendant appellants.

VAUGHN, Judge.

Defendants contend the trial court erred in not granting their motion for a directed verdict made at the close of plaintiff's case and renewed at the close of all the evidence. Defendants argue that the evidence was insufficient as a matter of law on the issue of negligence and that the evidence indicated that plaintiff was contributorily negligent as a matter of law.

[1, 2] Counsel has not referred to any North Carolina case involving injury to a student precipitated by alleged teacher negligence in accidents associated with manual or vocational training classes. A teacher must abide by that standard of care "which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances." *Lunn v. Needles Elementary School District,* 154 Cal. App. 2d 803, 316 P. 2d 773. Plaintiff's case is bottomed on the assertion that the course instructor negligently failed to give adequate warning of the danger associated with a shearing machine, to instruct on safety measures, and to explain the operational technique. An employer has an obligation to warn an employee of known dangers. *Watson v. Construction Company,* 197 N.C. 586, 150 S.E. 20. By analogy, it is appropriate to impose a similar burden upon a teacher so far as the duty to warn a student of known hazards is concerned, particularly with respect to danger which a student because of inexperience may not appreciate. There are numerous cases from other jurisdictions which at least implicitly recognize a teacher's obligation to warn students of potential harm. *See* cases collected at 35 A.L.R. 3d 758, § 3, 4 and 6. Plaintiff's evidence discloses that plaintiff's instructor, on two separate occasions, expressly cautioned the students against putting their

hands or fingers beyond the guardrail. Moreover, the instructor expressly discussed a procedure where the risk of harm appeared especially great, to wit: shearing a short piece of metal. The students viewed a demonstration of appropriate technique for cutting short sheets of metal. We hold, as a matter of law, that plaintiff was adequately warned, and the instructor was not otherwise negligent in his dealings with plaintiff. Defendants' motion for directed verdict should have been granted.

Although discussion of the issue is not crucial in this case, we note that, assuming the instructor was negligent, plaintiff, as shown by his own evidence, was contributorily negligent as a matter of law. "Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, . . . " *Clark v. Roberts,* 263 N.C. 336, 139 S.E. 2d 593. Plaintiff in two respects failed to insure his safety. First, he did not use an auxiliary piece of metal or wood when cutting a short metal sheet, although the class had been instructed to do so. Second, plaintiff did not recheck the position of his fingers in relation to the guardrail after looking down to find the foot pedal. The conclusion that plaintiff was contributorily negligent as a matter of law is not altered by the fact that the instructor may not have explained that the machine's hold down plungers could exert devastating pressure on a finger or hand beyond the guardrail. By virtue of the warnings given to the entire class, plaintiff should have been aware in general terms of the risk of harm. Moreover, since plaintiff had operated the metal shearer several times prior to the accident, he should have become aware that the hold down plungers exerted considerable pressure during the cutting process. Finally, we observe that while under certain circumstances *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297, precludes granting a directed verdict for the party having the burden of proof on a particular issue, that decision is inapplicable to the present case, even though defendants bear the burden of proof regarding plaintiff's contributory negligence. Plaintiff's own evidence rather than that offered by defendants establishes plaintiff's contributory negligence. We are thus confronted with one of those "few situations in which the acceptance of credibility as a matter of law seems compelled." *Cutts v. Casey, supra.* Defendants' motion for directed verdict should have been allowed.

Reversed.

Judges CAMPBELL and MORRIS concur.

IN THE MATTER OF: ELSIE McMILLAN, SHELBY JANE McMILLAN AND ABE McMILLAN, JUVENILES

No. 7416DC217

(Filed 5 June 1974)

Infants § 10— undisciplined child — absence from school — instructions from parents

Evidence that three children were absent from school on one occasion and that they were absent because they were obedient to express instructions from their parents was insufficient to support a finding that the children were "undisciplined" within the meaning of G.S. 7A-278(5).

ON *Certiorari* to review orders of *Britt, Chief District Judge,* entered at the 1 October 1973 Session of District Court held in ROBESON County.

This juvenile proceeding was commenced by the filing of a petition dated 18 September 1973, signed by a deputy sheriff of Robeson County, in which the petitioner alleged that Elsie McMillan, born 7 August 1958, Shelby Jane McMillan, born 1 October 1961, and Abe McMillan, born 6 March 1964, children of Doug McMillan and Hattie Mae McMillan, were each "an undisciplined child as defined by G.S. 7A-278(5), in that on or about the 17th day of September, 1973, the child was unlawfully absent from Prospect School." The petition prayed the court "to hear the case to determine whether the allegations are true and whether the child is in need of the care, protection or discipline of the State." A hearing was held on the petition before Samuel E. Britt, Chief District Judge, on 1 October 1973, at which time the three children and their parents were present and the children were represented by counsel. Evidence in support of the petition in substance showed the following:

Each of the three children is a student assigned to and attending the Prospect School, a public school in Robeson County which is under the supervision of the Robeson County Board of Education. On 17 September 1973, a normal school day, the three McMillan children, at the request and under instructions of their father, Doug McMillan, did not attend school. Instead, they accompanied their father and other parents and their children in going to the office of the Robeson County Board of Education, where they remained from approximately 10:00 a.m. until approximately 3:30 p.m. The purpose of the visit was

to see the Superintendent of Schools to inquire into funds under the Indian Education Act. At approximately 3:30 the parents were arrested and taken to jail and the juveniles were taken into custody. The children were not excused from attending school by their principal or teacher.

On cross-examination by counsel for the children, the principal of Prospect School testified that he did not recall there had been any unexcused absence other than on the 17th of September on the part of the children and that none of the children had been a disciplinary problem in any way in the school. The children's father testified that during the time they were at the office of the Board of Education they were under his supervision, and that his children had never been a disciplinary problem to him in any way.

At the conclusion of the hearing, the District Judge entered a separate order as to each child, finding as a fact "[t]hat the child is an undisciplined child as alleged in the Petition in that on or about the 17th day of September 1973, the child was unlawfully absent from Prospect School." On this finding of fact, the court found each child to be "within the juvenile jurisdiction of the court as an undisciplined child" and ordered each child placed on probation for a period of two years under the supervision of the District Court Counselor in accordance with certain conditions of probation.

To these orders each of the children, through their attorney, gave notice of appeal. To permit perfection of the appeals, this Court subsequently granted their petition for writ of certiorari.

Attorney General Robert Morgan by Associate Attorney William Woodward Webb and Assistant Attorney General Ann Reed for the State, appellee.

Rena K. Uviller, Philip A. Diehl and Norman Smith for appellants.

PARKER, Judge.

The record does not reveal what conduct on the part of appellants' parents prompted the authorities to arrest the parents while they were at the County School Board office, and in this proceeding we are not concerned with any charge against the parents. We are here concerned only with the juvenile proceeding in which the children were found to be "undisciplined" children and in which the court ordered the children placed on

probation. The question for our decision is whether the evidence presented supports the court's finding and the orders entered thereon. We hold that it does not.

For purposes of Article 23 of G.S. Chapter 7A, entitled "Jurisdiction and Procedure Applicable to Children," and "undisciplined child" is defined by G.S. 7A-278(5) as follows:

> " 'Undisciplined child' includes any child who is unlawfully absent from school, or who is regularly disobedient to his parents or guardian or custodian and beyond their disciplinary control, or who is regularly found in places where it is unlawful for a child to be, or who has run away from home."

In this proceeding no charge was made and no evidence was presented to show that any of the children here involved had ever been disobedient to their parents and beyond their disciplinary control, had ever been found in any place where it is unlawful for a child to be, or had ever run away from home. The sole charge against them is that they were "undisciplined" because they were unlawfully absent from school on 17 September 1973.

All of the evidence presented to support the single charge made against these children establishes that they were absent from school on only one occasion and that they were then absent only because they were obedient to express instructions from their parents. We hold this evidence insufficient to support the court's finding and adjudication that these children were "undisciplined" within the definition of G.S. 7A-278(5). Among the purposes which our Legislature sought to accomplish by enactment of Article 23 of G.S. Chap. 7A, as stated in G.S. 7A-277, was "to strengthen the child's family relationships." When this and the other legislatively stated purposes are kept in mind, we cannot believe that the Legislature intended that G.S. 7A-278(5) be so construed as to permit a child who, obedient to its parents' commands, is absent from school on one single occasion, to be adjudicated an "undisciplined child."

The orders appealed from, being unsupported by the evidence, are

Vacated.

Judges VAUGHN and CARSON concur.

IN THE MATTER OF: JANICE LEE LOCKLEAR, JUVENILE

No. 7416DC218

(Filed 5 June 1974)

ON *certiorari* to review the order of *Britt, Chief District Judge,* entered at the 1 October 1973 Session of ROBESON County District Court.

Facts necessary for the determination of this matter are set forth in the opinion.

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

Moses and Diehl by Philip A. Diehl for appellant.

CARSON, Judge.

The adjudication that the juvenile was undisciplined arose from the same factual situation and at the same hearing as that decided in the case of *In re McMillan,* decided contemporaneously with this decision. For the same reason as those set out in *In re McMillan,* the order appealed from, being unsupported by the evidence, must be vacated.

An additional question is presented in this appeal as to whether a juvenile is entitled to the appointment of counsel as a matter of right in appealing from an adjudication that the child is undisciplined. We do not deem it necessary to answer that question in view of our holding in this matter. We note, however, that the juvenile was ably represented in District Court by retained counsel, who has also ably represented her in this appeal.

The order appealed from is vacated.

Judges PARKER and VAUGHN concur.

J. C. MINTON v. TOWN OF AHOSKIE, A MUNICIPAL CORPORATION

No. 746SC300

(Filed 5 June 1974)

Municipal Corporations § 9; Retirement Systems § 5— municipal retirement ordinance — payment for sick leave — permissive or mandatory

Where a municipal vacation and sick leave ordinance provided that employees who retire and have 20 years continuous service "may" be paid for their accumulated sick leave as terminal leave pay and that payment may be made only by action of the city council, such payment for accumulated sick leave was not mandatory but was discretionary with the city council.

APPEAL by defendant from *Rouse, Judge*, 26 November 1973 Session of Superior Court held in HERTFORD County.

Plaintiff brought this action for a declaratory judgment to determine the rights and obligations of the parties under an ordinance, referred to as "Vacation and Sick Leave Ordinance," adopted by defendant on 20 December 1965. The cause was heard by the court without a jury, the parties stipulating that the case would consist of specified portions of the pleadings and certain stipulated facts.

The ordinance contained the following pertinent provisions:

"Whereas it is considered to be in the best interest of the Town of Ahoskie to establish the conditions of employment for all employees . . .

"Section 1. APPOINTMENTS, PROMOTIONS, AND DISMISSALS

* * *

(c) SUSPENSION OR DISMISSALS Any employee guilty of gross negligence, disloyalty to the Town, or defects of character that bring discredit upon the Town . . . [and] so dismissed will lose all sick . . . leave on the books.

* * *

"Section 3. ANNUAL LEAVE

(a) . . .

(b) TERMINAL LEAVE: A full-time employee shall be paid accrued annual leave upon separation from the Town, but in no case more than 30 days.

* * *

"Section 4. SICK LEAVE

(a) DEFINITION: Absence from work may be charged to sick leave if the absence is due to sickness, injury, required physical or dental examination or treatment, illness in the employee's immediate family (living in the same house) which requires care by the employee or a funeral in the employee's family. All such absences with pay shall be charged against sick leave credit of the employee . . . .

(b) SICK LEAVE EARNED: Sick leave will not be allowed during the first six months of employment. One day of sick leave with full pay for each month worked will be allowed. Credits accumulated by each Town employee shall be retained as of the effective date of this ordinance. Only employees who retire and have 20 years continuous service may be paid for the amount of accumulated sick leave to his credit as terminal leave pay. Provided further that payment may be made only by Council action.

(c) FORFEIT LEAVE: Any employee who resigns his or her position with the Town will forfeit all accrued sick leave. Any employee who is dismissed by the Town will forfeit all accrued sick leave."

The court found the following pertinent facts: At least five other employees of defendant who had been working for defendant for several years prior to the adoption of the ordinance in controversy and who continued to work for defendant after its adoption retired during the period of time from the adoption of the ordinance until plaintiff retired; that defendant paid in full the accrued unused sick leave of each of these retiring employees both before and after adoption of the ordinance.

Plaintiff retired from defendant's employment on 13 October 1972 after twenty years and seven months continuous service as a police officer. During his period of employment, plaintiff did not avail himself of the periods of paid sick leave as set out in the ordinance, but rather accrued unused sick leave in the total amount of 169 days. Upon his retirement, plaintiff requested, by letter, that defendant's then existing town council approve payment for 169 days sick leave.

At the 7 November 1972 meeting of defendant's council, a motion that plaintiff be paid for his accrued sick leave did not pass and the minutes of the meeting contain no findings as to

the reason for said action. Plaintiff is the first retiring employee of defendant not to be paid for accrued, unused sick leave.

The court concluded as a matter of law that plaintiff was entitled to payment for the 169 days accumulated sick leave and ordered that defendant pay plaintiff for same. Defendant appealed.

Revelle, Burleson and Lee, by L. Frank Burleson, Jr., for petitioner appellee.

L. Bennett Gram, Jr., for respondent appellant.

BRITT, Judge.

On the facts presented in this case, was it mandatory for defendant to pay plaintiff for accumulated sick leave, or was such payment within the discretion of defendant's council? We hold that payment was discretionary with the council and the trial court erred in its conclusions of law and adjudication.

The answer to the question depends on the construction of the word "may" in section 4(b) of the ordinance set forth above, and the effect of the proviso of said section.

In 5 Strong, N. C. Index 2d, Municipal Corporations, § 29, p. 679, we find:

> "The rules applicable to statutes apply equally to the construction and interpretation of municipal ordinances, and when the language of an ordinance is clear and unmistakable, there is no room for construction, and the plain language of the ordinance must be given effect. A municipal ordinance must be construed to ascertain and effectuate the intention of the municipal legislative body as gathered from the language of the ordinance. Furthermore, such an ordinance, like a statute or other written instrument, should not be interpreted as consisting of detached, unrelated sentences, but must be construed as a whole. The courts must interpret an ordinance as written, and whether the ordinance should or should not permit a certain use is a legislative question for the governing body and not for the courts."

Defendant argues that the term "may" ordinarily is construed as permissive and not mandatory, and cites 7 Strong, N. C. Index 2d, Statutes, § 5, page 75, for this proposition. Plain-

tiff concedes that this is the rule, but cites *Puckett v. Sellars,* 235 N.C. 264, 69 S.E. 2d 497 (1952), as an instance in which the term was construed as mandatory. In *Puckett, supra,* at 268, 500, we find: " 'The general rule is that the word "may" will be construed as "shall," or as imposing an imperative duty whenever it is employed in a statute to delegate a power, the exercise of which is important for the protection of public or private interests. Whether merely permissive or imperative depends on the intention as disclosed by the nature of the act in connection with which the word is employed and the context.' [Citations.]" In *Puckett* there were such interests, namely, the collection of revenue and the punishment of those who overproduced tobacco. A reading of the record in this case fails to disclose such interests.

With respect to the construction of statutes, in *Art Society v. Bridges, State Auditor,* 235 N.C. 125, 130, 69 S.E. 2d 1, 5 (1952), we find: "In determining whether a particular provision in a statute is to be regarded as mandatory or directory the legislative intent must govern, and this is usually to be ascertained not only from the phraseology of the provision, but also from the nature and purpose, and the consequences which would follow its construction one way or the other. *Smith v. Davis,* 228 N.C. 172 (179), 45 S.E. 2d 51; *Machinery Co. v. Sellers,* 197 N.C. 30, 147 S.E. 674; *Spruill v. Davenport,* 178 N.C. 364 (368), 100 S.E. 527; *S. v. Earnhardt,* 170 N.C. 725, 86 S.E. 960; 59 C.J. 1073. The heart of a statute is the intention of the lawmaking body. *S. v. Humphries,* 210 N.C. 406, 186 S.E. 473."

Applying the stated principles to the case at hand, we think a reading of the ordinance in question discloses an intent to make the term "may" permissive and not mandatory. To conclude otherwise would completely ignore the proviso that payment (for accumulated sick leave) "may be made only by council action."

Furthermore, on the question of terminal leave, section 3(b) of the ordinance provides: "A full-time employee shall be paid accrued annual leave upon separation from the Town, but in no case more than 30 days." Annual leave under the ordinance is leave granted for vacation and not sickness. The ordinance empowers the town council to convert sick leave to terminal leave if the employee meets certain requirements. It is not an automatic conversion but one that takes place upon council action. Further, to credit plaintiff with 169 days of terminal

leave would be to far exceed the maximum allowable terminal leave as set forth in the ordinance.

For the reasons stated, the judgment appealed from is

Reversed.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. WOODY POINDEXTER

No. 7413SC304

(Filed 5 June 1974)

Narcotics § 4.5— sale of marijuana — date of sale — alibi — instructions

In a prosecution for distribution of marijuana wherein the indictment charged defendant with selling marijuana to a specified person on 17 January 1973 and the State's evidence tended to show that the sale occurred on a Sunday (apparently 14 January 1973) and that 17 January 1973 was a Wednesday, the trial court erred in instructing the jury that it should return a guilty verdict if it found that defendant sold marijuana on 17 January 1973 since such instruction (1) permitted the jury to disregard the State's evidence that the offense occurred on Sunday and convict defendant for a transaction on Wednesday, January 17, about which there was no evidence, and (2) deprived defendant of the right of his alibi.

APPEAL by defendant from *Brewer, Judge,* 3 December 1973 Session of Superior Court held in BRUNSWICK County.

Heard in Court of Appeals 8 May 1973.

Defendant was tried for distribution of marijuana on a bill of indictment which read in part as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Woody Poindexter late of the County of Brunswick on the 17th day of January, 1973 . . . did unlawfully, wilfully and feloniously distribute a controlled substance to John Cooper at The Circle, Yaupon Beach, N. C. The said substance consisted of marihuana . . . . At the time of the offense the defendant was over 21 years of age, and John Cooper was under 18 years of age and at least 36 months younger than the defendant . . . . "

17 January 1973 was a Wednesday, 14 January 1973 was a Sunday, and 15 January 1973 was a Monday.

John Cooper was the first witness for the State at the trial. He testified that he purchased some marijuana from defendant for $20.00. He put it in a box and hid the box in the woods. Subsequently he was arrested and convicted of possession of marijuana with intent to distribute. During the course of his testimony, Cooper stated:

> "I know Woody Poindexter. . . . I knew him on the 17th day of January. I saw him on that day at Yaupon Beach in the afternoon. I am not sure of the date. . . .
>
> * * *
>
> "This transaction took place around 2:30. . . . I am not sure of the date, but I believe it was a Sunday. . . .
>
> "I hid the box in the woods the day after I bought the marijuana, which was on a Monday. A couple of days elapsed between the time I put the box in the woods and the time I was arrested."

Cooper testified that he was seventeen years old when he bought the marijuana from defendant.

L. D. Jones, the assistant police chief of the town of Yaupon Beach, testified that on 17 January 1973 he found a box of marijuana hidden in the woods. The box had John Cooper's name on it, and Jones arrested Cooper the same day.

Defendant took the stand and denied that he had sold any marijuana to John Cooper. He testified:

> "On the date in question, I was at home. It was a Sunday. On that day the Super Bowl was on and I was at my brother-in-law's house all day. . . . I did not leave the house at any time that day."

Three additional witnesses corroborated the testimony of defendant concerning his alibi.

The jury found defendant guilty, and the court at first sentenced him to two years in prison. Later in the day, the court increased the sentence to ten years, explaining the change as follows:

> "Madam Clerk, in the case of Mr. Poindexter whom I've just sentenced, in checking the Statute the Statute

sets out that the minimum term of imprisonment which can be imposed on this Defendant is Ten (10) years . . . . Therefore, the Court determines and adjudges that the Defendant be imprisoned for a term of ten (10) years in the State Prison and that the Appearance Bond be set at $10,000.00."

Defendant appealed to this Court.

Attorney General Morgan, by Assistant Attorney General James B. Richmond, for the State.

Prevatte and Prevatte, by James R. Prevatte, Jr., and Richard S. Owens III, for defendant appellant.

BALEY, Judge.

Defendant contends that the court erred in its instructions to the jury with respect to the date of the commission of the offense and deprived him of the effect of his alibi evidence. This contention is well founded and entitles him to a new trial.

In this case the indictment charged defendant with selling marijuana to John Cooper on 17 January 1973. The evidence of the State tended to show that the sale occurred on Sunday afternoon (apparently 14 January 1973) and that 17 January 1973 was a Wednesday, the date the marijuana was found by the deputy. Ordinarily, a variance such as this concerning the date in the indictment and the proof of the crime is not material. "The time alleged in an indictment is not usually an essential ingredient of the offense charged, and the State ordinarily may prove that it was committed on some other date." *State v. Wilson,* 264 N.C. 373, 377, 141 S.E. 2d 801, 804; *accord, State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664; *State v. Trippe,* 222 N.C. 600, 24 S.E. 2d 340. In this case, both the evidence for the State and the alibi evidence of the defendant related to the Sunday afternoon when the Super Bowl football game was played, not to Wednesday, January 17.

The court, however, instructed the jury:

"So, Members of the Jury, I charge you, if you find from the evidence beyond a reasonable doubt that on the 17th day of January, 1973, Woody Poindexter transferred or sold or handed to or gave to or sold to John Cooper marijuana, it would be your duty to return a verdict of guilty as charged."

This instruction permitted the jury to disregard the State's evidence that the offense occurred on Sunday, which was the only evidence of when any offense occurred, and convict defendant for a transaction on Wednesday, January 17, about which there was no evidence. It deprived defendant of the benefit of his alibi because it allowed the jurors to convict even if they believed the alibi witnesses. *See State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396.

Since this case is to be returned for a new trial, it might not be amiss to point out that the offense charged in the bill of indictment is distribution of a controlled substance by a person over twenty-one to a person under twenty-one. While the age of the defendant is a collateral matter, wholly independent of his guilt or innocence, it is relevant on the subject of punishment; and, unless admitted by defendant, it must be submitted for the determination of the jury. *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681; *State v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861; *State v. Lefler,* 202 N.C. 700, 163 S.E. 873.

New trial.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. DONALD E. CALDWELL

No. 7430SC330

(Filed 5 June 1974)

Criminal Law § 18; Assault and Battery § 17— assault upon public officer — appeal to superior court — conviction of assault by pointing gun — error

Since the jurisdiction of the superior court in misdemeanor cases is derivative and arises only upon appeal from a conviction in district court, defendant's conviction in superior court of assault by pointing a gun must be vacated where his appeal to superior court was from a conviction in district court of assault upon a public officer while discharging a duty of his office. G.S. 14-33(b)(1) and (4); G.S. 14-34.

APPEAL by defendant from *Thornburg, Judge,* 12 November 1973 Session, Superior Court, HAYWOOD County. Argued in Court of Appeals 22 April 1974.

The record indicates that defendant was charged in a warrant with "unlawfully, wilfully, and feloniously commit(ting)

an assault with a deadly weapon, to wit, a rifle, on Ronnie Bryson, a public officer, holding the office of Policeman, Hazelwood, N. C. by pointing the rifle at Bryson. At the time of the assault, said officer was attempting to discharge a duty of his office, to wit, to serve a capias on defendant." The warrant further stated that the offense was committed in violation of G.S. 14-33(c) (sic) (4) [obviously intended to be G.S. 14-33(b) (4)]. This statute is headed: Misdemeanor assaults, batteries, and affrays; simple and aggravated; punishments, and § (b) thereof provides that:

> "Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray, he:
>
> . . .
>
> (4) Assaults a public officer while the officer is discharging or attempting to discharge a duty of his office."

The record shows that in District Court a plea of not guilty was entered, a verdict of guilty was rendered and defendant noted an appeal to Superior Court.

We quote from the record:

"JUDGMENT AND COMMITMENT IN SUPERIOR COURT

In open court, the defendant appeared for trial upon the charge or charges of assault with a deadly weapon and thereupon entered a plea of not guilty.

Having been found guilty of the offense of Assault by pointing a gun which is a violation of G.S. 14-34 and of the grade of misdemeanor,

It is ADJUDGED . . . "

The court charged the jury: "Members of the jury, this is a criminal case wherein the defendant, Donald E. Caldwell, is charged in a Warrant with Assault by Pointing a Gun at the prosecuting witness, Ronnie Bryson." The jury was told it could

find the defendant guilty or not guilty of "Assault by Pointing a Gun." From judgment imposed on the verdict of guilty, defendant appealed.

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

Riddle and Shackelford, P.A., by George B. Hyler, Jr., for defendant appellant.

MORRIS, Judge.

It seems clear that the defendant was convicted in District Court of assault upon a public officer while the officer is attempting to discharge a duty of his office in violation of G.S. 14-33(b)(4). This charge requires all the essential elements of a charge under G.S. 14-223. (Resisting Officers) and all the elements necessary were included in the warrant. (See *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972), where Justice Sharp, writing for the Court held that where the defendant had been tried on two charges—one under G.S. 14-223 and one under G.S. 14-33(b)(4)—he had twice been convicted and sentenced for the same criminal offense. There defendant's conviction of assaulting an officer was vacated and the judgment arrested.)

In *State v. Guffey,* 283 N.C. 94, 194 S.E. 2d 827 (1973), the defendant was convicted in District Court for driving under the influence fourth offense. The warrant had charged also the operation of a motor vehicle while his operator's license was permanently revoked. On appeal, he was tried for both offenses charged in the warrant, the solicitor choosing to try him on a first offense charge of driving under the influence. He was found guilty on each count and on appeal to the Court of Appeals the convictions were affirmed, the jurisdictional question not having been raised. The Supreme Court granted certiorari and, in an opinion by Justice Moore, arrested judgment on the charge of driving while his license had been permanently revoked. There the Court said:

> "In *State v. Hall,* 240 N.C. 109, 81 S.E. 2d 189 (1954), this Court said that Sections 12 and 13 (now Sections 22 and 23) of Article I of the State Constitution provide, 'in essence, that the Superior Court has no jurisdiction to try an accused for *a specific misdemeanor* on the warrant of

an inferior court unless he is first tried and convicted for *such misdemeanor* in the inferior court and appeals to the Superior Court from the sentence pronounced against him by the inferior court on his conviction for *such misdemeanor.*' (Citations omitted.)" *Id.*, at 96.

The warrant in this case charges a specific misdemeanor, a violation of G.S. 14-33(b)(4). By the provisions of G.S. 7A-272, the district courts have original exclusive jurisdiction of misdemeanors.

The record before us, agreed to by the solicitor, clearly shows that the defendant in Superior Court was tried for the charge of assault with a deadly weapon and convicted of assault by pointing a gun. Nowhere does the record show that the solicitor chose to try him on a lesser included offense, if assault with a deadly weapon be a lesser included offense of the charge in the warrant, nor does the record indicate any agreement to submit the case to the jury on a lesser included offense of assault by pointing a gun. Indeed, the charge upon which he was put to trial, assault with a deadly weapon, is a violation of G.S. 14-33(b)(1). The charge upon which he was convicted, assault by pointing a gun, is a violation of G.S. 14-34.

The Superior Court has no original jurisdiction of a trial for the misdemeanor violation of either G.S. 14-33(b)(1) or G.S. 14-34, for one of which defendant was charged and for one of which he was convicted. Its jurisdiction of these offenses is derivative and arises only upon appeal from a conviction in District Court of the misdemeanor for which he stands charged in Superior Court or the misdemeanor with respect to which the jury returned a guilty verdict in Superior Court.

"We must base our decision upon the record as we find it." *State v. Guffey, supra.* We, therefore, reach the ineluctable conclusion that defendant's conviction in Superior Court must be vacated and the judgment arrested.

Judgment arrested.

Judges CAMPBELL and VAUGHN concur.

WILBUR HINSON, WIDOWER OF NANNIE MAE HINSON, DECEASED, EMPLOYEE-PLAINTIFF v. MR. & MRS. JOHN W. CREECH, t/a JACKSON EGG FARM, EMPLOYER-DEFENDANT (NON-INSURER)

No. 748IC160

(Filed 5 June 1974)

1. **Master and Servant § 49— Workmen's Compensation Act — exemption of employees in agriculture and domestic services**

G.S. 97-2(1) specifically exempts employment in agriculture and domestic services from the definition of employment within the meaning of the N. C. Workmen's Compensation Act.

2. **Master and Servant § 85— death of employee while delivering eggs — jurisdiction of Industrial Commission**

Keeping poultry and harvesting and selling the eggs produced by that poultry is an agricultural enterprise and those who labor therein are farm laborers not subject to the Workmen's Compensation Act; therefore, the Industrial Commission properly dismissed plaintiff's claim for lack of jurisdiction where the evidence tended to show that plaintiff's intestate worked in the egg house on defendants' farm and made deliveries of the eggs, and that she was killed in a motor vehicle accident while delivering eggs in her employer's truck.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission filed 7 August 1973.

Plaintiff is the surviving spouse of the deceased employee, Nannie Mae Hinson, who was killed in a motor vehicle accident while delivering eggs in her employer's truck.

Defendants (Employer) are John W. Creech and wife Jean Creech, who, under a certificate duly filed with the Register of Deeds of Lenoir County, do business under the assumed name of Eugene Jackson Egg Service.

Employer is engaged in the production and sale of eggs. Employer buys chickens when they are one day old and raises them until they begin laying eggs. When the hens complete their twelve to fourteen month laying cycle, they are removed from the farm. The eggs are cooled, cleaned, graded and packaged on Employer's premises, which he leases. They are then delivered to various stores, institutions, restaurants and individuals in two trucks owned by Employer. Some eggs are sold to an egg broker who takes possession on Employer's premises. Employer buys all of the chicken feed and stores in it in grain bins located on the leased premises. The bins have a capacity of 26,000 bushels. There are twelve chicken houses and an egg

house. Employer also operates a hog parlor on the premises. Employer has five or more employees and does not carry Workmen's Compensation Insurance.

Employee's duties were limited to work in the egg house and delivery. She cleaned, graded and packaged eggs while working in the egg house. When she delivered eggs, she collected money from the purchasers and kept records on the sales. Her average weekly wage was $50.00 per week.

A deputy commissioner made findings of fact substantially in accord with the foregoing. He then made the following:

"CONCLUSIONS OF LAW

1. The defendants are engaged in an agricultural pursuit, and the employees of the defendants, including the deceased employee, Nannie Mae Hinson, are farm laborers. The defendants are exempt from the North Carolina Workmen's Compensation Act. G.S. 97-2(1), G.S. 97-13, . . . "

The claim was dismissed for lack of jurisdiction. On appeal to the full Commission the opinion and award of the deputy commissioner was adopted as the opinion and award of the Industrial Commission.

Gerrans & Spence by William D. Spence for plaintiff appellant.

White, Allen, Hooten & Hines, P.A. by John R. Hooten for defendant appellees.

VAUGHN, Judge.

[1] General Statute 97-2(1) specifically exempts employment in agriculture and domestic services from the definition of employment within the meaning of the North Carolina Workmen's Compensation Act. Another exemption is found in G.S. 97-13(b) which provides that the article shall not apply to farm laborers.

The thrust of plaintiff's argument is that Employer is not really engaged in agricultural pursuits but in the large scale commercial production and marketing of chicken eggs. Plaintiff further contends that cleaning, packaging and delivering eggs is not employment in agriculture or the work of a farm laborer. He argues that the exemptions should be limited to small dirt farms and those engaged in tilling the soil or raising livestock

and certainly not exclude an employee who is delivering eggs in a motor vehicle over the public highways of this State.

In *Fleckles v. Hille,* 83 Ind. App. 715, 149 N.E. 915, the court noted, in evaluating the nature of an egg and poultry business, that agriculture includes "the raising, feeding and management of livestock and poultry." The court in *Davis v. Industrial Commission,* 59 Ut. 607, 206 P. 267, observed, after setting forth several examples, that "[e]very standard authority that defines the word 'agriculture' includes in the definition the rearing and care of live stock (sic)." Similarly, the court in *Shafer v. Parke, Davis & Co.,* 192 Mich. 577, 159 N.W. 304, states that "the raising and care of stock are the ordinary uses to which a farm is put. . . . " The definitions of "agriculture" and "farm" found in Webster's Third New International Dictionary are compatible with the above observations.

Department of Labor and Industries v. McLain, 66 Wash. 2d 54, 401 P. 2d 211, involved a fact situation very similar to the one at hand. In *McLain* the following facts were stipulated.

> "Mr. Hauenstein owned 22 acres of land near Reardan. With the exception of one cow, for family use, the land was devoted exclusively to a poultry and egg-laying business. The land was not cultivated and nothing was produced therefrom. The buildings consisted of Mr. Hauenstein's home, some outbuildings appurtenant thereto, and five laying houses. One-day-old chicks were bought and thereafter raised on the premises. Normally, 10,000 to 12,000 laying hens were maintained at one time. The hens, after attaining two years of age, were butchered, usually by third parties off the premises. All of the feed was purchased elsewhere, then ground and mixed on the premises in a feed room at the end of one of the laying houses. Two auger machines powered by ¾-horsepower electric motors lifted the feed to a grinding machine which was powered by a 15-horsepower electric motor. The ground feed was put through a mixing machine, powered by a 7½-horsepower electric motor. It was then transferred to an adjacent laying house by a bucket conveyor powered by a ¾-horsepower motor. Next to the feed room was a cooler room where the eggs were stored and cleaned by the use of two egg washers, each powered by a ⅓-horsepower electric motor."

It does not appear that the employee's duties included delivery of the eggs. The court rejected the claimant's contention

that the Dottie Egg Farm was a commercial enterprise and not a farming operation with respect to the Workmen's Compensation Act.

Courts from other jurisdictions have reached different results on somewhat similar facts.

[2] We are well aware that many modern agricultural enterprises are conducted on such a scale and fashion that there is little to distinguish them from any other business with respect to size, number of employees and nature of employment. Presumably, the legislative branch is also aware of the changes that have taken place but has seen fit to continue to exempt those employed in agriculture, without regard to the number of employees or the size of the enterprise. We decline to don the legislative mantle. We believe that keeping poultry and harvesting and selling the eggs produced by that poultry is an agricultural enterprise and those who labor therein are farm laborers.

Affirmed.

Judges CAMPBELL and MORRIS concur.

MARY SUE GORE v. SOUTH CAROLINA INSURANCE COMPANY

No. 7420DC183

(Filed 5 June 1974)

Insurance § 88— garage liability policy — conditional sales contract — coverage of buyer

Clause of a garage liability policy issued to an automobile dealer which excluded coverage of persons in possession of an automobile pursuant to a conditional sales contract was invalid as being in conflict with the provisions of G.S. 20-279.21(b)(2); therefore, the trial court properly determined that a driver was insured under the policy at the time of an accident where he had signed a conditional sales contract for the car but title had not been transferred to him pursuant to G.S. 20-72 and he was using the car within the scope of his permissive use.

APPEAL by defendant from *Mills, District Court Judge,* 18 June 1973 Session of District Court held in RICHMOND County.

The case was heard by the court without a jury.

Plaintiff Mary Sue Gore instituted this action against South Carolina Insurance Company to recover on a $5,000.00 judgment against Michael Harold Gore whom plaintiff alleged was insured by defendant.

Plaintiff's evidence tended to show the following. On 17 October 1965, plaintiff was injured in a single car accident while a passenger in an automobile driven by her husband, Michael Harold Gore. The automobile was allegedly owned by W & W Auto Sales, although plaintiff and her husband had signed a conditional sales contract for its purchase on 16 October 1965. Gore had paid W & W Auto Sales 50% of the agreed down payment and had made application for automobile insurance. Gore was operating the vehicle pursuant to a 96-hour loan permit issued by W & W Auto Sales. The permit was issued on 16 October at 12:30 p.m. It contained a declaration by an authorized representative of W & W Auto Sales that W & W Auto Sales was the owner of the vehicle and dealer plate and that the same were loaned to Gore. Plaintiff instituted an action against Michael Gore to recover for personal injuries sustained in the wreck. Defendant had issued a garage liability policy to W & W Auto Sales. Defendant was notified of plaintiff's action against Michael Gore but declined to defend. Judgment was entered for plaintiff who in this action now seeks to recover from defendant Insurance Company.

Defendant's evidence tended to indicate that although Gore was operating the vehicle in question under a 96-hour dealer's permit, he was told to return the permit and temporary tag later in the afternoon on 16 October. C. T. Waters testified that he "considered the [sale of the car] closed" when the automobile was delivered to Gore. Title to the vehicle was in W & W Auto Sales when the accident occurred. After the wreck, title was assigned to Gore.

After making numerous findings of fact, the trial court concluded that Michael Gore was an insured under the provisions of the garage liability policy issued by defendant to W & W Auto Sales and that plaintiff was entitled to recover $5,000.00 with interest and costs.

Webb, Lee, Davis & Gibson by Woodrow W. Gunter II and Hugh Lee for plaintiff appellee.

Pittman, Pittman & Guice by Zoro J. Guice, Jr., and William G. Pittman for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court erred in concluding that Michael Gore was protected under the garage liability policy. Applicable coverage provisions of the policy included the following:

"Automobile Hazards:

1. All Automobiles:

(a) The ownership, maintenance or use of any automobile for the purpose of garage operations, and the occasional use for other business purposes and the use for non-business purposes of any automobile owned by or in charge of the named insured and used principally in garage operations. . . .

* * *

Persons Insured: Each of the following is an insured under Part I, except as provided below:

* * *

(3) With respect to the Automobile Hazard:

(a) any person while using, with the permission of the named insured, an automobile to which the insurance applies under paragraph 1(a) or 2 of the Automobile Hazards, provided such person's actual operations of (sic) (if he is not operating) his other actual use thereof is within the scope of such permission,

* * *

None of the following is an insured:

* * *

(iii) any person . . . other than the named insured with respect to any automobile (a) owned by such person . . . , or (b) possession of which has been transferred to another by the named insured pursuant to an agreement of sale;"

There is ample evidence that at the time of the accident Gore was operating an automobile owned by W & W Auto Sales which was insured under the policy, and that Gore was using the car within the scope of his permissive use. The trial court correctly determined that Michael Gore was an insured within the purview of sections 1(a) and 3(a) of the insurance policy. *Compare Brinkley v. Insurance Co.* and *Transport Co. v. In-*

surance Co., 271 N.C. 301, 156 S.E. 2d 225; *Shearin v. Indemnity Co.*, 267 N.C. 505, 148 S.E. 2d 560.

The policy's exclusionary clause (iii), on its face, excludes Gore as an insured because his possession of the automobile was pursuant to a conditional sales contract. The court, however, correctly concluded that the clause was rendered inapplicable by the provision contained in G.S. 20-279.21(b)(2):

"(b) Such owner's policy of liability insurance:

* * *

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured . . . against liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle. . . ."

Even though G.S. 20-271.9 defines "owner" as a person holding legal title to a motor vehicle or as a conditional vendee in the event the vehicle is the subject of an agreement for its conditional sale and such vendee has an immediate right of possession, in *Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E. 2d 511, our Supreme Court held that the provisions of G.S. 20-72(b) control in determining who is an owner. Since in the present case title to the automobile in question had not, when the accident occurred, been transferred to Gore pursuant to G.S. 20-72, he was not the owner of the automobile for insurance purposes. Ownership remained with C. T. and H. F. Waters trading as W & W Auto Sales. Accordingly, W & W Auto Sales was required to maintain insurance the scope of which was compatible with the provisions of G.S. 20-279.21. Where, as here, the applicable statutory provisions are broader than and conflict with the express terms of the policy, the former prevail. *Insurance Co. v. Casualty Co.*, 283 N.C. 87, 194 S.E. 2d 834. If applicable statutory provisions are not expressly incorporated in an insurance policy, they will be read into such policy. *Insurance Co. v. Casualty Co., supra.* We conclude that the court properly determined that Michael Gore was not excluded from coverage under the garage liability policy issued by defendant to W & W Auto Sales.

We have carefully reviewed defendant's contentions relating to the running of the Statute of Limitations, the effect of plaintiff's prior action against Michael Gore and the appropri-

ateness of the trial court's findings of fact and have found them to be without merit.

Affirmed.

Judges PARKER and CARSON concur.

STATE OF NORTH CAROLINA v. RONALD SYLVESTER BYRD

No. 7427SC223

(Filed 5 June 1974)

Criminal Law §§ 79, 83— breaking and entering — evidence of wife's plea of guilty

In a prosecution for breaking and entering and larceny of a television set wherein defendant's witness testified that defendant and his wife were at a club at the time two State's witnesses placed them elsewhere on the night of the crimes in possession of the stolen television set, the trial court erred in permitting the State to introduce evidence that defendant's wife, who did not testify, had pled guilty to the breaking and entering for which defendant was on trial since (1) such evidence violated the rule that one spouse is not competent to testify against the other, G.S. 8-57, and (2) evidence of a coparticipant's earlier plea of guilty may not be used as evidence against another where the coparticipant does not testify at the trial of the other; such error was not cured by the court's instruction that the jury should consider the evidence only for the purpose of impeachment of defendant's witness.

APPEAL by defendant from *Friday, Judge,* 27 August 1973 Session of Superior Court held in GASTON County.

Defendant was indicted in three separate bills for rape, larceny of a television set and breaking and entering. The charges were consolidated for trial.

The evidence for the State tended to show the following. Between late on the night of 3 March and 6:00 a.m. on 4 March 1973, someone broke into the apartment of one Crawford and took a portable televison set. Defendant had joked about stealing the television and knew that on the night of the theft neither Crawford nor his wife would be at home.

Ruby Cooke purchased a television set identified as Crawford's from defendant late in the afternoon of 4 March 1973

for $60.00 after defendant told her he was moving and wanted to sell the set. Defendant gave Cooke a signed "receipt" in exchange for her $60.00, although the receipt did not refer to a television but instead indicated a loan from Cooke to defendant.

Kathy Benton and Ronald Zelrick were walking in downtown Gastonia about midnight on 3 March when they were approached by defendant and his wife. The four continued walking together until they came to a parked truck. Defendant showed Benton and Zelrick a portable television set which was in the truck. Defendant had his wife call a cab to deliver the television to an apartment. After defendant's wife left in the cab, defendant asked Zelrick if he and Benton wanted to smoke some "pot." Zelrick assented, and the trio went behind a building which had an elevated, partially enclosed back porch. There were mattresses under the porch. After the trio sat down on the mattresses, defendant placed a knife at Benton's throat and forced her to have sexual intercourse with him. Zelrick, present during the act, did not attempt to deter defendant because defendant had threatened to kill Benton.

Defendant offered the testimony of Johnny McClinton to the effect that defendant and his wife were at a club from approximately 11:30 p.m. until after 1:30 a.m. on the night of 3 March and the morning of 4 March 1973 respectively. McClinton's testimony placed defendant and his wife at a club at the time the State's evidence tended to show the alleged rape took place and at the time Benton and Zelrick saw defendant and his wife with the television set.

After McClinton testified, the State was permitted to reopen its case and show that defendant's wife pled guilty to breaking and entering Crawford's premises on 4 March 1973. She was also charged with the larceny of Crawford's television set but did not plead to that charge. The deputy clerk of court testified as to these facts over defendant's objection, and the warrant, shuck and judgment relating to the wife's case were introduced into evidence. Defendant's wife was not called as a witness. The court instructed the jury that the warrant, shuck and judgment could only be considered on the issue of McClinton's credibility.

Defendant was found not guilty of rape. He was convicted of felonious breaking and entering and larceny. Active prison sentences were imposed.

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

Atkins & Layton, P. A. by Nicholas Street for defendant appellant.

VAUGHN, Judge.

Error was committed when the State was allowed to offer evidence that defendant's wife, who did not testify, had pled guilty to the breaking and entering and thus admitted her participation in a crime which, according to the State's evidence, was committed by defendant and his wife.

With certain exceptions to the rule at common law which are set out in G.S. 8-57 and not material here, one spouse is neither competent nor compellable to give evidence against the other in criminal proceedings. Defendant's evidence was that he and his wife were together at a club during the time that two of the State's witnesses testified defendant and his wife were elsewhere, together and in possession of the stolen television set. The wife's admission by plea did not, of course, expressly incriminate defendant, but it certainly was evidence against him for it went to the heart of his defense.

There is another reason why the evidence should not have been admitted. Defendant and his wife were alleged to be coparticipants in the crime. Evidence of a coparticipant's earlier plea of guilty may not be used as evidence against another where the coparticipant does not testify at the trial of the other. Among other things, it deprives the defendant being tried of his right of confrontation and cross-examination.

The court's instruction that the jury should consider the evidence for the sole purpose of impeaching the credibility of defendant's witness, McClinton, and for no other purpose was inconsequential. The material challenged fact was whether defendant and his wife were at the club, as McClinton swore, or elsewhere and in possession of the stolen property, as the wife's plea of guilty tacitly admitted. The contradictory evidence from the wife was just as much substantive proof as McClinton's testimony which was under attack. If admissible at all, and it was not, the evidence would have been competent and material as substantive evidence. The evidence tended to impeach only in the sense that all evidence which tends to show a material fact

to be other than as testified to by a witness impeaches that witness.

We do not ignore the substantial amount of persuasive evidence of defendant's guilt, properly admitted. We do not necessarily suggest that the jury placed any credence in defendant's evidence that he and his wife were elsewhere when two of the State's witnesses placed them in possession of the stolen property. We cannot, however, in the light of the recent opinion of the North Carolina Supreme Court in *State v. Castor,* No. 68, filed 15 May 1974, say that there is no reasonable possibility that the evidence complained of contributed to the conviction.

For the reasons stated there must be a new trial.

New trial.

Judges CAMPBELL and MORRIS concur.

JACK AUSTIN v. TIRE TREADS, INC., AND W. A. HAYS

No. 7425DC84

(Filed 5 June 1974)

Corporations § 13; Fraud § 12— action against corporate president — checks returned for insufficient funds — insufficient evidence of fraud

In an action against the president of a corporation based on alleged fraud in the issuance of checks on behalf of the corporation which failed to clear the bank due to insufficient funds, plaintiff's evidence was insufficient for the jury where it showed that sufficient funds were in the corporation's bank account to cover the checks on the dates the checks were issued to and accepted by plaintiff and that sufficient funds were on hand so that the checks could have been honored on almost any day during the period covered by the transactions between the parties, and plaintiff failed to show when the checks were presented to the drawee bank and were returned for insufficient funds.

APPEAL by defendant from *Dale, District Court Judge,* 16 August 1973 Session of District Court held in BURKE County.

Plaintiff, Jack Austin, seeks to recover damages for fraud allegedly perpetrated by defendant W. A. Hays, the president of and a shareholder in Tire Treads, Inc., when he issued several checks which failed to clear the bank due to insufficient funds.

The checks were drawn on the corporate account in the First National Bank of Habersham County located in Cornelia, Georgia. Plaintiff also proceeded against the corporate defendant, Tire Treads, Inc. and secured a judgment against it which is not the subject of this appeal.

Plaintiff's evidence tended to show the following. On 19 July 1971, plaintiff who was in the business of selling recappable tire casings, sold Tire Treads, Inc. a load of tires and accepted a check for the amount of $980.00 in payment therefore. The check was signed by W. A. Hays. Printed on the check was "Tire Treads, Inc., W. A. Hays, Pres.—P. O. Box 477, Franklin, North Carolina 28734." Plaintiff stated that on 19 July 1971, he told defendant:

> "I am not the man that wants any bad checks, that if he could not write me a good check or give me the money, then I would pull my truck out and go away. He told me that he had never wrote a bad check yet."

On 27 July 1973, plaintiff sold another load of casings to Tire Treads, Inc. and was paid by a check in the amount of $962.00 similar to that already discussed. A third load of tires was sold to Tire Treads, Inc. on 6 August 1971. Plaintiff described the transaction as follows:

> "[H]e said he needed [the tires] bad so I unloaded the tires and picked up my check and he told me to send the check in and I don't know whether I got enough money to cover it or not until I get down there, and I said, 'O.K., I sure will.' "

Plaintiff then accepted a check for $772.00 signed by defendant. These checks were "put through" for collection on several occasions, but each time were returned marked insufficient funds.

Plaintiff and defendant stipulated as to the accuracy of bank records showing the balance at relevant times in the Tire Treads, Inc. account. The records were admitted into evidence and indicated that on 19 July 1971, the balance of the Tire Treads, Inc. account was $1,890.00, that on 27 July 1971 it was $7,342.51, and that on 6 August 1971 it was $795.06. An official at Austin's bank testified that "[f]rom looking at the ledger for some two months, it certainly shows that these checks could have been honored on almost every continuous day based upon the record."

Testifying as an adverse witness, defendant admitted knowing the business was in "bad financial" condition but stated that to his knowledge the checks in question were good when he wrote them. He also indicated that Tire Treads' problems resulted primarily from mismanagement by his predecessor. The firm was heavily indebted to the drawee bank and that bank had the power to, and frequently did, draw from the checking account to satisfy obligations due the bank. Defendant said he never knew in advance when the bank was going to exercise this privilege.

At the close of plaintiff's evidence, defendant moved for a directed verdict. The motion was renewed when defendant offered no evidence. Both motions were denied.

The jury found that defendant had fraudulently issued the checks in issue and fixed damages at $2,722.00 with interest.

Defendant appealed.

John H. McMurray for plaintiff appellee.

Byrd, Byrd, Ervin & Blanton by Robert B. Byrd for defendant appellant.

VAUGHN, Judge.

Defendant argues that his motion for a directed verdict should have been granted. We agree. Although personal liability may be imposed on a corporate officer for fraudulently misrepresenting a company's financial condition to one dealing with the company provided that party suffers a loss as a result of reliance on the misrepresentation involved, *see Mills Co. v. Earle,* 233 N.C. 74, 62 S.E. 2d 492, plaintiff failed to establish a *prima facie* case. Actionable misrepresentation consists of (1) a representation of a material fact, (2) which was false, (3) which was either known to be so by the defendant when it was made or which was made recklessly without any knowledge of its truth, (4) which was intended to induce reliance, and (5) which did induce reasonable reliance, (6) reliance which resulted in injury to plaintiff. *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131.

In writing the checks, defendant, in effect, represented that his funds on deposit at the drawee bank (First National Bank in Georgia) were adequate to cover them. *See Nunn v. Smith,*

270 N.C. 374, 154 S.E. 2d 497; *Auto Supply Co., Inc. v. Equipment Co., Inc.*, 2 N.C. App. 531, 163 S.E. 2d 510; 37 Am. Jur. 2d, "Fraud and Deceit," § 142, p. 194. It was thus incumbent upon plaintiff to offer, among other things, evidence from which it could be inferred that defendant issued the checks with insufficient funds to cover them, that is, plaintiff had to prove the falsity of defendant's representations. Ordinarily, falsity is evaluated at the time a representation is made or when it is acted upon by the plaintiff. *Childress v. Nordman*, 238 N.C. 708, 78 S.E. 2d 757. Plaintiff presented no evidence that, when issued, the checks were not covered by adequate deposits. In fact plaintiff introduced records of the drawee bank which demonstrate that on the dates the checks were issued to and accepted by plaintiff, sufficient funds were in defendant's Georgia bank account and that sufficient funds were on hand so that the checks could have been honored on almost any day during the period covered by the transactions between the parties. The record is silent as to when the checks were presented to the drawee bank in Georgia, showing only that they were returned for "insufficient funds." Plaintiff failed to show that the checks were not good when issued or collectable for a reasonable time after issuance. Defendant's motion for a directed verdict should have been allowed.

Reversed.

Judges CAMPBELL and MORRIS concur.

AMENDMENTS TO COURT OF APPEALS RULES

ANALYTICAL INDEX

WORD AND PHRASE INDEX

AMENDMENTS TO THE RULES OF PRACTICE IN THE COURT OF APPEALS

Rule 3, "Appeals—How Docketed", 1 N. C. App. 634, is amended by deleting therefrom the first sentence. Also, by deleting from the next to the last line the following: "each in its own class,".

Rule 5, "Appeals When Heard", 1 N. C. App. 635, as amended effective 1 July 1973, 15 N. C. App. 757, is further amended by deleting therefrom the first paragraph and inserting in lieu of said first paragraph the following: "In general, appeals will be calendared for hearing in the order in which they are docketed, subject to the power of the Court to vary the order to give priority to criminal appeals, or for any other cause deemed appropriate. Except as advanced for peremptory setting on motion of a party or of the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. Except where a shorter time is provided by the court in conjunction with the peremptory setting of an appeal for hearing, the clerk of the Court of Appeals will give not less than 20 days' notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar."

Rule 12, "Brief Regarded as Personal Appearance", 1 N. C. App. 638, is amended by deleting therefrom the following words appearing in the second line "on the regular call of the docket".

Rule 17, "Appeal Dismissed for Failure to Docket in Time", 1 N. C. App. 639, as amended effective 1 January 1974, 19 N. C. App. 761, is further amended by deleting therefrom the following words beginning in line two "before the call of cases from the district to which the case belongs, by failure to comply with" and inserting in lieu thereof the following: "within the time provided by".

Rule 28, "Appellant's Brief", 1 N. C. App. 647, as amended effective 1 July 1973, 15 N. C. App. 757, is further amended by deleting therefrom the following words beginning in the fifth line of the second paragraph "by 12:00 o'clock noon on the fourth Tuesday preceding the call of the district to which the case belongs" and inserting in lieu thereof the following: "within 20 days after the appeal is docketed". The said rule is further amended by deleting therefrom the following words beginning on the next to the last line and reading as follows: "when the call of that district is begun,".

Rule 29, "Appellee's Brief", 1 N. C. App. 647, is amended by deleting therefrom the following words beginning in the second line reading as follows: "by noon of the second Tuesday preceding the call of the district to which the case belongs" and by inserting in lieu thereof the following: "within twenty (20) days after appellant's brief has been mailed or delivered to appellee,".

The foregoing amendments shall become effective on the 24th day of July, 1974.

Adopted by the Supreme Court of North Carolina in Conference on this 1st day of July, 1974.

MOORE, J.

For the Court

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

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APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Purported appeal from an interlocutory order is dismissed as premature. *Assurance Co. v. Ingram,* 591.

Appeal from a preliminary injunction requiring defendant to refrain from obstructing plaintiffs' easement to cross defendant's property is dismissed as premature. *Setzer v. Annas,* 632.

§ 26. Exceptions to Judgment

An exception to the signing of the judgment presents the face of the record proper for review, but it cannot present the question of the sufficiency of the evidence to sustain the verdict. *Hawkins v. Hawkins,* 536.

§ 39. Time for Docketing

Appeal is dismissed for failure to docket the record on appeal within 90 days from the date of the order appealed from. *Bill v. Hughes,* 152.

§ 41. Form and Requisites of Transcript

Defendant's record on appeal which did not list proceedings in the order in which they occurred did not comply with Rule 19 of the Court of Appeals Rules. *Rickenbaker v. Rickenbaker,* 276; *Kamp v. Brookshire,* 280; *Bowman v. Town of Granite Falls,* 333.

§ 45. Failure to Discuss Assignments of Error in Brief

Where defendant made no reference in her brief to an assignment of error stated in the record on appeal, the assignment is deemed abandoned. *Hawkins v. Hawkins,* 536.

APPEARANCE

§ 2. Effect of Appearance

Defendant made a general appearance by obtaining extensions of time in which to plead, thereby giving the court jurisdiction over his person. *Kohler v. Kohler,* 339.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

Defendants had no standing to challenge probable cause for their warrantless arrest where they were escapees from the State's prison system. *S. v. White,* 173.

Plaintiff's allegation that he was not taken before a magistrate after his warrantless arrest prior to the issuance of warrants by the magistrate does not state a claim for relief against the magistrate. *Foust v. Hughes,* 268.

§ 6. Resisting Arrest

Trial court should have granted defendant's motion for nonsuit in a prosecution for resisting arrest since the arrest warrant was invalid. *S. v. Carroll,* 530.

ARSON

§ 4. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for attempt to commit arson. *S. v. Arnold,* 92.

ASSAULT AND BATTERY

§ 13. Competency of Evidence

Evidence of prior threats was properly excluded in this assault case where there was no evidence that threats allegedly made to defendant were made by defendant's victim. *S. v. Butler*, 679.

Prosecutrix in a prosecution for assault with intent to kill could properly testify that she heard gunshots and saw a flash of a gun or what appeared to be a gun. *S. v. Sasser*, 618.

§ 14. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for assault on a police officer. *S. v. Clark*, 35.

§ 15. Instructions

In a prosecution for wilfully discharging a firearm into an occupied dwelling, trial court erred in instructing the jury that in order to find defendant guilty the jury must find "that the defendant acted wilfully or wantonly which means that he must have known that one or more persons were in the dwelling." *S. v. Williams*, 525.

Trial court in a prosecution for assault with a deadly weapon with intent to kill erred in failing to define assault and in failing to instruct on self-defense. *S. v. Hickman*, 421.

Trial court did not err in failing to define the term "aggressor" in charging on self-defense or in failing to charge on communicated threats. *S. v. Butler*, 679.

§ 16. Lesser Degrees of Offense

Defendant in felonious assault case was not entitled to an instruction on a lesser included offense. *S. v. Brown*, 552; *S. v. Harmon*, 508.

In a prosecution for assault with a deadly weapon with intent to kill where all of the evidence showed serious injury, it was not error for the trial court to fail to submit to the jury any lesser included offense which did not contain serious injury as an element. *S. v. Turner*, 608.

§ 17. Verdict and Punishment

Sentence in excess of 30 days for simple assault was erroneous. *S. v. Watson*, 374.

Verdicts of not guilty of assault with a deadly weapon and guilty of assault with a firearm were not inconsistent. *S. v. Sasser*, 618.

Conviction of defendant in superior court of assault by pointing a gun is vacated where defendant's appeal to superior court was from conviction in district court of assaulting a public officer. *S. v. Caldwell*, 723.

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

Award of attorney fee in a condemnation proceeding is reversed and the cause is remanded for the allowance of a reasonable attorney fee. *Redevelopment Comm. v. Coxco, Inc.*, 335.

AUTOMOBILES

§ 2. **Suspension or Revocation of Drivers' Licenses**

Statute dealing with habitual offenders of the motor vehicles laws is constitutional. *In re Newsome,* 345.

§ 3. **Driving After Revocation**

Jury verdict finding defendant guilty of driving "after" his license was revoked rather than "while" his license was revoked was defective. *S. v. McDonald,* 136.

§ 46. **Opinion Testimony as to Speed**

Witness had sufficient opportunity to observe defendant's car to permit her to give an opinion as to the speed where she observed the car immediately after the collision as it braked down over a distance of 50 to 60 feet. *Herring v. Scott,* 78.

§ 50. **Sufficiency of Evidence on Issue of Negligence**

Plaintiff's evidence was insufficient to permit the jury to find that the collision between plaintiff's motorcycle and defendants' car was caused by negligence on the part of defendants. *Thompson v. Boles,* 97.

§ 53. **Failing to Stay on Right Side of Highway**

Plaintiffs' evidence that defendants' truck was traveling on the wrong side of the highway at the time of the collision presented a case for the jury. *Arnold v. Distributors,* 579.

§ 55. **Driving Without Lights**

Trial court erred in granting summary judgment for defendant where plaintiff's evidence tended to show that defendant was driving without lights on. *Hardison v. Williams,* 670.

§ 61. **Backing**

Plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence in backing into plaintiff's car while attempting to leave a parking space. *Hinson v. Sparrow,* 554.

§ 62. **Striking Pedestrian**

Plaintiff's evidence was sufficient to support a jury finding that defendant was negligent in failing to keep a proper lookout when he struck plaintiff who was standing at the edge of the road. *Herring v. Scott,* 78.

§ 63. **Striking Children**

Plaintiff's evidence was insufficient for the jury on the issue of defendant's negligence in striking a 6-year-old child who suddenly darted into the road. *Burns v. Turner,* 61.

§ 75. **Contributory Negligence in Stopping or Parking**

Plaintiff's evidence did not show that his employee was contributorily negligent as a matter of law in stopping his vehicle partly on and partly off the road for the purpose of helping a disabled vehicle. *Kornegay v. Oxendine,* 501.

§ 76. **Contributory Negligence in Hitting Stopped or Parked Vehicle**

Defendant's evidence did not show that he was contributorily negligent as a matter of law in striking plaintiff's vehicle which was parked partly on and partly off the highway. *Kornegay v. Oxendine,* 501.

AUTOMOBILES — Continued

§ 89. Last Clear Chance

Trial court did not err in submission of an issue as to last clear chance in a case in which contributory negligence had not been admitted by plaintiff. *Herring v. Scott*, 78.

§ 90. Instructions in Accident Cases

Trial court's application of the law to the facts was insufficient. *Chipps v. Rackley*, 448.

Trial court erred in failing to apply the law as to vehicles meeting on the highway to defendants' evidence that their truck was traveling in the proper lane and that plaintiffs' truck was across the center line. *Arnold v. Distributors*, 579.

§ 94. Contributory Negligence of Passenger

In a passenger's action against the driver, trial court erred in failing to instruct the jury that plaintiff contended and offered evidence that she did not know defendant was intoxicated at the time she rode with him. *Walser v. Coley*, 654.

§ 103. Pleading in Action to Recover Under Respondeat Superior

Complaint alleging that negligent acts and omissions of defendant driver were "imputed to" defendant owner was sufficient to support submission of an issue as to the driver's agency for the owner. *Nolan v. Boulware*, 347.

§ 105. Sufficiency of Evidence on Issue of Respondeat Superior

Evidence was sufficient to support a jury finding that defendant driver was operating a car as the agent of defendant owner for the purpose of having repairs made to the car. *Nolan v. Boulware*, 347.

§ 117. Prosecutions for Speeding

Trial court properly denied defendant's motion for nonsuit on a charge of driving 60 mph in a 45 mph zone. *S. v. McDonald*, 136.

In a speeding and reckless driving case, trial court erred in failing to instruct the jury that if defendant did not know and had been given no recognizable information that the pursuing car was a law enforcement car, he had the right to attempt to evade his pursuer when he had reasonable grounds to fear for his safety. *S. v. Borland*, 559.

§ 119. Prosecution for Reckless Driving

Superior court had no jurisdiction to accept a plea of guilty of reckless driving when defendant was before the court on appeal from conviction in the district court for drunken driving. *S. v. Craig*, 51.

§ 129. Instructions in Prosecution for Driving Under the Influence

Trial court was not required to instruct the jury they must find the breathalyzer test given defendant was administered in accordance with State Board of Health regulations in order to find defendant guilty of drunken driving. *S. v. Jenkins*, 541.

BILLS AND NOTES

§ 22. Prosecutions for Issuing Worthless Checks

Where none of the seven warrants charging defendant with issuing and delivering worthless checks charged that the offense was a fourth or subsequent offense, and where the court consolidated the cases for the purpose of judgment, it was error for the court to impose punishment greater than that permitted for an individual case. *S. v. Williams*, 70.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for breaking and entering a restaurant and larceny of money therefrom. *S. v. Murray*, 573.

§ 6. Instructions

Trial court in a prosecution for breaking and entering with intent to commit larceny erred in failing to define larceny in its jury instructions. *S. v. Elliott*, 555.

Defendant was not prejudiced by the court's reference to intent to commit robbery rather than intent to commit larceny. *S. v. Wood*, 547.

COLLEGES AND UNIVERSITIES

In an action by a community college student to recover for injuries sustained while operating a metal shearing machine during a welding class, evidence was insufficient to disclose negligence on the part of the instructor and disclosed that plaintiff was contributorily negligent. *Kiser v. Snyder*, 708.

CONSPIRACY

§ 7. Instructions

Trial court's instruction did not suggest that defendant could be guilty of conspiracy even if he made no agreement with anyone. *S. v. Richards*, 686.

CONSTITUTIONAL LAW

§ 7. Delegation of Powers by General Assembly

The Controlled Substances Act which permits the N. C. Commission of Health Services to reschedule controlled substances is not an unconstitutional delegation of legislative authority. *S. v. Lisk*, 474.

§ 12. Regulation of Trades and Professions

The statute authorizing the Board of Pharmacy to adopt a code of professional conduct constitutes an unlawful delegation of legislative power without sufficient standards and guidelines, and a section of the code adopted by the Board which prohibited advertising of prescription drugs is invalid. *Drug Centers v. Board of Pharmacy*, 156.

Fayetteville massage parlor ordinance, as construed by the court, meets requirements of due process. *Smith v. Keator*, 102.

CONSTITUTIONAL LAW — Continued

Provision of massage parlor ordinance making it unlawful for persons licensed under the ordinance to treat a person of the opposite sex does not discriminate against women in violation of the equal protection clause. *Ibid.*

§ 18. Rights of Free Speech and Assemblage

A proclamation declaring a state of emergency and forbidding the use of public parks between certain hours did not abridge defendants' rights to freedom of speech and assembly. *S. v. Allred,* 229.

§ 20. Equal Protection, Application of Laws and Discrimination

Proclamation declaring a state of emergency to exist within the county was uniformly enforced. *S. v. Allred,* 229.

The Relocation Assistance Act did not unconstitutionally discriminate against plaintiffs. *Quick v. City of Charlotte,* 401.

§ 21. Right to Security in Person and Property

Taxes do not constitute a debt within the meaning of the Constitutional prohibition against imprisonment for debt. *S. v. Locklear,* 48.

§ 28. Necessity for Indictment

Superior Court had no jurisdiction to accept a plea of guilty of reckless driving when defendant was before the court on appeal from conviction in the district court for drunken driving. *S. v. Craig,* 51.

§ 30. Due Process in Trial

Defendant was not denied his right to a speedy trial by the lapse of three months between the offense and trial. *S. v. Arnold,* 92.

Where the trial judge ordered that defendant's trial be instituted within 60 days or that defendant be released from custody, the court properly refused to grant defendant's motion to dismiss made after the case was calendared for trial on the 59th day, a Friday, and continued until Monday. *S. v. Wilburn,* 140.

G.S. 15-10 providing for release of defendant from custody should be applied in deserving situations when defendant cannot make bail. *Ibid.*

Defendant was not denied his right to a speedy trial where seven months elapsed between arrest and trial, *S. v. Horne,* 197; ten months, *S. v. Wilburn,* 140.

Defendants were not denied their right to a speedy trial on assault charges by delay between arrest in 1972 and trial in 1973. *S. v. Watson,* 374; *S. v. Setzer,* 511.

§ 31. Right of Confrontation and Access to Evidence

Defendant was not prejudiced by admission of testimony and photograph where he had access to the testimony prior to trial. *S. v. Sommerset,* 272.

Trial court did not err in failing to require disclosure of identity of the State's confidential informant. *S. v. Lisk,* 474.

§ 32. Right to Counsel

Defendant was not prejudiced by the court's appointment of counsel to advise defendant if so requested after defendant waived his right to counsel. *S. v. Harper,* 30.

CONSTITUTIONAL LAW — Continued

The trial judge was not required to act as defense counsel for defendant who appeared pro se. *State v. Lashley*, 83.

Trial court in a common law robbery case erred in concluding that defendant was not indigent and in denying him an attorney at his trial. *S. v. Lee*, 337.

Where defendant executed written waiver of counsel prior to his trial in district court, it was not necessary for defendant to execute another written waiver of counsel upon his appeal to superior court. *S. v. Watson*, 374.

§ 34. Double Jeopardy

Where defendant's conviction for attempted armed robbery of an insurance agency's employee was set aside because defendant had made a demand for money upon another employee of the agency, defendant was not subjected to double jeopardy when he was placed on trial for attempted armed robbery of the insurance agency employee from whom he had demanded money. *S. v. Hinton*, 42.

Defendant was not placed in double jeopardy when he was convicted of conspiracy to commit robbery and of being an accessory before the fact to the same robbery. *S. v. Wiggins*, 441.

§ 37. Waiver of Constitutional Guaranties

Evidence was sufficient to support the trial court's findings that defendant knowingly and intentionally waived his rights. *S. v. Lisk*, 474.

CONTEMPT OF COURT

§ 4. Summary Proceedings

Order entered by the trial court summarily holding an attorney in contempt for leaving the presence of the court without permission was void ab initio. *In re West*, 302.

§ 6. Hearings on Orders to Show Cause, Findings and Judgment

Trial court properly committed defendant for failure to comply with a child support order though defendant was unemployed at the time of the hearing. *Bennett v. Bennett*, 390.

§ 8. Appeal and Review

There is no right of appeal from an order of direct contempt. *In re West*, 302.

CONTRACTS

§ 4. Consideration

Defendant's oral promise to bid in plaintiffs' property at a foreclosure sale, satisfy the note and deed of trust on the property and deed the property to plaintiffs was supported by consideration. *Britt v. Allen*, 497.

§ 21. Performance and Breach

Subcontract clause requiring subcontractor to use labor acceptable to the contractor "and of a standing or affiliation that will permit the work to be carried on harmoniously and without delay" may not be enforced

CONTRACTS — Continued

against the subcontractor on the ground that the subcontractor's employees are not union members because such enforcement would violate the Right to Work law. *Poole & Kent Corp. v. Thurston & Sons,* 1.

§ 26. Competency and Relevancy of Evidence

In an action for breach of an alleged oral agreement by defendant to bid in plaintiffs' property at a foreclosure sale, trial court erred in refusing to permit one plaintiff to testify as to her conversation with defendant and the alleged verbal agreement. *Britt v. Allen,* 497.

§ 27. Sufficiency of Evidence

Evidence supported trial court's determination that defendant was entitled to recover $7655 from plaintiffs for work completed on a house and that plaintiffs were entitled to recover liquidated damages of $1530 for work not adequately completed by defendant. *Mauldin v. Ballou,* 94.

Differing contentions of the parties as to terms of an agreement for partial payment of an amount owed for bulldozer work on defendant's property presented a valid issue for jury determination. *Scott v. Smith,* 520.

§ 31. Interference With Contractual Rights by Third Persons

While a competitor of plaintiff cannot induce an employee to breach his contract with plaintiff, a competitor may induce an employee not to enter or renew a contract with plaintiff. *Moye v. Eure,* 261.

§ 32. Action for Wrongful Interference

Preliminary injunction prohibiting defendant, a former employee of plaintiff, from contacting independent sales contractors allegedly employed by plaintiff to persuade them to associate themselves with defendant in a business in competition with plaintiff cannot be sustained on theory of interference with contract. *Moye v. Eure,* 261.

CORPORATIONS

§ 13. Liabilities of Officers to Third Person for Fraud

Plaintiff's evidence was insufficient for the jury in an action against the president of a corporation based on an alleged fraud in the issuance of checks on behalf of the corporation which failed to clear the bank due to insufficient funds. *Austin v. Tire Treads, Inc.,* 737.

§ 18. Sale and Transfer of Stock

Trial court properly concluded that the parties to a stock purchase agreement intended that the surviving shareholder be allowed to purchase deceased shareholder's stock at so much per share. *Meyers v. Bank,* 202.

§ 23. Deeds and Conveyances

A deed signed by the corporation's president but not attested by its secretary was not valid, and the cause was remanded for determination as to whether the corporation ratified the deed or is estopped to deny its validity. *Realty, Inc. v. McLamb,* 482.

COSTS

§ 4. Items of Cost and Amount of Allowance

Award of attorney fee in a condemnation proceeding is reversed and the cause is remanded for the allowance of a reasonable attorney fee. *Redevelopment Comm. v. Coxco, Inc.,* 335.

COUNTIES

§ 5.5. County Subdivision Regulation

Conveyances made for the purpose of dividing land among heirs did not violate a county subdivision ordinance. *Williamson v. Avant*, 211.

COURTS

§ 2. Jurisdiction of Courts in General

Trial court had jurisdiction to enter orders in an action for child custody and support, although defendant was not represented by counsel and did not appear at the hearings, where defendant was served with process and the case was properly calendared for hearing. *Thompson v. Thompson*, 215.

Trial court properly denied defendant's motion to dismiss for lack of jurisdiction over the plaintiff in that plaintiff was not domiciled in N. C. since the uncontested testimony was that she was a resident of Durham. *Kohler v. Kohler*, 339.

§ 21. What Law Governs; as Between This State and Other States

Virginia law governed in an action resulting from an automobile collision in Virginia. *Kornegay v. Oxendine*, 501.

CRIME AGAINST NATURE

§ 2. Prosecutions

Jury instruction detailing the biblical story of Sodom and Gomorrah was not prejudicial to defendant. *S. v. Gray*, 63.

CRIMINAL LAW

§ 7. Entrapment and Compulsion

Instruction on entrapment was not required. *S. v. Rigsbee*, 188.

In a speeding and reckless driving case, trial court erred in failing to instruct the jury that if defendant did not know and had been given no recognizable information that the pursuing car was a law enforcement car, he had the right to attempt to evade his pursuer when he had reasonable grounds to fear for his safety. *S. v. Borland*, 559.

In a prosecution for sale of marijuana, trial court was not required to charge on entrapment where the evidence showed the buyer acted on his own initiative in purchasing the marijuana and delivering a portion to an SBI agent. *S. v. Harris*, 697.

§ 11. Accessories After the Fact

Trial court had no jurisdiction to try defendant on a charge of accessory after the fact of armed robbery where the indictment charged him with armed robbery. *S. v. Brown*, 87.

§ 18. Jurisdiction of Superior Court

Superior court had no jurisdiction to accept a plea of guilty of reckless driving when defendant was before the court on appeal from conviction in the district court for drunken driving. *S. v. Craig*, 51.

CRIMINAL LAW — Continued

Conviction of defendant in superior court of assault by pointing a gun is vacated where defendant's appeal to superior court was from conviction in district court of assaulting a public officer. *S. v. Caldwell*, 723.

§ 26. Plea of Double Jeopardy

Where defendant's conviction for attempted armed robbery of an insurance agency's employee was set aside because defendant had made a demand for money from another employee of the agency, defendant was not subjected to double jeopardy when he was placed on trial for attempted armed robbery of the insurance agency employee from whom he had demanded money. *S. v. Hinton*, 42.

A defendant may be prosecuted for both possession and distribution of a controlled substance without violating the constitutional prohibition against double jeopardy. *S. v. Patterson*, 443; and for both armed robbery and felonious assault. *S. v. Wheeler*, 514.

§ 31. Judicial Notice

Trial court could take notice that Desoxyn and methamphetamine were the same substance, and there was no variance between the indictment which charged possession of Desoxyn and proof that defendant possessed methamphetamine. *S. v. Newton*, 384.

§ 34. Evidence of Defendant's Guilt of Other Offenses

In a prosecution for murder of defendant's 2½ year old child by beating and kicking her, testimony by defendant's wife as to defendant's mistreatment of his children on prior occasions was competent to show quo animo. *S. v. Artis*, 73.

Evidence of Sears merchandise found in defendant's vehicle was admissible in a prosecution for felonious larceny and felonious receiving of merchandise from Belks. *S. v. Lash*, 365.

The trial judge in an armed robbery prosecution did not err in instructing as to prior offenses committed by defendant. *S. v. Smyles*, 533.

District attorney's question to defendant as to the type of sentence defendant received for a prior offense was proper. *S. v. Turner*, 608.

§ 38. Evidence of Like Facts and Transactions

Testimony by a firearms expert as to his study of the gun used in the crime for defects was not testimony as to an experiment to determine if defendant's version of the killing could have occurred. *S. v. Laney*, 490.

§ 40. Evidence at Former Trial

Trial court properly allowed into evidence transcript of a witness at a former trial. *S. v. Honeycutt*, 342.

§ 42. Articles and Clothing Connected With the Crime

Trial court did not err in admitting a white Panama hat worn by defendant during the attempted robbery. *S. v. Blackburn*, 517.

State's showing of the chain of possession of spent cartridges, bullets removed from deceased, and an envelope containing bullets and a pistol was sufficient to permit admission of such exhibits. *S. v. Feimster*, 602.

Fact that a medical witness stated only that bullets presented at trial were "similar" to those he removed from deceased did not render the bullets inadmissible. *Ibid.*

CRIMINAL LAW — Continued

§ 43. Photographs

Defendant was not prejudiced by admission of testimony and photograph where he had access to the testimony prior to trial. *S. v. Sommerset,* 272.

§ 45. Experimental Evidence

Trial court properly allowed an SBI agent to testify as to an experiment conducted to determine the distance decedent's cab had been driven. *S. v. Feimster,* 602.

§ 50. Opinion Testimony

An officer's opinion that material seized from defendant's premises was marijuana was competent in defendant's trial for possession of marijuana with intent to distribute. *S. v. Lisk,* 474.

§ 57. Evidence in Regard to Firearms

Testimony by a firearms expert as to his study of the gun used in the crime for defects was not testimony as to an experiment to determine if defendant's version of the killing could have occurred. *S. v. Laney,* 490.

§ 66. Evidence of Identity by Sight

In-court identification of defendant was properly allowed in a robbery case. *S. v. Alexander,* 91.

Failure of the trial court to conduct a voir dire did not render an in-court identification of defendant prejudicial. *S. v. Smith,* 426.

Trial court properly allowed an in-court identification of defendant based on a witness's observations of defendant at the crime scene. *S. v. Harmon,* 508.

Pretrial photographic procedures were not unduly suggestive, and in-court identification of defendant was properly admitted. *S. v. Murray,* 573.

§ 73. Hearsay Testimony

Statement made by the owner of a grill to an officer that defendant had stolen money from the cash register while she was in the back of the grill for three or four minutes was not a spontaneous utterance admissible as substantive evidence. *S. v. Murray,* 573.

§ 75. Test of Voluntariness of Confession

Evidence supported the trial court's findings that defendant voluntarily and understandingly waived his rights after being given Miranda warnings. *S. v. Howard,* 75.

§ 77. Admissions and Declarations

Incriminating statement made by defendant before he was taken into custody was admissible in a second degree murder case. *S. v. Howard,* 75.

Defendant's "confidential statement" to an officer was properly admitted by the trial court in a murder case. *S. v. Young,* 369.

Statement by defendant to the victim of an armed robbery was admissible. *S. v. Smyles,* 533.

CRIMINAL LAW — Continued

§ 80. Books, Records and Private Writings

Authentication testimony was sufficient to permit admission of business records of an apartment complex. *S. v. Carr*, 470.

§ 83. Competency of Husband or Wife to Testify For or Against Spouse

Trial court properly permitted defendant's wife to testify against defendant as to an assault on her. *S. v. Watson*, 374.

Trial court erred in permitting the State to introduce evidence that defendant's wife, who did not testify, had pled guilty to the breaking and entering for which defendant was on trial. *S. v. Byrd*, 734.

§ 84. Evidence Obtained by Unlawful Means

Evidence seized pursuant to a search warrant was not inadmissible by reason of the State's failure to introduce in evidence the affidavit to obtain the warrant. *S. v. Cobb*, 66.

Items seized from defendant when he was apprehended while running from the crime scene were properly admitted in an armed robbery case. *S. v. Alexander*, 91.

Trial court properly admitted evidence seized in search of defendant's apartment, though the court failed to make specific findings on voir dire. *S. v. White*, 173.

Trial court properly allowed into evidence currency discovered by officers in plain view in defendant's apartment. *S. v. Rigsbee*, 188.

Items seized without a warrant from one defendant's home were admissible where the officer entered the home to execute a valid arrest warrant and found the items in plain view. *S. v. Carr*, 470.

Trial court erred in failing to make findings of fact and conclusions of law on voir dire to determine admissibility of items seized in defendant's car. *S. v. Brannon*, 464.

Trial court was not required to hold a voir dire and make findings of fact before allowing into evidence bags of marijuana seized pursuant to a search warrant. *S. v. Mahler*, 505.

In conducting a voir dire to determine the legality of a search, the trial court did not err in accepting evidence as to information presented to the magistrate and not included in the affidavit. *S. v. Akel*, 415.

§ 86. Credibility of Defendant

The solicitor properly asked defendant on cross-examination about specific prior convictions and whether he had been convicted of anything else. *S. v. Murray*, 573.

In a prosecution for possession of opium, trial court did not err in allowing defendant to be cross-examined with reference to a marijuana offense. *S. v. Akel*, 415.

§ 87. Direct Examination of Witness

Trial court did not err in allowing leading questions and disallowing others. *S. v. Blackburn*, 517.

§ 88. Cross-examination

Trial court properly refused to permit cross-examination of the witness about a civil action against another witness. *S. v. Patterson*, 443.

CRIMINAL LAW — Continued

Defendant was not prejudiced by the exclusion of questions asked an officer on cross-examination as to a description of defendant given by the victim where another officer had testified about such description. *S. v. Murray*, 573.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

Where transcript of witness at former trial was read into evidence, the court erred in refusing to allow defendant to testify about an earlier altercation he had had with the witness to show bias. *S. v. Honeycutt*, 342.

A prior inconsistent statement of a witness was admissible for impeachment purposes only. *S. v. Brannon*, 464.

A witness may be examined for impeachment purposes as to whether he has committed named criminal offenses and acts of degrading conduct for which he has not been convicted. *S. v. Wallace*, 523.

Question to a State's witness as to whether he had called his wife and told her that defendant had killed his wife and "I'm going to kill you" was not admissible to show bias on the part of the witness by showing he had an intimate friendship with deceased. *S. v. Laney*, 490.

Trial court properly allowed an SBI agent to read statements given by two State's witnesses for the purpose of corroborating their testimony. *S. v. Feimster*, 602.

§ 90. Rule That Party Bound by and May Not Discredit Own Witness

Trial judge did not abuse his discretion in declaring a State's witness hostile and in permitting the solicitor to cross-examine him. *S. v. Little*, 428.

§ 91. Time of Trial and Continuance

Trial court in robbery case did not abuse its discretion in denial of defendants' motions made during trial that the proceedings be delayed in order for defendants to obtain certain evidence. *S. v. Friday*, 154.

Where the trial judge ordered that defendant's trial be instituted within 60 days or that defendant be released from custody, the court properly refused to grant defendant's motion to dismiss made after the case was calendared for trial on the 59th day, a Friday, and continued until Monday. *S. v. Wilburn*, 140.

Trial court properly denied defendant's motion for continuance based on the unavailability of witnesses. *S. v. McMillian*, 222; *S. v. Horne*, 197; *S. v. Rigsbee*, 188.

Trial court did not err in denial of defendant's motion for continuance so defendant could attempt to locate two unnamed persons who an SBI agent testified were with defendant when the agent purchased LSD from defendant. *S. v. Martin*, 645.

§ 92. Consolidation of Counts

Trial court properly consolidated for trial homicide cases against two defendants. *S. v. Feimster*, 602.

§ 95. Admission of Evidence Competent for Restricted Purpose

Trial court properly refused to instruct the jury to consider items of evidence seized from one defendant's house against that defendant only. *S. v. Carr*, 470.

CRIMINAL LAW — Continued

Trial court properly refused to restrict to codefendant testimony of a witness's conversation with the codefendant regarding a pistol. *S. v. Feimster*, 602.

Admission of telephone statements made by a nontestifying codefendant which referred to defendants was not prejudicial. *S. v. Richards*, 686.

§ 97. Introduction of Additional Evidence

Trial court properly excluded the testimony of a witness who appeared in the courtroom after the jury had begun deliberations. *S. v. Turner*, 608.

§ 98. Presence of Defendant; Custody of Defendant or Witnesses

Trial court did not err in denial of defendant's motion to sequester witnesses. *S. v. Jones*, 666.

Defendants are not prejudiced though they were absent from hearings on motions where their counsel was present. *S. v. Richards*, 686.

Trial court did not err in denial of defendants' motions to sequester prosecuting witnesses in trial of two robbery charges. *S. v. Friday*, 154.

§ 99. Conduct of Court and Expression of Opinion

Comments by the trial judge, while disapproved, were not prejudicial. *S. v. Harper*, 30.

Questioning of defendant by the trial court for the purpose of clarifying defendant's testimony was proper. *S. v. Smyles*, 533.

§ 102. Argument of Counsel

Defendant is granted a new trial where the court improperly limited the length of his jury argument. *S. v. Feldstein*, 446.

§ 109. Directed Verdict and Peremptory Instructions

Trial court's instruction that the jury should return a verdict of guilty if it found the evidence to be true beyond a reasonable doubt was proper. *S. v. Allred*, 229.

§ 111. Form and Sufficiency of Instructions in General

Errors made in punctuation of the trial court's instructions when they were transcribed did not prejudice defendant. *S. v. Turner*, 608.

§ 112. Instructions on Burden of Proof and Presumptions

Definition of the term reasonable doubt as possibility of innocence did not prejudice defendant. *S. v. West*, 58.

Trial court did not err in failing to define reasonable doubt, *S. v. Murray*, 573; or in failing to charge that a reasonable doubt may be based on a lack of evidence. *S. v. Butler*, 679.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court's instruction in a prosecution for the discharge of a firearm into an occupied dwelling was sufficient. *S. v. Hatch*, 148.

Trial court erred in instructing the jury with respect to the arresting officer's voir dire testimony. *S. v. Turner*, 151.

Trial court was not required to charge on definition of "confession." *S. v. Jones*, 666.

Trial court's charge on alibi was proper. *S. v. Richards*, 686.

CRIMINAL LAW — Continued

§ 114. Expression of Opinion by Court on Evidence in Charge

Trial court's reference in its jury instructions to the man defendant allegedly robbed and kidnapped as "the victim" was not prejudicial. *S. v. Sommerset*, 272.

Trial court's statement to the jury that "we are trying" defendant under a certain bill of indictment did not imply to the jury that the trial judge was part of the prosecution. *S. v. Wallace*, 523.

Trial judge did not express an opinion that evidence showed defendant admitted the robbery in question when he charged the jury that a deputy sheriff testified he wasn't present "when defendant admitted the robbery." *S. v. Jones*, 666.

Trial court did not express an opinion on the evidence in characterizing additional instructions requested by defendant as "contentions" rather than "evidence." *S. v. Harris*, 697.

§ 116. Charge on Failure of Defendant to Testify

Instruction was not required on right of defendant not to testify where the court erroneously instructed the jury that defendant had testified in his own behalf but the court corrected the inadvertence. *S. v. West*, 58.

§ 117. Charge on Character Evidence and Credibility of Witness

Trial court did not err in failing to instruct the jury that they should scrutinize and look carefully into the testimony of a witness who was an accessory after the fact. *S. v. Huffman*, 331.

Trial court did not err in failing to charge the jury to scrutinize testimony of an accomplice where defendant made no request for such instruction. *S. v. King*, 549; *S. v. Jones*, 666.

§ 118. Charge on Contentions of the Parties

Trial court erred in failing to instruct on self-defense. *S. v. Hickman*, 421.

§ 119. Request for Instructions

Trial court did not err in denying the jury's request for further instructions. *S. v. Hatch*, 148.

Trial court properly refused defendant's request for an instruction to the jury to "scrutinize and look carefully into the testimony" of a witness who was an accessory after the fact to the crime charged. *S. v. Huffman*, 331.

§ 122. Additional Instructions After Initial Retirement of Jury

Additional instructions given the jury before they resumed deliberations following a recess were not coercive. *S. v. West*, 58.

Trial court's instructions to the jury to engage in further deliberations were proper. *S. v. Strickland*, 545; *S. v. Perry*, 478.

§ 128. Mistrial

Trial court did not err in failing to declare a mistrial because of remarks of the solicitor in his jury argument. *S. v. Harris*, 550.

Trial court in a homicide case did not err in denial of defendant's motion for mistrial based on a newspaper article stating that a warrant had been issued charging defendant with another crime. *S. v. Feimster*, 602.

CRIMINAL LAW — Continued

§ 131. New Trial for Newly Discovered Evidence

Trial court properly denied defendant's motion for a new trial on the ground of newly discovered evidence where such evidence consisted of affidavits of a co-defendant and an accessory after the fact. *S. v. Grant*, 431.

Trial court properly denied defendant's motion for a new trial based on newly discovered evidence where that evidence would tend merely to contradict the testimony of a witness at defendant's trial. *S. v. Shelton*, 662.

§ 138. Severity of Sentence and Determination Thereof

Where charges set forth in separate warrants or bills of indictment are consolidated for the purpose of judgment, punishment may not exceed that permitted on a single charge. *S. v. Williams*, 70.

Defendant was not punished for exercising his right to plead not guilty when he received a more severe sentence than sentences received by two accomplices who pled guilty and testified against defendant. *S. v. Jones*, 666.

§ 145.1 Probation

Defendant in a probation revocation proceeding has the burden of showing his inability to make payments as required by the terms of his probation; otherwise evidence establishing that defendant has failed to make payments may justify a finding that defendant's failure to comply was wilful or without lawful excuse. *S. v. Young*, 316.

Order revoking defendant's probation is vacated where defendant offered evidence tending to show that he was unavoidably without the means to make payments as required by his probationary judgment, but the record does not show that the trial judge considered the evidence. *Ibid.*

Trial court erred in revoking defendant's probation for changing her place of residence without permission where the evidence of such violation was hearsay. *S. v. Pratt*, 538.

Superior court is not required to review the record of defendant's original trial upon appeal from district court for de novo hearing on the revocation of defendant's probation. *S. v. Cordon*, 394.

§ 148. Judgments Appealable

Appeal does not lie from a refusal to grant a new trial for newly discovered evidence. *S. v. Shelton*, 662.

§ 154. Case on Appeal

Superior court was without authority to order a new trial for defendant for the reason that a transcript of his trial was unavailable because the court reporter died before transcribing her record of the trial. *S. v. Neely*, 439.

§ 158. Conclusiveness of Record and Presumptions as to Matters Omitted

The Court of Appeals cannot review the trial court's conclusion that a warrant to search defendant's premises was valid where the warrant and supporting affidavit are not in the record on appeal. *S. v. Lisk*, 474.

§ 161. Requisites of Exceptions

Defendant's appeal was an exception to the judgment and presented the face of the record for review. *S. v. Lowe*, 98.

CRIMINAL LAW — Continued

An exception to the judgment presents the face of the record proper for review. *S. v. Lucas,* 343.

§ 166. The Brief

Exception is deemed abandoned where appellant merely restated the question involved and stated that "the evidence presented does not sustain such a ruling." *S. v. Harris,* 550.

§ 169. Harmless and Prejudicial Error in Exclusion of Evidence

Defendant was not prejudiced by the exclusion of a witness's answer where the record failed to show what the answer would have been. *S. v. Turner,* 608; *S. v. Sasser,* 618.

DAMAGES

§ 4. Damages for Injury to Personal Property

The measure of damages for loss of use of a business vehicle is the cost of renting a similar vehicle during a reasonable period for repairs. *Little v. Rose,* 596.

§ 6. Special Damages

Evidence in an action to recover for loss of use of plaintiff's truck did not disclose as a matter of law that plaintiff failed to act reasonably to minimize his damages although it took six months to have the truck repaired. *Timber Management Co. v. Bell,* 143.

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages

In an action to recover for damages to merchandise in plaintiffs' store, trial court erred in allowing testimony of damages based on retail selling prices of the merchandise. *Kaplan v. City of Winston-Salem,* 168.

In an action for damages to plaintiff's boat, trial court properly refused to allow defendant to cross-examine plaintiff as to the purchase price of the boat which plaintiff purchased by sealed bid at a government surplus sale 14 months before defendants damaged it. *Heath v. Mosley,* 245.

In an action to recover damages for loss of use of a crane, trial court properly allowed evidence as to cost incurred by plaintiff in renting other cranes. *Little v. Rose,* 596.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

No justiciable controversy was presented in an action for declaratory judgment as to the validity of a contract entered between a city and the N. C. Consumers Power, Inc. *Consumers Power v. Power Co.,* 237.

DIVORCE AND ALIMONY

§ 4. Condonation

Trial court was not required to instruct on condonation since that issue was not raised in the pleadings and plaintiff did not request a special instruction. *Hudson v. Hudson,* 412.

DIVORCE AND ALIMONY — Continued

§ 8. **Abandonment**

Trial court properly submitted the issue of abandonment to the jury in an absolute divorce case. *Hudson v. Hudson,* 412.

§ 14. **Adultery**

In the husband's divorce action, the wife was barred on the ground of res judicata from asserting as a plea in bar or counterclaim acts of adultery by the husband allegedly occurring prior to the date of a judgment dismissing with prejudice the wife's prior action for alimony without divorce based on adultery. *Young v. Young,* 424.

§ 16. **Alimony Without Divorce**

Where a consent judgment obligated the husband to make support payments to the wife until he is relieved therefrom "by operation of law," the wife's right to receive support payments terminated upon death of the husband. *Bland v. Bland,* 192.

Obligations imposed on a husband by a consent judgment to permit his former wife to occupy the dwelling and to pay taxes on the dwelling were binding on the husband's estate after his death. *Ibid.*

§ 18. **Alimony and Subsistence Pendente Lite**

In a hearing for alimony pendente lite, trial court erred in ordering that defendant deposit with the clerk of court all stock bearing joint names of plaintiff and defendant and all assets of the minor child of the parties. *Kohler v. Kohler,* 339.

Trial court erred in awarding alimony based solely on the income of defendant husband. *Rickenbaker v. Rickenbaker,* 276.

Trial court erred in awarding attorney's fees in the absence of evidence and findings of fact as to reasonable attorney's fees. *Ibid.*

Evidence was sufficient to establish that defendant wife was the dependent spouse. *Hudson v. Hudson,* 412.

Trial court erred in ordering defendant to make alimony pendente lite and child support payments exceeding $1000 per month where the court made no findings as to the reasonable and necessary expenses of defendant. *Briggs v. Briggs,* 674.

§ 20. **Decree of Divorce as Affecting Right to Alimony**

Plaintiff's appeal from an order denying alimony pendente lite is dismissed since plaintiff secured an absolute divorce while her appeal was pending. *Sawyer v. Sawyer,* 293.

§ 21. **Enforcing Payment of Alimony**

Trial court properly committed defendant for failure to comply with a child support order though defendant was unemployed at the time of the hearing. *Bennett v. Bennett,* 390.

Plaintiff's complaint stated no claim for relief to modify a Texas judgment in a divorce action granting plaintiff one-half of defendant's army retirement pay. *Brown v. Brown,* 435.

§ 22. **Jurisdiction and Procedure in Custody and Support Proceedings**

Plaintiff's complaint to obtain child custody was sufficient to state a claim for relief. *DuBose v. Reece,* 99.

DIVORCE AND ALIMONY — Continued

Trial court had jurisdiction to enter orders in an action for child custody and support, although defendant was not represented by counsel and did not appear at the hearings, where defendant was served with process and the case was properly calendared for hearing. *Thompson v. Thompson,* 215.

Where the trial court refused to exercise jurisdiction in a child custody proceeding on the ground that a court in another state had assumed jurisdiction, the court was not thus deprived of authority to award temporary custody of the children and to award attorney's fees for the hearing held in this State. *Mackenzie v. Mackenzie,* 403.

§ 23. Child Support

Trial court erred in increasing child support payments without finding changed circumstances. *Hines v. Hines,* 218.

Trial court erred in awarding child support based solely on the income of defendant father. *Rickenbaker v. Rickenbaker,* 276.

Evidence was sufficient to support trial court's award of child support. *Sawyer v. Sawyer,* 293.

Allowance of attorney's fees for the representation of the minor children in this support case was authorized by G.S. 50-13.6. *Ibid.*

§ 24. Child Custody

Circumstances found by the trial court in 1973 with respect to the mother's adultery were materially different from the circumstances which the court found to exist in 1971 when custody was first awarded the mother. *Paschall v. Paschall,* 120.

Evidence was sufficient to support trial court's finding in a child custody case that an adulterous relationship of the mother was likely to and did create emotional difficulties for the child. *Ibid.*

Evidence was sufficient to support the trial court's finding that plaintiff father was a fit and proper person to have custody of the minor child. *Ibid.*

Defendant father failed to show a change in circumstances sufficient to warrant modification of a child custody order. *Hensley v. Hensley,* 306.

EMINENT DOMAIN

§ 1. Nature and Extent of Power

Trial court properly concluded that a city did not act arbitrarily in condemning a right-of-way for a sewer outfall line across respondent's property rather than along two alternate routes. *In re Condemnation by Greensboro,* 124.

§ 5. Amount of Compensation

The landowner is entitled to interest from the date the condemnor acquires the right to possession, not from the date the petition is filed. *Board of Education v. Evans,* 493.

§ 6. Evidence of Value

Respondents were not entitled to an instruction that in determining the fair market value the jury could consider the probability of a change

EMINENT DOMAIN — Continued

in zoning classification where the only evidence of a zoning change related to a contiguous tract. *Board of Education v. Evans*, 493.

§ 7. Proceedings to Take Land and Assess Compensation

The "quick take" condemnation procedure authorized by a local act for the City of Durham was not unconstitutional for its failure to require notice. *City of Durham v. Manson*, 161.

Record shows parties had been unable to agree on purchase price. *Board of Education v. Evans*, 493.

§ 8. Proceeding to Take Land for School Site

Board of county commissioners was not a necessary party in a condemnation action instituted by a city board of education. *Board of Education v. Evans*, 493.

§ 11. Trial Upon Exceptions

Trial court had discretion to submit to the jury issue of whether the city acted arbitrarily and capriciously in determination of a site to be condemned. *In re Condemnation by Greensboro*, 124.

Appeal to superior court from a condemnation proceeding presented the issue of damages for trial de novo before a jury. *Ibid.*

ESCAPE

§ 1. Elements of and Prosecutions for Escape

In a prosecution for felonious escape, defendant was entitled to an instruction that the jury must find that he was serving a sentence imposed upon conviction of a felony. *S. v. Johnson*, 85.

EVIDENCE

§ 11. Transactions or Communications With Decedent

In an action to recover for the wrongful death of a passenger in an automobile driven by defendant, plaintiff, by offering evidence as to the sobriety of his intestate and of defendant, waived any right under G.S. 8-51 to object to defendant's rebuttal testimony on the same question. *Bowen v. Jones*, 224.

Dead Man's Statute precluded testimony as to conversations between plaintiffs and decedent as to decedent's promise to leave stock to plaintiffs for their services. *Woodard v. McGee*, 487.

§ 31. Best Evidence Relating to Writings

Best evidence rule did not prohibit oral testimony as to whether defendant was a party to a note satisfied by plaintiff. *Johnson v. Hooks*, 585.

§ 33. Hearsay Evidence

Trial court in a wrongful death action properly excluded descriptive literature accompanying a drug which defendant prescribed for deceased. *Sharpe v. Pugh*, 110.

§ 35. Declarations Constituting Part of the Res Gestae

Statement made by the owner of a grill to an officer that defendant had stolen money from the cash register while she was in the back of the

EVIDENCE — Continued

grill for three or four minutes was not a spontaneous utterance admissible as substantive evidence. *S. v. Murray,* 573.

§ 45. **Nonexpert Opinion as to Value**

Trial court properly excluded defendant's opinion testimony as to the value of bulldozer work based on opinions gathered from "three 'dozer people." *Scott v. Smith,* 520.

EXECUTORS AND ADMINISTRATORS

§ 27. **Amount of Recovery From Estate and Evidence of Value**

Trial court properly excluded opinion testimony as to reasonable value of services allegedly rendered by plaintiffs to decedent where there was no evidence of expectation of payment. *Woodard v. McGee,* 487.

FALSE IMPRISONMENT

§ 2. **Actions For**

Plaintiff failed to state a claim for relief for false imprisonment against a magistrate by reason of any act of the magistrate in issuing warrants for plaintiff's arrest. *Foust v. Hughes,* 268.

Plaintiff's allegations that he was unlawfully arrested by two city police officers and delivered into the custody of the county sheriff who held plaintiff in jail until he was released on bail failed to state a claim for relief against the sheriff for false imprisonment. *Ibid.*

FIDUCIARIES

Where the evidence was sufficient to show a fiduciary relationship between the grantor of a deed and defendants, trial court in an action to set aside the deed on the ground of fraud erred in directing a verdict for defendants. *Blackburn v. Duncan,* 20.

FIXTURES

Trial court's findings as to the amount of damages due plaintiffs for items taken from the premises and for injury to the structure in the process of removal were not supported by sufficient evidence. *Brewer v. Davis,* 309.

FRAUD

§ 12. **Sufficiency of Evidence and Nonsuit**

Trial court properly directed a verdict for defendants in an action based upon the alleged fraud of defendants in the sale to plaintiffs of a house on a lot with septic tank problems. *Goff v. Realty and Insurance Co.,* 25.

Where the evidence was sufficient to show a fiduciary relationship between the grantor of a deed and defendants, trial court in an action to set aside the deed on the ground of fraud erred in directing a verdict for defendants. *Blackburn v. Duncan,* 20.

Plaintiff's evidence was insufficient for the jury in an action against the president of a corporation based on alleged fraud in the issuance of checks on behalf of the corporation which failed to clear the bank due to insufficient funds. *Austin v. Tire Treads, Inc.,* 737.

FRAUDS, STATUTE OF

§ 6. Contracts Affecting Realty

Alleged oral agreement that defendant would bid in plaintiffs' property at a foreclosure sale and deed the property to plaintiffs was enforceable and not within the purview of the statute of frauds. *Britt v. Allen,* 497.

§ 7. Contracts to Convey or Devise

In an action seeking specific performance of a contract for sale of land owned by defendants as tenants by the entirety, trial court erred in entering judgment on the pleadings in favor of the femme defendant although memorandum of the contract made no reference to the femme defendant and was not signed by her. *Reichler v. Tillman,* 38.

FRAUDULENT CONVEYANCES

§ 3. Actions to Set Aside Conveyances as Fraudulent

Summary judgment was improperly entered for plaintiffs in an action to set aside conveyances allegedly made with intent to defraud creditors of the now bankrupt grantors. *Borden, Inc. v. Wade,* 205.

HEALTH

§ 2. Functions and Duties of Board of Health

Since the N. C. State Board of Health rescheduled methamphetamine from Schedule III to Schedule II of the Controlled Substances Act, defendant's possession of methamphetamine with intent to distribute constituted a felony. *S. v. Newton,* 384.

§ 3. Health Ordinances and Regulations

Evidence was sufficient to support trial court's findings of fact and orders involving disposal of sewage on defendant's property. *Kamp v. Brookshire,* 280.

HIGHWAYS AND CARTWAYS

§ 5. Rights of Way

Trial court's charge in condemnation action was proper. *Board of Transportation v. Powell,* 95.

HOMICIDE

§ 15. Relevancy and Competency of Evidence

In a prosecution for murder of defendant's 2½ year old child by beating and kicking her, testimony by defendant's wife as to defendant's mistreatment of his children on prior occasions was competent to show quo animo. *S. v. Artis,* 73.

Cause of death in a prosecution for homicide may be established without the introduction of expert medical testimony. *S. v. Luther,* 13.

§ 20. Demonstrative Evidence

Fact that a medical witness stated only that bullets presented at trial were "similar" to those he removed from deceased did not render the bullets inadmissible. *S. v. Feimster,* 602.

HOMICIDE — Continued

§ 21. Sufficiency of Evidence

Evidence in a first degree murder case was sufficient to be submitted to the jury where it tended to show that defendant intentionally struck deceased with an iron pipe. *S. v. Luther,* 13.

Evidence was sufficient to be submitted to the jury in a second degree murder case where it tended to show that defendant stabbed his victim. *S. v. Howard,* 75.

State's evidence in a second degree murder case was sufficient to permit the jury to find that the cause of death was a gunshot wound inflicted by defendant. *S. v. Perry,* 528; *S. v. Strickland,* 545.

§ 28. Instructions on Defenses

Trial judge in a murder case committed prejudicial error in failing to instruct on the right to use force in defense of one's family. *S. v. Spencer,* 445.

§ 30. Lesser Degrees of Crime

Submission of manslaughter to the jury, if erroneous, was favorable to defendant. *S. v. Chambers,* 450.

Evidence in a second degree murder case that a gun was found in decedent's pocket did not require the court to instruct on voluntary manslaughter. *S. v. Perry,* 528.

HOSPITALS

§ 3. Liability of Hospital to Patient

Evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to raise rails on plaintiff's intestate's bed and in failing to instruct her to obtain assistance when getting up. *Norris v. Hospital,* 623.

HUSBAND AND WIFE

§ 2. Antenuptial Agreements

Petitioner's complaint was insufficient to state a claim for relief to set aside an antenuptial agreement on the ground it was procured by fraud. *In re Estate of Loftin,* 627.

INDEMNITY

§ 3. Actions

Summary judgment was properly entered for defendant in a railway's action to recover under an indemnity agreement a sum which the railroad had paid to defendant's employee for personal injuries. *Railway Co. v. Werner Industries,* 116.

INDICTMENT AND WARRANT

§ 3. Jurisdiction of Grand Jury

The grand jury of Pasquotank County had no jurisdiction to indict defendant for crimes allegedly committed in Tyrrell County. *S. v. Bond,* 434.

INDICTMENT AND WARRANT — Continued

§ 6. Issuance of Warrants

Plaintiff failed to state a claim for relief for false imprisonment against a magistrate by reason of any act of the magistrate in issuing warrants for plaintiff's arrest. *Foust v. Hughes*, 268.

§ 7. Sufficiency of Warrant

Warrants were sufficient to charge defendant with wilful failure to pay a tax assessed upon her as the operator of retail sales businesses. *S. v. Locklear*, 48.

§ 9. Charge of Crime

Warrants were sufficient to charge defendants with a crime where the warrants alleged defendants' failure to comply with a proclamation declaring a state of emergency to exist by using a named public park between stated hours on a given date. *S. v. Allred*, 229.

§ 13. Bill of Particulars

Trial court in a prosecution for possession of LSD did not err in denial of defendant's motion for a bill of particulars. *S. v. Martin*, 645.

§ 18. Sufficiency of Indictment to Support Conviction of Other Degrees of Crime

Though evidence was insufficient to support a conviction for robbery, the State could properly try defendant on the same indictment as an accessory before the fact to the robbery. *S. v. Wiggins*, 441.

INFANTS

§ 6. Duties and Authority of Guardian Ad Litem

Rights of a minor in certain assets could be determined only by appearance through a guardian or guardian ad litem and not through plaintiff mother in her individual capacity. *Kohler v. Kohler*, 339.

§ 10. Commitment of Minors for Delinquency

Evidence that children were absent from school on one occasion in obedience to instructions from their parents was insufficient to support a finding that the children were "undisciplined." *In re McMillan*, 712.

INJUNCTIONS

§ 7. Injunction to Restrain Use of Land

Plaintiff's evidence was insufficient to entitle it to an injunction against defendants' use of their property for operation of a garage on the ground that such use would contaminate plaintiff's water source. *Town of Rolesville v. Perry*, 354.

INSURANCE

§ 38. Permanent Total Disability

Plaintiff was not entitled to total disability payments though she was unable to work as a cook or waitress since she was physically capable of engaging in other occupations at which she could earn comparable wages. *Harrison v. Insurance Co.*, 290.

INSURANCE — Continued

§ 69. Protection Against Injury by Uninsured Motorist

It was proper for insurance company's counsel during jury argument to explain the position of his client in the cases although the company stated in its answer that it elected to defend in the name of defendant uninsured motorist. *Nolan v. Boulware,* 347.

§ 75. Payment and Satisfaction, Subrogation of Collision Insurer

Where collision insurer was required to pay coinsured mortgagee a sum to cover damages to insured's car, mortgagee has an equitable lien in the amount obtained by insured from the tortfeasor for damages to the car and the collision insurer is subrogated to the rights the mortgagee has against insured. *Insurance Co. v. Velez,* 700.

§ 76. Automobile Fire Policy

Plaintiff's notification by telephone to insurance broker that he wanted an automobile fire policy changed to afford protection for a new automobile which he had purchased in lieu of the insured automobile was not sufficient to bind defendant insurer. *Williams v. Insurance Co.,* 658.

§ 85. Liability Coverage of Other Vehicles Used by Insured

Defendant was not covered by a policy issued by plaintiff when she was involved in an accident while driving a vehicle belonging to another since the vehicle was provided for her regular use. *Insurance Co. v. Bullock,* 208.

§ 88. Garage and Dealers' Liability Insurance

Clause of a garage liability policy issued to a dealer which excluded persons in possession of an automobile pursuant to a conditional sales contract was invalid as being in conflict with statutory provisons. *Gore v. Insurance Co.,* 730.

§ 95. Vehicle Financial Responsibility Act

Action to determine whether an assigned risk automobile policy had been cancelled by defendant insurer for nonpayment of premium prior to an accident was properly submitted to the jury. *Redmon v. Guaranty Co.,* 704.

§ 106. Action Against Insurer by Person Injured

In an action to determine whether an assigned risk policy was in effect at the time of an accident, trial court erred in exclusion of testimony by defendant driver that he would like to see plaintiff recover from defendant insurer since such testimony was competent to show bias, and the trial court committed prejudicial error in refusing to allow defendant to introduce the FS-4 form received by the Dept. of Motor Vehicles which notified defendant of the cancellation. *Redmon v. Guaranty Co.,* 704.

JUDGMENTS

§ 36. Parties Concluded

Judgment of voluntary dismissal with prejudice in a negligence action against an employee was a judgment on the merits and precluded plaintiff from proceeding against the employer. *Barnes v. McGee,* 287.

JUDGMENTS — Continued

§ 37. Matters Concluded in General

In the husband's divorce action, the wife was barred on the ground of res judicata from asserting as a plea in bar or counterclaim acts of adultery by the husband allegedly occurring prior to the date of a judgment dismissing with prejudice the wife's prior action for alimony without divorce based on adultery. *Young v. Young,* 424.

§ 51. Foreign Judgment

Plaintiff's complaint stated claim for relief for enforcement of a Texas judgment in a divorce action granting plaintiff one-half of defendant's army retirement pay. *Brown v. Brown,* 435.

JURY

§ 2. Special Venire

Trial court in a prosecution for possession of LSD did not err in denial of defendant's motion for a special venire based on the fact the jury panel was in the audience during the preceding trial when the State's witnesses testified their testimony in both cases would be substantially identical and when the jury returned a guilty verdict. *S. v. Martin,* 645.

§ 3. Number of Jurors

Defendants were entitled to a new trial where they were convicted by 13 jurors. *S. v. Alston,* 544.

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

In a prosecution for armed robbery and kidnapping, trial court correctly denied defendant's motion to require the State to elect between charges. *S. v. Sommerset,* 272.

Trial court's reference in its jury instructions to the man defendant allegedly robbed and kidnapped as "the victim" was not prejudicial. *Ibid.*

LANDLORD AND TENANT

§ 8. Liability for Damage to Property; Duty to Repair

Plaintiff was entitled to recover of defendant landlord the cost of a new roof placed on defendant's building by plaintiff and damages suffered by plaintiff to his merchandise where the roof leaked, plaintiff informed defendant of the leak and defendant failed to make necessary repairs. *Cato Ladies Modes v. Pope,* 133.

§ 14. Holding Over

Purchase agreement in the original lease was inapplicable where plaintiff held over at the end of the term and defendant was subsequently called upon to repurchase in accordance with the lease. *Hannah v. Hannah,* 265.

§ 15. Tenancies at Will

Defendants were tenants at will where they rented a house under an agreement whereby plaintiffs agreed to rent to male defendant "until such time that he decided to buy same house." *Stout v. Crutchfield,* 387.

LANDLORD AND TENANT — Continued

§ 18. **Forfeiture for Nonpayment of Rent**

Lessor waived his right to terminate the lease for lessee's failure to pay a rent increase where the lessor quietly accepted the lesser amount of rent for ten months. *Price v. Conley,* 326.

Plaintiffs were not required to give defendants ten days' notice before termination of the lease since defendants were tenants at will. *Stout v. Crutchfield,* 387.

§ 20. **Injury to Premises by Lessee and Condition of Property When Surrendered to Lessor**

Trial court's findings as to the amount of damages due plaintiffs for items taken from the premises and for injury to the structure in the process of removal were not supported by sufficient evidence. *Brewer v. Davis,* 309.

LARCENY

§ 4. **Warrant and Indictment**

There was no fatal variance between indictment charging larceny of an automobile of William Brad Crowell and evidence that the vehicle was registered in the name of Crowell's T.V. *S. v. Carr,* 470.

§ 7. **Sufficiency of Evidence and Nonsuit**

Evidence was sufficient to be submitted to the jury in a prosecution for the larceny of certain dogs but insufficient for the larceny of other dogs. *S. v. Brannon,* 464.

State's evidence was sufficient for the jury in a prosecution for breaking and entering a restaurant and larceny of money therefrom. *S. v. Murray,* 573.

§ 8. **Instructions**

Defendant was not prejudiced by the court's inaccurate statement that the value of the stolen property was $800 when testimony showed the value of a portion of it was $800. *S. v. Perry,* 478.

The trial court's instructions on the elements of felonious larceny were sufficient although the court did not use the term "felonious intent." *Ibid.*

LIMITATION OF ACTIONS

§ 18. **Sufficiency of Evidence**

Facts pleaded by plaintiff were sufficient to establish that the commencement of his action took place within the required three year period. *Little v. Rose,* 596.

MALICIOUS PROSECUTIONS

§ 6. **Termination of Prosecution**

A counterclaim cannot be maintained to recover damages for malicious prosecution of the action in which the counterclaim is asserted. *Reichler v. Tillman,* 38.

MASTER AND SERVANT

§ 11. Agreement Not to Engage in Like Employment

Names of plaintiff's employees are not the type of trade secret which would be protected from exposure by injunction. *Moye v. Eure*, 261.

§ 15. State and Federal Collective Bargaining Regulations

Subcontract clause requiring subcontractor to use labor acceptable to the contractor "and of a standing or affiliation that will permit the work to be carried on harmoniously and without delay" may not be enforced against the subcontractor on the ground that the subcontractor's employees are not union members because such enforcement would violate the Right to Work Law. *Poole & Kent Corp. v. Thurston & Sons*, 1.

§ 49. "Employees" Within Meaning of Workmen's Compensation Act

Agriculture and domestic employees are exempt from the provisions of the N. C. Workmen's Compensation Act. *Hinson v. Creech*, 727.

§ 53. Dual Employment

Asphalt truck driver was not employed by paving contractor so as to make such contractor jointly liable with the driver's general employer for workmen's compensation benefits. *Collins v. Edwards*, 455.

§ 56. Causal Relation Between Employment and Injury

Evidence was insufficient to support a finding that plaintiff hospital employee contracted infectious hepatitis while unplugging a commode in the hospital. *Morrow v. Hospital*, 299; *Smith v. Hospital*, 380.

§ 68. Occupational Diseases

Evidence was insufficient to support a conclusion of law that infectious hepatitis is an occupational disease. *Morrow v. Hospital*, 299; *Smith v. Hospital*, 380.

§ 85. Nature and Extent of Jurisdiction of Industrial Commission

The Industrial Commission had no jurisdiction over an action involving an employee who worked in defendant's poultry business delivering eggs. *Hinson v. Creech*, 727.

MUNICIPAL CORPORATIONS

§ 9. Officers and Employees Generally

Payment for accumulated sick leave was discretionary and not mandatory where a municipal ordinance provided that employees who retire and have 20 years of service "may" be paid for their accumulated sick leave. *Minton v. Town of Ahoskie*, 716.

§ 14. Injuries in Connection With Streets and Sidewalks

Doctrine of governmental immunity did not apply to bar plaintiffs' action to recover for damages to merchandise in plaintiffs' store caused by concrete dust from city's sidewalk repair project. *Kaplan v. City of Winston-Salem*, 168.

The city's motion for directed verdict should have been allowed in an action to recover for damages to plaintiff's automobile when a tree allegedly under the city's control fell on it. *Bowman v. Town of Granite Falls*, 333.

MUNICIPAL CORPORATIONS — Continued

§ 16. Action for Torts of Municipality

In an action to recover for damages to merchandise in plaintiffs' store from concrete dust caused by the city's sidewalk repair project, evidence was sufficient to justify a finding that defendant's crew was negligent in performing the work without taking sufficient precautions to safeguard plaintiffs' property from dust damage or failing to advise plaintiffs of the risk of dust in the area. *Kaplan v. City of Winston-Salem,* 168.

§ 17. Contributory Negligence in Action Against Municipality

Plaintiffs were not contributorily negligent in failing to take action to minimize damages to merchandise in their store from dust particles arising from the city's sidewalk repair project. *Kaplan v. City of Winston-Salem,* 168.

§ 29. Nature and Extent of Police Power

Trial court properly held as a matter of law that a proclamation issued by the chairman of the board of county commissioners declaring a state of emergency to exist in the county and imposing limited restrictions was valid. *S. v. Allred,* 229.

§ 32. Regulations Relating to Public Morals

Masseurs are not persons practicing any professionl art of healing within the meaning of G.S. 105-41(a) and are not required to obtain a privilege license. *Smith v. Keator,* 102.

Fayetteville massage parlor ordinance, as construed by the court, meets requirements of due process. *Ibid.*

Provision of massage parlor ordinance making it unlawful for persons licensed under the ordinance to treat a person of the opposite sex does not discriminate against women in violation of the equal protection clause. *Ibid.*

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses Relating to Narcotics

Since the N. C. State Board of Health rescheduled methamphetamine from Schedule III to Schedule II of the Controlled Substances Act, defendant's possession of methamphetamine with intent to distribute constituted a felony. *S. v. Newton,* 384.

§ 2. Indictment

Trial court could take notice that Desoxyn and methamphetamine were the same substance, and there was no variance between the indictment which charged possession of Desoxyn and proof which tended to show that defendant possessed methamphetamine. *S. v. Newton,* 384.

§ 3. Competency and Relevancy of Evidence

An officer's opinion that material seized from defendant's premises was marijuana was competent. *S. v. Lisk,* 474.

Trial court was not required to hold a voir dire and make findings of fact before allowing into evidence bags of marijuana seized pursuant to a search warrant. *S. v. Mahler,* 505.

NARCOTICS — Continued

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was insufficient to be submitted to the jury on the issue of defendant's guilt of manufacturing marijuana. *S. v. Baxter*, 81.

Evidence was sufficient to be submitted to the jury in a prosecution for possession and distribution of marijuana. *S. v. Rigsbee*, 188.

Evidence was sufficient for the jury on the issue of defendant's constructive possession of heroin but was insufficient on the charge of manufacturing heroin. *S. v. Whitted*, 649.

There was no fatal variance between the indictment charging sale of marijuana to one person and evidence showing that second person wrote a check for the marijuana and the person named in the indictment took possession of the marijuana. *S. v. Harris*, 697.

§ 4.5. Instructions

Where the indictment charged defendant with selling marijuana on 17 January 1973 and the State's evidence tended to show that the sale occurred on another date, trial court erred in instructing the jury it should return a guilty verdict if it found defendant sold marijuana on 17 January 1973. *S. v. Poindexter*, 720.

§ 5. Verdict and Punishment

A defendant may be prosecuted for both possession and distribution of a controlled substance without violating the constitutional prohibition against double jeopardy. *S. v. Patterson*, 443.

NEGLIGENCE

§ 2. Negligence Arising From Performance of a Contract

Plaintiff's evidence was sufficient for the jury in an action to recover for damages to plaintiff's tractor allegedly caused by defendant's breach of contract in failing to replace hoses related to the motor when defendant overhauled the motor. *Produce Corp. v. Covington Diesel*, 313.

§ 27. Competency and Relevancy of Evidence

Defendant was not prejudiced by testimony of plaintiff's witness that he talked to an insurance company employee about leasing a vehicle to replace his damaged truck. *Timber Management Co. v. Bell*, 143.

NUISANCE

§ 4. Pollution of Streams

Evidence was sufficient to support trial court's findings of fact and orders involving disposal of sewage on defendant's property. *Kamp v. Brookshire*, 280.

§ 9. Acts Constituting Nuisances Against Public Safety

Plaintiff's evidence was insufficient to entitle it to an injunction against defendant's use of their property for operation of a garage on the ground that such use would contaminate plaintiff's water source. *Town of Rolesville v. Perry*, 354.

PHYSICIANS AND SURGEONS

§ 1. What Constitutes Practicing Medicine

Masseurs are not persons practicing any professional art of healing within the meaning of G.S. 105-41(a) and are not required to obtain a privilege license. *Smith v. Keator*, 102.

§ 2. Licensing and Regulation of Pharmacists

The statute authorizing the Board of Pharmacy to adopt a code of professional conduct constitutes an unlawful delegation of legislative power without sufficient standards and guidelines, and a section of the code adopted by the Board which prohibited advertising of prescription drugs is invalid. *Drug Centers v. Board of Pharmacy*, 156.

§ 17. Departing From Approved Standard of Care

In a wrongful death action, there was no evidence to establish the standard of care to which defendant was required to adhere in prescribing a drug for deceased. *Sharpe v. Pugh*, 110.

Evidence of defendant's negligence in prescribing a drug for deceased was insufficient to be submitted to the jury. *Ibid.*

§ 20. Causal Connection Between Malpractice and Injury

Evidence in a wrongful death action failed to show a causal connection between defendant's alleged negligence and deceased's contraction of a disease from which her death resulted. *Sharpe v. Pugh*, 110.

PLEADINGS

§ 9. Filing and Time for Filing Answer

Trial court properly granted defendant an extension of time to file answer based on excusable neglect where the court found plaintiff had been given 60 days to amend his complaint and that defendant did not file answer because he had not received an amended complaint. *Johnson v. Hooks*, 585.

§ 32. Motion to Amend

Trial court did not abuse its discretion in the denial of defendants' motion to amend their answers to plead contributory negligence. *Arnold v. Distributors*, 579.

PROCESS

§ 5. Amendment of Process

Where summons commanded defendant to appear and answer in the wrong county, summons could not be amended to show the proper county. *Grace v. Johnson*, 432.

§ 9. Personal Service on Nonresident in Another State

A contract executed in this State for the sale of realty located in the State constitutes sufficient minimal contact upon which the courts of this State may assert in personam jurisdiction over a nonresident in an action for breach of the contract, and the nonresident was properly served by registered mail. *Chadbourn, Inc. v. Katz*, 284.

PUBLIC OFFICERS

§ 9. Personal Liability of Public Officer to Private Individual

The taking of an acknowledgement of the execution of a deed by a notary public is a judicial or quasi-judicial act by a public official for which he may not be held personally liable absent a showing that his act was corrupt, malicious, or outside the scope of his duties. *Nelson v. Comer,* 636.

RAILROADS

§ 7. Injury to Automobile Passenger in Crossing Accident

Plaintiff's evidence showed that he was contributorily negligent in a crossing accident. *Alligood v. Railroad,* 419.

RECEIVING STOLEN GOODS

§ 4. Relevancy and Competency of Evidence

Evidence of Sears merchandise found in defendant's vehicle was admissible in a prosecution for receiving of merchandise from Belks. *S. v. Lash,* 365.

In a prosecution for receiving, trial court properly allowed evidence as to inventory tags on garments found in defendant's car. *Ibid.*

REGISTRATION

§ 3. Registration as Notice

Recordation of a lease gave plaintiff constructive notice of its terms. *Price v. Conley,* 326.

RETIREMENT SYSTEMS

§ 5. Claims of Members

Payment for accumulated sick leave was discretionary and not mandatory where a municipal ordinance provided that employees who retire and have 20 years of service "may" be paid for their accumulated sick leave. *Minton v. Town of Ahoskie,* 716.

RIOT AND INCITING TO RIOT

§ 2. Prosecutions

Warrants were sufficient to charge defendants with a crime where the warrants alleged defendants' failure to comply with a proclamation declaring a state of emergency to exist by using a named public park between stated hours on a given date. *S. v. Allred,* 229.

ROBBERY

§ 1. Nature and Elements of the Offense

In a prosecution for armed robbery and kidnapping, trial court correctly denied defendant's motion to require the State to elect between charges. *S. v. Sommerset,* 272.

ROBBERY — Continued

Defendant was not placed in double jeopardy when he was convicted of conspiracy to commit robbery and of being an accessory before the fact to the same robbery. *S. v. Wiggins*, 441.

§ 2. Indictment

Though evidence was insufficient to support a conviction for robbery, the State could properly try defendant on the same indictment as an accessory before the fact to the robbery. *S. v. Wiggins*, 441.

§ 3. Competency of Evidence

Statement by defendant to the victim of an armed robbery was admissible. *S. v. Smyles*, 533.

Trial court did not err in admitting a white Panama hat worn by defendant during the attempted robbery. *S. v. Blackburn*, 517.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for robbery with a dangerous weapon. *S. v. Horne*, 197.

§ 5. Instructions and Submission of Lesser Degrees of Crime

Trial court properly failed to submit lesser included offenses in a common law robbery case. *S. v. White*, 173.

Trial court's reference in its jury instructions to the man defendant allegedly robbed and kidnapped as "the victim" was not prejudicial. *S. v. Sommerset*, 272.

Trial court in an armed robbery case did not err in failing to charge the jury on the lesser included offense of assault. *S. v. Capel*, 311.

Trial court's instruction in an armed robbery case was sufficient though the court did not use the words "felonious taking" in its instruction. *S. v. Harmon*, 508.

Trial court in a prosecution for armed robbery or attempted armed robbery did not err in failing to submit lesser included offense of common law robbery. *S. v. Black*, 640.

RULES OF CIVIL PROCEDURE

§ 6. Time

Trial court properly granted defendant an extension of time to file answer based on excusable neglect where the court found plaintiff had been given 60 days to amend his complaint and that defendant did not file answer because he had not received an amended complaint. *Johnson v. Hooks*, 585.

§ 15. Supplemental Pleadings

In ruling on defendant's motion for summary judgment, trial court should have given consideration to plaintiff's evidence that defendant was driving without lights though plaintiff did not allege such negligence in his complaint. *Hardison v. Williams*, 670.

§ 41. Dismissal of Actions

Judgment of voluntary dismissal with prejudice in a negligence action against an employee was a judgment on the merits and precluded plaintiff from proceeding against the employer. *Barnes v. McGee*, 287.

RULES OF CIVIL PROCEDURE — Continued

§ 50. Motion for Directed Verdict and for Judgment N.O.V.

Trial court did not err in granting judgment n.o.v. for defendant who had the burden of proof. *Price v. Conley,* 326.

Trial court did not err in granting a directed verdict for the party with the burden of proof. *Alligood v. Railroad,* 419.

§ 56. Summary Judgment

Trial court erred in allowing defendant to offer affidavits in support of his motion for summary judgment for the first time at the time of the hearing. *Insurance Co. v. Chantos,* 129.

Trial court properly entered summary judgment against the moving party in an action to recover benefits due under a consent judgment. *Bland v. Bland,* 192.

§ 59. New Trials

Trial court properly refused to consider defendant's affidavit in support of his motion for a new trial where the affidavit was filed after the court had ruled on the motion. *S. v. Shelton,* 662.

SALES

§ 18. Issues and Instructions in Action for Breach of Warranty

Trial court should have submitted issues as to whether the seller of a boiler conversion system warranted that the system would permit the burning of wood refuse without smoke and whether the seller breached such warranty. *HPS, Inc. v. All Wood Turning Corp.,* 321.

SCHOOLS

§ 11. Liability for Torts

In an action by a community college student to recover for injuries sustained while operating a metal shearing machine during a welding class, evidence was insufficient to disclose negligence on the part of the instructor and disclosed that plaintiff was contributorily negligent. *Kiser v. Snyder,* 708.

§ 13. Principals and Teachers

Chapter 1068 of the Session Laws of 1971 did not provide vacation and sick pay benefits for public school teachers. *Bray v. Board of Education,* 225.

County board of education had authority to refuse to renew plaintiff's contract as school principal for the 1972-73 school year without a recommendation to that effect by the superintendent of schools. *Taylor v. Crisp,* 359.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Officers' search of defendants after their arrest as prison escapees was entirely reasonable. *S. v. White,* 173.

Officers were justified in making a warrantless seizure of defendant's automobile which was in plain view. *S. v. Young,* 369.

SEARCHES AND SEIZURES — Continued

Items seized without a warrant from one defendant's home were admissible where the officer entered the home to execute a valid arrest warrant and found the items in plain view. *S. v. Carr*, 470.

§ 2. **Consent to Search Without Necessary Warrant**

Defendant's consent to a search of her vehicle extended to the trunk of the vehicle. *S. v. Lash*, 365.

Trial court erred in failing to make findings of fact and conclusions of law on voir dire to determine admissibilty of items seized in defendant's car. *S. v. Brannon*, 464.

§ 3. **Requisites and Validity of Search Warrant**

Affidavit based on information received from a confidential informant was sufficient to support issuance of a search warrant although it did not disclose when the informant observed the activities referred to in the affidavit where the magistrate could reasonably conclude illegal activities were occurring at the time of the issuance of the warrant. *S. v. Cobb*, 66.

In conducting a voir dire to determine the legality of a search, the trial court did not err in accepting evidence as to information presented to the magistrate and not included in the affidavit. *S. v. Akel*, 415.

An affidavit was sufficient to support a finding of probable cause and the issuance of a search warrant. *S. v. Mahler*, 505; *S. v. Whitted*, 649.

§ 4. **Search Under the Warrant**

Evidence seized pursuant to a search warrant was not inadmissible by reason of the State's failure to introduce in evidence the affidavit to obtain the warrant. *S. v. Cobb*, 66.

SHERIFFS AND CONSTABLES

§ 4. **Civil Liabilities to Individuals**

Plaintiff's allegations that he was unlawfully arrested by two city police officers and delivered into the custody of the county sheriff who held plaintiff in jail until he was released on bail failed to state a claim for relief against the sheriff for false imprisonment. *Foust v. Hughes*, 268.

STATE

§ 4. **Actions Against the State**

Doctrine of governmental immunity did not apply to bar plaintiffs' action to recover for damages to merchandise in plaintiffs' store caused by concrete dust from a city's sidewalk repair project. *Kaplan v. City of Winston-Salem*, 168.

Where plaintiffs were entitled to repossession of property for breach of a condition subsequent by the State, plaintiffs had no right to sue the State for the fair rental value of the property from the time plaintiffs first requested return of the property until the time when possession was given to them. *Mattox v. State*, 677.

STATUTES

§ 11. Repeal

Repeal of a general statute to which a local act authorizing use of the "quick take" condemnation procedure by plaintiff was appended did not repeal the local act. *City of Durham v. Manson,* 161.

TAXATION

§ 31. Sales and Use Tax

A commercial chicken hatchery is a manufacturing industry or plant, and machinery purchased for use in the hatchery is subject to a use tax of 1% rather than the regular rate of 3%. *Hatcheries, Inc. v. Coble,* 256.

§ 37. Collection, Payment and Discharge in General

Taxes do not constitute a debt within the meaning of the Constitutional prohibition against imprisonment for debt. *S. v. Locklear,* 48.

Warrants were sufficient to charge defendant with wilful failure to pay a tax assessed upon her as the operator of retail sales businesses. *Ibid.*

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

The Utilities Commission is not authorized by statute to compel a telephone company to provide local exchange services to an area which is already receiving such services from another telephone company. *Utilities Comm. v. Telegraph Co.,* 182.

Utilities Commission in a telephone rate case erred in failing to make a specific finding showing the effect it gave the factor of inadequate service in determining fair value. *Utilities Comm. v. Telephone Co.,* 408.

TRIAL

§ 8. Consolidation for Trial

Trial court properly consolidated for trial separate actions instituted by a city board of education condemning contiguous tracts of land. *Board of Education v. Evans,* 493.

§ 11. Argument and Conduct of Counsel

It was proper for insurance company's counsel during jury argument to explain the position of his client in the case although the company stated in its answer that it elected to defend in the name of defendant uninsured motorist. *Nolan v. Boulware,* 347.

§ 16. Withdrawal of Evidence

Defendant was not prejudiced by testimony of plaintiff's witness that he talked to an insurance company employee about leasing a vehicle to replace his damaged truck where court struck the testimony and instructed jury to disregard it. *Timber Management Co. v. Bell,* 143.

§ 45. Acceptance or Rejection of Verdict by Court

Trial court properly accepted the verdict after one juror expressed some hesitation about the verdict on one issue during the jury poll where the juror's final statement signified his assent to the verdict as rendered. *Nolan v. Boulware,* 347.

TRIAL — Continued

§ 52. Setting Aside Verdict for Inadequate Award

In an action to recover compensatory damages for personal injuries, it was within the discretion of the trial judge to set aside the jury's verdict for its failure to include any award of damages for pain and suffering. *Robertson v. Stanley*, 55.

TRUSTS

§ 13. Creation of Resulting Trust

Alleged oral agreement that defendant would bid in plaintiffs' property at a foreclosure sale and deed the property to plaintiffs was enforceable and not within the purview of the statute of frauds. *Britt v. Allen*, 497.

§ 18. Competency and Relevancy of Evidence Establishing Resulting Trust

Trial court erred in refusing to allow one plaintiff to testify as to oral agreement by defendant to bid in plaintiffs' property at a foreclosure sale. *Britt v. Allen*, 497.

UNIFORM COMMERCIAL CODE

§ 20. Repudiation of Sale, Breach

Trial court should have submitted an issue as to whether the buyer accepted a boiler plant conversion system installed in the buyer's plant. *HPS, Inc. v. All Wood Turning Corp.*, 321.

In an action for breach of implied warranty of merchantability, plaintiff's evidence was sufficient to raise only a conjecture as to whether a trailer hitch was defective. *Burbage v. Suppliers Corp.*, 615.

§ 21. Buyer's Remedies

Trial court should have submitted issues as to whether the seller of a boiler conversion system warranted that the system would permit the burning of wood refuse without smoke and whether the seller breached such warranty. *HPS, Inc. v. All Wood Turning Corp.*, 321.

UNJUST ENRICHMENT

If plaintiff paid an amount to a bank under the mistaken belief he was paying a note of defendant's son rather than defendant's note, plaintiff may bring an action against defendant to recover the money paid upon the theory of unjust enrichment. *Johnson v. Hooks*, 585.

UTILITIES COMMISSION

§ 4. Jurisdiction and Authority of Commission Over Electric Companies

Order of the Utilities Commission allowing a general increase in power company's rates is affirmed. *Utilities Comm. v. Power Co.*, 89; *Utilities Comm. v. Power Co.*, 45.

§ 5. Jurisdiction of Commission Over Water Companies

Order of the Utilities Commission in a rate case involving five water and sewer utilities in Mecklenburg County is affirmed. *Utilities Comm. v. Utilities, Inc.*, 213.

UTILITIES COMMISSION — Continued

The Utilities Commission has authority to allow the use of an availability charge in a rate schedule for water services to a recreational subdivision. *Utilities Comm. v. Carolina Forest Utilities*, 146.

§ 6. Hearings and Orders; Rates

Purported final order of the Utilities Commission is invalid as not being a majority order where only one of the three commissioners who heard the evidence at the public hearing was still a member of the Commission and participated in the final order. *Utilities Comm. v. Telephone Co.*, 251.

The Utilities Commission erred in consolidating two docketed cases without notice to respondent and in basing its purported order in one of the cases on the record in both cases. *Ibid.*

Utilities Commission in a telephone rate case erred in failing to make a specific finding showing the effect it gave the factor of inadequate service in determining fair value. *Utilities Comm. v. Telephone Co.*, 408.

§ 7. Services

The Utilities Commission is not authorized by statute to compel a telephone company to provide local exchange services to an area which is already receiving such services from another telephone company. *Utilities Comm. v. Telegraph Co.*, 182.

VENDOR AND PURCHASER

§ 1. Requisites, Validity and Construction of Contracts of Sale and Options

In an action seeking specific performance of a contract for sale of land owned by defendants as tenants by the entirety, trial court erred in entering judgment on the pleadings in favor of the femme defendant although memorandum of the contract made no reference to the femme defendant and was not signed by her. *Reichler v. Tillman*, 38.

A paperwriting giving plaintiffs the "option" to repurchase land was void. *Jenkins v. Coombs*, 683.

§ 2. Performance or Tender

Plaintiff which failed to tender payment and demand delivery of a deed according to the terms of the contract was in no position to demand specific performance. *Development Corp. v. Woodall*, 567.

§ 5. Specific Performance

Plaintiff was not entitled to specific performance which was not in accordance with the terms of the contract. *Development Corp. v. Woodall*, 567.

VENUE

§ 4. Actions Against Public Officers

Action instituted in Mecklenburg County against the Adjutant General of N. C. was properly removed to Wake County. *King v. Buck*, 221.

§ 8. Removal for Convenience of Parties and Witnesses

The fact that a public officer is entitled to have a case removed to Wake County does not preclude the court from changing venue to another

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county for the convenience of witnesses and promotion of justice. *King v. Buck*, 221.

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§ 28. General Rules of Construction

Advancement as used by testator when referring to money given his son is given its ordinary and not its statutory meaning. *Crews v. Taylor*, 296.

§ 32. Dispositive and Precatory Words

Testator's statement "it is my desire" that one of his children repay money before sharing in the partition of testator's real estate was mandatory and not precatory. *Crews v. Taylor*, 296.

§ 41. Rule Against Perpetuities

Attempted devise to testator's great-grandchildren of the remainder interest in property after the termination of successive life estates granted testator's widow, his daughters and his grandchildren violated the rule against perpetuities. *Bank v. Norris*, 178.

§ 52. Residuary Clauses

A residuary clause in testatrix' will disposed of only one-fourth of her estate, and there was no testamentary disposition of the remaining three-fourths. *Rodman v. Rodman*, 397.

§ 61. Dissent of Spouse and Effect Thereof

Wife was estopped to dissent from deceased husband's will where she accepted a bequest and a life estate pursuant to the terms of the will. *In re estate of Loftin*, 627.

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